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The Importance of Resource Allocation in Administrative Law

Eric Biber

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ARTICLES

THE IMPORTANCE OF RESOURCE ALLOCATION IN ADMINISTRATIVE LAW

ERIC BIBER*

ABSTRACT

The Supreme Court's landmark decision in Massachusetts v. EPA, *requiring the federal government to reconsider its refusal to regulate greenhouse gases as an air pollutant, is the most recent example of judicial review of an agency's decision not to take a regulatory action. Despite the importance of this type of judicial review, it has received little analysis by scholars, and the case law in the field is confused. Accordingly, there are serious questions about the nature and scope of judicial review of agency decisions not to act—with some scholars and leading judges calling for sharp limitations on this type of judicial review to protect "individual liberty." This paper examines an alternative set of principles to guide judicial review of agency decisions not to regulate—a trade-off between judicial deference to agency decisions as to how to allocate their resources and judicial enforcement of clear congressional commands to agencies.*

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This framework provides guidance for understanding how and why courts should be intervening in situations where agencies have refused to act. Moreover, the trade-off helps explain both varying levels of judicial deference outside the context of judicial review of agency inaction and why the Court has found some agency decisions reviewable and others unreviewable—including the Court's decision in Massachusetts v. EPA *that agency refusals to regulate are reviewable. Finally, when courts strike the proper balance between judicial deference to agency resource allocation and enforcement of clear congressional commands they will be able to counteract public choice failures in the implementation of regulatory programs.*

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INTRODUCTION

The Supreme Court's decision in *Massachusetts v. EPA* last year was one of the Court's highest-profile decisions, and rightly so. The Court's conclusion that the Environmental Protection Agency (EPA) had jurisdiction to regulate the emission of greenhouse gasses from automobiles under the Clean Air Act (CAA), and its conclusion that the state and environmental plaintiffs had standing to challenge the EPA's refusal to regulate, were both watershed rulings in environmental and administrative law.[1] The Court's decision contributed to a fundamental change in the political dynamic surrounding climate change policy.[2]

However, *Massachusetts v. EPA* is important in administrative law for yet another major issue: it affirmatively concluded that private parties could seek judicial review of an agency's decision not to issue a regulation.[3] To date, that conclusion has received very little attention in the press or in scholarly literature—perhaps because administrative law scholars have perceived it as a relatively technical or obscure question in administrative law.

The Court's conclusion is important nonetheless, as it was only the third time the Court has seriously considered questions of when and how courts may intervene in administrative agency decisions over whether or not to take action.[4] Even more interesting is the Court's reluctance in *Massachusetts v. EPA* to discuss its prior precedent on the subject. The Court never cited *Norton v. Southern Utah Wilderness Alliance*, and it only discussed in passing its prior decision in *Heckler v. Chaney*, which had concluded that agency decisions not to enforce the law were presumptively unreviewable.

1. Massachusetts v. EPA, 127 S. Ct. 1438, 1455, 1459-63 (2007).
2. *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, SUP. CT. REV. (forthcoming 2008) (manuscript at 2) (discussing what the authors call "expertise-forcing," which is the courts' attempt to ensure that agency expertise is not suborned to outside political pressures).
3. *See* 127 S. Ct. at 1458-59 & n.24 ("Refusals to promulgate rules are thus susceptible to judicial review . . . . ").
4. The prior two cases were *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004), and *Heckler v. Chaney*, 470 U.S. 821 (1985).

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Justice Stevens's majority opinion in *Massachusetts v. EPA* may have been reluctant to discuss these prior precedents because, on the surface, they do not create a cohesive structure for judicial review of agency decisions not to take action, whether through the issuance of regulations or the pursuit of enforcement actions. For instance, under current Supreme Court doctrine, some decisions are now presumptively unreviewable,[5] while others are reviewable (albeit with greater discretion).[6]

Thus, despite the Supreme Court precedent, judicial review of agency inaction is a confused and uncertain field that, on a simple doctrinal level, calls out for a fundamental reanalysis and reevaluation. That reanalysis and reevaluation is all the more important because judicial review of agency inaction is a field where fundamental questions are still undecided. In particular, both academia and the courts have yet to resolve whether agency inaction is a fundamentally different type of agency decisionmaking that should be outside the scope of judicial review, as the conflicts between *Heckler* and *Massachusetts v. EPA* make clear.

Much of the confusion in the case law stems from an incoherent and hard-to-apply action/inaction distinction that courts have been applying in their analysis, a distinction that is ultimately unworkable and unpredictable in the long run. Instead, the case law is much better viewed as the result of a balancing test between judicial deference to agency allocation of resources among various priorities and the judicial duty to uphold the supremacy of Congress's statutory mandates and commands to the agencies.

This balancing test provides us with three important insights into judicial review of agency decisionmaking in general, not just agency inaction. First, where courts strike the balance between resource allocation and upholding congressional instructions to agencies will often be an important factor in determining the level of deference that courts provide to agency decisionmaking, whether action or inaction is involved.

Second, resource allocation is sometimes outcome-determinative, in that it requires courts to make some agency decisions fundamentally

5. *See Heckler*, 470 U.S. at 834-35 (limiting judicial review of agency decisions against enforcement to situations where Congress "has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under § 701(a)(2)," in that "courts may require that the agency follow that law").

6. *See* Massachusetts v. EPA, 127 S. Ct. at 1459 (insisting that review of agency refusals to issue a rule is "extremely limited" and "highly deferential" (quoting Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989))).

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unreviewable—such as agency decisions whether to pursue enforcement actions, as in *Heckler*. In such a situation, even the possibility of judicial review would frustrate agency resource allocation.

Third, where statutory supremacy and resource allocation are both important in an agency decision, public choice considerations support the general judicial trend to enforce explicit statutory duties and mandates against agencies even where there could be severe intrusions into the agency's authority to allocate its resources. If the courts failed to enforce these duties, the gap between statutory language and agency implementation might further weaken the already difficult position that regulatory beneficiaries have to organize, monitor, and lobby the government to ensure that their interests are represented.

Ultimately, my analysis does not call for a revolution in the case law of judicial review of agency inaction. Despite their reliance on an incoherent doctrinal distinction, courts have generally been reaching the right results, albeit for the wrong reasons. Indeed, the Court's recent decision in *Massachusetts v. EPA* to allow judicial review of agency refusals to promulgate rules is entirely consistent with the framework.

However, my conclusions have important practical and theoretical ramifications beyond simply supporting the current doctrine of judicial review in this area. The practical ramifications stem from general trends in the nature and scope of regulatory decisionmaking in the federal government. Over the past thirty years, more and more of the initiative in making decisions about the nature and scope of federal regulatory policy has moved from Congress to the agencies. Accordingly, important decisions about whether and how the federal government will regulate in fields such as environmental law are largely left to agencies deciding whether or not to take action to regulate, deregulate, or change the type of regulation. Because those agency decisions are often decisions about whether or not to take action, if courts are to be involved, it will be through judicial review of agency decisions not to act. Both *Massachusetts v. EPA* and *Norton v. Southern Utah Wilderness Alliance*[7] (*SUWA*)—where the Court rejected efforts by environmental groups to force federal land management agencies to regulate the use of off-road vehicles on public lands—highlight this trend.

The theoretical ramifications include providing a solid basis for justifying judicial review of agency inaction. This theoretical basis for judicial review of agency decisions not to act allows us to reject an

7. Norton v. S. Utah Wilderness Alliance (*SUWA*), 542 U.S. 55 (2004).

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alternative vision of the role of judicial review as solely intended to protect individual rights, a vision that would lead to a narrow and cramped role for courts in forcing agencies to act.

This piece does not just provide a new framework for the understanding of judicial review of agency inaction—it is also a new way of understanding administrative law in general. Accordingly, this Article is part of a larger project where I will look at the role that judicial deference to administrative agency resource allocation plays in administrative law. A companion paper demonstrates how the theoretical framework I develop in this piece actually drives important doctrinal questions in judicial review of administrative agency inaction.[8] As I tentatively indicate at the end of this piece, later portions of the project will examine the role that resource allocation and related issues play in questions such as standing and ripeness.

I begin in Part I of this Article by providing a brief overview of the statutory provisions and significant case law for judicial review of agency inaction; I also show how the law in this field is incoherent, and how legal scholars and the courts have debated the question of whether courts should even review agency inaction. Part II then presents a rationale for judicial deference to agency decisions not to act—the need for the Executive Branch to have discretion as to how it allocates its resources—and develops it in detail to explain how courts should be reviewing agency decisions not to act. I start by defining what the concept of resource allocation means and how it necessarily requires a trade-off with other principles that might justify judicial review, specifically judicial enforcement of congressional statutory commands. I then construct a framework that allows courts to understand whether and how they should review agency decisions not to act; this framework also provides a limited normative justification for judicial refusals to review certain types of agency decisions and a broader normative justification (based in large part on public choice theory) for why courts should be enforcing clear congressional mandates that agencies must act. Part III concludes by showing how resource allocation is superior to other rationales for judicial review (or non-review) of agency decisions not to act, and then spins out the possible implications that the resource allocation theory might have for other fields of administrative law, such as the doctrine of standing.

8. Eric Biber, *Two Sides of the Same Coin: Judicial Review Under APA Sections 706(1) and 706(2)*, 26 VA. ENVTL. L.J. (forthcoming Spring 2008).

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I. THE CURRENT STATUS OF JUDICIAL REVIEW OF AGENCY INACTION

Judicial review of agency inaction is based on the provisions of the Administrative Procedure Act (APA) that lay out the standards and scope of judicial review of agency decisionmaking. The plain text of the APA leaves many questions unanswered, and accordingly, the courts have developed an extensive common law-like system of precedent to apply and explicate the APA. That case law has, however, failed to answer underlying questions about the nature and scope of judicial review of agency decisionmaking; indeed, the case law is extremely incoherent and inconsistent. That uncertainty about the nature and scope of judicial review of agency inaction has left the door open for serious questions about whether courts should review agency inaction at all, or in the vast majority of cases.

A. Judicial Review Provisions of the APA

Congress enacted the APA in 1946 in part to rationalize a hodge-podge of case law covering judicial review of agency decisionmaking.[9] The judicial review provisions of the APA are in § 10 of the original statute, now codified at 5 U.S.C. §§ 701-706. These provisions define the scope of agency actions subject to judicial review, and also provide the standard of review the courts must use.

Section 701 details which types of agency actions are reviewable, and excludes two types of agency action from judicial review: those that another statute specifically excludes from judicial review, and those that the law commits to agency discretion.[10] Section 704 generally limits judicial review to "final agency action."[11] In turn, "agency action" is not just an affirmative action, "the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof," but is also a "failure to act."[12]

Section 706 of the APA describes both the standard of review for courts reviewing agency actions, and the types of remedies that courts may afford. Section 706(1) allows courts to "compel agency action unlawfully withheld and unreasonably delayed," and § 706(2) allows courts to "set aside agency action."[13] Section 706 then proceeds to provide a list of specific grounds for courts to overturn an agency decision.

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9. *See* S. REP. NO. 79-752, at 1 (1945) (noting that "[t]here are no clearly recognized legal guides for either the public or the administrators").
10. 5 U.S.C. § 701(a) (2000).
11. *Id.* § 704.
12. *Id.* § 551(13).
13. *Id.* § 706.

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1. Section 706(1)

From a cursory reading of the APA's statutory text, it is not obvious that the APA would set a higher standard for judicial review of agency inaction as opposed to agency action. In practice, however, the courts have been much more reluctant to review agency inaction. An excellent example is the Supreme Court's recent decision in *Norton v. Southern Utah Wilderness Alliance* (*SUWA*).[14] In *SUWA*, the Supreme Court addressed claims by environmental groups that the Bureau of Land Management had shirked its statutory responsibility to protect federal lands from harm caused by off-road vehicles.[15] While the Tenth Circuit had given the environmental groups a fairly receptive hearing,[16] the Supreme Court firmly rejected each of the plaintiffs' claims. In response to the plaintiffs' requests that the Court require the agency to take affirmative steps to fulfill its statutory duties to prevent damage to certain wilderness-quality public lands, the Court responded that such a request "would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management."[17] Such a step would result in "undue judicial interference" in agency discretion, contrary to the purposes of the APA.[18] Accordingly, the Court held that federal courts could force an agency to act only where "an agency [has] failed to take a *discrete* agency action that it is *required to take*."[19]

The Supreme Court's decision in *SUWA* is not an aberration. Indeed, both the Supreme Court and the lower federal courts have long been skeptical of claims that they should force agencies to take action. Case law has generally only allowed private parties to force agencies to act where the agency has some sort of "clear" or "nondiscretionary" duty to do so.[20] In contrast, judicial review of an agency action is possible even where an

14. 542 U.S. 55 (2004).
15. *Id.* at 57-61.
16. S. Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1222-23 (10th Cir. 2002).
17. *SUWA*, 542 U.S. at 66-67.
18. *Id.* at 66.
19. *Id.* at 64.
20. *See, e.g.*, S.F. Baykeeper v. Whitman, 297 F.3d 877, 885-86 (9th Cir. 2002) (finding that the EPA did not have a statutory duty to issue certain water pollution standards, and so the plaintiff's claim of unreasonable delay could not survive); *In re* Bluewater Network, 234 F.3d 1305, 1315 (D.C. Cir. 2000) (concluding that the Oil Pollution Act of 1990 did not compel the Coast Guard to promulgate certain regulations); Estate of Smith v. Heckler, 747 F.2d 583, 591 (10th Cir. 1984) (holding that § 706(1) relief was appropriate where a "ministerial, clearly defined and peremptory" duty exists (quoting Carpet, Linoleum & Resilient Tile Layers, Local Union No. 419 v. Brown, 656 F.2d 564, 566 (10th Cir. 1981))).

