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Agency Settlement Reviewability

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AGENCY SETTLEMENT REVIEWABILITY

*Dustin Plotnick**

Administrative agency settlements have recently come under increased judicial scrutiny. Agency actions are presumptively reviewable under the Administrative Procedure Act (APA), which means they are generally subject to, among other requirements, “arbitrary and capricious” review under 5 U.S.C. § 706(2) and Motor Vehicles Manufacturing Ass’n of the United States v. State Farm Mutual Automobile Insurance Co. In contrast, the U.S. Supreme Court held in Heckler v. Chaney that agency no-action decisions are presumptively unreviewable because they are “committed to agency discretion by law” under 5 U.S.C. § 701(a)(2). Are agency settlements also presumptively unreviewable? In other words, are they more like actions or no-action decisions?

The Supreme Court has twice analyzed agency settlement decisions but has never reached the “committed to agency discretion by law” question. While the D.C. Circuit has ruled that such settlements are presumptively unreviewable, no other circuit has established binding precedent on the issue, and the Ninth Circuit has reviewed agency settlements in several discrete cases. This Note argues that, based on the criteria put forward in Heckler v. Chaney, agency settlements are not presumptively unreviewable. They are, in short, more like actions than no-action decisions.

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INTRODUCTION

Administrative agency settlements have recently come under increased judicial scrutiny. In the summer of 2010, the Securities Exchange Commission (SEC) entered a \$535 million fine settlement consent judgment against Goldman Sachs for providing incomplete information to investors in the well-publicized “Abacus” deal.¹ Goldman was alleged to have made about \$15 million in profits on the deal.² In autumn 2011, the SEC filed a similar consent judgment against Citigroup, except this time the fine was only \$95 million while the alleged illicit profits were considerably higher, \$160 million.³ Judge Jed Rakoff of the Southern District of New York rejected the Citigroup consent judgment,⁴ and noted that the discrepancy between the fines in the Goldman and Citigroup cases “troubled” him.⁵

Both cases had gone before the court because they were consent judgments, which, unlike regular agency settlements, are necessarily subject to court approval.⁶ The SEC, however, could just as easily have skirted consent judgment review by dropping an injunction against further wrongdoing from the agreement.⁷ This would have achieved substantially the same result,⁸ but without the scrutiny of consent judgment approval.

However, to what extent would this move have actually allowed the SEC to escape judicial review? Agency actions are presumptively reviewable under the Administrative Procedure Act⁹ (APA), which imposes a broad set of restrictions on agencies, including that their actions must not be “arbitrary, capricious, [or] an abuse of discretion.”¹⁰ The APA, however,

1. See Consent of Defendant Goldman, Sachs & Co., SEC v. Goldman, Sachs & Co., No. 10 Civ. 3229 (S.D.N.Y. July 14, 2010) (No. 25), available at <http://www.sec.gov/litigation/litreleases/2010/consent-pr2010-123.pdf>; see also Louise Story & Gretchen Morgenson, *S.E.C. Accuses Goldman of Fraud in Housing Deal*, N.Y. TIMES, Apr. 16, 2010, at A1. The Abacus deal involved the sale of financial securities related to the housing market.

2. See Consent of Defendant Goldman, Sachs & Co., *supra* note 1, at 1 (consenting to a disgorgement of \$15 million).

3. See SEC v. Citigroup Global Mkts., Inc., 827 F. Supp. 2d 328, 329 (S.D.N.Y. 2011).

4. *Id.* at 335.

5. *Id.* at 334 n.7.

6. See *infra* note 78.

7. See John C. Coffee Jr., *Collision Course: The SEC and Judge Rakoff*, N.Y. L.J., Jan. 19, 2012, at 5, 7 (“The SEC could settle with the defendants for monetary damages and withdraw its request for injunctive relief.”); see also Joel S. Jacobs, *Compromising NEPA? The Interplay Between Settlement Agreements and the National Environmental Policy Act*, 19 HARV. ENVTL. L. REV. 113, 116–17 (1995) (“Settlement agreements are contracts that resolve pending disputes between parties. Consent decrees are settlement agreements that enlist the powers of the court, in particular the power to hold parties in contempt . . .”).

8. See Coffee, *supra* note 7, at 6–7 (“[It is not] credible that the injunctive relief is that important to the SEC (at least in the case of large corporate defendants) because the SEC never seeks to enforce its injunctions through contempt . . .”).

9. 5 U.S.C. § 500 (2006); see *Abbott Labs. v. Gardner*, 387 U.S. 136, 139–41 (1967); see also Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 702 (1990).

10. 5 U.S.C. § 706. See generally HARRY T. EDWARDS & LINDA A. ELLIOT, *FEDERAL COURTS STANDARDS OF REVIEW: APPELLATE COURT REVIEW OF DISTRICT COURT DECISIONS*

expressly exempts agency actions from judicial review if either the agency statute precludes judicial review¹¹ or the actions are “committed to agency discretion by law” under 5 U.S.C. § 701(a)(2). The central question of this Note is whether agency settlements fall within the § 701(a)(2) exemption. The issue of settlement reviewability is especially important because settlements now resolve the vast majority of agency enforcement actions.¹²

From a policy perspective, whether agency settlements fall under the § 701(a)(2) exception is a contentious issue. On one hand, agency autonomy is beneficial because agencies have unique expertise that is useful for setting agency priorities and estimating the likelihood of success when engaging in enforcement actions.¹³ On the other hand, judicial review under the APA was established to ward off arbitrariness and abuses of discretion.¹⁴ Agency accountability to elected officials is limited, and may be insufficient on its own at alleviating these concerns.¹⁵

The U.S. Supreme Court has addressed the § 701(a)(2) exemption on several occasions, but not in the settlement context.¹⁶ In the landmark case of *Heckler v. Chaney*, the Supreme Court held that agency decisions not to initiate an enforcement action are presumptively unreviewable under § 701(a)(2).¹⁷ The D.C. Circuit extended *Chaney* to hold that settlements are presumptively unreviewable,¹⁸ but no other circuit has established binding precedent on the matter.¹⁹

AND AGENCY ACTIONS 167 (2007) (describing the standard for reviewing agency actions). For an overview of the relevant factors for determining whether an agency action is “arbitrary and capricious,” see *infra* Part I.B.

11. 5 U.S.C. § 701(a)(1).

12. See Richard M. Cooper, *The Need for Oversight of Agency Policies for Settling Enforcement Actions*, 59 ADMIN. L. REV. 835, 835 (2007); see also Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 891.

13. See *infra* Part II.D.1.

14. See *infra* Part II.D.2.

15. See *infra* Part II.D.2.

16. The Court examined discrete agency settlement decisions in two cases, but in neither case did it analyze the § 701(a)(2) question, either to adopt a general rule or to analyze the particular application of the subsection in that case. See *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 133 n.31 (1987) (“Because we find APA review precluded by statute, we need not address petitioners’ alternative argument that 5 U.S.C. § 701(a)(2) (acts committed to agency discretion) also bars review.”); *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 5 n.1 (1985) (“[T]he cases do not pose the question whether an agency’s decision, resting on jurisdictional concerns, not to take enforcement action is presumptively immune from judicial review under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2).”).

17. See *Heckler v. Chaney*, 470 U.S. 821, 830–32 (1985) (holding unreviewable under 5 U.S.C. § 701(a)(2) the Food and Drug Administration’s denial of a petition by death row inmates that the agency review lethal injection drugs for violation of the Food, Drug, and Cosmetics Act). For a description of when the presumption may be rebutted, see *infra* note 124.

18. See, e.g., *Ass’n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1031 (D.C. Cir. 2007); see also *infra* Part III.A.

19. In a nonprecedential opinion, the Third Circuit followed the D.C. Circuit, holding that settlements are presumptively unreviewable. See *Mahoney v. U.S. Consumer Prods. Safety Comm’n*, 146 F. App’x 587, 590 (3d Cir. 2005). The Ninth Circuit, on the other

Is a settlement more like a decision to act or not to act? This Note argues that settlements should not be entitled to the presumption of unreviewability because they do not meet the legal criteria put forward in *Heckler v. Chaney*.²⁰

This Note proceeds in four parts. Part I discusses the APA and agency settlement generally. Part II explains the Supreme Court's § 701(a)(2) jurisprudence. Next, Part III examines the D.C. Circuit's agency settlement jurisprudence, which holds settlements presumptively unreviewable under § 701(a)(2). Finally, Part IV argues that settlements should not be entitled to the presumption of unreviewability.

I. APA REVIEW AND AGENCY SETTLEMENT

The D.C. Circuit adopted its agency settlement rule on the basis of the APA's "committed to agency discretion by law" exception to judicial review, 5 U.S.C. § 701(a)(2). But before diving into the meaning of § 701(a)(2) or the D.C. Circuit's agency settlement jurisprudence, it is necessary to examine the basics of APA review and provide a brief overview of agency action, including agency settlement. Part I.A discusses the statutory framework for agency review. Part I.B examines "arbitrary and capricious" review, which is particularly important for analyzing the reviewability question, in greater detail. Finally, Part I.C introduces the topic of agency settlements.

A. Administrative Agencies and the APA

Under the APA, "agency" is defined as "each authority of the Government of the United States," excluding Congress, the courts, governments of territories, and the military.²¹ Judge Harry Edwards and Linda Elliot add that administrative agencies are organizations that are not expressly designated by the U.S. Constitution but nonetheless wield "authority of the Government of the United States."²² The Environmental Protection Agency (EPA), Food and Drug Administration (FDA), and SEC are typical examples of administrative agencies.

Administrative agencies are generally created through, or authorized by, congressional statute. For example, the SEC was created by the Securities Exchange Act of 1934.²³ The EPA, on the other hand, was originally

hand, rejected § 701(a)(2) challenges to reviewability of individual settlement decisions in at least two cases, but neither case established a general rule of reviewability. *See United States v. Carpenter*, 526 F.3d 1237, 1241 (9th Cir. 2008); *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1013, 1031–32 (9th Cir. 2007).

20. 470 U.S. at 830–32.

21. 5 U.S.C. § 551 (2006).

22. *See EDWARDS & ELLIOT, supra* note 10, at 97 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992)).

23. Pub. L. No. 73-291, 48 Stat. 881 ("There is hereby established a Securities and Exchange Commission . . .").

formed by an executive order that reorganized some prior agencies,²⁴ but, after legality concerns, Congress supported the reorganization through statute.²⁵

These statutes are called “organic” statutes.²⁶ Organic statutes declare the “basic mission of an agency, its principal responsibilities, and its authority to act.”²⁷ They also sometimes specify judicial reviewing standards of the agency actions they authorize.²⁸

In addition to their organic statutes, agencies also have powers and restrictions created by the APA.²⁹ The APA effectively creates a set of default rules that apply unless expressly countermanded by Congress.³⁰ For example, the APA divides all forms of agency actions into four categories: formal adjudications, formal rulemakings, informal rulemakings, and an implied catch-all category, informal adjudications.³¹ The APA imposes a detailed set of procedural requirements on the various types of agency actions.³² Failure to adhere to these procedural requirements is grounds for challenging the action in an Article III court.³³

Agency actions are presumptively subject to judicial review under the APA,³⁴ but can be exempt for two reasons. First, they can be unreviewable under § 701(a)(1) of the APA if Congress has passed a statute precluding judicial review.³⁵ Second, agency actions can be unreviewable under § 701(a)(2) if they are “committed to agency discretion by law.”³⁶ The Supreme Court has ruled that agency no-action decisions are presumptively

24. The EPA was established by Reorganization Plan 3 of 1970, an executive order of President Nixon. *See* 40 C.F.R. § 1.1 (2013).

25. Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3192.

26. *See, e.g.,* Stuart Minor Benjamin & Arti K. Rai, *Who’s Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 279 (2007) (“Federal statutes, known as organic statutes, create administrative agencies and empower them to take a range of actions, usually including informal rulemaking and different types of adjudication.”); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1033 (1998) (referring to administrative agency organic statutes).

27. *See* EDWARDS & ELLIOT, *supra* note 10, at 97.

28. *See* Benjamin & Rai, *supra* note 26, at 279.

29. 5 U.S.C. §§ 500–559 (2006).

30. *See* Benjamin & Rai, *supra* note 26, at 279–80.

31. *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 584 (2010).

32. *See id.*

33. *See* 5 U.S.C. § 706(2)(D).

34. *See* *Abbott Labs. v. Gardner*, 387 U.S. 136, 139–41 (1967); *see also* Levin, *supra* note 9, at 702.