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agency has broad discretion in how or whether to act, with courts taking a "hard look" to ensure that the agency decision is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[21] Thus, it is far more difficult as a practical matter to obtain judicial review of agency inaction under § 706(1) than judicial review of agency action under § 706(2).

2. Section 701(a)(2)

Section 701(a)(2) of the APA excludes from judicial review agency actions "committed to agency discretion by law." The Supreme Court has applied this provision in a series of cases to restrict judicial review of agency decisionmaking, including agency decisions not to act.[22]

Here, I focus on the most important of the Supreme Court's cases, *Heckler v. Chaney*, where the Court concluded that suits challenging an agency's failure to exercise its enforcement powers must establish that the statute definitively provides for judicial review of that decision, contrary to the standard presumption that judicial review is available.[23] The decision at issue in *Heckler* was the Food and Drug Administration's (FDA) refusal to undertake investigatory and enforcement actions against the use of drugs for human executions.[24] In concluding that the agency's refusal to

21. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413 n.30 (1971) (quoting 5 U.S.C. § 706(2)(A) (2000)).

22. *See, e.g.*, Lincoln v. Vigil, 508 U.S. 182 (1993) (concluding that the Indian Health Service decision to discontinue a children's treatment program was part of the agency's authority to allocate funds from a lump sum appropriation, and was thus committed to agency discretion and not subject to judicial review); Webster v. Doe, 486 U.S. 592 (1988) (finding no meaningful standard by which to review the CIA Director's termination decisions and determining that this decision was unreviewable); ICC v. Bhd. of Locomotive Eng'rs, 482 U.S. 270 (1987) (holding that the Interstate Commerce Commission (ICC) had unreviewable discretion in determining whether to reopen certain decisions for material error); Heckler v. Chaney, 470 U.S. 821 (1985) (holding immune from judicial review the Food and Drug Administration's (FDA) non-enforcement of safety regulations with regard to lethal injection of drugs); S. Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444 (1979) (maintaining that the ICC had unreviewable discretion not to investigate the legitimacy of shipping rate increases).

Another major category of unreviewability includes agency action under a statute "drawn in such broad terms that in a given case there is no law to apply." *Overton Park*, 401 U.S. at 410 (citation omitted). Because this branch of § 701(a) depends (at least explicitly) more on the particularities of individual statutes than on general principles of administrative law, I set it aside for purposes of this paper. *See* Milk Train, Inc. v. Veneman, 310 F.3d 747, 749-52 (D.C. Cir. 2002) (concluding that the court could not review an agency decision as to milk subsidies under a statute that allowed agencies to allocate funds "in a manner determined by the Secretary" because the statute provided "no relevant 'statutory reference point' for the court other than the decisionmaker's own views of what is an 'appropriate' manner of distribution" (quoting Drake v. FAA, 291 F.3d 59, 72 (D.C. Cir. 2002))).

23. Heckler v. Chaney, 470 U.S. 821, 837-38 (1985).

24. *Id.* at 824.

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undertake these actions were presumptively exempt from judicial review, the Court relied upon four primary factors:

> First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities . . . .
>
> In addition to these administrative concerns, we note that when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers. . . . Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed."[25]

Heckler sets out a potentially sweeping exception to the general presumption that agency decisionmaking is reviewable. Because *Heckler* might cover any agency "enforcement" decision, it might indeed include all, or almost all, judicial review of agency inaction.

B. The Incoherence of Judicial Review of Agency Inaction

A fundamental problem with the current doctrine for judicial review of agency inaction is that it relies in large part on a distinction between agency "action" that should be reviewed under § 706(2), and agency "inaction" that should be reviewed under § 706(1).[26] This is a distinction that has long

25. *Id.* at 831-32 (internal citations omitted).

26. *See, e.g.*, PGBA, LLC v. United States, 389 F.3d 1219, 1227 n.5 (Fed. Cir. 2004) (stating that § 706(1) speaks only to improper failure to act, and not to arbitrary or capricious conduct pursuant to § 706(2)); Georgia v. Army Corps of Eng'rs, 302 F.3d 1242, 1249 n.4 (11th Cir. 2002) (stating that "the review conducted under the two sections [§§ 706(1) and (2)] is different"); Envtl. Def. Fund, Inc. v. Costle, 657 F.2d 275, 283 (D.C.

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bedeviled courts, even before the passage of the APA. For example, many pre-APA mandamus cases involved agency denials of petitions for action by private parties—cases that one could categorize as agency action (denial of the petition) or inaction (the underlying petition sought affirmative action by the agency).[27] Trying to categorize these cases under either §§ 706(1) or 706(2) would be problematic. Likewise, many post-APA cases reflect this difficulty of distinguishing between a claim that falls under § 706(1) versus a claim that falls under § 706(2). For instance, in *Antone v. Block*, the agency issued—after the relevant statutory deadline had passed—a timetable for the promulgation of future regulations.[28] Of course, one could interpret the issuance of the timetable as an act reviewable under § 706(2), but the substance of the timetable itself was only a prediction of when the agency would accomplish additional actions. If the plaintiffs had argued that the timetable was too slow, should not that, in effect, have been an argument that the agency had unreasonably delayed action? The *Antone* court appeared to dodge the question by lumping the §§ 706(1) and 706(2) analysis together.[29]

In *Clouser v. Espy*,[30] plaintiffs challenged the Forest Service's decision to prohibit motorized access to a mining claim. Instead of challenging the decision under § 706(2), plaintiffs characterized the agency decision as unlawfully withholding motorized access to the mining claim, in violation of § 706(1).[31] The court obliged the plaintiffs and treated their claim under the § 706(1) standard, but aside from the plaintiffs' own strategic choice to pursue that route, there is no reason why the § 706(1) standard, and not the § 706(2) standard, would apply. Indeed, in the same case plaintiffs challenged the denial of motorized access to another mining claim, which the court treated as a § 706(2) claim.[32] The only apparent difference between the two claims was that the first one involved a temporary denial

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Cir. 1981) (noting that courts have construed review under § 706(1) to generally inquire whether the agency has violated its statutory mandate in failing to act, or whether any delay in action was unreasonable).

27. *See, e.g.*, United States *ex rel.* McLennan v. Wilbur, 283 U.S. 414, 418 (1931) (challenge to the Interior Secretary's denial of oil and gas prospecting permits); Goldsmith v. U.S. Bd. of Tax Appeals, 270 U.S. 117, 119-20 (1926) (mandamus challenge to the denial of admission of certain attorneys to practice before the Board of Tax Appeals); United States *ex rel.* Chi., N.Y. & Boston Refrigerator Co. v. ICC, 265 U.S. 292, 293 (1924) (mandamus challenge to a denial of a company's application to qualify as a category of carrier entitling them to special rates); United States *ex rel.* West v. Hitchcock, 205 U.S. 80, 83 (1907); Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840) (mandamus challenge to the Navy's denial of pension funds to a deceased soldier's widow).

28. 661 F.2d 230, 231-33 (D.C. Cir. 1981).

29. *Id.* at 233.

30. 42 F.3d 1522, 1533-34 (9th Cir. 1994).

31. *Id.*

32. *Id.* at 1538.

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of motorized access, while the second one involved a permanent denial of motorized access.[33] This distinction, without a meaningful difference, has profound consequences for the standard of judicial review that applies.[34]

Even *Heckler v. Chaney* reflects this ambiguity between agency action and inaction. While the Court characterized the case in *Heckler* as a challenge to agency inaction, the prisoners who sought judicial review, in fact, had filed a petition with the FDA seeking enforcement by the agency, and filed their complaint only after the agency denied that petition.[35] Similarly, courts have struggled with whether agency decisions to grant or deny waivers from regulations should be reviewable under *Heckler*. A decision to grant a waiver, for example, could be seen as an agency refusal to enforce, and therefore unreviewable; on the other hand, an agency denial of a waiver could be seen as agency inaction and therefore also unreviewable (or reviewable with a high degree of deference).[36]

In *SUWA*, the Supreme Court did make a brief effort to distinguish between action and inaction. The Court claimed that a "failure to act" is different from a "denial" (for example) of a request for agency action because the "latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a request."[37] Although the Court never develops the point, presumably a "failure to act" would be reviewable under § 706(1) while a denial would be reviewable under § 706(2).

The Court's distinction is ultimately unworkable. On a purely doctrinal level, it misstates the case law. Before the APA, courts regularly allowed mandamus challenges (a remedy to require an agency to act) to challenge an agency's failure to act, as well as an agency's denial of a request for

33. *Id.* at 1533-34, 1536.

34. Of course, in some situations judicial review of agency decisionmaking can be pigeonholed without too much difficulty. For instance, it is relatively clear that in *Massachusetts v. EPA*, the agency's refusal to regulate could be categorized as an agency action. *See* 127 S. Ct. 1438, 1459 (2007) (distinguishing a refusal to regulate from the denial of a petition for rulemaking). Even so, there might be substantial confusion. When a court reviews an agency's refusal to issue a regulation, as in *Massachusetts v. EPA*, we may nonetheless want to have substantial deference on resource allocation grounds, even though doctrinally the case involves judicial review of agency action. *See infra* Part II.

35. Heckler v. Chaney, 470 U.S. 821, 824-25 (1985).

36. *See also* Jim Rossi, *Waivers, Flexibility, and Reviewability*, 72 CHI.-KENT L. REV. 1359, 1369-70 (1997) (noting the difficulties in distinguishing between agency action and agency inaction). *Compare* Crowley Caribbean Transp., Inc. v. Peña, 37 F.3d 671, 674-77 (D.C. Cir. 1994) (concluding that an agency decision to waive a maritime transport licensing requirement was unreviewable), *with* Transp. Intelligence, Inc. v. FCC, 336 F.3d 1058, 1062-64 (D.C. Cir. 2003) (holding that agency refusal to revoke a license is reviewable).

37. Norton v. S. Utah Wilderness Alliance (*SUWA*), 542 U.S. 55, 63 (2004).

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action, without drawing any distinction in terms of the standard of review that would apply.[38]

More fundamentally, however, the Court's distinction is without any difference. Why should key questions about standards of review and the applications of fundamental principles of reviewability potentially turn on whether the agency has bothered to provide a piece of paper that says, simply, "no" to a request for agency action? What fundamental issues—constitutional or otherwise—could turn on that distinction?

In short, there is no articulated principled basis for the purported doctrinal distinction between agency action and inaction—the distinction that justifies a set of very different rules being applied to judicial review of agency inaction. That being said, I will nonetheless continue to refer on occasion to the terms of "action" and "inaction" throughout this paper, primarily because they are the terms used in the existing court opinions and scholarly literature.

C. Should Agency Decisions Not to Act Be Unreviewable?

One might reply that the doctrinal incoherence in the field of judicial review of agency inaction is perhaps a problem for academics, but not one that would concern us in the real world of agency decisionmaking and regulatory practice. But the ambiguities surrounding judicial review of agency inaction are more than just theoretically problematic. The uncertainty surrounding the exact role of the courts in reviewing agency inaction could be resolved by concluding that agency inaction is a fundamentally different type of agency decision that courts should not be in the business of reviewing. For instance, *Heckler v. Chaney*'s presumption against reviewability could expand to swallow most, if not all, of judicial review of agency decisions not to act.

As noted above, the *Heckler v. Chaney* presumption has very uncertain bounds as to its scope—it applies agency decisions to "enforce" the law, whatever that might mean.[39] Accordingly, the rationales the Court presented for its decision in *Heckler* are particularly important in understanding the scope of the presumption. One of those rationales was the Court's statement that judicial review is predominantly about protecting individual rights from government action—and judicial review of agency inaction might instead result in government action that might infringe on

38. *See* Biber, *supra* note 8, at 7-9.

39. *Massachusetts v. EPA* clarified that *Heckler* did not apply to agency decisions not to promulgate regulations. Massachusetts v. EPA, 127 S. Ct. at 1459.

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individual rights. In fact, some appellate courts have used this rationale to broadly extend the *Heckler* doctrine.[40]

The possibility of a broad expansion of the *Heckler* doctrine is all the greater because the individual rights rationale connects closely with the Court's own statements about the purposes of judicial review in the context of standing.[41] One could easily connect the *Heckler* rationale with these statements by the Court to develop a sweeping statement that all judicial review of agency inaction is out of bounds.

The Court itself has not fully articulated why it would limit judicial review of agency decisionmaking to the protection of individual rights; however, one of the Court's most influential members in the field of administrative law, Justice Scalia,[42] has more fully developed the rationale behind this approach.[43] Justice Scalia argued that the doctrine of standing should be limited so as to restrict or limit the ability of plaintiffs to "complain[] of an agency's unlawful *failure* to impose a requirement or prohibition upon *someone else*," because the "democratic process," should correct such failures, and not the courts.[44] He claimed that the courts are "perfect" in protecting "the individual against the people," but that they are "terrible" in deciding whether the majority is being sufficiently protected because the courts are an unelected and inherently elitist branch of government.[45] Accordingly, "where the courts, in the supposed interest of all the people, do enforce upon the Executive Branch adherence to legislative policies that the political process itself would not enforce, they are likely (despite the best of intentions) to be enforcing the political prejudices of their own class."[46] Indeed, Justice Scalia embraced the

40. *See* Biber, *supra* note 8, at 20-21 (citing decisions that have relied on *Heckler*'s assertion that courts should avoid forcing agencies to regulate private parties).

41. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561-62 (1992) (stating that it is more difficult for regulatory beneficiaries to assert standing to challenge agency decisionmaking when the agency has not directly regulated them).

42. *See id.* (authored by Justice Scalia); Bret C. Birdsong, *Justice Scalia's Footprints on the Public Lands*, 83 DENV. U. L. REV. 259, 261-62 (2005); Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110, 1124 n.86 (1995) (noting the importance of Scalia's standing jurisprudence).

43. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) [hereinafter Scalia, *Doctrine of Standing*] (suggesting that courts emphasize the requirement of standing).

44. *Id*. at 894-96. Scalia has mentioned his preference for deregulation in a number of other articles. *See, e.g.*, Antonin Scalia, *A Note on the Benzene Case*, REG., July/Aug. 1980, at 25, 26-27 (arguing for a revival of the unconstitutional delegation doctrine); Antonin Scalia, *Regulatory Reform—The Game Has Changed*, REG., Jan./Feb. 1981, at 13, 14 (describing the "[e]xecutive-enfeebling" approach to regulatory reform as misguided); Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, SUP. CT. REV. 1978, at 345, 388-89.

45. Scalia, *Doctrine of Standing*, *supra* note 43, at 896.

46. *Id.* at 896-97.

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possibility that "important legislative purposes, heralded in the halls of Congress, can be lost or misdirected in the vast hallways of the federal bureaucracy" as a "good thing."[47] For Justice Scalia, failure to enforce laws is simply a way that the government keeps up with social changes.[48]

Justice Scalia's vision of individual rights as the sole basis for judicial review of agency decisionmaking has not gone unchallenged in the context of agency decisions not to act. Professor Lisa Bressman has advanced an alternative approach that calls for much broader judicial review of agency decisions not to act, based on a theory that courts should be preventing arbitrary agency decisionmaking.[49] Professor Bressman accordingly calls for the abandonment of *Heckler v. Chaney*'s broad presumption against judicial review of agency decisions not to enforce the law.

Bressman notes that the risk of arbitrariness is hardly limited to the area of agency action—and that agency inaction can just as well be the result of arbitrary agency decisionmaking.[50] Bressman adds that the *Heckler* doctrine of non-reviewability for agency enforcement decisions heightened this risk. Because agency decisions not to prosecute at the behest of powerful regulated entities and/or congressional pressure are essentially shielded from judicial review, the *Heckler* doctrine "allow[s] regulated entities to skew enforcement decisionmaking at public expense."[51]

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47. *Id.* at 897.

48. *Id.* Coincidentally, Justice Scalia dissented from the D.C. Circuit decision that *Heckler v. Chaney* overturned. Chaney v. Heckler, 718 F.2d 1174, 1192-1200 (D.C. Cir. 1983) (Scalia, J., dissenting). However, Justice Scalia's dissent largely centered on his belief that the majority in the Circuit Court ignored binding D.C. Circuit and Supreme Court precedent, and he did not develop any of the themes raised in this paper. *Id.* Justice Scalia's only theoretical argument was that the Constitution reserves to the Executive the responsibility to execute the laws. *Id.* at 1192. Others have drawn the connection between Justice Scalia's standing arguments (in the academic literature and in his opinions) and the Supreme Court's skepticism for judicial review of agency inaction. *See* Noah Perch-Ahern, *Broad Programmatic Attacks:* SUWA*, The Lower Courts' Responses, and the Law of Agency Inaction*, 18 TUL. ENVTL. L.J. 411, 431 (2005) (finding in Scalia's tendency to link "failure to act claims with the concept of standing" an implicit tenet that "agency inaction will not result in a concrete individualized injury"); Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599, 616 n.95 (1997) ("The object-beneficiary distinction drawn by Justice Scalia . . . is similar to the action-inaction distinction drawn in *Heckler*: both rely on the image of negative liberty."); *see also* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 54 (2001) (noting that the narrow standing requirements articulated in Scalia's jurisprudence that favor regulatory subjects bar "pure" citizens' suits to force agency action); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 476 (1987) (connecting Supreme Court decisions on standing and inaction).

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

50. *Id*. at 1692-93; *see also infra* note 54.

51. *Id*. at 1692.

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Accordingly, Bressman argues for significantly expanding judicial review of agency decisions not to act—and discarding the *Heckler* presumption of non-reviewability for agency non-enforcement decisions.[52] Bressman calls for courts to "ask agencies to supply explanations for particular nonenforcement decisions" and to further "require agencies to promulgate standards governing all such decisions."[53]

II. RESOURCE ALLOCATION AS AN ALTERNATIVE THEORY FOR JUDICIAL REVIEW OF AGENCY DECISIONS NOT TO ACT

So we are faced with an uncertain and confused case law, and two sharply conflicting calls for how to resolve that case law—one in favor of dramatically reducing or even eliminating judicial review of agency decisions not to act, and the other in favor of dramatically increasing judicial review of agency decisions not to act. The debate to this point has not considered an important factor, perhaps the most important factor—one highlighted in *Heckler v. Chaney* itself—the role that judicial deference to agency resource allocation should play in administrative law.[54]

A. The Importance of Resource Allocation to Executive Power

Protection of individual rights was only one of the four rationales that *Heckler v. Chaney* laid out for its presumption against judicial review. One of those other three rationales was an explicit concern about interfering with how the Executive Branch allocates its resources among various priorities.[55]

The Executive Branch of the federal government (by far the largest branch) consists of an enormous bureaucracy. It has a budget of about $2.7 trillion[56] and 2.6 million employees,[57] 15 cabinet-level departments,[58] and

52. *Id*. at 1692-93.
53. *Id*. at 1693.
54. Two scholars have discussed the issue of resource allocation in the context of judicial review of agency inaction. Professor Dan Selmi explored the issue, but in the context of judicial review of EPA decisionmaking and specific statutory provisions that allocate judicial review of action or inaction between the district court and court of appeals. *See* Daniel P. Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 IND. L.J. 65 (1996). Professor Cass Sunstein examined the *Heckler v. Chaney* Court's reliance on the resource allocation rationale in its decision, and concluded that while it was a significant factor, it did not justify a sweeping exemption of agency decisionmaking from judicial review. *See* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653 (1985) [hereinafter Sunstein, *Reviewing Agency Inaction*]. Sunstein concluded that there should be judicial review of agency inaction where statutory standards provide a guideline for the court. *Id.*
55. *See* Heckler v. Chaney, 470 U.S. 821, 831-32 (1985).
56. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2008 (2007), Summary Table 1, *available at*

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89 independent agencies.[59] But even the leviathan that is the United States government is not exempt from the laws of nature and economics that dictate that resources are inherently limited. As the *Heckler* court noted, no agency has limitless resources, and perfect enforcement of any statute is impossible.[60] An administrative agency cannot function without setting priorities.[61]

Accordingly, the federal government must make difficult choices every day about how to allocate its resources between different problems, concerns, dreams, and goals. Congress makes many of those decisions through legislation—whether it is appropriations bills or substantive statutes that create new agencies to tackle certain problems or require existing agencies to focus on particular issues. The President and other officers of the Executive Branch make many more of those decisions in the course of deciding which of a range of activities the administrative agencies should pursue—the issuance of a regulation, the pursuit of an aggressive investigation, or the development of a new policy manual.

Given the centrality of resource allocation to decisionmaking in any organization, even one as large as the federal government, it is not surprising that the Court has viewed resource allocation as so central to agency discretion, and not just in the *Heckler* case. For instance, the *SUWA* court noted the resource allocation issues present in that case.[62] A

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http://www.whitehouse.gov/omb/budget/fy2008/pdf/budget/tables.pdf (showing the budget for fiscal year 2008 as $2.662 trillion).

57. *See* Office of Pers. Mgmt., *Federal Civilian Personnel Summary*, http://www.opm.gov/feddata/html/2006/march/table1.asp (last visited Jan. 5, 2008) (specifying the total civilian employment of the federal government as 2,688,096, as reported in March 2006).

58. *See* President Bush's Cabinet, http://www.whitehouse.gov/government/cabinet.html (last visited Nov. 19, 2007) (displaying photographs and titles of each of the department heads).

59. *See Office of Pers. Mgmt., Table 2–Comparison of Total Civilian Employment of the Federal Government by Branch, Agency, and Area as of October 2005 and November 2005*, http://www.opm.gov/feddata/html/2005/november/table2.asp (last visited Jan. 5, 2008).

60. *Heckler*, 470 U.S. at 831-32.

61. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1454-59 (1992) (discussing agency prioritizing in the context of increasing the possibility for outsiders to instigate rulemaking); *see also* Harold J. Krent, *Reviewing Agency Action for Inconsistency with Prior Rules and Regulations*, 72 CHI.-KENT L. REV. 1187, 1196-97 (1997) (discussing various ways agencies direct the actions of their officials); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 82-87 (1997) (noting that setting priorities through litigation leaves decisions about resource allocation to the whim of those litigants who obtain final judgments first); Selmi, *supra* note 54, at 132-33 (1996) (discussing the assertion by critics that agencies need more discretion to establish their own regulatory priorities and to assign resources accordingly).

62. Norton v. S. Utah Wilderness Alliance (*SUWA*), 542 U.S. 55, 71 (2004) ("But allowing general enforcement of plan terms would lead to pervasive interference with BLM's own ordering of priorities."); *see also* S. Ry. Co. v. Seaboard Allied Milling Corp.,

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cursory examination of lower court case law under § 706(1) makes clear that the analysis of whether an agency must act under § 706(1) often turns on whether the courts have concluded that the case involves important resource allocation issues.[63] As the Third Circuit put it, "the quintessential discretion" of an agency is "to allocate [its] resources and set its priorities."[64]

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442 U.S. 444, 457 (1979) (noting that judicial review of agency decisions not to suspend rates would cause a "tremendous" increase in the agency's workload). Justice Scalia has also embraced this rationale as a reason for courts to be reluctant to force agencies to act. *See* Antonin Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 HOUS. L. REV. 97, 105 (1987); Antonin Scalia, *The Role of the Judiciary in Deregulation*, 55 ANTITRUST L.J. 191, 195 (1986).

63. For examples of courts refusing to force agency action because of resource allocation, see *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100-02 (D.C. Cir. 2003) (reversing and remanding a district court judgment that held a decision by the Secretary of the Interior to have been unreasonably delayed, because the district court did not first consider the limited resources and competing priorities of the Bureau of Indian Affairs); *In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1125 (9th Cir. 2001) (deferring to the agency's decision to "focus [] its resources" and give "higher priority" to structural remedies of the California electricity market instead of retroactive refund determinations); *Envtl. Def. Fund, Inc. v. Nuclear Regulatory Comm'n*, 902 F.2d 785, 790 (10th Cir. 1990) (noting a reason asserted by the Nuclear Regulatory Commission (NRC) for refraining from rulemaking included "its preference for concentrating NRC resources on site-specific enforcement"); *Panhandle Coop. v. EPA*, 771 F.2d 1149, 1152-53 (8th Cir. 1985) (finding that without proof of the agency's workload or the priority of Panhandle's appeal in relation to other matters before the EPA, the court could not determine that the EPA violated its regulation on timeliness); *Blankenship v. Sec'y of HEW*, 587 F.2d 329, 335 (6th Cir. 1978) (declining to require a ninety-day deadline for Social Security Administration hearings for plaintiffs in Kentucky, and citing the agency's assertion that compliance with that court order would "merely result in shifting resources from other parts of the country to handle hearings in Kentucky, thereby aggravating hearing delays in other areas"). For examples of courts forcing agency action because they conclude that no resource allocation concerns exist, see *In re Bluewater Network*, 234 F.3d 1305, 1316 (D.C. Cir. 2000) (granting mandamus to require an agency to promulgate rules where the agency "has not shown that expedited rulemaking here will interfere with other, higher priority activities"); *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 623 n.11 (D.C. Cir. 1987) (requiring an agency to act on regulation and rejecting the agency's resource allocation argument because the agency decision barely discussed this issue); *Pub. Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1158 (D.C. Cir. 1983) ("We would hesitate to require [an agency] to expedite the . . . rulemaking if such a command would seriously disrupt other rulemakings of higher or competing priority. But we do not confront such a case."); see also *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 420 (D.C. Cir. 2004) (compelling the Federal Energy Regulatory Commission to answer a petition because it has not indicated "that any 'agency activities of a higher or competing priority' have required its attention" (quoting In re United Mine Workers of Am. Int'l Union, 190 F.3d 545, 549 (D.C. Cir. 1999))).

64. Oil, Chem. & Atomic Workers Union v. OSHA, 145 F.3d 120, 123 (3d Cir. 1998); *see also In re* Monroe Commc'ns Corp., 840 F.2d 942, 946 (D.C. Cir. 1988) ("[W]e must give agencies great latitude in determining their agendas."); FEC v. Rose, 806 F.2d 1081, 1091 (D.C. Cir. 1986) ("It is not for the judiciary to . . . sit as a board of superintendance directing where limited agency resources will be devoted. We are not here to run the agencies."); Med. Comm. for Human Rights v. SEC, 432 F.2d 659, 674 (D.C. Cir. 1970) ("[E]ven the boldest advocates of judicial review recognize that the agencies' internal management decisions and allocations of priorities are not a proper subject of inquiry by the courts.").