35. 5 U.S.C. § 701(a)(1). For example, in *Sackett v. EPA*, homeowners challenged the EPA’s issuance of an administrative compliance order under the Clean Water Act. *Sackett v. EPA*, 132 S. Ct. 1367, 1367 (2012). The EPA argued that the Clean Water Act precludes judicial review of compliance orders because, among other reasons, the Act gives the EPA a choice of advancing by judicial proceeding *or* administrative action, implying the administrative action is precluded from judicial review. *Id.* at 1373. The Court noted that it presumes administrative agency actions are reviewable but then examines the express language and intent of the statute for signs to the contrary. *Id.* at 1372–73. Ultimately, the Court held the statute did not preclude judicial review. *Id.* at 1374.

36. 5 U.S.C. § 701(a)(2).

unreviewable under § 701(a)(2).³⁷ This Note asks whether agency settlements should also be entitled to a presumption of unreviewability under § 701(a)(2).

B. Arbitrary and Capricious Review

It is important, at the outset, to explain some circumstances under which an agency action may be set aside. In addition to the procedural requirements identified above, the APA prohibits all agency actions that are “arbitrary, capricious, [or an] abuse of discretion.”³⁸ This clause is generally held to refer to a single standard, called “arbitrary and capricious review.”³⁹

Arbitrary and capricious review includes an expansive set of restrictions. Agencies must not

[rely] on factors which Congress has not intended [them] to consider, entirely fail to consider an important aspect of the problem, offer[] an explanation . . . that runs counter to the evidence before [them], or [offer an explanation that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁴⁰

For example, in the landmark case of *Motor Vehicles Manufacturing Ass’n of the United States v. State Farm Mutual Automobile Insurance Co.*, the Supreme Court invalidated an order by the National Highway Traffic Safety Administration (NHTSA) that rescinded an earlier requirement that cars be manufactured with passive restraints (automatic seatbelts and air bags).⁴¹ The Court held that the order was arbitrary and capricious because the agency didn’t adequately explain removing the seatbelt requirement and did not examine air bag effectiveness at all.⁴²

Under arbitrary and capricious review, agencies must adduce reasons for reversing precedent during adjudications.⁴³ For example, in *Allentown Mack Sales & Service, Inc. v. NLRB*, the Supreme Court rejected the NLRB’s decision to apply a “clear and convincing” evidentiary standard to a particular employer requirement after the Board had previously announced that a “preponderance of the evidence” standard would apply in those cases, because “reasoned decisionmaking,” which is a requirement of the arbitrary and capricious standard, “demands it.”⁴⁴

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

38. 5 U.S.C. § 706(2)(A).

39. See EDWARDS & ELLIOT, *supra* note 10, at 167.

40. *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

41. *Id.* at 34.

42. See EDWARDS & ELLIOT, *supra* note 10, at 169.

43. See *id.* at 168 (citing *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374–77 (1998)); see also Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 761 (2008) (“[A]gencies were required to . . . justify departures from past practices . . .”).

44. *Allentown Mack*, 522 U.S. at 376.

Likewise, if an agency has established a general policy by rule or settled course of adjudication that governs its discretion, the agency must supply a reason when departing from the policy in order to clear arbitrary and capricious review.⁴⁵ This applies *even if* the agency originally had “unfettered discretion.”⁴⁶ In *INS v. Yang*, an immigrant who had gained entry to the United States through a fraudulent scheme, argued that the INS improperly denied him a deportation waiver by considering the fraud even though the agency had a “settled policy” of disregarding such frauds.⁴⁷ The Court reasoned that if the INS had disregarded its settled policy, its waiver denial could be void as arbitrary and capricious, but ultimately decided that the INS had not disregarded its policy.⁴⁸

One scholar, Professor Ronald Levin, has observed that some forms of abuse of discretion challenges do not rely upon an assertion that the agency “misunderstood its governing statute or any other source of legal constraints.”⁴⁹ He calls these “pure” abuse of discretion theories.⁵⁰ Examples of “pure” abuse of discretion allegations include when agencies misunderstand the facts, depart from precedents without good justification, fail to reason in a “minimally plausible fashion,” and make “unconscionable value judgment[s].”⁵¹ *State Farm*, because it involved a rejection for an agency’s failure to present an adequate factual basis for its determination, could be considered a “pure” abuse of discretion case.⁵² *Rust v. Sullivan* presents a good contrary example.⁵³ The Department of Health and Human Services (HHS) had restricted Title X funds from being used for abortion counseling, referral, and advocacy as a method of family planning.⁵⁴ Title X provided that “[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.”⁵⁵ The restriction on *counseling* was a “sharp break” with prior interpretations of the statute,⁵⁶ and the Supreme Court analyzed the change in interpretation for abuse of discretion, holding that “the Secretary amply justified his change of interpretation with a ‘reasoned analysis.’”⁵⁷

45. *M.B. v. Quarantillo*, 301 F.3d 109, 112–13 (3rd Cir. 2002) (“[A]lthough its discretion may be unfettered at the outset, if an agency ‘announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy . . . could constitute action that must be overturned as [arbitrary and capricious].’” (quoting *INS v. Yang*, 519 U.S. 26, 32 (1996))).

46. *Id.*

47. *Yang*, 519 U.S. at 30–31.

48. *Id.* at 32.

49. Levin, *supra* note 9, at 708.

50. *Id.*

51. *Id.*

52. *See Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

53. *Rust v. Sullivan*, 500 U.S. 173 (1991).

54. *See id.* at 178–79. Title X of the Public Health Service Act provides federal funding for family planning services. *See id.*

55. *Id.* at 178 (alterations in original) (citing 42 U.S.C. § 300a-6 (1988)).

56. *Id.* at 186.

57. *Id.* at 187 (quoting *State Farm*, 463 U.S. at 42); *see also* EDWARDS & ELLIOT, *supra* note 10, at 179 (“The Court upheld the change both because the new regulations espoused a

As explained in greater detail in Part II.A, the existence of “pure” abuse of discretion theories complicates the analysis of the proper scope of the § 701(a)(2) exception because the exception is arguably based—at least in part—on the existence of a valid basis for setting aside the agency action.⁵⁸

C. Agency Settlement

This section gives an overview of agency settlements and then describes two related concepts, consent decrees and plea bargains. As explained in detail below, most of the recent controversies involved consent decrees. Plea bargains, meanwhile, are relevant as a basis for comparison to agency settlements.

1. Overview of Agency Settlements

The APA does not expressly contemplate the possibility that enforcement proceedings might be settled, and scholars have identified this area as a “blind spot” within administrative law.⁵⁹ The issue of settlements is especially important because they now resolve the “vast majority of enforcement actions by federal agencies against public companies and other major institutions,”⁶⁰ making the “blind spot” quite large.

The archetypal agency settlement, for purposes of this Note, occurs when an agency arguably has authority to sanction a private party through an adjudication but ultimately agrees not to in exchange for consideration from the party. For example, in *Mahoney v. United States Consumer Products Safety Commission*,⁶¹ the U.S. Consumer Products Safety Commission (CPSC) issued an administrative complaint against a BB gun manufacturer, and, while the adjudicatory proceeding was in discovery, the manufacturer made a settlement offer to the CPSC, which the agency accepted.⁶²

The issue of judicial review of settlements generally arises when an aggrieved third party dislikes the settlement terms. In *Mahoney*, the parents of a boy injured by a defective BB gun challenged the CPSC’s settlement with the BB gun manufacturer.⁶³ Likewise, in *United States v. Carpenter*, an environmental group challenged a proposed settlement between the United States and a group of local residents who were trespassing on

permissible interpretation under *Chevron* Step Two *and* because the agency’s decision to change its position was supported by the reasoned decisionmaking required by *State Farm*.”). “Reasoned decisionmaking” refers to an arbitrary and capricious review standard. See *supra* note 44 and accompanying text.

58. See *infra* Part II.A.

59. Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1016 (2001) (quoting Elizabeth Fisher & Patrick Schmidt, *Seeing the “Blind Spots” in Administrative Law: Theory, Practice, and Rulemaking Settlements in the United States*, 37 COMMON L. WORLD REV. 272, 273 (2001)) (referring to rulemaking settlements, but relevant to settlements generally).

60. Cooper, *supra* note 12, at 835; see also Noah, *supra* note 12, at 891.

61. 146 F. App’x 587 (3d Cir. 2005).

62. *Id.* at 588.

63. *Id.* at 589.

federal land to restore a roadway to a wilderness preserve.⁶⁴ The proposed settlement would have permitted the residents to continue traversing the land, but the environmental group believed this activity would harm a population of local trout, so it brought an action demanding participation in the settlement negotiations.⁶⁵

Third parties have standing to challenge agency actions, including settlements, under section 702 of the APA, which states that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”⁶⁶

Although the Supreme Court has not definitively ruled on the matter, agency settlements can be subject to third party challenges because they are final actions.⁶⁷ In support of this viewpoint, the Ninth Circuit noted that the Supreme Court has held that an Attorney General no-action decision was nonetheless an agency action for purposes of section 702.⁶⁸

There are strong policy arguments both for and against the proliferation of agency settlements. Settlements can impose large costs on private parties that may have little bargaining power,⁶⁹ stifle development of the law,⁷⁰ and restrict the discretion of an agency in the future.⁷¹ On the other hand, agency settlements provide agencies with greater discretion to manage finite resources,⁷² and, like all settlements, help parties by reducing outcome uncertainty.⁷³

64. *United States v. Carpenter*, 526 F.3d 1237, 1238–39 (9th Cir. 2008).

65. *Id.*

66. 5 U.S.C. § 702 (2006). Third parties must also surmount constitutional challenges to standing. *See, e.g.*, *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1353 (9th Cir. 1994) (“The doctrine of standing encompasses both constitutional and statutory considerations.”); *Coeur d’Alene Lake v. Kiebert*, 790 F. Supp. 998, 1004–05 (D. Idaho 1992) (“In the case at hand, the minimum standing requirements of Article III must be met, as well as the particular standing requirements under the APA.”).

67. *See, e.g.*, *Carpenter*, 526 F.3d at 1241; *Ass’n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1029–30 (D.C. Cir. 2007); *Mahoney v. U.S. Consumer Prods. Safety Comm’n*, 146 F. App’x 587, 589 (3d Cir. 2005) (nonprecedential).

68. *See Carpenter*, 526 F.3d at 1241 (citing *Morris v. Gressette*, 432 U.S. 491, 500–01 (1977)).

69. *See Cooper*, *supra* note 12, at 843.

70. *See id.*

71. Memorandum from Randolph D. Moss, Acting Assistant Attorney Gen., Office of Legal Counsel, to Raymond C. Fisher, Assoc. Attorney Gen. (June 15, 1999), available at http://www.justice.gov/olc/consent_decrees2.htm (referring only to executive agency settlements, but with concerns that apply to all agency settlements).

72. *Jacobs*, *supra* note 7, at 113.

73. *Id.* at 116.

2. Consent Decrees

Settlements are different than “consent decrees,” another popular form of resolving administrative agency disputes.⁷⁴ A consent decree is “an agreement between the parties to end a lawsuit on mutually acceptable terms which the judge agrees to enforce as a judgment.”⁷⁵ Consent decrees differ from ordinary settlements because in an ordinary settlement once the parties have resolved their dispute there is no further judicial involvement. For consent decrees, in contrast, the court enters the settlement as a decree.⁷⁶ This has the practical effect that “[i]f either party fails to live up to the agreement, the other party can obtain contempt sanctions without having to file an independent lawsuit on the contract.”⁷⁷

Consent decrees require court approval⁷⁸ (which involves at least some judicial review)⁷⁹ but can be functionally identical to settlements. For example, Professor John Coffee notes that the SEC has a practice of including injunctions against further violation of the law when settling enforcement actions—making these settlements consent decrees—but argues these injunctions serve no practical purpose.⁸⁰ Judicial review of consent decrees is not necessarily rigorous, and “will not usually reach the merits of the underlying dispute.”⁸¹ However, several district court decisions have recently approached agency consent decrees with increased

74. Consent decrees are not necessarily between agencies and private parties; two private parties can enter into a consent decree. *See* Donald C. Baur, *Settlements in Particular Programs—Factors Distinguishing Administrative from Judicial Settlements—The Distinguishing Characteristics of Judicial Consent Decrees*, in 1 *LAW OF ENVIRONMENTAL PROTECTION* § 9:81 (Sheldon M. Novick et al. eds., 2013) (“Consent decrees are also used frequently to settle enforcement actions brought through citizen suits directly against polluters, without government intervention.”).

75. Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 *MICH. L. REV.* 321, 325 (1988). But Professor Kramer notes that there is no consensus view on the precise meaning of a consent decree. *See id.* at 324–25.

76. *See id.* at 325.

77. *Id.*

78. *See, e.g.,* Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983) (“A consent decree is essentially a settlement judgment subject to continued judicial policing.”); United States v. City of Miami, 664 F.2d 435, 441 (5th Cir. 1981) (“[T]he [consent] judgment is not an *inter partes* contract . . . when [the court] has rendered a consent judgment it has made an adjudication.” (quoting 1B JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 0.409[5], at 1030 (2d ed. 1980))); *see also* 46 *AM. JUR. 2D Judgments* §§ 183, 200 (2006).

79. *See* Kramer, *supra* note 75, at 358 (“Presently, all courts hold a fairness hearing before entering a consent decree. This is a hearing at which interested third parties and *amici* may comment on the advantages or disadvantages of a settlement; after hearing their objections, the court may refuse to enter the proposed decree unless the parties revise it to take third-party concerns into account. The Supreme Court assumed without actually holding that a fairness hearing was required in [*Local No. 93, International Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 528–29 (1986)].” (footnotes omitted)).

80. *See* Coffee, *supra* note 7, at 7 (“[It is not] credible that the injunctive relief is that important to the SEC . . . because the SEC never seeks to enforce its injunctions through contempt . . .”).

81. Jacobs, *supra* note 7, at 117.

skepticism.⁸² If agencies respond to the skepticism by removing demands for injunction, settlement reviewability will become increasingly important because these actions will not be subject to consent decree review.⁸³

Perhaps because judicial review of consent decrees is well established, courts rarely analyze whether they are unreviewable under § 701(a)(2). There have, however, been several cases where courts analyzed administrative agency consent decree reviewability under § 701(a)(2). Because these cases bear on the general issue of settlement reviewability, they are also discussed below.⁸⁴

3. Plea Bargains

A plea bargain is a “negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, [usually] a more lenient sentence or a dismissal of the other charges.”⁸⁵ Plea bargaining is regulated by the courts, albeit loosely.⁸⁶ In federal court, judges may reject plea agreements that include the dismissal of any charges or that include a specific sentence. If the plea agreement merely involves a sentencing recommendation, then the judge cannot reject the guilty plea, but does get to make the sentencing determination.⁸⁷ Thus, judges in federal court exercise some review as to the end result of every plea bargain.

Judicial review of plea bargaining exists in spite of separation of powers concerns. According to Professor Erwin Chemerinsky, lower courts have found that “there is a political question when there is a challenge to the exercise of executive discretion,”⁸⁸ and the courts avoid political questions in order to avoid “judicial intrusion into the domain of the other branches

82. See *FTC v. Circa Direct LLC*, No. 11-2172, 2012 WL 2178705, at *1 (D.N.J. June 13, 2012). The parties in *Circa Direct LLC* addressed the court’s initial concerns, and the order was later approved. *FTC v. Circa Direct LLC*, No. 11-2172, 2012 WL 3987610, at *1 (D.N.J. Sept. 11, 2012). For another example of court skepticism of agency consent decrees, see *SEC v. Citigroup Global Mkts., Inc.*, No. 11 Civ. 7387, 2011 WL 5903733, at *2–3 (S.D.N.Y. Nov. 28, 2011).

83. See Noah, *supra* note 12, at 927 (“If courts began reviewing proposed consent decrees more vigorously, however, the government might prefer reaching out-of-court settlements with regulated entities, which would avoid judicial review altogether.”). Professor Noah bases his remark that settlements are unreviewable on *NLRB v. United Food & Commercial Workers Union*. See *id.* at 927 n.199 (citing *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 133 (1987)). But, as observed in note 16, *supra*, that case refers only to settlements that are explicitly defined in the National Labor Relations Act (NLRA). See *United Food*, 484 U.S. at 118–19. The Court held that those settlements were explicitly exempt from review under the NLRA via APA section 701(a)(1) and therefore did not reach the section 701(a)(2) question. See *id.* at 133 & n.31.

84. See *infra* Part III.A.

85. BLACK’S LAW DICTIONARY 1270 (9th ed. 2009).

86. See STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 1030 (9th ed. 2007).

87. See *id.* at 1058.

88. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 150 (4th ed. 2011).

[of government].”⁸⁹ This includes prosecutorial discretion, a “core power[]” of the executive branch.⁹⁰ However, in spite of the separation of powers, courts are nonetheless capable of reviewing plea bargains.⁹¹

Agency settlements are comparable to plea bargains in criminal law.⁹² While a detailed comparison between plea bargaining and agency settlement is beyond the scope of this Note, a limited comparison is useful because the Supreme Court has compared agency no-action decisions to criminal prosecutorial discretion when analyzing agency action reviewability.⁹³

Unlike the well-established judicial reviewability of plea bargains, reviewability of settlements is unclear. The critical question is whether the APA’s “committed to agency discretion by law” exception, section 701(a)(2), also applies to settlements.

II. THE “COMMITTED TO AGENCY DISCRETION BY LAW” EXCEPTION, 5 U.S.C. § 701(A)(2)

Before assessing whether the § 701(a)(2) exception applies to agency settlements, it is necessary to examine the exception in detail. The Supreme Court has announced three different—perhaps competing—standards interpreting the meaning of § 701(a)(2). This ambiguity has not been resolved, and lower courts continue to apply all of the standards announced by the Court. To analyze the settlement question this section describes each of the standards in turn, introducing relevant scholarly arguments and describing applications by the lower courts.

Part II.A discusses the Supreme Court’s first case to address the subsection, *Citizens to Preserve Overton Park, Inc. v. Volpe*,⁹⁴ which announced the “no law to apply” test. Part II.B discusses *Heckler v. Chaney*,⁹⁵ which introduced a four-factor analysis for examining whether particular types of agency action fall under § 701(a)(2). Part II.C describes the “common law” approach to § 701(a)(2), which was first put forward by Justice Antonin Scalia in his dissent in *Webster v. Doe*,⁹⁶ and arguably

89. *Id.* at 149.

90. *United States v. Armstrong*, 517 U.S. 456, 457 (1996); *see* Andrew B. Loewenstein, Note, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 AM. CRIM. L. REV. 351, 364 (2001) (“Traditionally, separation of powers has been understood to impose on the courts deference to prosecutorial decisions.”).

91. *See supra* notes 86–87 and accompanying text; *see also* *United States v. Miller*, 722 F.2d 562, 565 (9th Cir. 1983) (describing how, even though “separation of powers requires that the judiciary remain independent of executive affairs,” courts are nonetheless “free to accept or reject individual charge bargains”).

92. *See* Noah, *supra* note 12, at 903 (“Plea bargaining also offers some interesting parallels to administrative arm-twisting.”). Professor Noah considers agency settlements to be a type of “administrative arm-twisting.” *Id.* at 875.

93. *See* *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985); *see also infra* Part III.B.

94. 401 U.S. 402 (1971).

95. 470 U.S. 821 (1985).

96. 486 U.S. 592 (1988).

adopted by the Court in *Lincoln v. Vigil*.⁹⁷ Lastly, Part II.D examines some scholarly perspectives on how § 701(a)(2) should be applied.

A. Overton Park's "No Law To Apply"

This section describes the "no law to apply" test, which was originally announced in *Overton Park*. Part II.A.1 describes the Court's opinion in *Overton Park*. Part II.A.2 describes two problems of the test: surplusage and "pure" abuse of discretion.

1. Announcing "No Law To Apply"

In *Overton Park*, a citizens group alleged that the Secretary of Transportation had failed his statutorily mandated duty to examine all "feasible and prudent" alternatives before authorizing funds for a highway through a public park.⁹⁸ The Secretary had not made formal findings inquiring into other alternative routes for the highway, and the citizens group contended that he thereby violated the statute.⁹⁹ The Supreme Court observed that the Department of Transportation was an agency under the APA, making the fund authorization an "action" subject to review.¹⁰⁰ The Court then considered, as a threshold question, whether the Secretary's decision to authorize funds for the highway was unreviewable under § 701(a)(2), and held it was not¹⁰¹ because it was a "very narrow exception" applicable only when there was "no law to apply."¹⁰² The Court found that the feasible and prudent alternative requirement established the existence of "law to apply,"¹⁰³ making the action reviewable.

In *Overton Park*, the Court used legislative history to arrive at the "no law to apply" standard.¹⁰⁴ A Senate report had described the clause as referring to instances where "statutes are drawn in such broad terms that in a given case there is no law to apply."¹⁰⁵ The Court seized on the "no law to apply" language and adopted that as the test.¹⁰⁶

2. The Surplusage and "Pure" Abuse of Discretion Problems of "No Law To Apply"

One commentator, Professor Levin, has vigorously attacked the "no law to apply" test. Professor Levin argues that the test makes § 701(a)(2) mere surplusage.¹⁰⁷ According to Professor Levin, under the theory of the Senate

97. 508 U.S. 182 (1993).

98. *Overton Park*, 401 U.S. at 405–06.

99. *Id.* at 408.

100. *Id.* at 410.

101. *Id.*

102. *Id.* (emphasis added) (quoting S. REP. NO. 79-752, at 26 (1945)).

103. *Id.*

104. *Id.*; see Levin, *supra* note 9, at 705 ("The Court drew its 'no law to apply' test from the language of the Senate Judiciary Committee report on the APA.").

105. *Overton Park*, 401 U.S. at 410.

106. *See id.*

107. *See* Levin, *supra* note 9, at 705–06.

report, which he calls the “futility theory,” “agency action is ‘committed to agency discretion’ only when there are no grounds on which the action could possibly be set aside.”¹⁰⁸ He continues, “When this condition is met, however, the agency action obviously would survive judicial review in any event.”¹⁰⁹ Therefore, according to Professor Levin, in every unreviewable case, the agency would have won anyway, thus making the entire subsection surplusage.¹¹⁰

Professor Levin also argues that the holding in *Overton Park* ignored the possibility that agency actions can be reviewed under what he calls “pure” abuse of discretion theories.¹¹¹ In *Overton Park*, the Court held that § 701(a)(2) applies when “statutes are drawn in such broad terms that in a given case there is no law to apply.”¹¹² This implies that statutes are the only source of “law to apply.” However, according to Professor Levin, reviewing courts may also invalidate action on “pure” abuse of discretion theories, which “do not rest on an assertion that the agency misunderstood its governing statute or any other source of legal constraints.”¹¹³ He argues that courts are just as capable of reviewing agency actions for violation of “pure” abuse of discretion theories as they are for statutory violations, and therefore there is no reason why § 701(a)(2) should apply to one and not the other.¹¹⁴

108. *Id.* at 705; *see also id.* at 705–07. Professor Levin notes that the “futility” theory is not the only possible interpretation of *Overton Park*’s “no law to apply” test, but argues that it is a plausible interpretation of that ruling, and that the Supreme Court clearly adopted the theory in *Heckler v. Chaney*, its next § 701(a)(2) case. *See id.* at 707 n.85. For a discussion of *Heckler v. Chaney*, including the language that supports the “futility theory” of “no law to apply,” *see infra* Part II.B.

109. *See Levin, supra* note 9, at 705–06.

110. As Professor Levin notes, he is not the only scholar to argue that “no law to apply” makes the reviewability inquiry redundant with the analysis of whether the action survives on the merits. Professor Cass Sunstein has echoed the point exactly:

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. In both cases, one is saying the same thing: that the governing statute does not impose legal constraints on the action at issue.

See Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 659 (1985). But unlike Professor Levin, Professor Sunstein does not appear to view this redundancy as a defect. *See id.*

111. *See Levin, supra* note 9, at 707–08.

112. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (emphasis added) (quoting S. REP. NO. 79-752, at 26 (1945)) (internal quotation marks omitted).

113. *See Levin, supra* note 9, at 707–08.

114. *See id.* at 708–09 (“If judicial review of the agency’s factual perceptions, logic, and consistency is acceptable when the agency operates under significant statutory restrictions, it should be no less acceptable when the agency is not doing so.”). Professor Levin’s surplusage and “pure” abuse of discretion arguments are *alternative* problems of the *Overton Park* holding: if § 701(a)(2) applies even when an action could be invalidated for “pure” abuse of discretion, then it is not surplusage because it identifies a group of cases where § 701(a)(2) independently protects an agency action from invalidation.