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Priority setting is therefore central to the role that an Executive Branch, headed by an elected officer, plays in our constitutional system of government. The Executive's discretion as to what priorities it will set in enforcing and implementing statutes, in drafting regulations, in processing applications, and in funding programs, is crucial to the independence of the Executive vis-à-vis Congress or the judiciary. Without that discretion, the Executive's scope for policymaking would be sorely reduced—limited to its discretion about the content of the rules it writes or the administrative adjudications that it performs.[65]

Finally, courts might well conclude that, based on how they are structured as organizations, they are just not well suited to the task of regularly supervising and monitoring large organizations.[66] Accordingly, courts might well be reluctant to interpose themselves in day-to-day decisionmaking of the agency—and resource allocation is perhaps the archetypal example of this type of decisionmaking.[67]

The importance of resource allocation can be understood by looking at another factor that the Court in *Heckler v. Chaney* indicated was important to its conclusion not to review agency decisions not to enforce the law—the traditional discretion that government prosecutors have as to whether to proceed with criminal charges, or "prosecutorial discretion."[68] The Supreme Court has repeatedly held that prosecutors' decisions as to

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65. *See* Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation:* CNI v. Young *and the Aflatoxin Dance*, 44 ADMIN. L. REV. 131, 143 (1992) (noting the inherently political decisions that agencies must make about how to allocate resources and set priorities); WILLIAM F. WEST, CONTROLLING THE BUREAUCRACY: INSTITUTIONAL CONSTRAINTS IN THEORY AND PRACTICE 43 (1995) (asserting that agenda setting is an "'executive function' best left to administrators" because of the "subtle balancing considerations" agencies face when allocating resources).

66. *See* Frank H. Easterbrook, *The Supreme Court 1983 Term–Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 42 (1984) (arguing that courts should not become involved in resource allocation decisionmaking by agencies because courts could "control the decisionmaking effectively only by taking charge of the entire operation"); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1268-70 (1982) (expressing similar concerns).

67. This judicial reluctance to take over supervisory functions of agencies—particularly in the resource allocation context—may help explain other barriers to judicial review under the APA, such as the Supreme Court's conclusion that only specific "agency action" can be challenged under the APA. *See* Norton v. S. Utah Wilderness Alliance (*SUWA*), 542 U.S. 55, 62 (2004) (defining and giving examples of "agency action," all of which "involve circumscribed, discrete agency actions"); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 873 (1990).

68. *See* 470 U.S. 821, 832 (1985) ("[W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. art. II, § 3)).

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whether or not to file criminal charges are generally unreviewable by the courts.[69] In many of the Court's decisions (and those of the lower courts), it has justified this position by simply referring to separation of powers concerns.[70] When the Court has discussed functional grounds for those separation of powers concerns, it has often referred to concerns about resource allocation. For instance, deference to prosecutor's determinations that some cases would have higher deterrence value and so would be worth more resources, or determinations that other cases involve only marginal violations of the law that would be ultimately counter-productive to challenge, or determinations that given limited resources, only certain types of cases or crimes can be pursued.[71] In other words, resource allocation is

69. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996) ('"[I]n the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties.'" (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926))); Wayte v. United States, 470 U.S. 598, 607-08 (1985) ("[T]he courts [are] properly hesitant to examine the decision whether to prosecute.").

70. *See, e.g.*, *Armstrong*, 517 U.S. at 464 (rejecting a selective-prosecution claim because judicial review would involve intrusion of a "'special province' of the Executive"); *see also* United States v. Doe, 125 F.3d 1249, 1255 (9th Cir. 1997).

71. *See, e.g.*, *Armstrong*, 517 U.S. at 465 (stating that prosecutorial decisions involve "'[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan'" (quoting *Wayte*, 470 U.S. at 607)); Town of Newton v. Rumery, 480 U.S. 386, 396 (1987) (stating that prosecutors "must consider other tangible and intangible factors, such as government enforcement priorities" and "must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge"); *see also* United States v. Jarrett, 133 F.3d 519, 540 (7th Cir. 1998) ("[The] decision [to prosecute] is administrative in nature, made after a studied assessment of the Government's policy visions and priorities, as well as practical considerations like budgetary constraints . . . ."); United States v. Redondo-Lemos, 955 F.2d 1296, 1299 (9th Cir. 1992) (stating that prosecutorial decisions "are normally made as a result of careful professional judgment as to . . . the availability of resources"); United States v. Brock, 782 F.2d 1442, 1444 (7th Cir. 1986) (declaring that prosecutors must weigh "the limited availability of prosecutorial resources and the government's enforcement priorities"); EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 39 (1982) (describing that in addition to the strength of a case, a "violation [must be] sufficiently serious to warrant criminal prosecution and a portion of [the prosecutor's] scarce legal resources"); Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 378 (2000) ("The government simply does not have sufficient resources to investigate, charge, and prosecute all offenses which come to its attention."); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 264 (2001) (explaining that prosecutors cannot pursue all crimes because of limits on enforcement resources, and that administrators develop policies that provide for the prosecution of certain crimes at the exclusion of others); Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1328 (1997) (discussing the "limited resources of . . . prosecutors' offices" asserted in *Armstrong* as a reason for broad prosecutorial discretion); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 163 (1994) ("Charging decisions are made with an eye to efficient allocation of scarce law enforcement

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apparently a fundamental basis for a core component of executive power—prosecutorial discretion.[72]

Another example of the importance of resource allocation to the Executive Branch is the Supreme Court's decision in *Lincoln v. Vigil*.[73] In *Lincoln*, the Supreme Court held that the clearest instance of agency resource allocation—how to allocate lump sum appropriations among various agency programs—is unreviewable under the APA absent specific congressional directives as to how the money should be spent.[74] In so

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resources."); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1547-49 (1981) (discussing prosecutors' screening and selecting of cases under resource limitations).

72. Other justifications commonly advanced for prosecutorial discretion, and in particular shielding that discretion from judicial review include the need to reduce the potentially over-broad scope of criminal laws, and the need to shield prosecutors' strategic decisions about enforcement from public view. *See, e.g.*, *Wayte*, 470 U.S. at 607 (maintaining that if a "prosecutor has probable cause to believe that the accused committed an offense defined by statute," then the prosecution decision "generally rests entirely in his discretion," and that evaluating the basis for a prosecution "threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy"); *Redondo-Lemos*, 955 F.2d at 1300 n.4 ("The confidential nature of the charging process serves important institutional functions . . . ."); Dickerson Moore, *supra* note 71, at 377-78 (explaining that a reason asserted for allowing prosecutorial discretion "is that it serves to mitigate the ill effects of the trend toward legislative over-criminalization"); Griffin, *supra* note 71, at 263-65 (stating that '"prosecutors must exercise *judgment* about which of the many cases that are technically covered by the criminal law are really worthy of criminal punishment"' (quoting Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2136-37 (1998))); Heller, *supra* note 71, at 1333-34 (explaining the argument for strong judicial deference to prosecutors' decisions based on a concern that "reveal[ing] prosecutorial and law enforcement strategies" could "undermin[e] effective crime control" by reducing the effect of deterrence); Kwei Yung Lee, *supra* note 71, at 159-60; William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1364-65 (1993) (discussing the issue of official guidelines for prosecutors and their potential impact on deterrence); Vorenberg, *supra* note 71, at 1547-50. Both arguments, however, appear to have far more traction in the particular realm of criminal law rather than in the broader realm of regulatory decisionmaking. With respect to the first argument, we may be concerned about overly broad criminal statutes because of the shame, symbolic statements, and individualized punishment that result from a criminal statute—but we need not be nearly as concerned about broad regulatory provisions enforced by licensing requirements and (generally speaking) civil penalties. Indeed, the fact that most environmental regulatory statutes only provide criminal penalties for particularly egregious violations of the regulatory provisions reflects this distinction. Memorandum from Earl E. Devaney, Director, Office of Criminal Enforcement, EPA, to EPA Employees, on The Exercise of Investigative Discretion 6 (Jan. 12, 1994), *available at* http://www.epa.gov/Compliance/resources/policies/criminal/exercise.pdf. As for the second argument, it has the most force when judicial review is sought of an uncompleted agency decision (such as an investigation), and does not support complete denial of judicial review. In any case, in the regulatory field where broad, sweeping regulatory statutes of unclear scope are allowed—in contrast to criminal statutes—we would want to encourage or even require agencies to provide more specific guidance to allow regulated parties to understand how they might comply with the law.

73. 508 U.S. 182 (1993).

74. *Id*. at 192.

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holding, the Court emphasized that decisions as to how to allocate resources involve

> "a complicated balancing of a number of factors peculiarly within [the agency's] expertise" [including] whether its "resources are best spent" on one program or another; whether it 'is likely to succeed' in fulfilling its statutory mandate; whether a particular program "best fits the agency's overall policies"; and, "indeed, whether the agency has enough resources" to fund a program "at all."[75]

B. Understanding the Role that Resource Allocation Plays in Judicial Review

Of course, if a relatively simple definition of resource allocation and a method for the courts to consider it in cases cannot be developed, then this principle is useless in practice. Fortunately, neither is particularly difficult.

First of all, resource allocation can be understood as an agency's decision about what issues it wants to address with how many limited resources at what time and at what speed. In other words, it is the question that agency heads (or, assuming perfect agent-principal relationships, every agency employee) ask themselves as they walk in the door for work every morning: "What am I going to do with my time today?"

The agency can—and often will—answer that question at multiple levels and at multiple stages of the decisionmaking process. At the highest level, an agency may decide whether or not to place a higher priority on one of many substantive areas it is in charge of regulating. For instance, the FDA may decide that, of food inspection, drug regulation, and cosmetics regulation, it will place the lowest priority on cosmetics regulation.[76] At the next level, an agency may decide on an approach to deal with the problems in a particular area. For instance, an agency may decide to pursue adjudications for violations of existing regulations in order to tighten up the regulatory system, rather than develop new regulations to cover new problems within the field. Likewise, an agency may decide that only some of the problems within a particular area—for instance, contamination of food with bacteria, as opposed to pesticide residues on food—should be a higher priority for either enforcement or rulemaking efforts. And at the field level, an agency will have to decide whether or not to seek enforcement efforts against particular violations of rules or statutes, or whether particular loopholes or flaws in individual regulations are worth the time and effort to correct through amendment of the regulations or the issuance of guidance documents.

75. *Id*. at 193 (quoting Heckler v. Chaney, 470 U.S. 821, 831 (1985)).
76. I am indebted to Prof. Jerry Mashaw for this example.

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Decisions at each of these levels will have substantially different impacts on the agency's allocation of its resources. Decisions at the two highest levels—which of the policy areas within the agency's jurisdiction should be the highest priority and the prioritization of major topics within those policy areas—will often involve the most important resource allocation decisions. For instance, an agency's decision to issue a major regulation or to proceed with a significant enforcement proceeding (such as a complex antitrust case) would require enormous amounts of resources for that particular task, and likely will only begin if the agency has committed to making that particular area a priority. Accordingly, a judicial order to commence or redo such a proceeding will have significant effects on the agency's resources. On the other hand, decisions at the field level will often have relatively little resource allocation concerns. For example, an agency might have a regular administrative system based on hearings or other regularized procedures that decide claims for benefits, waivers from regulations, or applications for licenses. Requiring an agency to process a particular case that it has refused to handle, or to rehear a decision that it has improperly decided, is unlikely to greatly affect the agency's resource allocation decisions. The agency has already committed significant amounts of resources to the overall process, and the one particular case is often only a fraction of the overall workload.

It is important to note that the above generalizations are just that—generalizations. Consider the systemic consequences of judicial review of a wide range of agency field decisions. If, for example, a court orders an agency to process a significant number of individual applications, that can have significant resource allocation implications, even if the agency already has a regularized process to consider those applications.[77] Such a situation may lead us to conclude that we may want to limit or even exclude judicial review of certain types of field level actions because of resource allocation concerns.[78]

The next, and somewhat trickier question, is how courts should, and do, consider resource allocation. Resource allocation cannot be the only factor that courts consider in reviewing agency decisionmaking, or judicial review would never take place. Any time a court reviews an agency decision, the court is in some way interfering with agency resource allocation, and not just where a court compels an agency to take a particular action. For

77. *See, e.g.*, Blankenship v. Sec'y of HEW, 587 F.2d 329, 335 (6th Cir. 1978) (refusing in part to impose a uniform ninety day deadline for the agency to hold all Social Security disability hearings because such an order "will merely result in shifting resources from other parts of the country to handle hearings in Kentucky, thereby aggravating hearing delays in other areas").

78. *See infra* text accompanying notes 103-14.

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example, in one classic example of judicial review of an agency decisionmaking—judicial review of an agency's issuance of a rule—judicial review imposes a demand on the agency to spend time and effort to defend the rule in court that it could spend on another activity.[79] If an agency loses, it may redo the rule—after all, the agency decided that the issue warranted time and effort to issue a regulation in the first place, so it may not just simply give up.[80] In that case, the agency will have been forced to divert time and effort into redrafting the rule—time and effort that it otherwise likely would have spent on other priorities. Agencies will also siphon additional resources in future activities subject to judicial review in order to avoid having those struck down as well.

So courts must consider other fundamental values. Here, I build on Bressman's point that one of the fundamental purposes for judicial review of agency decisionmaking is to prevent arbitrary action.[81] The difficulty, of course, is in defining what, exactly, arbitrary action consists of. Bressman herself notes that the concept is a slippery one.[82] Arbitrariness cannot mean irrationality, since (absent an Equal Protection rational review challenge) a court will uphold an agency action that is consistent with an irrational congressional statute.[83] Indeed, a tentative examination of the concept might indicate that arbitrariness is in large part, if not entirely, coterminous with the constitutional value of "statutory supremacy," and ensuring that agency action is consistent with that value.[84] Accordingly,

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79. *See* Emerson H. Tiller, *Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making*, 14 J.L. ECON. & ORG. 114 (1998).

80. *See* William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 412-42 (2000) (compiling empirical data that shows that most agencies, after remand, continue to pursue their regulatory goals); *see also* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1048 chart 18 (1990) (reporting the agency dropped only about five percent of all federal agency decisions remanded by courts).

81. Bressman, *Judicial Review of Agency Inaction*, *supra* note 49, at 1687-89.

82. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 495-96 (2003) (stating that she (the author) will "forego[] a grand definition of the term 'arbitrary'" and instead will focus on the "evidence of a problem rather than its source").

83. Searching judicial review of the rationality of congressional statutes would, of course, raise the specter of Lochnerian substantive due process review. Agency action that is consonant with a congressional statute based on an irrational purpose, or a non-public-regarding purpose, should be upheld simply because it is consistent with the law, even if that law is a poor one.

84. The Constitution requires the President to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, and the Supremacy Clause makes congressional statutes the "supreme Law of the Land," U.S. CONST. art. VI, cl. 2. Accordingly, unless there is another even more fundamental cross-cutting constitutional value, congressional commands in the form of statutes control both presidential action and judicial interpretation—what I call "statutory supremacy." Of course, resource allocation might be just such a cross-cutting

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there must inherently be a trade-off between holding agencies to their obligations under the law—including situations where Congress has commanded the agency to make an issue a high priority[85]—and deferring to their decisions as to how to spend their limited resources.[86]

Ultimately what we have is a balance that courts must strike between deferring to administrative agency resource allocation and upholding the statutory commands and directions of Congress. This understanding of the interaction of resource allocation and statutory supremacy concerns in judicial review of agency decisionmaking leads to the important conclusion that agency inaction is not some discrete category of administrative law that should be rendered off-limits from judicial review. Instead, the appropriate paradigm is one in which judicial review of agency inaction is not fundamentally different from judicial review of agency action—in both situations, deference to resource allocation decisions by agencies is usually only one of a number of elements that helps determine the overall deference that courts apply in reviewing agency decisionmaking.

Accordingly, courts should construe *Heckler v. Chaney* narrowly—only in a few limited situations, where the mere possibility of judicial review might fundamentally alter an agency's allocation of resources, should resource allocation be outcome-determinative such that courts should apply the non-reviewability principle laid out in *Heckler*. In any case, where Congress has spoken clearly to the priorities it wishes agencies to follow, courts should be enforcing those priorities.

The above framework helps us understand not only judicial review of agency inaction, but indeed, much of judicial review of agency decisionmaking in general. Below, I provide some initial development of that framework. I begin by explaining how courts should generally apply the tradeoff between deference to resource allocation and statutory supremacy and how these principles in fact should apply across the board to judicial review of agency action and inaction. I then explore the proper scope of non-reviewability of agency decisions pursuant to *Heckler* to demonstrate that it is an example of how resource allocation concerns might require the elimination of any judicial review in relatively limited

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value, and I discuss below why we might want to privilege one or the other value where there is a direct conflict.

Bressman identifies the strong connection between arbitrariness and statutory supremacy. *See* Lisa Schultz Bressman, Schechter Poultry *at the Millenium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1424-25 (2000) (quoting commentators who make connections between arbitrariness and statutory supremacy).

85. Krent, *supra* note 61, at 1196 (noting that Congress can always impose requirements on the agency as to how to set its priorities).

86. *See* Selmi, *supra* note 54, at 138-39 (noting the trade-off between agency autonomy and accountability).

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circumstances. I conclude with an analysis of why statutory supremacy concerns should trump deference to agency resource allocation when the two principles conflict.

1. Understanding Judicial Review as a Balance Between Resource Allocation and Statutory Supremacy

As noted above, at times courts have stated that judicial review of agency inaction under § 706(1) is fundamentally different from judicial review of agency action under § 706(2). If that is the case, then arguments for fundamentally different standards of judicial review—perhaps even a lack of review, as in *Heckler*—suddenly have a much greater appeal. Thus, an important contribution that a framework of judicial review based on deference to resource allocation can provide is to answer the question of whether judicial review under § 706(1) is fundamentally different from review under § 706(2).

The answer to that question is that there is no fundamental difference. Instead, judicial review of agency inaction is simply a specific application of the general framework of judicial balancing between deferring to resource allocation and upholding congressional mandates. As outlined above, in general, the more that judicial review in a particular situation implicates statutory supremacy and the less it implicates resource allocation, the less deferential (all other things being equal) courts will be to the agency in undertaking review.[87] We can accordingly lay out four categories of agency decisions, including both action and inaction—those involving: (1) important questions of resource allocation and statutory supremacy; (2) important questions of resource allocation but minimal questions of statutory supremacy; (3) minimal questions of resource allocation but important questions of statutory supremacy; and (4) minimal questions of resource allocation and minimal questions of statutory supremacy. In category two, deference by a court will be high. In category three, deference by a court will be low. In category one, courts will be faced with difficult questions, though usually statutory supremacy will trump resource allocation (as discussed below). Category four will turn on other questions (such as deference to agency expertise or accuracy of agency fact-finding) besides statutory supremacy and resource allocation.

We can expand some on what it means for a case to have important or minimal questions of resource allocation or statutory supremacy. At a most

87. *See id.* at 141-42 (concluding that deference to agency resource allocation should be reduced where it conflicts with congressional mandates, and increased where Congress has not spoken and the agency is relying on its expertise and policy setting autonomy).

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basic level, the agency's decision may explicitly and directly implicate the amount of resources an agency will have to expend. Such situations are relatively rare, and will almost never be outcome determinative, but they are informative for my analysis.

Second, and far more important for all practical purposes, there are situations where the type of agency decision at issue will necessarily implicate resource allocation concerns. In these types of cases, resource allocation may determine not just the deference that courts will grant, but even the possibility of review. There are two ways in which the type of agency decision may implicate resource allocation concerns. One, resource allocation questions will be less important in situations where the agency has proceeded some or all of the way towards acting compared to situations where the agency has not proceeded at all to act. Two, statutory supremacy questions will be more important in situations where the agency acts through a rulemaking or other generally applicable policy-setting procedure versus situations where the agency is acting in a case-by-case process.

a. Resource Allocation as a Direct Factor in Agency Decisionmaking

There may be occasions where an agency explicitly decides not to act, or shapes the form of the action that it takes, based on concerns about how it will expend its resources.[88] Given the centrality of such decisions to agency discretion—and the difficult task that courts would have in closely examining the veracity of these claims by an agency—it is no surprise that courts provide at least some deference to such arguments, and properly so (as with any of the other important factors in judicial review in administrative law, such as agency expertise).[89] Moreover, courts will also defer to explicit agency decisions as to whether to fund a particular program or not—and as noted above, agency decisions as to how to allocate funds from lump sum appropriations are in fact unreviewable.[90]

88. *See, e.g.*, NLRB v. Cedar Tree Press, Inc., 169 F.3d 794, 797 (3d Cir. 1999) (discussing an NLRB policy prohibiting the provision of absentee ballots for representation elections because of agency resources that would be required to consider thousands of requests for individual absentee ballots).

89. *See, e.g.*, *id*. (deferring to agency policy of not providing absentee ballots for labor representation elections because of resource allocation concerns. The court wrote: "We believe the Board has made a valid, well-reasoned determination to deploy its limited resources elsewhere and that this determination should not be disturbed without good cause or clear statutory authority."). In considering claims that an agency has "unreasonably delayed" acting under § 706(1) of the APA, courts will explicitly consider the various other decisions and issues that the agency considers high priority. *See* Biber, *supra* note 8, at 17-18.

90. *See* Lincoln v. Vigil, 508 U.S. 182, 192-94 (1993).

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Likewise, big picture agency decisions—an FDA decision to prioritize food regulation over cosmetics regulation, for instance—inherently and obviously implicate resource allocation concerns. Those types of decisions also tend to be outside the scope of judicial review by courts because plaintiffs seeking to attack these types of decisions do not qualify under the specific "agency action" that the APA requires for judicial review.[91]

However, the vast majority of agency decisions are not the high-level ones made in the corner offices of agency buildings in Washington, D.C. Agencies often will not explicitly base decisions on resource allocation concerns, perhaps because they are prohibited from doing so (for example, because of a statutory mandate to act). Furthermore, agency invocation of "limited resources" cannot be talismanic because agencies would then strategically be able to alter the extent or nature of judicial review with the use of some magic words or phrases. Indeed, to the extent that we are attempting to use resource allocation concerns to determine the level of deference or draw the lines between reviewable and unreviewable decisions, the possibility that agencies might strategically use resource allocation rationales is worrisome. Courts accordingly need some way of determining when deference to agency resource allocation is truly called for. The structure of the agency decisionmaking process can in fact reveal those types of clues.

91. *See* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990).

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b. Indirect Consideration of Resource Allocation

For the reasons given above—lack of an explicit agency reliance on resource allocation issues, or concerns about strategic agency use of resource allocation rationales—we might well want to rely on more "objective" indications of when a particular agency decision implicates resource allocation concerns. There are two primary ways we can categorize agency decisions that allow us to understand whether resource allocation concerns are greater or lesser, and whether the balance between resource allocation deference and upholding statutory supremacy should go in one direction or another: (1) the extent to which an agency has completed its decisionmaking process; and (2) whether the agency decision involves general rulemaking or particularized adjudications.

i. Comparing Situations Where an Agency Has Acted Versus Situations Where the Agency Has Not Acted at All

Resource allocation is based on deferring to the agency's discretion to prioritize which particular issues, problems, or concerns warrant expenditures of limited time and resources. If an agency has already expressed what its priorities are, there is much less reason for a court to defer to the agency. For example, if an agency has already issued a regulation and the court is being asked to review the legality of that regulation, then resource allocation is of minimal concern. The agency cannot object that any additional time and effort it must spend to defend the regulation and rewrite the regulation on remand (if the regulation is struck down) is an improper interference with its priority-setting. After all, the agency has already made it abundantly clear that the issue is of high priority to the agency—it has spent plenty of time and energy drafting and promulgating the regulation.[92] In contrast, the need to ensure the legality of the agency action is undiminished. The trade-off implies minimal

92. *See* Med. Comm. for Human Rights v. SEC, 432 F.2d 659, 674, 675 & n.19 (D.C. Cir. 1970) (reviewing the agency decision because "the full Commission has exercised its discretion to review this controversy" and distinguishing situations where courts might "compel the Commission . . . either to entertain administrative review of a staff decision in the first instance"); *see also* N.Y. State Dep't of Law v. FCC, 984 F.2d 1209, 1214 (D.C. Cir. 1993) (stating that an agency decision to settle an administrative proceeding may be reviewable where the agency has completed much of the proceeding); Inv. Co. Inst. v. FDIC, 728 F.2d 518, 527-28 (D.C. Cir. 1984) (noting same); Robbins v. Reagan, 780 F.2d 37, 46-47 (D.C. Cir. 1985) (concluding the agency decision to close a homeless shelter was reviewable because the agency had already committed resources to the shelter, and the court was only considering rescission of that commitment); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 381 (1972) ("[O]nce an action is begun the agency's resource commitment has already been made.").

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deference to the agency action (at least on the basis of resource allocation), and judicial review under § 706(2), which tends to focus on completed agency action, is much less deferential than review under § 706(1).[93]

Courts would owe more deference to resource allocation if the agency action was partially completed. For instance, an agency's decision to initiate rulemaking and then abandon the proceedings midway through would imply that the issue was initially of high priority and then the agency changed its mind—courts would want to defer to some extent to the agency's change of heart. After all, agency priorities obviously will dynamically change based on numerous factors and external events, such as changes in administration, budget cuts or increases, changes in a regulated industry, or broader economic or social currents. On the other hand, the agency at one point did think this issue was worth time and effort to pursue, and the change of position should require at least some explanation (at least if the change of position has harmed a party sufficiently to support standing to sue).[94] Any agency claims of interference with resource allocation to some extent are weak given that extensive resources were put into the aborted process by the agency—the harm of requiring the agency to expend additional resources to ensure meaningful judicial review is relatively minimal, and if the agency truly erred in abandoning the proceedings, then requiring the agency to recommence those proceedings will be less intrusive to the extent that the agency can rely on its earlier efforts as a starting point.[95] Obviously, the above analysis makes it clear that the

93. As an example of this principle, consider *United Steelworkers of Am. v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987). The court had previously held that the agency's decision to issue a narrowly drawn workplace safety regulation was arbitrary and capricious—the agency responded by reinitiating the regulatory process, essentially from scratch. *Id*. at 1266-67. The court's response was sharp—the agency was required to issue a broader regulation (or an explanation as to why a broader regulation was improper) based on the existing rulemaking record within sixty days. Any additional delay would be unreasonable. *Id.* at 1269-70. The short timetable for agency reworking of a completed action contrasts strongly with judicial review of agency delays on completing action, where unreasonable delay is usually measured in years. *Compare* Potomac Elec. Power Co. v. ICC, 702 F.2d 1026, 1033-35 (D.C. Cir. 1983) (requiring the agency to act after a ten year delay although refusing to rely explicitly upon deadlines in the underlying statutory scheme), *with In re* Cal. Power Exch. Corp., 245 F.3d 1110, 1124-25 (9th Cir. 2001) (concluding that a four month delay was not egregious).

94. *Cf.* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40-42 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").