The circuit courts are split on whether an agency action is unreviewable under § 701(a)(2) even when it could theoretically be invalidated under a “pure” abuse of discretion theory. The Eleventh Circuit holds that, so long as an agency’s discretion is not limited by any “statute, executive order, regulation, or treaty,” there is “no law to apply.”¹¹⁵ The D.C. Circuit, similarly, holds that there is “no law to apply” when “[an agency’s] governing statute confers such broad discretion as to essentially rule out the possibility of abuse.”¹¹⁶

The Third and Ninth Circuits, in contrast, will determine that there is “law to apply” on a “pure” abuse of discretion theory.¹¹⁷ In *Chehazeh v. Attorney General of the United States*, the Third Circuit held that an agency decision was not entitled to § 701(a)(2) unreviewability because, the court concluded, past adjudications had established “a general policy” as to this form of decision, thereby making any subsequent decision reviewable for abuse of discretion.¹¹⁸ Because the agency action could be reviewed for abuse of discretion on “general policy” grounds, there was “a basis for judicial review”¹¹⁹—in other words, law to apply.

In *Pinnacle Armor v. United States*, the Ninth Circuit adopted an even more expansive view, holding that any abuse of discretion standard satisfies “law to apply”:

Indeed, although 5 U.S.C. § 701(a)(2) insulates from judicial review agency discretion where there is no law to apply, the APA itself commits final agency action to our review for “abuse of discretion.” Those standards are adequate to allow a court to determine whether the [agency] is doing what it is supposed to be doing: setting out standards and determining whether law enforcement products should be certified under those standards, whatever they may be.¹²⁰

The existence of the “pure” abuse of discretion problem may explain why, when analyzing § 701(a)(2) in the context of an enforcement action in *Heckler v. Chaney*, the Court opted for a different approach.

115. *Conservancy of Sw. Fla. v. U.S. Fish & Wildlife Serv.*, 677 F.3d 1073, 1082 (11th Cir. 2012) (holding denial of a petition to designate a critical endangered species habitat unreviewable).

116. *Amador Cnty. v. Salazar*, 640 F.3d 373, 380 (D.C. Cir. 2011) (quoting *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002)).

117. *See Chehazeh v. Attorney Gen. of the U.S.*, 666 F.3d 118, 128–30 (3d Cir. 2012) (holding a decision by the Board of Immigration Appeals to reopen removal proceedings reviewable because it could run counter to a general policy expressed in past adjudications); *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 720 (9th Cir. 2011).

118. *Chehazeh*, 666 F.3d at 128–29.

119. *Id.* at 129–30.

120. *Pinnacle Armor*, 648 F.3d at 720 (citations omitted) (quoting 5 U.S.C. § 706(2)(A) (2006)).

B. *Heckler v. Chaney*, Reaffirming “No Law To Apply,” but Also Introducing an Independent Factor Analysis

This section examines *Heckler v. Chaney*,¹²¹ the Supreme Court’s next § 701(a)(2) case after *Overton Park*. As explained below, *Chaney* held that agency no-action decisions are entitled to a presumption of unreviewability under § 701(a)(2) and complicated the analysis of § 701(a)(2) by introducing four factors that influenced its holding on no-action decisions without clearly explaining how those factors related to “no law to apply.” Part II.B.1 introduces the Court’s decision. Part II.B.2 describes lower court non-settlement applications of the decision.

1. The Court’s Opinion

In *Heckler v. Chaney*, a group of death row inmates had petitioned the FDA, alleging that lethal injection drugs violated portions of the Food, Drug, and Cosmetic Act and requesting that the FDA take enforcement actions to prevent the violations.¹²² The FDA refused the request, and the inmates subsequently filed suit in federal court, requesting that the FDA be required to take the requested enforcement actions.¹²³

The Supreme Court held that the FDA’s decision not to take an enforcement action was unreviewable under § 701(a)(2), and further, that *all* no-action decisions are presumptively unreviewable under the subsection.¹²⁴

The Court put forward two distinct justifications for its rule. First, the Court reiterated *Overton Park*’s “no law to apply” standard, stating that an action is unreviewable when “the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.”¹²⁵ The statute provided no constraints on when to make a no-action decision, so there was “no law to apply.”¹²⁶ Then, without clearly identifying the relationship to “no law to apply,” the Court identified four factors that compelled it to hold an agency no-action decision unreviewable under § 701(a)(2): (1) the decision involved a “complicated balancing of a number of factors which are peculiarly within [the agency’s] expertise,” such as resource allocation, likelihood of success, and fit with the agency’s overall policies;¹²⁷ (2) refusals to act “generally [do] not exercise [an agency’s] *coercive* power over an individual’s liberty or

121. 470 U.S. 821 (1985).

122. *Id.* at 823.

123. *Id.*

124. *Id.* at 832–33. However, the unreviewability presumption “may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers,” predicated refusal solely on belief it lacks jurisdiction, or adopted a general policy that is “so extreme as to amount to an abdication of its statutory responsibilities.” *Id.* at 833 & n.4.

125. *Id.* at 830. This language articulates what Professor Levin calls the “futility” theory of “no law to apply.” *See supra* note 108.

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

127. *Id.* at 831.

property rights, and thus [do] not infringe upon areas that courts often are called upon to protect";¹²⁸ (3) lack of "focus for judicial review";¹²⁹ and (4) similarity between no-action decisions and prosecutorial enforcement discretion, an area that had long been considered exempt from judicial review.¹³⁰

One of the challenges when analyzing § 701(a)(2) is that the section suffers an inherent interpretation problem. As stated above, under the "futility" theory of "no law to apply," which the court appeared to adopt, § 701(a)(2) is mere surplusage.¹³¹ However, if the "futility" theory of "no law to apply" is not used, a second, different interpretation problem arises. As the Court observed in *Chaney*, while § 701(a)(2) states that any agency action "committed to agency discretion by law" is exempt from review, the APA also declares that "reviewing court[s] shall . . . hold unlawful and set aside agency action . . . found to be . . . an abuse of discretion."¹³² The Court thus identified a potential conflict between the two uses of "discretion."¹³³ How can a court review an agency decision for abuse of discretion when it is not permitted to analyze decisions that are committed to agency discretion? The Court concluded that "no law to apply" solves the problem because if an action has no standards under which it can be set aside, it cannot be reviewed for abuse of discretion, and, therefore, the two clauses never fight against each other.¹³⁴ The Court ignored the possibility that this created the aforementioned surplusage issue.

Professor Levin argues that the factor analysis is incompatible with, and actually undermines, *Overton Park's* "no law to apply."¹³⁵ According to Professor Levin, "no law to apply" could not have sustained the unreviewability determination in *Chaney* because there were "judicially manageable standards" by which to judge the decision.¹³⁶ Professor Levin argues that, for example, if "the FDA had declined to proceed against execution drugs on the ground that they were not dangerous at all," and "the record contained strong contrary evidence," a court could hold that the

128. *Id.* at 832.

129. *See id.* ("[W]hen an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner.").

130. *Id.*

131. *See supra* notes 108–10 and accompanying text.

132. 5 U.S.C. § 706 (2006) (emphasis added).

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

134. *Id.*

135. *See* Levin, *supra* note 9, at 712–15 ("On the surface, *Chaney* appeared to be a strong vindication of the *Overton Park* test of unreviewability; most commentators have read it that way. When the Court's reasoning is scrutinized, however, *Chaney* proves to be just the opposite. The Court subtly undermined the 'law to apply' formalism, substituting a decidedly functional approach."). *But cf.* Sunstein, *supra* note 110 (identifying the four factors as evidence that there was no law to apply).

136. *See* Levin, *supra* note 9, at 714 ("[O]ne can easily conceive of ways in which the Commissioner could have abused his discretion in responding to the prisoners' petition, even if we assume that the Food, Drug, and Cosmetic Act did not limit the FDA's enforcement discretion."). Professor Levin argues that *Chaney* adopted the "futility theory" of "no law to apply" and that this theory "standing alone, could not have logically supported the Court's finding of unreviewability in *Chaney*." *Id.* at 715.

decision was an abuse of discretion because it rested “on unjustifiable factual assumptions.”¹³⁷ Thus, according to Professor Levin, the Court had to look *beyond* “law to apply” to hold the FDA’s decision unreviewable, and so instead based its decision on “functional” considerations—the factor analysis.¹³⁸

2. Applying the Four Factors

This section describes lower court analysis of each of the four *Chaney* factors: “complicated balancing,” “focus for review,” “coercive power,” and the analogy to prosecutorial discretion.

a. “Complicated Balancing” (i.e., “Resource Allocation”)

By far the most popularly employed and discussed of the four factors has been the “complicated balancing” factor.¹³⁹ Judge Frank Easterbrook provided a typical justification for the resource allocation factor in the context of an SEC no-action decision:

Doing nothing may be the most constructive use of the Commission’s resources. Congress gives the SEC a budget, setting a cap on its personnel. With limited numbers of staff-years, the Commission must enforce several complex statutes. To do this intelligently the Commissioners must assign priorities. Prosecuting the [potential defendant] means less time for something else¹⁴⁰

Nonetheless, this passage perhaps too broadly states the strength of the factor. Courts commonly use the resource allocation factor in “situations where agencies make large numbers of informal decisions about whether to enforce against individual parties.”¹⁴¹ Such decisions would potentially result in lots of *new* activity for the agency. *Heckler v. Chaney* is the quintessential example for this concern. In *Heckler*, if the Court had ruled that the no-action decision was reviewable, the FDA may have been required to investigate, or at least adduce reasons why it was not investigating, any substance that could arguably be under its control, regardless of the substance’s safety or popularity.¹⁴² Thus, rather than focusing on new drugs and unhealthy foods, the FDA could have

137. *See id.* at 714.

138. *See id.* at 717 (“Had the Court been prepared to adhere strictly to the *Overton Park* ‘law to apply’ test, such policy considerations would have been irrelevant, and the case would have been over almost immediately.”).

139. *See, e.g.*, Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 486 (2008). This Note also refers to this factor as the “resource allocation” factor, although the notion is more expansive than resource allocation, because it also includes agencies’ general policy goals.

140. *Bd. of Trade v. SEC*, 883 F.2d 525, 531 (7th Cir. 1989).

141. Biber, *supra* note 139, at 489; *see, e.g.*, *Block v. SEC*, 50 F.3d 1078, 1081 (D.C. Cir. 1995) (holding unreviewable the SEC’s rejection of a petition to hold a hearing to determine potential liability of directors of a corporation); *Bd. of Trade*, 883 F.2d at 531 (holding unreviewable an SEC no-action order).

142. *See supra* notes 122–23, 127 and accompanying text.

potentially been inundated with frivolous demands to review obviously noncontroversial products or unreasonably close variations on already approved products.

However, resource allocation has also been applied where granting reviewability would not create new agency action but merely increase the cost of an existing agency action. For example, in *Ngure v. Ashcroft*, the Eighth Circuit held unreviewable a policy of the Board of Immigration Appeals (BIA) to use a single immigration judge, rather than a three-judge panel, in certain immigration hearings.¹⁴³ The BIA had adopted the procedural shortcut because of a mounting caseload.¹⁴⁴ The court ruled that BIA's decision to switch to one judge was unreviewable, relying heavily on the resource allocation consideration.¹⁴⁵ Here, had the court declared the decision reviewable, the result may have been that each adjudication would have been more costly—by requiring three times the number of judges—but would not have forced the agency to take on new agency actions. However, on this particular regulation, the Eighth Circuit is in the minority; all the other circuit courts that have examined this BIA policy have found it reviewable, which lends added support for the “new action” theory.¹⁴⁶

On the other side, the D.C. Circuit has rejected resource allocation as a defense of unreviewability when it found that the agency's decision was not within its exclusive expertise. In *Dickson v. Secretary of Defense*, the court held reviewable servicemen's petitions to be able to apply for upgrades on their discharge classifications because the Army Board for Correction of Military Records must make such determinations “in the interest of justice.”¹⁴⁷ The court reasoned that “we have been shown no sufficient reason why the determination, on a case-by-case basis, of what is ‘in the interest of justice’ lies within the exclusive expertise of the Board.”¹⁴⁸

b. Focus for Review

Lower courts have held agency decisions reviewable because there is a “focus for review” when the agency has been forced to examine its decision. For example, agency denials of rulemakings have focus for review because the APA requires the agency to give a brief reason for its denial.¹⁴⁹ Likewise, in *Dina v. Attorney General of the United States*, Judge James Oakes argued that when the organic statute requires the agency

143. *Ngure v. Ashcroft*, 367 F.3d 975, 983 (8th Cir. 2004).