95. *See* WWHT, Inc. v. FCC, 656 F.2d 807, 816-17 (D.C. Cir. 1981) ("[T]he greater the agency's investment of resources in considering the issues . . . and the more complete the record compiled during the course of the agency's consideration, the more likely it is that the ultimate decision not to take action will be a proper subject of judicial review." (internal quotations omitted)); Raymond Murphy, Note, *The Scope of Review of Agencies' Refusals to Enforce or Promulgate Rules*, 53 GEO. WASH. L. REV. 86, 114 (1985) (explaining judicial

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farther advanced an agency proceeding has become, the less deference the courts owe the agency. Indeed, the (scant) case law on judicial review of partially completed agency actions is consistent with this principle.[96]

At a similar level of deference would be claims that an agency has unreasonably delayed in completing an ongoing action.[97] Again, in such a situation the agency has already committed to undertaking the action (or a statute already requires the agency to act), and to this extent resource allocation is less of an issue. On the other hand, the agency certainly has discretion to proceed at different rates of speed to complete the various items on its agenda, and to give each of those items more or less priority. Thus, significant discretion exists for the agency in these types of claims, with considerable deference to agency protestations that it is proceeding at an adequate pace to resolve the issue and/or that there are other issues of higher priority within the agency.[98]

The next and higher level of deference would be situations where an agency explicitly denies a petition or other motion by a private party for the agency to initiate action, and the statutes or regulations impose a duty on the agency to respond to the petition or motion. The most important example of such a duty would be the APA's requirement that agencies shall respond to petitions for rulemaking in a timely manner.[99] Such a situation implicates the agency's resource allocation decisionmaking, and deference is warranted. On the other hand, the agency has a duty to respond to the petition or motion, and should not be able to evade that duty through a lack of a response or an irrational response. If there is a legitimate reason for the agency not to act, that reason should receive deference—if there is no

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review of agency refusal to promulgate smoking rules on the grounds that "once the agency had expended the resources to study the proposals in depth, the agency was obligated to address the major issues in its final decision").

96. *See* State Farm Mut. Auto. Ins. Co. v. Dep't of Transp., 680 F.2d 206, 221 (D.C. Cir. 1982), *aff'd on other grounds*, *State Farm*, 463 U.S. 29; and cases cited therein. Of course, it is possible that agencies might take advantage of this by delaying completion or progress on rulemakings (e.g., issuing notices of proposed rulemaking but avoiding issuing draft regulations) in order to take advantage of heightened deference. But that kind of action might then open the agency up to claims of unreasonable delay.

97. *See* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 774 (1990) (noting the parallels between an unreasonable delay claim and a claim that an agency has improperly abandoned an action in midstream).

98. *See* Biber, *supra* note 8, at 15-17 (describing that as part of a balancing test for judicial review of a claim that agency action has been unreasonably delayed, "the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority").

99. *See* 5 U.S.C. § 553(e) (2000) (requiring agencies to accept petitions for rulemaking); *id.* § 555(e) (requiring agencies to respond to petitions made "in connection with any agency proceeding"). The two provisions have generally been read together by courts to require agencies to respond to petitions for rulemaking. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1459 (2007).

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legitimate reason for the agency not to act, then the agency should be required to act (although the agency would have significant discretion in how speedily it may act). Thus, even though resource allocation weighs significantly and great deference is owed to agency denials of petitions or other motions, courts should, and do, provide at least some judicial review in order to vindicate the statutory or regulatory requirements.[100]

Finally, there are situations where an agency has not made any decision whether or not to initiate work on a particular issue, project, or concern.[101] In such a situation, deference would be at its highest, and only in the most egregious situations—for instance, where a statute explicitly requires an agency to commit resources to the particular issue, project, or concern, as in the "clear duty" of mandamus law—would the courts require the agency to act. Only in these types of situations where there is a clear, even blatant, violation of the law by the agency will courts interfere with the heart of agency discretion in resource allocation.[102]

ii. Statutory Supremacy: Collective Actions Versus Individual Actions

Because courts balance upholding statutory supremacy with deference to agency resource allocation, courts should be more willing to step in when the benefits to enforcing statutory supremacy are higher—i.e., when the judicial action will result in the correction of legal errors that might harm a wide range of private parties or public interests. Agencies have two major paths by which they can choose to make policy and implement a regulatory scheme: they can issue regulations or similar guidance that sets policy that is generally applicable, or they can set policy through case-by-case adjudications.[103] Generally, agency decisions to promulgate regulations (or similar policy statements that are binding on private parties and/or the

100. For examples of courts providing judicial review of agency decisions not to issue a regulation, but with great deference, see *Am. Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987), concluding that agency refusals to institute rulemaking are reviewable, and *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971), reviewing agency refusal to issue regulations regarding business on an Indian reservation. *See also* Biber, *supra* note 8, at 13-14.

101. Alternatively, an agency may even explicitly decide against initiating any work on a particular issue, project, or concern outside of responding to a petition, as discussed above.

102. *See* Biber, *supra* note 8, at 13-14 (explaining that "courts are very reluctant to interfere with an agency's ordering of its priorities" except where Congress has imposed a "clear duty").

103. Courts will generally defer to an agency's decision whether or not to pursue its policy goals through regulation or adjudication. *See, e.g.*, Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 674 (D.C. Cir. 1973) (explaining that the court's duty "is not . . . to make a policy judgment as to what mode of procedure—adjudication alone or a mixed system of rule-making and adjudication, as the Commission proposes—best accommodates the need for effective enforcement of the Commission's mandate").

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agency) will impose a far broader and more sweeping legal rule than an agency decision in an individual adjudication or proceeding. The rule is binding on the world as a matter of law, while the individual proceeding is only binding on the particular parties affected.[104] Of course, the individual proceeding may announce a legal rule that is binding as precedent on subsequent proceedings, but if that new rule is erroneous, the agency can correct it in the subsequent proceeding as easily (or almost as easily) as in the prior proceeding.[105] On the other hand, issuance of a regulation often consumes more time and resources than an individual adjudication, and therefore any errors will only be corrected in the (less likely) event that the agency revisits its regulation. Thus, judicial review in the context of regulations is much more likely to produce a significant benefit in terms of making sure the agency is complying with the law and protecting private parties from legal error, i.e., the benefit of judicial review is much higher.[106] In addition, individual proceedings by agencies will occur more frequently, raising concerns that the possibility of judicial review will substantially increase the resources the agency expends in order to buttress its many decisions against judicial review.[107] Moreover, individual adjudications will usually depend on close evaluations of the facts in the case, rather than the underlying law.[108] Accordingly, courts should be much more willing to review agency decisions that establish binding legal

104. *See* John A. Ferejohn, *The Structure of Agency Decision Processes*, *in* CONGRESS: STRUCTURE AND POLICY 441, 443-45 (Matthew D. McCubbins & Terry Sullivan eds., 1987) (discussing how rulemaking by agencies allows for the "grouping [of] broad classes of decisions into categories" while adjudication is much more focused on the particularities of individual cases).

105. *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 453 (4th ed. 1999) (stating that an agency "surely can change" a policy developed through adjudication as long as it explains its change in course) (citing NLRB v. Int'l Union of Operating Eng'rs, 460 F.2d 589, 604 (5th Cir. 1972) and WLOS T.V. v. FCC, 932 F.2d 993, 998 (D.C. Cir. 1991)).

106. *See* CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 35 (2d ed. 1999) ("Clearly articulated rules offer judges an efficient way to review and determine agencies' stewardship of the law and public policy.").

107. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1459 (2007) ("[A]gency refusals to initiate rulemaking 'are less frequent'" than agency decisions not to enforce (quoting Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 4 (D.C. Cir. 1987))); *see also* Schuck & Elliott, *supra* note 80, at 1013-14 (reporting that adjudications consisted of approximately 87% to 98% of agency decisions reviewed by courts in published opinions from the 1960s to the 1980s).

108. *See* Massachusetts v. EPA, 127 S. Ct. at 1459 (concluding that agency refusals to institute rulemaking remain reviewable after *Heckler*, in part because decisions not to prosecute, unlike rulemaking decisions, are "numerous" and are "typically based mainly on close consideration of the facts of the case at hand, rather than on legal analysis" (quoting *Lyng*, 812 F.2d at 4)).

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standards (such as regulations) than individual adjudications, at least where resource allocation is a significant issue.[109]

The case law reflects this distinction. For instance, agencies have argued that a decision to set standards (or not to set standards) through rulemaking or similar proceedings should be exempt from review, in particular under *Heckler v. Chaney*. The Supreme Court, in *Massachusetts v. EPA*, specifically rejected this argument.[110] Lower courts have also rejected these agency claims on the grounds that an agency decision involves broad policy-setting decisions, rather than an individual enforcement decision, and therefore judicial review is appropriate.[111]

c. Conclusion: Resource Allocation as a Determinant of Deference to Agency Decisionmaking

109. *See* Schuck & Elliott, *supra* note 80, at 1021-22 (reporting that affirmance rates in judicial review of agency decisions are much higher for adjudications (57.8%) than rulemaking (43.9%)).

110. Massachusetts v. EPA, 127 S. Ct. at 1459 (remarking that in contrast to decisions not to enforce in individual cases, "[r]efusals to promulgate rules are . . . susceptible to judicial review, though such review is 'extremely limited' and 'highly deferential'" (quoting Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989))).

111. *See* Crowley Caribbean Transp., Inc. v. Peña, 37 F.3d 671, 676-77 (D.C. Cir. 1994) (distinguishing between "expressions of broad enforcement policies" which are reviewable and which "are more likely to be direct interpretations of the commands of the substantive statute rather than . . . mingled assessments of fact, policy, and law" and "individual enforcement decision[s]" which are unreviewable); Nat'l Wildlife Fed'n v. EPA, 980 F.2d 765, 773 (D.C. Cir. 1992) (reviewing an agency regulation that allowed discretion in revoking state drinking water regulatory authority, in part because plaintiff "raise[d] a facial challenge to the EPA statutory interpretation . . . and d[id] not contest a particular enforcement decision"); Nat'l Treasury Employees Union v. Horner, 854 F.2d 490, 496-97 (D.C. Cir. 1988) (allowing judicial review of an OPM personnel policy decision, and distinguishing between a "major policy decision" and "day-to-day personnel management decisions," in part because review of major policy decisions does not run the risk subjecting "hundreds of thousands of employment decisions" each year "to the possibility of judicial review," which would be "utterly impractical"); *Lyng*, 812 F.2d at 4 (concluding that agency refusals to institute rulemaking remain reviewable after *Heckler* in part because decisions not to prosecute, unlike rulemaking decisions, are "numerous," and are "typically based mainly on close consideration of the facts of the case at hand, rather than on legal analysis"). Of course, the standard of review is quite deferential, as noted above. *See* Murphy, *supra* note 95, at 107-14. *But see* Levin, *supra* note 97, at 764-68 (arguing that courts should be less likely to review refusals to issue regulations). Levin rests his critique in part on an assertion that judicial review of refusals to issue regulations will increase the burden on agencies because private parties are more likely to seek review of refusals to issue regulations than to seek review of refusals to enforce in individual proceedings. *Id.* at 764-65. This analysis does not address the fact that the chilling effect on the agency from the mere potential for judicial review may be what matters most for agency resource allocation (as discussed *supra* notes 15-17 and accompanying text). Where individual proceedings are far more frequent, the chilling effect (and the agency's concomitant diversion of resources to immunize the decisions from judicial review) will be significantly larger. Levin concedes that regulations differ from individual proceedings primarily in terms of the number of people impacted by the regulation, and that this would justify more searching judicial review. *Id.* at 765, 768.

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Under the framework developed above, courts would provide more or less deference to an agency decision based on the trade-off between resource allocation and statutory supremacy. It is important to keep in mind that this would be just one of a number of factors that play into the deference given by the court to an agency decision—i.e., that resource allocation is not determinative of the level of discretion that applies. Other factors that might apply include an agency's expertise on a particular question, the statutory scheme that Congress has laid out, and the court's own determination as to whether the agency is acting in good faith.

The Court's decision in *Massachusetts v. EPA* illuminates this point. The Court properly noted that the default level of judicial review of an agency's failure to initiate a rulemaking proceeding is "extremely limited" and "highly deferential."[112] The Court then noted that if the agency reached certain conclusions (i.e., that certain air pollutants present a threat to human health or welfare), the agency had a mandatory duty to issue regulatory standards (in this case, to control those air pollutants).[113] The agency's mandatory duty to regulate if it finds that certain conditions exist greatly reduced the agency's legal room to maneuver. According to the Court, the plain text of the statute made clear that Congress intended to strip away most of the agency's discretion over resource allocation—and that instead, the agency was restricted to a narrow, focused analysis about whether an air pollution problem existed. If such a problem existed, the agency was required to regulate. Because the agency had never squarely considered the question of whether an air pollution problem existed, its refusal to regulate was arbitrary and capricious—even under what first started out as a highly deferential standard of review.

In short, the key conclusion of this Article is not that there are no other factors that are important to understanding how judicial review functions both for agency action and inaction. What is significant is the realization that agency inaction is not a fundamentally different type of agency decision that receives fundamentally different treatment by the courts, and it is not always, or even often, unreviewable. Instead, agency inaction is subject to the same general scheme of judicial review—including deference

112. Massachusetts v. EPA, 127 S. Ct. at 1459 (explaining that judicial review of the agency's refusal to act in the case was based on a special judicial review provision in the Clean Air Act, but the Court's analysis was based on APA case law and the Court did not indicate that its analysis was in any material way affected by that difference (citing 42 U.S.C. § 7607(b)(1) (2006))).

113. *Id*. at 1459-60 (discussing 42 U.S.C. § 7521(a)(1), which requires the EPA to issue regulatory standards for any "air pollution which may reasonably be anticipated to endanger public health or welfare").

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on issues such as expertise—as the rest of agency decisionmaking.[114] Resource allocation is and should be a significant factor in that judicial review process—albeit one with particularly important weight in certain types of agency decisions that we tend to identify as "inaction."

114. *See* Biber, *supra* note 8, at 11-18.

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2. Explaining Why Agency Decisions May Be Unreviewable Based on Resource Allocation

The analysis above explains why agency inaction should be reviewable by the courts—albeit with some level of deference in certain circumstances. However, what about the presumption of non-reviewability laid out by the Supreme Court in *Heckler v. Chaney* for agency decisions not to enforce? Is it simply wrong? Or, if it is not wrong, why does it not cover the field of agency inaction?

My answer is that *Heckler* is not wrongly decided—but that it has a (relatively) narrow application in the field of administrative law. The underlying purpose of the *Heckler* presumption of non-reviewability is to protect agency resource allocation, and it applies even where the mere possibility of judicial review would excessively interfere with agency resource allocation. In other words, while in general resource allocation is simply an important factor that helps determine the level of deference that courts give to agency decisions, in some situations resource allocation is so important that it becomes the overriding factor that requires courts to refuse judicial review altogether.

What types of situations would warrant such a draconian limitation on judicial power? Situations where the agency must make many informal and quick judgments on a regular basis, and where the possibility of judicial review would force the agency to fundamentally change how it made those decisions. In such situations, the possibility of judicial review would require an agency to make those decisions in a more formal and regularized manner, require a vast increase in resources for the decisionmaking process, and sharply circumscribe its ability to address other issues or problems.[115]

The classic example of this is, in fact, the *Heckler* situation—an agency decision about whether to enforce a regulation or statute against a private

115. *See* Krent, *supra* note 61, at 1214 (noting that the possibility of judicial review will cause an agency to "devote considerable time and resources into papering the record to withstand review"); Sunstein, *Reviewing Agency Inaction*, *supra* note 54, at 673 (noting that if there is judicial review of agency decisions not to act, "it might become necessary to formalize inaction decisions, a step that could have considerable costs"); Thomas, *supra* note 65, at 140 n.67 (noting that judicial review cannot only restrict the ability of agencies to substantively choose where they should allocate their resources, but also that imposition of judicial review entails enormous transaction costs as agencies and private parties must comply with more formal procedures); *see also* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1772-76 (1975) (arguing that an increase in judicial review of informal agency decisions has led to much more formality, delay, and use of resources by agencies to make those decisions); Stewart & Sunstein, *supra* note 66, at 1270 n.324 (noting the risk that judicial review of inaction will increase resource demands on the agency to justify its decisions).

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party. Agencies receive a plethora of reports of possible violations of the law on a regular basis, and must make quick and informal decisions about which possible violations are worth further investigation and which ones to ignore. After further investigation, the agency again must make a large number of decisions about whether or not to pursue formal proceedings. Judicial review of these enormous numbers of agency decisions would destroy their informal nature and require agencies to spend significant time and effort on keeping records on their decisionmaking.[116] Judicial review might even force all agencies to conduct at least some investigation on all complaints, if only to justify a refusal to investigate further, which would drain even more resources from the agency. Accordingly, it makes perfect sense that the courts have refused to allow judicial review of these types of decisions. Moreover, given that individual enforcement decisions rarely, if ever, set any sort of legal precedent, the benefit of enforcing agency compliance with the law is relatively low.[117]

Indeed, the *Heckler* court appeared to recognize this factor, albeit obliquely, in its analysis. The Court specifically stated that one factor in denying judicial review in the case was that an agency action (as opposed to an inaction) "itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner."[118] Lower courts have interpreted this *Heckler* rationale as requiring that an agency act in such a manner that it has created a record or similar material that a court can review.[119] Of course, if courts began to impose judicial review on an

116. The informality of the agency decisions in *Heckler* is important in distinguishing the absence of judicial review in that case from judicial review of an agency's refusal to, for example, process a Social Security disability claim, where the agency has already established a formal system for adjudicating disputes and the possibility of judicial review will not seriously alter the agency's resource calculus.

117. There is case law that preceded *Heckler* that reaches similar results. *See, e.g.*, Bays v. Miller, 524 F.2d 631 (9th Cir. 1975) (finding no judicial review of NLRB refusal to file unfair labor practice complaint). *But see* REA Express v. Civil Aeronautics Bd., 507 F.2d 42 (2d Cir. 1974) (reviewing agency dismissal of complaint). The Supreme Court has raised similar concerns about judicial review of prosecutorial charging decisions in the criminal context. *See* Wayte v. United States, 470 U.S. 598, 607 (1985) (noting that judicial review of charging decisions might "chill law enforcement"); *see also* United States v. Redondo-Lemos, 955 F.2d 1296, 1299 (9th Cir. 1992) (noting the "host of virtually insurmountable practical problems" of allowing judicial review of prosecutor charging decisions).

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

119. *See* Transp. Intelligence, Inc. v. FCC, 336 F.3d 1058, 1063 (D.C. Cir. 2003) (concluding that the agency's denial of a petition to revoke a license was reviewable because the agency's grant of the license in the first place "provides a focus for judicial review") (internal citations omitted); Crowley Caribbean Transp., Inc. v. Peña, 37 F.3d 671, 677 (D.C. Cir. 1994) ("[A]n agency will generally present a clearer (and more easily reviewable) statement of its reasons for acting when formally articulating a broadly applicable enforcement policy" in contrast to "individual decisions to forego enforcement [which] tend to be cursory, ad hoc, or post hoc" confronting courts "with the task of teasing meaning out of agencies' side comments, form letters, litigation documents, and informal

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agency's decision not to enforce, that would in turn prompt the agencies to begin developing records that could be reviewed—as happened in the wake of the Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*. In doing so, the courts would be forcing the agency to fundamentally readjust and formalize its decisionmaking process, with dramatic impacts on the agency's resource allocation priorities described above.

An excellent example of how the courts have explicitly recognized this logic is a pair of D.C. Circuit cases (pre-*Heckler*) in which the court considered whether to judicially review the Security and Exchange Commission's (SEC) decision to issue "no-action" letters. In a no-action letter, the SEC indicates to a publicly traded company that it will not take action against the company for failing to include a particular motion in the proxy materials for a shareholder meeting. In *Medical Committee for Human Rights v. SEC*,[120] the D.C. Circuit allowed judicial review of the SEC's issuance of a "no-action" letter, relying in significant part on the fact that the full SEC itself had explicitly reviewed the agency decision in question. The court explicitly recognized that judicial review must be limited to avoid interfering with an agency's informal ability to deal with "a formidable number of proxy statements in limited time and with insufficient manpower," especially given that "not all proxy proposals can or should be given detailed consideration by the full Commission."[121] Thorough judicial review of all "no-action" decisions by the agency would interfere with "agencies' internal management decisions and allocations of priorities" because they might require the agency to give full review to all proxy proposals.[122] Judicial review in that particular instance was appropriate because the full SEC had examined the case, an unusual circumstance. Accordingly, the agency had already gone through the formal review process, and judicial review of that particular decision was unlikely to force the agency to formalize all of the many decisions that never went to the full SEC.[123] The D.C. Circuit explicitly relied on this language in *Medical Committee* to limit its prior holding to its facts. In

communications"); Nat'l Treasury Employees Union v. Horner, 854 F.2d 490, 496 (D.C. Cir. 1988) (reviewing an OPM policy decision because it must follow notice and comment rulemaking, a procedure that "provides a focal point for judicial review"); Int'l Union, United Mine Workers v. Mine Safety & Health Admin., 823 F.2d 608, 616 n.5 (D.C. Cir. 1987) (concluding that an agency's grant of interim relief from regulation was reviewable because the agency had exercised its power in a manner that at least allowed review to determine whether the agency had exceeded its powers).

120. 432 F.2d 659, 674 (D.C. Cir. 1970).

121. *Id.*

122. *Id.*

123. *Id.*

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Kixmiller v. SEC,[124] the court stated that judicial review under *Medical Committee* was limited to situations where the full SEC has reviewed a staff decision, and refused to subject informal staff advice to judicial review in part because the "[s]heer volume" of such advice precludes detailed, formal agency review.[125]

Therefore, now we can understand *Heckler v. Chaney* not as an anomaly in the world of administrative law, nor as the basis for an exception to judicial review that might swallow all of judicial review of agency decisions not to act. Instead, it is simply the result of the principled application of judicial deference to resource allocation in a relatively limited subset of cases of agency decisionmaking.[126]

3. Resolving Conflicts Between Resource Allocation and Statutory Language

Ultimately, however, courts will face situations where both statutory supremacy concerns and resource allocation concerns are high. Which goal in the end is paramount for a court? In practice, when push comes to shove

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124. 492 F.2d 641, 645-46 (D.C. Cir. 1974).

125. *Id*. Of course, there might be situations where constitutional requirements of procedural due process require judicial imposition of significant procedural formalities on agency decisionmaking, even when that might result in significant changes in how agencies allocate their resources. *See, e.g*., Goldberg v. Kelly, 397 U.S. 254 (1970) (imposing procedural protections on agency decisions to terminate welfare benefits).

126. *Contra* Bressman, *Judicial Review of Agency Inaction*, *supra* note 49, at 1693-94 (arguing that the *Heckler v. Chaney* exception to judicial review should be essentially abandoned, whatever the "considerable costs" "in terms of administrative flexibility and administrative efficiency," because there is "no principled way to defend" nonreviewability for agency enforcement decisions while advancing reviewability for agency actions).

There is another alternative explanation for the Court's decision in *Heckler*, albeit one that the Court itself never expressed. To the extent that the agency is being forced to take enforcement action in court, we might have concerns about a supposedly neutral arbiter (the court) requiring a party to initiate an adversarial proceeding in front of that arbiter. A recalcitrant agency, for instance, might decide to initiate the proceeding but only in a pro forma or indifferent manner. However, a supposedly impartial arbiter (i.e., the court) will have a very difficult task of supervising the litigation efforts of one of the adversarial parties and requiring it to make better efforts on its behalf to litigate. These concerns have animated the judicial reluctance to reject settlement agreements between litigants and force further litigation of the case. *See, e.g*., County of Santa Fe v. Pub. Serv. Co. of N.M., 311 F.3d 1031, 1047-50 (10th Cir. 2002) (noting judicial deference to motions by parties to dismiss cases pursuant to FED. R. CIV. P. 41 and noting concerns that if a motion to dismiss by a plaintiff is denied, the plaintiff "may seek effective dismissal of his case through non-prosecution or poor litigation tactics" and that courts will be ill-placed to force parties to submit higher-quality litigation materials for the court's own consideration in an adversarial proceeding). But this concern has only limited application in the context of judicial review of agency inaction, where much agency activity occurs informally or administratively, such that courts are not directly involved. Indeed, even in *Heckler*, at least one of the tools available to the agency (suspension of the registration of the drugs for use) would not have required judicial action. *See* Heckler v. Chaney, 470 U.S. 821, 853 (1985). Accordingly, it would support a narrower application of the *Heckler* doctrine than would resource allocation.

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and there is a direct conflict between statutory language (such as a deadline) and an agency claim that its resource allocation priorities are different, courts have consistently chosen clear statutory language over the agency claims of resource allocation discretion. This choice is most evident in situations where, absent the statutory language, the courts would certainly defer to an agency's decision to act or not to act—for instance, where a private party claims that an agency has completely failed to address a problem. Where the statute states that an agency "shall" take a particular action—the "clear" or "ministerial" or "nondiscretionary" language that most courts search for in many § 706(1) cases—then the agency can be required to act, deference to resource allocation notwithstanding.[127] Similarly, "unreasonable delay" cases, which might be very difficult for a private party to win, become simple claims that the agency has "unlawfully withheld" action where the relevant statute imposes a clear deadline on the agency to act.[128] It is also shown in the context of agency allocation of funds appropriated by Congress—even in this area, where agency decisions are unreviewable absent congressional instruction, courts will enforce explicit statutory instructions from Congress on how to allocate funds.[129] Finally, the *Heckler v. Chaney* presumption that an agency decision not to enforce is unreviewable can be overcome by clear statutory language indicating that the agency has a duty to enforce the law.[130]

Why, however, should statutory duties trump an agency's decision about how to allocate its own resources? This is not an idle question—there are those who believe that judicial interference in agency decisionmaking is so pernicious and inappropriate that even a clear statement by Congress as to what an agency should do and when does not warrant judicial intervention.[131] These scholars usually do not argue that courts should

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127. *See, e.g.*, Forest Guardians v. Babbitt, 174 F.3d 1261, 1270 (10th Cir. 1998) (taking a "'shall'-means-shall approach" and holding that an agency can be required to perform tasks that Congress has mandated).

128. *Id*. at 1272 ("[T]he distinction between agency action 'unlawfully withheld' and 'unreasonably delayed' turns on whether Congress imposed a date-certain deadline on agency action."); *see also* Stewart & Sunstein, *supra* note 66, at 1272, 1285-86 (explaining that courts are more likely to force agencies to act where there is strict, statutory duty).

129. *See* Lincoln v. Vigil, 508 U.S. 182, 193 (1993) ("Of course, an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes . . . .").

130. *Heckler*, 470 U.S. at 832-33.