144. *Id.* at 980.

145. *Id.* at 983. The resource concern was quite large in this case. *Id.* “[O]ver 28,000 appeals and motions are filed” with the BIA annually. *Id.*

146. *Smriko v. Ashcroft*, 387 F.3d 279, 294 (3d Cir. 2004) (citing *Chen v. Ashcroft*, 378 F.3d 1081, 1086–87 (9th Cir. 2004)); *Batalova v. Ashcroft*, 355 F.3d 1246, 1252–54 (10th Cir. 2004); *Denko v. INS*, 351 F.3d 717, 731–32 (6th Cir. 2003); *Haoud v. Ashcroft*, 350 F.3d 201, 206 (1st Cir. 2003)).

147. *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1403 (D.C. Cir. 1995).

148. *Id.*

149. *See Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987); *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 636 (D.C. Cir.), *vacated on other grounds*, 817 F.2d 890 (1987).

to examine its decision, there is focus for review.¹⁵⁰ Statutory or regulatory requirements, however, are not the only way in which an agency might be forced to contemplate a decision.

When circumstances force an agency to examine a decision, there is also a focus for review, even if the agency was not compelled by statute to examine the precise decision before the court. For example, in *Transportation Intelligence, Inc. v. FCC*, the FCC had granted certification of a manufacturer's radio system, and a rival manufacturer then petitioned for revocation of the certification.¹⁵¹ The FCC denied that request, and the rival manufacturer challenged the denial.¹⁵² Because the FCC had granted certification in the first instance, and therefore had been required to consider the certificate's validity, the subsequent denial of the revocation petition had a focus for review.¹⁵³

Likewise, in *Whitaker v. Clementon Housing Authority*, Clementon Housing Authority had ceased providing a low-income tenant with funds necessary to pay rent on her apartment, allegedly in violation of federal regulations.¹⁵⁴ The tenant petitioned the Department of Housing and Urban Development (HUD) to take action against Clementon Housing Authority.¹⁵⁵ HUD refused. The court held that HUD's refusal had focus for review because an "affirmative agency action ha[d] created the situation from which plaintiff now [sought] relief through agency enforcement action."¹⁵⁶

Focus for judicial review is to some extent intertwined with the third *Chaney* factor, coercive power, because when agencies exercise coercive power, they create a focus for review.¹⁵⁷ It is possible, however, to have focus for review without coercive power, for instance, when denying a rulemaking.¹⁵⁸

150. *Dina v. Attorney Gen. of the U.S.*, 793 F.2d 473, 477 (2d Cir. 1986) (Oakes, J., concurring) (arguing that the Attorney General's denial of an application for waiver of an immigration requirement was reviewable because the relevant statute required a staff member of the agency to assess the waiver and submit a recommendation to the Attorney General). The majority in *Dina*, however, held the Attorney General's action unreviewable in part *because* the Attorney General, in conjunction with the U.S. Information Agency (USIA), had reviewed all the factors it was required to review. *Cf. id.* at 476–77 (per curiam) (“[W]hile regulations govern the submission to the [USIA], none offers adequate guidance to make review for abuse of discretion possible *where the USIA has in fact considered the required factors on the required record.*” (emphasis added)).

151. *Transp. Intelligence, Inc. v. FCC*, 336 F.3d 1058, 1060–62 (D.C. Cir. 2003).

152. *Id.*

153. *Id.* at 1063 (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)).

154. 788 F. Supp. 226, 227 (D.N.J. 1992).

155. *Id.* at 227–28.

156. *Id.* at 232.

157. See Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 36–37 n.119 (2008) (citing *Transp. Intelligence*, 336 F.3d at 1063); *Int'l Union, United Mine Workers v. Mine Safety & Health Admin.*, 823 F.2d 608, 616 n.5 (D.C. Cir. 1987)).

158. See *Conservancy of Sw. Fla. v. U.S. Fish & Wildlife Serv.*, 677 F.3d 1073, 1084 (11th Cir. 2012).

c. Coercive Force

Agency actions must have a “direct influence” on a person or entity to have coercive force. For example, the D.C. Circuit in *Robbins v. Reagan* held that agency decisions that amount to “rescissions of commitments” are reviewable because they “exert much more *direct influence* on the individuals or entities to whom the repudiated commitments were made” than no-action decisions.¹⁵⁹ Likewise, courts hold that decisions made in conjunction with deportation actions have coercive force because the affirmative decision to deport the immigrant creates a situation from which he or she seeks relief—a direct influence.¹⁶⁰

The “direct influence” definition is consistent with *Chaney*. The denial of the prisoner’s petition resulted only in an indirect influence, because it was only through allowing the drugs to be used that the prisoners themselves were influenced by the agency action.¹⁶¹ Likewise an agency decision denying a rulemaking does not have coercive force because it does not directly influence anyone,¹⁶² but only indirectly influences through later enforcement actions.

d. Prosecutorial Discretion

Courts have referred to *Chaney*’s prosecutorial discretion factor when alluding to other areas of law in which “courts traditionally have been reluctant to intervene.”¹⁶³ This “traditional” theory is discussed in detail below because it is also a general theory on the scope of § 701(a)(2). Prosecutorial discretion is also used to support¹⁶⁴ or refute¹⁶⁵ analogies to a no-action decision.

159. *Robbins v. Reagan*, 780 F.2d 37, 47 (D.C. Cir. 1985) (emphasis added) (holding reviewable a decision by HHS to close a homeless shelter).

160. *See Carrillo v. Mohrman*, 832 F. Supp. 1412, 1419 (D. Idaho 1989); *Gurbisz v. INS*, 675 F. Supp 436, 444 (N.D. Ill. 1987) (holding reviewable a decision by the INS to deny extended voluntary departure status to an alien resident).

161. *See supra* text accompanying notes 121–23.

162. *See Conservancy of Sw. Fla.*, 677 F.3d at 1084.

163. *See N.D. ex rel. Bd. of Univ. & Sch. Lands v. Yeutter*, 914 F.2d 1031, 1038 (8th Cir. 1990) (Larson, J., concurring in part and dissenting in part) (identifying prosecutorial discretion and national security); *Shearson v. Holder*, 865 F. Supp. 2d 850, 866 (N.D. Ohio, 2011) (relating prosecutorial discretion and national security).

164. *See Ctr. for Auto Safety v. Dole*, 828 F.2d 799, 819 (D.C. Cir. 1987) (Bork, J., dissenting) (arguing that an NHTSA decision to deny a petition to reopen an enforcement investigation should be unreviewable because it was sufficiently similar to a prosecutor’s discretion).

165. *See Robbins v. Reagan*, 780 F.2d 37, 47 (D.C. Cir. 1985) (holding an HHS decision to close a homeless shelter was not sufficiently similar to prosecutor’s discretion to constitute a no-action decision); *Alliance to Save Mattaponi v. U.S. Army Corps of Eng’rs*, 515 F. Supp. 2d 1, 9 (D.D.C. 2007) (holding that an EPA decision not to review a U.S. Army Corps of Engineers permit issuance was reviewable because it was not sufficiently similar to prosecutor’s discretion to constitute a no-action decision).

C. *The “Common Law” of Judicial Review and Lincoln v. Vigil’s “Traditionally Committed to Agency Discretion”*

Early on after *Chaney*, it appeared that “no law to apply” would remain the dominant test for the § 701(a)(2) exception. In *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*, the Supreme Court held that an agency refusal to reconsider a prior decision for material error was unreviewable because of “the impossibility of devising an adequate standard of review for such agency action,”¹⁶⁶ echoing *Chaney*’s “no meaningful standard” language.¹⁶⁷ The *Brotherhood of Locomotive Engineers* Court did not address the *Chaney* factors—for instance, the potentially large cost of forcing the agency to reconsider every decision after it has already been made.

The Court next addressed 5 U.S.C. § 701(a)(2) in *Webster v. Doe*, which also reaffirmed the primacy of “no law to apply.”¹⁶⁸ In that case, an employee of the CIA alleged that he was wrongfully terminated for being homosexual, and challenged the termination as both a violation of the APA and of constitutional liberties. The Court held that the APA challenge failed; the CIA Director’s decision was unreviewable because the organic statute gave the CIA Director the power to terminate an employee whenever “necessary or advisable in the interests of the United States.”¹⁶⁹ The Court echoed *Overton Park*’s “no law to apply” standard, noting that there was “no basis on which a reviewing court could properly assess an Agency termination decision. The language of [the organic statute] thus strongly suggests that its implementation was ‘committed to agency discretion by law.’”¹⁷⁰ The Court did not employ *Chaney*’s four-factor analysis, which is very surprising, given that employment decisions directly impact an agency’s ability to manage its resources.

Tellingly, Justice Scalia wrote a dissent that agreed with the Court’s APA holding but disagreed with its reasoning.¹⁷¹ He argued that “no law to apply” is not the exclusive test for 5 U.S.C. § 701(a)(2)¹⁷² and that the Court gave short shrift to *Chaney* by ignoring that case’s discussion of “general unsuitability” to judicial review.¹⁷³ Justice Scalia then argued that § 701(a)(2) refers to decisions that had traditionally been exempt from

166. *Interstate Commerce Comm’n v. Bhd. of Locomotive Eng’rs*, 482 U.S. 270, 282 (1987).

167. “No meaningful standard” is a “no law to apply” consideration. *See supra* note 108.

168. *Webster v. Doe*, 486 U.S. 592 (1988).

169. *Id.* at 600. The Court ultimately held the employee’s constitutional allegations were reviewable. *Id.* at 605.

170. *Id.* at 600 (quoting 5 U.S.C. § 701(a)(2) (1982)).

171. Justice Scalia dissented to the constitutional holding. *Id.* at 606 (Scalia, J., dissenting).

172. *Id.* at 607–08 (“Perhaps *Overton Park* discussed only the ‘no law to apply’ factor because that was the only basis for nonreviewability that was even arguably applicable. It surely could not have believed that factor to be exclusive, for that would contradict the very legislative history, both cited and quoted in the opinion, from which it had been derived . . .”).

173. *Id.* at 607 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

review in a body of jurisprudence he called the “common law” of judicial review,¹⁷⁴ which includes various principles including the “political question” doctrine, sovereign immunity, official immunity, prudential limitations upon the courts’ equitable powers, and “what can be described no more precisely than a traditional respect for the functions of the other branches.”¹⁷⁵

Justice Scalia argued that this view effectively distinguishes between the otherwise inconsistent uses of “discretion” in the APA¹⁷⁶ because this reading of § 701(a)(2) identifies categories of agency decisions that are beyond review, thus preserving the possibility of abuse of discretion “when agency action is appropriately in the courts.”¹⁷⁷

The *Webster* Court’s decision to narrowly read the § 701(a)(2) exception, in spite of Justice Scalia’s forceful dissent, could be read as an affirmation of “no law to apply” over the *Chaney* factors. But in the next case to address the issue, *Lincoln v. Vigil*,¹⁷⁸ the Supreme Court again changed direction, appearing to adopt Justice Scalia’s approach.

In *Lincoln v. Vigil*, the Court held that an agency decision to reallocate a lump-sum appropriation from a localized health program to a different national health program was unreviewable.¹⁷⁹ The Court’s principle justification was that allocation of lump-sum appropriations is an area “traditionally . . . regarded as ‘committed to agency discretion.’”¹⁸⁰ The Court identified both *Chaney* and *Brotherhood of Locomotive Engineers* as cases identifying areas “traditionally left to agency discretion.”¹⁸¹

The Court held that the lump-sum appropriation allocations are traditionally discretionary; according to the Court, it is “a fundamental principle of appropriations law” that lump-sum appropriations without statutory restrictions are disposable at the agency’s discretion.¹⁸² The Court further noted that case law clearly established that “a lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit.”¹⁸³

The Court further reasoned that these appropriations were traditionally discretionary for the same reason as no-action decisions: they require the

174. *Id.* at 608–09.

175. *Id.*

176. *See supra* note 133 and accompanying text (identifying the conflicting uses of “discretion”).

177. *Webster*, 486 U.S. at 609–10.

178. 508 U.S. 182 (1993).

179. *Id.* at 184.

180. *Id.* at 191–92 (emphasis added) (“Over the years, we have read § 701(a)(2) to preclude judicial review of certain categories of administrative decisions that courts *traditionally* have regarded as ‘committed to agency discretion.’” (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 817 (1992) (Stevens, J., concurring) (emphasis added))).

181. *Id.*

182. *Id.* at 192.

183. *Id.* (quoting *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Donovan*, 746 F.2d 855, 861 (1984)).

same sort of balancing decision on agency goals and resources as a no-action decision.¹⁸⁴

D. Scholarly Viewpoints on the Application of § 701(a)(2)

Scholars disagree on the proper test for § 701(a)(2). Professor Eric Biber argues that a balancing test based upon resource allocation should be the sole test of “committed to agency discretion by law.”¹⁸⁵ Professor Biber, however, also argues that the resource allocation concern is much weaker when, as in a settlement, an agency has begun and subsequently aborted an action.¹⁸⁶ Professor Lisa Schultz Bressman, meanwhile, argues that *Chaney* in general and resource allocation in particular fail to capture the APA’s goal of preventing arbitrary decisionmaking.¹⁸⁷

1. Professor Biber’s View: Resource Allocation Is the Principal Reviewability Concern

According to Professor Biber, *Chaney*’s action/inaction distinction is ineffectual¹⁸⁸ and the other *Chaney* factors cannot persuasively account for its result.¹⁸⁹ Professor Biber notes that the APA contains two complementary subsections, 5 U.S.C. § 706(1) and (2), which are meant to refer to inaction and action respectively. Section 706(1) grants the courts authority to “compel action unlawfully withheld or unreasonably delayed.” Professor Biber argues that courts apply § 706(2), the “action” subsection, to issues that are properly within § 706(1), thereby negating the distinction between action and inaction. For example, he cites a case where the First Circuit “‘set aside’ an agency’s pattern and practice of failing to properly enforce the law because it was *arbitrary and capricious*”—a standard rightly applied only under § 706(2).¹⁹⁰

According to Professor Biber, of the four *Chaney* factors—“resource allocation, prosecutorial discretion, ease of judicial review, and the proper role of the courts in protecting individual liberty”¹⁹¹—only resource allocation can adequately justify the ruling in *Chaney*.¹⁹²

Professor Biber argues the analogy to prosecutorial discretion is not a persuasive rationale when considered independently of resource allocation

184. *Id.* at 193.

185. Biber, *supra* note 157, at 9.

186. *Id.* at 29.

187. See Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004).

188. Biber, *supra* note 157, at 4.

189. Biber, *supra* note 139, at 486.

190. *Id.* at 475 (emphasis added) (citing *NAACP v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 160 (1st Cir. 1987)).

191. *Id.* at 486. Professor Biber does not explicitly examine “no law to apply.” The language Professor Biber uses when referring to the four factors is slightly different than the language this Note uses. When referring to “ease of judicial review” and “protecting individual liberties,” Professor Biber is referring to this Note’s “focus of judicial review” and “coercive force,” respectively.

192. *Id.*

because, he contends, prosecutorial discretion is itself generally defended on resource allocation grounds.¹⁹³ According to Professor Biber, justifications for prosecutorial discretion “boil[] down to deference to how prosecutors should allocate their scarce resources among varying objectives.”¹⁹⁴ Professor Biber acknowledges that prosecutorial discretion is often defended by referring to separation of powers concerns,¹⁹⁵ but argues that the Supreme Court often references resource allocation when discussing the “functional grounds for those separation of powers concerns.”¹⁹⁶

Professor Biber argues that the “focus for judicial review” factor is unpersuasive because courts generally interpret it as a test of whether the agency has created a paper record,¹⁹⁷ but “rarely, if ever” invalidate action because the inverse is true.¹⁹⁸ In support, he cites *Overton Park*, where, in spite of the lack of paper record, the Court still held the agency’s decision reviewable.¹⁹⁹

Professor Biber argues that the final factor, coercive effect, suffers two problems. First, it would require courts to analyze the significance of the aggrieved party’s interest, which is difficult.²⁰⁰ Second, it relies upon “an artificial distinction between whether a private party had a ‘right’ that the government took away . . . and whether the person had a ‘privilege’ that the government has simply refused to grant”—agency decisions not to grant a privilege are unreviewable, whereas decisions to take away a right are reviewable.²⁰¹

Professor Biber argues that, because of the problems with the other *Chaney* factors, courts should focus on resource allocation. He contends that judicial review should not interfere in decisions involving resource allocation because such action could potentially cripple agencies by forcing them to make costly examinations of an enormous number of complaints.²⁰² For example, Biber identifies a pre-*Chaney* D.C. Circuit case, *Medical Committee for Human Rights v. SEC*, where the court observed that if SEC “no-action” letters were subject to judicial review, the SEC would effectively be barred from making such letters because the cost of litigating the no-action letter dispute would be greater than simply formalizing the

193. *Id.* (“Indeed, the justification that courts and legal scholars use for prosecutorial discretion generally boils down to deference to how prosecutors should allocate their scarce resources among varying objectives, such as maximizing the probability of winning cases, producing deterrence of future violations, and responding to public pressures and political priorities for prosecutions.”).

194. *Id.*

195. Biber, *supra* note 157, at 19 (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996)).

196. *Id.* (citing *Armstrong*, 517 U.S. at 464; *Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987)).

197. Biber, *supra* note 139, at 486 & n.94.

198. *Id.*

199. *Id.* at 487.

200. *See id.*

201. *Id.* at 487–88.

202. *See* Biber, *supra* note 157, at 37–38.

decision.²⁰³ Meanwhile, the cost of formalizing every “no-action” letter would cripple the agency.²⁰⁴ Professor Biber argues that the *Chaney* Court “obliquely” recognized this issue when announcing the “focus for judicial review” factor, because holding no-action decisions reviewable might force agencies to create paper records that the courts could review, thus drastically increasing the cost for an enormous number of minute decisions.²⁰⁵

Professor Biber, however, also argues that resource allocation concerns are weaker when, as in a settlement, an agency has begun and subsequently aborted an action.²⁰⁶ According to Biber, “the harm of requiring the agency to expend additional resources to ensure meaningful judicial review is relatively minimal.”²⁰⁷ Further, because an agency has already sunk effort into the action, “requiring the agency to recommence those proceedings will be less intrusive to the extent” that the agency can pick up where it left off.²⁰⁸

2. Professor Bressman’s View: Arbitrariness Concerns Imply § 701(a)(2) Should Be Narrowly Construed

Professor Bressman takes a view sharply opposed to Biber’s resource allocation theory, arguing that *Chaney* should be overturned because giving agencies enforcement discretion fails to prevent arbitrariness, which is a chief concern of the APA.²⁰⁹ According to Professor Bressman, arbitrariness is problematic because it is generally the result of agencies serving narrow interests rather than effectively performing their mission.²¹⁰ Professor Bressman argues that pro-*Chaney* scholarly viewpoints rely upon what she calls the “Accountability Theory of Agency Legitimacy.”²¹¹ Within the accountability theory, the president is ultimately responsible for agency decisionmaking—what Bressman calls the “presidential control model.”²¹² Because agencies are thus accountable to the president, who is accountable to the popular will, the courts need not intervene.²¹³ Professor Bressman argues that this view is popular because, “[n]ot only does the presidential control model reconcile agency decisionmaking with the ultimate form of majority rule, it squares such decisionmaking with the

203. *Id.* (citing *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 674 (D.C. Cir. 1970)).

204. *Id.*

205. *Id.* at 36.

206. *Id.* at 29.

207. *Id.*

208. *Id.* (citing *WWHT, Inc. v. FCC*, 656 F.2d 807, 816–17 (D.C. Cir. 1981)).

209. Bressman, *supra* note 187, at 1657 (“[F]ounding principles of the administrative state are dedicated not only to promoting political accountability, but also to preventing administrative arbitrariness—and reserve a role for judicial review toward that end.”).

210. *Id.* at 1687–88.

211. *Id.* at 1675–78.

212. *Id.*

213. *Id.* at 1678 (“Courts should have little place micro-managing [enforcement priorities] when the President is available and suited to that function.”).

formal structure of our three-branch government by relocating agencies from the headless fourth branch to the executive branch.”²¹⁴ Professor Bressman argues that this is an increasingly popular view tied in with the concept of the unitary executive, but ultimately incorrect.²¹⁵

According to Professor Bressman, accountability does not ward against arbitrariness.²¹⁶ She notes that “an agency is subject to improper influences when it refuses to act, just as when it decides to act,”²¹⁷ and that arbitrary decisionmaking is primarily the result of improper influence.²¹⁸ Meanwhile, although the president is accountable to the general populace, he “exercises control in a manner that is too corrupting and sporadic to reduce the potential for faction.”²¹⁹

Professor Bressman then argues that “arbitrary and capricious” review solves the problem by requiring reason giving and standard setting, thereby inserting transparency and consistency into the administrative process, and thus correctly effectuating the APA’s arbitrariness concern.²²⁰

Professor Bressman is supported by Professor Robert Percival, who argues that presidents are not capable of directing the internal affairs of administrative agencies.²²¹ Thus, under Professor Percival’s theory, even if presidents are properly accountable to the public, they would not be able to prevent agencies from engaging in arbitrary decisionmaking.

III. APPLYING § 701(A)(2) TO AGENCY SETTLEMENTS

As stated above, the D.C. Circuit has announced a general rule that agency settlements are presumptively unreviewable because of § 701(a)(2). No other circuit court has established binding precedent on a general application of § 701(a)(2) to agency settlements.²²² This section proceeds

214. *Id.* at 1677; see also Lisa Schulz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 490 & n.146 (2002).

215. Bressman, *supra* note 187, at 1676–77 & n.99. The unitary executive theory argues that the president has authority to direct the actions of administrative agencies because all executive power is vested in the president. See Robert V. Percival, *Who’s in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions*, 79 FORDHAM L. REV. 2487, 2487 (2011).

216. Bressman, *supra* note 187, at 1660–61 (arguing that accountability does not protect against “narrowly interested administrative decisionmaking,” but that “such decisionmaking nonetheless is ‘arbitrary’ and objectionable”).

217. *Id.* at 1686.

218. *Id.* at 1688.

219. *Id.* at 1690.

220. *Id.* at 1690–91.

221. Percival, *supra* note 215, at 2488. For a description of unitary executive theory, which generally argues that the president controls the entire executive branch, see STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008).

222. In a nonprecedential opinion, the Third Circuit followed the D.C. Circuit, holding settlements are presumptively unreviewable. See *Mahoney v. U.S. Consumer Prods. Safety Comm’n*, 146 F. App’x 587, 590 (3d Cir. 2005). The Ninth Circuit, however, has ruled individual settlement decisions reviewable in at least two instances. See *United States v. Carpenter*, 526 F.3d 1237, 1241 (9th Cir. 2008); *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1013, 1031–32 (9th Cir. 2007).

in two parts. Part III.A describes the course of the D.C. Circuit's § 701(a)(2) settlement jurisprudence. Part III.B describes the D.C. Circuit's separation of powers concern if agency settlements are reviewable.

A. *The D.C. Circuit's Schering Line: Evolving from Simple No-Action Decisions to Comprehensive "Settlement Rulemaking"*

The D.C. Circuit extended *Chaney's* presumption of unreviewability to an agency settlement decision more than twenty years ago in *Schering Corp. v. Heckler*.²²³ In that case, the settlement was little more than a binding time-limited nonenforcement decision.²²⁴ Since then, however, the D.C. Circuit has extended unreviewability to traditional settlements—settlements whereby the private actor pays some form of monetary consideration in return for cessation of an enforcement action or dismissal of a suit that could have resulted in harsher sanctions like a larger fine.²²⁵ Recently, the court held unreviewable a “Settlement Rulemaking”—a comprehensive plan offering settlements to all regulated entities without assessing each case's individual merits.²²⁶ The D.C. Circuit has largely relied upon *Chaney's* factor analysis, in particular the “complicated balancing” factor, rather than *Overton Park's* “no law to apply.” This section traces the evolution of the D.C. Circuit's settlement decisions.

1. *Schering Corp. v. Heckler*: Agency Settlement May Be Akin to a No-Action Decision

In *Schering Corp. v. Heckler*, the FDA had instituted a seizure against Tri-Bio, a drug manufacturer, for failure to seek FDA approval for a drug, Gentaject.²²⁷ Tri-Bio sued the FDA, seeking a determination that Gentaject was not a “new animal drug” and therefore required no approval.²²⁸ The FDA and Tri-Bio then settled the case—the FDA would not bring enforcement litigation against Gentaject for eighteen months, giving the FDA time to examine the drug's status.²²⁹ Schering Corporation, the maker of the drug upon which Gentaject is based, sued the FDA, challenging the settlement with Tri-Bio.²³⁰

The court held the FDA's settlement decision unreviewable, reasoning that it was little more than a decision not to prosecute for a set period of time.²³¹ The court explained that “the settlement agreement merely holds enforcement in abeyance until the agency can determine whether Gentaject

223. 779 F.2d 683, 685–86 (D.C. Cir. 1985).

224. *See id.*

225. *See Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1029–30 (D.C. Cir. 2007); *N.Y. State Dep't of Law v. FCC*, 984 F.2d 1209 (D.C. Cir. 1993).

226. *See infra* Part III.A.3.

227. *Schering Corp.*, 779 F.2d at 684.

228. *Id.*

229. *Id.* at 685.

230. *Id.* at 684.

231. *Id.* at 686.

is a product subject to the Act's requirements," which, as a "paradigm case of enforcement discretion,"²³² was unreviewable under *Chaney*.²³³

The court also reiterated *Chaney*'s concern that enforcement decisions "involve a complex balancing of an agency's priorities, informed by judgments 'peculiarly within its expertise.'"²³⁴ But it did not hold that *all* settlements should be unreviewable; rather, that this particular settlement decision was an unreviewable exercise of enforcement discretion.²³⁵

2. *New York State Department of Law v. FCC*: Applying the *Chaney* Factor Analysis to Settlements

The D.C. Circuit next addressed agency settlement in *New York State Department of Law v. FCC*.²³⁶ In this case, the court explicitly rejected the notion that settlements are exactly like no-action decisions,²³⁷ but nonetheless held they are presumptively unreviewable under *Chaney*'s resource allocation factor.

The FCC has certain rules and policies about the fee rates that a telephone company may charge an affiliate to prevent regulated affiliates from overcharging customers by passing fees through nonregulated affiliates.²³⁸ After an investigation, the FCC concluded that certain affiliates of a telephone company "appear[ed] to have violated [the FCC's] affiliate transaction rules and policies" and that there was a valid basis for enforcement proceedings.²³⁹

The FCC issued an order to show cause²⁴⁰ why the telephone affiliates should not be subject to various sanctions, including adjusting certain accounting statements and paying a forfeiture of almost \$1.5 million.²⁴¹ The telephone affiliates contested the enforcement proceeding; subsequently, the FCC entered into a consent decree.²⁴² The consent decree required the telephone affiliates to adhere to all the terms of the order to

232. *Id.*

233. *Id.* at 684.

234. *Id.* at 685 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

235. *Id.* at 686 ("While we do not hold that *any* agency settlement with a potential regulatee, whatever its terms, is unreviewable under *Chaney*, we think it clear that in this case the agreement merely embodies a legitimate exercise of enforcement discretion.").

236. 984 F.2d 1209 (D.C. Cir. 1993).

237. *Id.* at 1214 ("This case differs from *Chaney* in that it involves a decision to settle an enforcement action once begun, not a decision whether to initiate the action in the first place.").

238. *Id.* at 1210–11.

239. *Id.* at 1212 (alteration in original) (quoting Order To Show Cause, *In re N.Y. Tel. Co. & New Eng. Tel. & Tel. Co.*, 5 FCC Rcd. 866, 869 (1990)).

240. *Id.* at 1211. The order to show cause started the enforcement proceeding, notified the regulated entity of sanctions, and gave it thirty days to respond before the sanctions would take effect. Order To Show Cause, *supra* note 239, at 866.

241. *N.Y. State Dep't of Law*, 984 F.2d at 1211–12.

242. *Id.* at 1212. The consent decree was entered by the FCC itself, not an Article III court.

show cause except that they were to pay the \$1.5 million as a voluntary contribution to the U.S. Treasury rather than as a forfeiture.²⁴³

The New York State Department of Law and a private party challenged the consent decree because they were disappointed with its terms.²⁴⁴ They argued that the FCC had underestimated the extent of the overcharging, and that the settlement was not consistent with the FCC's statutory enforcement duties and further violated the agency's ex parte communications rules and the APA's notice and comment requirements.²⁴⁵

The D.C. Circuit held the FCC's decision to enter into the consent decree was entitled to the presumption of unreviewability and that the parties challenging the decree failed to overcome the presumption.²⁴⁶ The court noted that this case was different than a no-action decision because it did not involve the decision whether to initiate an action, but rather whether to end one.²⁴⁷ Nonetheless, the court held that settlements should be unreviewable under *Chaney*. The court noted that the FCC is best positioned to weigh the benefits and costs of pursuing an adjudication and the likelihood of success.²⁴⁸ Rejecting the challenger's argument that the agency erred by only pursuing one theory of liability, the court observed that if it required agencies to always demand all legal remedies available, that would create an "all-or-nothing approach" that "would discourage many responsible and fruitful enforcement actions."²⁴⁹

The court was careful to distinguish another case, *MCI Telecommunications Corp. v. FCC*, where it had held reviewable an FCC decision to end an enforcement action because "it was based on a premise that 'everyone involved knew, and . . . the FCC had conceded at argument *it* knew' to be faulty"²⁵⁰—an instance of granting reviewability on a "pure" abuse of discretion theory.²⁵¹ The court, however, concluded that *MCI* was distinguishable because there, the FCC had completed an adjudication on the merits, whereas in this case, the enforcement action was terminated before any legal issues could be resolved.²⁵² This reasoning would appear to create the counterintuitive result—from the perspective of a third party—that if an agency's enforcement division settled a case before it had reached an outcome within agency adjudication, it would be unreviewable, but if the agency enforcement division prevailed during agency adjudication and then

243. *Id.*

244. *Id.* Because the settlement terms were very similar to the FCC's original demands, one imagines that, had the enforcement action been completed, they would have challenged that instead.

245. *Id.*

246. *Id.* at 1215 ("We conclude, therefore, that the FCC's decision to enter into the Consent Decree with the [telephone affiliates] is non-reviewable under *Chaney*.").

247. *Id.* at 1214.

248. *Id.* at 1213.

249. *Id.* at 1216.

250. *Id.* at 1214 (citing *MCI Telecomm. Corp. v. FCC*, 917 F.2d 30, 41 (D.C. Cir. 1990)).

251. *See supra* note 50 and accompanying text.

252. *N.Y. State Dep't of Law*, 984 F.2d at 1214. The *New York State Department of Law* court noted that in *MCI Telecommunications Corp.*, the situation was so different that neither the court nor the agency mentioned *Chaney*. *See id.*

settled after being challenged in an Article III court, the settlement would be reviewable even on a pure abuse of discretion theory.

3. *Ass'n of Irrigated Residents v. EPA*: Using Settlements
To Simulate a Rulemaking

Ass'n of Irrigated Residents v. EPA is the most recent D.C. Circuit case upholding the presumption of unreviewability for agency settlement.²⁵³ In this case, the D.C. Circuit held that a regulatory scheme to offer settlements to any regulated entity potentially affected by a recent regulation was unreviewable, even though, by creating a general scheme, the agency was not exercising enforcement discretion on a case-by-case basis.

Under the Clean Air Act and other statutes, the EPA regulates certain air pollutants.²⁵⁴ Animal feeding operations (AFOs), which are facilities that raise animals for eggs, dairy, and meat, create these pollutants, but the EPA lacked the means to measure their output.²⁵⁵ Roughly speaking, AFOs emit the regulated pollutants in proportion to their size.²⁵⁶ Rather than initiate enforcement actions with an insufficient emissions-measuring methodology, the EPA offered every AFO a standardized "Consent Agreement," which is a settlement.²⁵⁷ The Consent Agreement required the AFO to pay a civil penalty for potential violations based on the AFO's size and to help fund a study to develop an emissions-estimating methodology.²⁵⁸ In return, the EPA agreed not to pursue enforcement actions for a set period of time.²⁵⁹

Community and environmental groups challenged the settlement scheme.²⁶⁰ They argued that the EPA exceeded its statutory authority and that the settlements were actually rules disguised as enforcement actions.²⁶¹ Part of the challengers' concern was probably the relatively generous offer of the settlement scheme. As Judge Judith Rogers noted in her dissent, AFOs that agreed to the settlement were able to buy at least two years of exemption from enforcement for at most \$100,000, whereas, in the absence of the settlement scheme, "potential civil penalties could run up to \$32,500 per day per violation."²⁶²

The court reasoned that this particular settlement was entitled to the presumption of unreviewability because of the settlement rule in *Schering Corp.*,²⁶³ and because of *Chaney's* "complicated balancing" factor. It noted that the EPA made a determination that the standardized settlement scheme

253. *Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1031 (D.C. Cir. 2007).

254. *Id.* at 1028.

255. *Id.*

256. *Id.* at 1029.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 1030.

261. *Id.*

262. *Id.* at 1038 n.1 (Rogers, J., dissenting) (citations omitted).

263. *Id.* at 1031 (majority opinion).

would “lead to quicker industry-wide compliance,” and that “judgments—arising from considerations of resource allocation, agency priorities, and costs of alternatives—are well within the agency’s expertise and discretion.”²⁶⁴

The court held that, because the relevant statutes were framed in permissive rather than mandatory terms, the agency had discretion whether to enforce.²⁶⁵ The court noted that, under the relevant statutes, the president “may” bring an enforcement action to assess a penalty.²⁶⁶ The court did note that the statutes provide limitations on the dollar amounts for each type of violation, but held that this was insufficient to infer that the agency’s enforcement discretion was restricted.²⁶⁷

Judge Rogers, in dissent, argued that this enforcement action was not committed to agency discretion. By assessing a monetary fine, she argued, the EPA had exercised its coercive power, and therefore, under *Chaney*, the action should not be entitled to a presumption of unreviewability.²⁶⁸ Judge Rogers also argued that, because the settlements were offered generally, they did not constitute the form of case-by-case enforcement discretion contemplated in *Chaney*.²⁶⁹

In addition to the § 701(a)(2) exemption, the D.C. Circuit has also raised the argument, discussed below, that holding agency settlements reviewable might be a separation of powers problem.

B. The D.C. Circuit’s Separation of Powers Argument

In one case, *Baltimore Gas & Electric Co. v. Federal Energy Regulatory Commission*,²⁷⁰ the D.C. Circuit also stated that settlement decisions should be presumptively unreviewable because to hold otherwise would create a separation of powers problem.²⁷¹ According to the *Baltimore Gas* court, one reason for the *Chaney* presumption was that “[w]hen the judiciary orders an executive agency to enforce the law it risks arrogating to itself a power that the Constitution commits to the executive branch.”²⁷² The court found that under the Take Care Clause of the Constitution,²⁷³ the powers both “to decline to enforce a law [and] to enforce a law in a particular way”

264. *Id.* at 1031–32.

265. *Id.* at 1032.

266. *Id.*

267. *Id.*

268. *Id.* at 1041 (Rogers, J., dissenting).

269. *Id.*

270. 252 F.3d 456, 459–60 (D.C. Cir. 2001). The D.C. Circuit does not raise separation of powers in any other agency settlement reviewability case.

271. *Id.* at 459 (“Indeed, *Chaney*’s recognition that the courts must not require agencies to initiate enforcement actions may well be a requirement of the separation of powers commanded by our Constitution.”).

272. *See id.*

273. U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”).

are committed to the executive branch.²⁷⁴ Under the court's theory, settlement is a decision to "enforce a law in a particular way."

The court then noted, in contrast, that if *Congress* wished to restrict executive agency enforcement discretion, it could do so because, "[u]nlike a judicial command to initiate an enforcement action, Congress's authority to impose discretion-curtailling limitations is fully consistent with the executive's power to take care that the laws be faithfully executed. Such restrictions are simply an instance of lawmaking, a power committed to Congress by the Constitution."²⁷⁵

IV. BALANCING ALL FOUR *CHANEY* FACTORS: SETTLEMENTS ARE NOT PRESUMPTIVELY UNREVIEWABLE

Settlements should not be entitled to a presumption of unreviewability under § 701(a)(2). Under "no law to apply," settlements are not distinguishable from no-action decisions. However, analyzing no-action decisions under "no law to apply" is problematic, and settlements share those problems. Under *Chaney's* factor analysis, the "complicated balancing" resource allocation factor cuts in favor of unreviewability, but considerably less strongly than for no-action decisions. Meanwhile, the other three factors each indicate settlements should be reviewable.

This section proceeds in three parts. Part IV.A applies "no law to apply" to settlement decisions. Part IV.B applies *Chaney's* factor analysis. Part IV.C addresses the separation of powers argument.

A. "No Law To Apply" Is an Unworkable Test for Enforcement Decisions, Including Settlements

From a "no law to apply" perspective, settlements are not distinguishable from no-action decisions. *Chaney* announced that there is "no law to apply" when there is "no meaningful standard against which to judge the agency's exercise of discretion."²⁷⁶ *Chaney* distinguished its enforcement no-action decision from *Overton Park's* highway fund allocation because the no-action decision was unconstrained by statute, whereas the fund allocation required the agency to perform specific statutory duties in conjunction with the decision.²⁷⁷ Thus, the highway fund allocation decision was "constrained by statute," and the no-action decision was not.²⁷⁸ Unless otherwise constrained by statute, then, settlements are akin to no-action decisions under the reasoning in *Chaney*.

However, as Professor Levin argues, the factor analysis, rather than "no law to apply," was the driving force behind the *Chaney* decision.²⁷⁹

274. *Balt. Gas*, 252 F.3d at 459 (emphasis added).

275. *Id.*

276. See *supra* note 125 and accompanying text.

277. See *supra* note 126 and accompanying text.

278. See *supra* note 126 and accompanying text.

279. See *supra* notes 135–36 and accompanying text.

Settlements and no-action decisions are both enforcement decisions,²⁸⁰ and therefore are far more closely related to each other than to highway funding decisions. If the factor analysis is the appropriate test for no-action decisions, it should apply for settlements as well.

Professor Levin's argument that "no law to apply" was not the driving force behind *Chaney* is compelling. There are at least three reasons indicating that "no law to apply" was insufficient to support the ruling.

First, the *Chaney* Court did not rest on its "no law to apply" argument, but rather continued to its factor analysis.

Second, "no law to apply" cannot answer the "pure" abuse of discretion problem. No-action decisions are susceptible to "pure" abuse of discretion theories—for example, that an agency's no-action decision might rest on an unjustifiable factual assumption.²⁸¹ Settlements suffer the same problem. If courts do not use "pure" abuse of discretion when analyzing reviewability, they risk declaring agency actions "committed to agency discretion by law," even though those actions have judicially manageable standards for rejection under "abuse of discretion."²⁸² If, however, they do use pure abuse of discretion, they eviscerate § 701(a)(2) because there is always some applicable standard.²⁸³

Finally, as Justice Scalia argued, § 701(a)(2) should not be limited to instances where agency discretion is statutorily constrained because the text of the subsection expresses a more expansive notion of unreviewability.²⁸⁴ Note that this does not mean that the world of § 701(a)(2) exceptions is a strict superset of the statutory constraint test, but rather that it merely covers a broader range of possible agency action.

These three arguments together support the position that "no law to apply" is not alone sufficient to generate an inference of unreviewability in all cases. This viewpoint is entirely consistent with *Overton Park*, where the Court, despite the language it chose,²⁸⁵ merely held that because there was "law to apply," there was reviewability, but did not hold that the inverse was true as well.²⁸⁶ This explains why the *Chaney* court used a different test altogether—the factor analysis—whose application is discussed below.

280. See *supra* note 232 and accompanying text.

281. See *supra* note 137 and accompanying text.

282. See *supra* notes 112–14 and accompanying text.

283. See *supra* note 113.

284. See *supra* note 172.

285. See *supra* note 112 and accompanying text. The Court *said* that § 701(a)(2) only applies when there is "no law to apply," but it *held* that § 701(a)(2) does not apply when there is "law to apply." See *supra* note 112 and accompanying text.

286. See *supra* note 103 and accompanying text. *Webster v. Doe*, because it did hold that lack of law to apply implied there was no reviewability, provides a counterpoint. But, because it was decided after *Chaney*, see *supra* note 168, it may not necessarily be relevant in the enforcement decision context.

B. Settlements Are Not No-Action Decisions and They Are Reviewable Under Chaney's Four-Factor Analysis

Under a correct reading of *Chaney*, settlements are reviewable. First, as explained below, settlements are meaningfully different than no-action decisions. Second, under the four-factor analysis, the “complicated balancing” resource allocation factor cuts in favor of unreviewability, but considerably less strongly than for no-action decisions. Meanwhile, the other three factors each indicate settlements should be reviewable.

Settlements bear a superficial resemblance to no-action decisions because, from the agency's perspective, they take the form of a promise not to enforce a rule or regulation.²⁸⁷ However, as observed by the D.C. Circuit, settlements are different than no-action decisions because no-action decisions are decisions whether to *initiate* actions, whereas settlements are decisions to conclude them.²⁸⁸ For this reason, reviewability of settlements and no-action decisions has very different implications in terms of an agency's discretion to manage its resources—discussed in detail below. This no-action definition is consistent with *Chaney*, which was a denial of a petition by a third party to launch an enforcement action, and with the D.C. Circuit's decisions in *New York State Department of Law and Ass'n of Irrigated Residents*, which argue settlements are unreviewable not because they are no-action decisions, but rather based on *Chaney's* factor analysis.²⁸⁹ That being said, a careful examination of *Chaney's* factor analysis reveals that settlements should not be presumptively unreviewable.

“Complicated balancing” presents the strongest argument in favor of holding settlements unreviewable. Much of the “complicated balancing” reasoning used in *Chaney* applies to settlements as well. If settlements are reviewable, agencies might be forced to pursue or abandon weak claims, without the ability to salvage the work they have done by seeking a partial recovery.²⁹⁰ Likewise, agencies might have less flexibility to construct the plan that they think best meets their policy objectives; *Ass'n of Irrigated Residents*, for example, can be viewed as a creative solution by the EPA to figure out how to measure gas pollutants produced by farm animals.²⁹¹

The complicated balancing justifications for settlements are, however, considerably weaker than for no-action decisions. Courts commonly use the resource allocation factor to protect agencies when they must make large numbers of informal decisions.²⁹² If no-action decisions were reviewable, it could potentially cripple agencies by forcing them to make costly examination of an enormous number of complaints.²⁹³ Settlement reviewability, however, does not suffer the same problem. Rather than

287. See *supra* Parts I.C.1, III.A.1.

288. See *supra* note 247 and accompanying text.

289. See *supra* Part IV.A.

290. See *supra* note 140 and accompanying text (discussing management of enforcement priorities).

291. See *supra* Part III.A.3.

292. See *supra* note 141 and accompanying text.

293. See *supra* note 202 and accompanying text.

exposing the agency to costly examinations of new complaints, settlement reviewability merely forces agencies to expend more resources on preexisting investigations, and even then only if they choose to settle, rather than abandon the investigation outright.²⁹⁴

Admittedly, *Ngure v. Ashcroft*, where the Eleventh Circuit held that the BIA's decision to use a single immigration judge rather than a three-judge panel was unreviewable, cuts against this argument.²⁹⁵ But that case is different; the BIA oversees over 28,000 appeals and motions filed annually,²⁹⁶ so holding the decision reviewable could have potentially tripled an enormous cost. Further, all the other circuit courts to have considered the issue in *Ngure* held that it was reviewable, reinforcing the "new action" theory.²⁹⁷

Arbitrariness is also a concern that weighs against resource allocation justifications for unreviewability. As Professor Bressman argues, one of the APA's principle concerns was arbitrariness.²⁹⁸ Even if administrative agencies are meaningfully accountable to elected officials—a debatable proposition²⁹⁹—that kind of accountability still does not ward against arbitrariness.³⁰⁰ Professor Bressman was concerned with unreviewability of no-action decisions, but the same concerns apply to settlements as well. Arbitrariness concerns arguably motivated Judge Rakoff's skepticism over the "troubling" inconsistencies in SEC's Citigroup and Goldman Sachs consent decrees,³⁰¹ and possibly Judge Rogers's dissent in *Ass'n of Irrigated Residents*, where the EPA was offering settlements for considerably lower dollar amounts than the potential civil penalties imposable under the statute.³⁰² For these reasons, "complicated balancing" is an insufficient justification to hold settlements unreviewable.

Settlements, unlike no-action decisions, have "focus for judicial review" because the agency must have examined the settlement decision. Lower courts routinely hold agency actions have "focus for judicial review" whenever, either by statute or by the circumstances under which the action occurred, the agency was compelled to contemplate its decision.³⁰³ Settlements necessarily occur after an agency has performed an investigation of alleged misconduct. Much like the FCC's consideration of the prior grant of certification in *Transportation Intelligence, Inc.*,³⁰⁴ the pre-settlement investigation serves as a focus point for judicial review.

Settlements also generally have coercive power because they exert a "direct influence" over the regulated entity. Settlements occur when the

294. See *supra* notes 207–08 and accompanying text.

295. See *supra* note 143 and accompanying text.

296. See *supra* note 145.

297. See *supra* note 146.

298. See *supra* note 209 and accompanying text.

299. See *supra* notes 215, 221 and accompanying text.

300. See *supra* notes 215–19 and accompanying text.

301. See *supra* note 5 and accompanying text.

302. See *supra* note 262 and accompanying text.

303. See *supra* notes 149–53 and accompanying text.

304. See *supra* note 152 and accompanying text.

regulated entity furnishes consideration.³⁰⁵ Such consideration is a “direct influence” from the action of settlement.

Finally, under the prosecutorial discretion analogy, the fourth *Chaney* factor, settlements should be reviewable. Plea bargains are negotiated agreements between the prosecutor and the defendants whereby the defendant furnishes consideration in the form of a guilty plea in exchange for a lesser charge or other concession from the prosecutor,³⁰⁶ making them the appropriate analog for settlements.³⁰⁷ Unlike prosecutors’ decisions not to indict, plea bargains are subject to judicial review, implying that settlements should also be subject to review.³⁰⁸

Settlements, therefore, should not be presumptively unreviewable under § 701(a)(2). Settlements do not severely restrict agencies’ “complicated balancing” considerations, and those considerations must be balanced against meaningful arbitrariness concerns. Meanwhile, the other three *Chaney* factors each indicate that settlements should be reviewable.

C. Separation of Powers Concerns Are Unwarranted

The *Baltimore Gas* court’s separation of powers argument³⁰⁹ suffers several problems. First, while it is true that prosecutorial decisions on who and how to charge are within the “core functions” of the executive branch, and therefore awarded deference,³¹⁰ that deference does not extend to plea bargain decisions.³¹¹ If judicial review of plea bargains does not violate the separation of powers, then neither should review of agency settlements.

Second, the *Baltimore Gas* court concedes that Congress could “impose discretion-curtailing limitations” on administrative agency enforcement decisions.³¹² By imposing a comprehensive scheme of judicial review on agency action—including the § 701(a)(2) exemption—Congress has already spoken to the issue. If settlement decisions are not included in the § 701(a)(2) exemption then Congress has imposed the discretion-curtailing limitation, and, therefore, there is no separation of powers concern. This explains why, when Justice Scalia invokes the “political question” doctrine in *Webster v. Doe*, he does so to determine the proper construction of § 701(a)(2),³¹³ rather than to attack the basic framework of judicial review of agency action. Therefore, separation of powers is not a bar to agency settlement reviewability.

305. See *supra* Part III.A.2–3 (discussing *New York State Department of Law and Ass’n of Irrigated Residents*, which both involved monetary settlements).

306. See *supra* note 85.

307. See *supra* note 92 and accompanying text.

308. See *supra* notes 86–87 and accompanying text.

309. See *supra* Part III.B.

310. See *supra* note 88 and accompanying text.

311. See *supra* notes 86–91, and accompanying text.

312. See *supra* note 275 and accompanying text.

313. See *supra* notes 173–75 and accompanying text.

CONCLUSION

Administrative agency settlements have recently come under increased judicial scrutiny. While agency actions are presumptively reviewable under the APA, the Supreme Court held in *Heckler v. Chaney* that agency no-action decisions are presumptively unreviewable because they are “committed to agency discretion by law” under APA section 701(a)(2). Settlements are a “blind spot” within the APA, and the Supreme Court has not ruled on their general reviewability. The D.C. Circuit has ruled that they are presumptively unreviewable, but no other circuit has established binding precedent on the issue. However, based on the criteria set forth in *Chaney*, settlements should be reviewable. This viewpoint is consistent with the APA’s general concern of preventing arbitrary decisionmaking by imposing judicial review on agency actions.