131. *See, e.g.*, Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1027-36, 1068-69 (2000) (arguing that judicial review of any kind, and particularly of agency failure to comply with deadlines, is flawed and illegitimate); R. Shep Melnick, *The Political Roots of the Judicial Dilemma*, 49 ADMIN. L. REV. 585, 597 (1997) [hereinafter Melnick, *Political Roots*] (calling for narrow standing to prevent litigation of agency deadline cases: "Some will complain that denying

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explicitly disregard statutory language; instead they contend that courts should avoid claims that agencies have illegally failed to act through the use of various justiciability and reviewability doctrines, such as standing.[132]

There are multiple possible answers in response. One answer would be that from a strictly formalist constitutional perspective, it is the duty of the courts to interpret the law, not to write it, rewrite it, or repeal it.[133] Accordingly, it would be inappropriate and even unconstitutional for the courts not to enforce congressional statutes that require an agency to allocate its resources in a particular way.[134] Another answer would be that it is Congress's role, in general, to have the first and primary voice in setting policy, and that the role of agencies is to implement Congress's policy decisions, not to override them.[135]

A third answer is more important in the specific context of agency decisions not to act, and accordingly, it is one that I will discuss in more depth. This answer is based on a public choice theory understanding of how the political and regulatory process works. At its heart, this answer states that agency failures to implement regulatory statutes may be the result of asymmetries in the ability of regulatory subjects and regulatory beneficiaries to monitor and influence the political process. Thus, in order to counterbalance those asymmetries, at least in the most egregious situations, courts should uphold clear, specific congressional requirements for agencies to act.

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standing to private attorneys general will make statutory deadlines unenforceable and will thereby discourage Congress from putting specific mandates in statutes. Right. That's the point."); R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245 (1992) (questioning the propriety of having courts require agencies to take actions).

132. *See* Melnick, *Political Roots*, *supra* note 131.

133. *Cf.* U.S. CONST. art. VI, cl. 3 (stating that congressional statutes are the "supreme Law of the land").

134. *See, e.g.*, Pierce, *supra* note 61, at 90 (rejecting judicial failure to enforce deadlines because "[a]ny judicial action that places the judiciary in a position inconsistent with that of the 'honest agent' of the Framers or the legislative branch imposes high costs on the legitimacy of the political and legal structure of government"); *see also* Selmi, *supra* note 54, at 139-42 (noting the conflict between resource allocation and upholding congressional deadlines, but concluding that courts should uphold deadlines because "it is entirely appropriate for courts to determine whether the agency's inaction violates a purely statutory command. In [such a case], the need for agency accountability is more important than protecting its autonomy"); Sunstein, *Reviewing Agency Inaction*, *supra* note 54, at 670 (while the executive has "power to set enforcement priorities and to allocate resources to those problems that, in the judgment of the executive, seem most severe" that does not "authorize the executive to fail to enforce those laws of which it disapproves"); *cf.* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

135. *See* EDWARD L. RUBIN, BEYOND CAMELOT, RETHINKING POLITICS AND LAW FOR THE MODERN STATE 224 (2005) (developing the distinction between Congress's role in setting policy and the Executive's role in implementation).

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According to public choice theory, regulatory actions that benefit small groups of voters in a concentrated manner are more likely to be enacted than regulatory actions that benefit a large group of voters in a diffuse manner.[136] The more distributed the benefits of a regulatory action, the less likely that it will be in the self-interest of any individual voter to take action to obtain that regulatory action—the ratio of the benefits to the costs are necessarily lower.[137] In contrast, where the impacts of a regulatory action are concentrated, it may well be worthwhile for individuals to invest the large initial costs to organize themselves and fellow beneficiaries, monitor and engage the political process, and achieve their regulatory goals.[138]

These asymmetries in the political arena could be directly reflected in the elections for legislators.[139] They may be reflected in the lobbying, persuasion, or influence of administrative agencies in their own decisionmaking.[140] They may also be reflected in the monitoring by citizens of the actions of their legislators and regulatory agencies. In any event, they have real implications for the regulatory process and agency decisionmaking.[141]

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136. *See, e.g.*, ROBERT E. MCCORMICK & ROBERT D. TOLLISON, POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT 16-25, 42-44 (1981); Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 35-36 (2000) [hereinafter Croley, *Public Interested Regulation*].

137. *See* Croley, *Public Interested Regulation*, *supra* note 136, at 35-36; MCCORMICK & TOLLISON, *supra* note 136, at 16-21, 42-44. The terms "concentrated" or "distributed" are widely used in the scholarly literature. *See, e.g.*, R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 25-26 (1990); James Q. Wilson, *The Politics of Regulation*, *in* THE POLITICS OF REGULATION 357, 370 (James Q. Wilson ed., 1980).

138. *See* Croley, *Public Interested Regulation*, *supra* note 136, at 14-16, 36-38.

139. *See, e.g.*, DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 137 (1974) (arguing that the electoral process means Congress favors organized interests). "Congress will be reluctant to legislate new programs benefiting the unorganized over the opposition of the organized." *Id.*

140. *See* JOHN E. CHUBB, INTEREST GROUPS AND THE BUREAUCRACY: THE POLITICS OF ENERGY (1983) (providing case studies of the expense of monitoring and being involved in administrative process, and how accordingly process tended to be dominated by industry groups with larger resources and more benefits from lobbying); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 11-14 (1965) (noting the cost of participation in agency proceedings and that public interest groups participate in only a fraction of those proceedings); Ernest Gellhorn, *supra* note 92, at 389-94 (same); Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 538 (1972); Roger Noll, *Political Foundations of Regulatory Policy*, *in* CONGRESS: STRUCTURE AND POLICY 462, 479-80 (Mathew D. McCubbins & Terry Sullivan eds., 1987) (same); Roger G. Noll, *Government Regulatory Behavior: A Multidisciplinary Survey and Synthesis*, *in* REGULATORY POLICY AND THE SOCIAL SCIENCES 31, 44 (Roger G. Noll ed., 1985) (noting this dynamic); Peter H. Schuck, *Public Interest Groups and the Policy Process*, PUB. ADMIN. REV. 132, 137-39 (Mar./Apr. 1977) (same); *see also* KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 316 (1986) (providing evidence as to greater resources available to industry groups).

141. I recognize that there are important, and in many ways valid, critiques of the public choice theory. Any casual observer of the political landscape will note that a wide range of

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In the context of agency decisions not to act, this dynamic can have particularly problematic results. Legislatures are notorious for enacting broadly worded regulatory statutes that provide glowing rhetoric about the benefits that the statute will provide to the broader citizenry—statutes for which there is little if any chance that the goals announced will ever be achieved. In environmental law, a classic example is the Clean Water Act's call for fishable and swimmable waters throughout the United States by 1983 and zero discharge of pollutants into the waters of the United States by 1985.[142]

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groups at least purport to represent widely diffused interests, and at times represent those interests rather effectively. Examples are environmental, consumer interest, and taxpayer groups. *See* Croley, *Public Interested Regulation*, *supra* note 136, at 92-95; R. Shep Melnick, *Strange Bedfellows Make Normal Politics: An Essay*, 9 DUKE ENVTL. L. & POL'Y F. 75, App. A (1998) (providing data as to size of national environmental groups). There are a variety of theories to explain the existence of these groups, and their existence at least to some extent calls into question whether the collective action problems described by the public choice theory are the sole determinants of the political system. *See* Croley, *Public Interested Regulation*, *supra* note 136, at 19-22 (describing how moral imperatives and suasion, inherent rewards from participation in group activities, and political entrepreneurship might explain how diffuse beneficiary organizations are created and run); *id*. at 46-48 (describing the fundamental problems that collective action theory has in explaining how any group organization might occur); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 202-03 (1988) (challenging the assumptions and empirical evidence underlying public choice theory); V. Kerry Smith, *A Theoretical Analysis of the "Green Lobby"*, 79 AM. POL. SCI. REV. 132 (1984) (developing models to demonstrate that environmental groups can develop despite collective action problems). Moreover, public choice theory necessarily requires basic assumptions about human nature and behavior that are clearly false in important and significant ways. Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, But Throw Out That Baby*, 87 CORNELL L. REV. 309, 340-46 (2002). Nonetheless, a number of scholars have concluded that there appears to be at least some truth to the collective action problems identified in public choice theory. *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 24-25 (1998) [hereinafter Croley, *Theories of Regulation*] ("[A]ny serious theory must somehow consider that collective goods, including monitoring, will in the absence of some catalyst tend to be underproduced."); *id*. at 52-56, 63-65, 145-47 (noting that the empirical evidence for the public choice theory is mixed but that there is at least some "modest support" for the theory); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 170-71 (1990); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 146 (1989) [hereinafter Mashaw, *Economics of Politics*] (concluding that public choice theory provides a partial explanation of the motives of legislators); Lars Udéhn, *Twenty-Five Years with* The Logic of Collective Action, 36 ACTA SOCIOLOGICA 239, 240, 256 (Scandinavian Sociological Ass'n 1993) (noting same). To the extent there is some truth to the public choice story, we would want to design our regulatory structure in a way to minimize the risks that public choice flaws would pose to the decisionmaking process. *See* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 25-29 (1997).

142. *See* 33 U.S.C. § 1251(a)(1)-(2) (2000). Obviously, these environmental goals are yet to be achieved in the United States, even if those goals are achievable.

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Setting aside the feasibility of such sweeping goals, even partial achievement requires the creation and governance of a large, complex regulatory system. Such a system requires cooperation by both Congress and the agencies. The Legislature must fund the agency to develop the regulatory system on an ongoing basis, and not meddle with the substantive regulation in a way that undermines the program. On the agency side, regulations must be drafted, personnel hired, administrative capacity developed, research conducted, and laws and regulations enforced.

All of these steps allow for slippage between the initial passage of the statutory scheme and its implementation. That slippage creates an opportunity that can be exploited through the political system. For many of these symbolic regulatory statutes, particularly in fields such as environmental law, the benefits of the regulatory scheme often redound to all or almost all of the public, but in a diffuse manner, while the costs are concentrated on a relatively small number of individuals or businesses—an asymmetry that will then be reflected in the political process of implementation of the regulatory statute.[143]

For instance, instead of aggressively funding the expansion of the regulatory state in an effort to achieve the goals, Congress might instead impose restrictions on the agency's ability to act through budget cuts for the agency as a whole or refuse to fund program expansions—decisions that need not be explicitly linked to the underlying substantive issues, either in the text of the statute, the congressional debates, or in the press coverage (if any) of the budget decisions.[144] Alternatively, Congress might

143. For an account of how symbolic regulatory legislation may be passed that does not actually benefit the public in practice, see MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 22-29 (1964).

144. *See* Bressman, *Judicial Review of Agency Inaction*, *supra* note 49, at 1688 (noting that "Congress often writes broad delegating statutes to create opportunities for narrow interests to dominate agency decisionmaking" and that "Congress similarly grants power without meaningful administrative limits so that its members will have space to push agencies toward preferential outcomes"); James V. DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399, 434-35 (1986) (noting same); Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 327, 328-29 (1991) (noting that appropriations committees, often skeptical of environmental laws, had purposefully passed low budgets to undermine enforcement, and that the committees "felt far more secure in undermining the statutory mandates in a less visible way through the appropriation process" as opposed to direct attempts at repeal); Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 443-44 (1999) (noting that Congress often imposes stringent duties on agencies but refuses to provide resources to carry out those duties, thus simultaneously rewarding the public and private interests). Interference with agency implementation may be the result not of a decision by Congress as a whole, but instead of decisions by individual congressional committees or even individual members of those committees. *See* R. DOUGLAS ARNOLD, CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE (1979); Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90

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impose procedural hurdles that make it impossible for the agency to promptly fulfill these responsibilities.[145] If questions arise about the fact that the glowing rhetoric has not been realized in practice, the Legislature might call oversight agencies and blame the agency for failing to achieve those results, while keeping for itself the credit of striving to reach the ideal.[146]

Likewise, the Executive Branch can instruct its agencies to make fulfillment of these goals a low priority, with the same goal of rewarding groups with concentrated costs at stake.[147] Blame can be transferred back to the Legislature by, for example, accusing it of not providing sufficient resources or by interfering with the Executive's ability to enforce the law. Alternatively, the Executive Branch may make implementation of the statute a lower priority based not on any intent to benefit particular groups, but simply in response to the relatively stronger ability of those who bear

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HARV. L. REV. 1369, 1421-22 (1977) (providing examples of appropriations and other congressional committees putting pressure on agencies to prevent regulation); J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443 (2003) (providing empirical evidence of committee influence on agency decisionmaking); Eric Helland, *The Waiver Pork Barrel: Committee Membership and the Approval Time of Medicaid Waivers*, 17 CONT. ECON. POL'Y 401 (1999); MICHAEL W. KIRST, GOVERNMENT WITHOUT PASSING LAWS 6-7 (1969) (describing the ways in which appropriations committees can use legislative history, oversight hearings, and other non-statutory tools to control an agency's substantive decisions); Jeremy Rabkin, *Micromanaging the Administrative Agencies*, 100 PUB. INTEREST 116 (1990) (providing examples of appropriations committees closely controlling agency decisionmaking); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983) (noting same); *see also* JOSEPH L. SAX, DEFENDING THE ENVIRONMENT 1 (1970) (describing a case study of how lobbying by individual Congressmen had an important impact on agency decisionmaking).

145. Matthew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 442-44, 457, 468-70 (1989) (noting capture of the House of Representatives Commerce Committee by specific pro-business interests, and the imposition of elaborate procedures by Congress on the agency, in order to restrict the agency's ability to implement statutory programs).

146. *See* Bressman, *Judicial Review of Agency Inaction*, *supra* note 49, at 1689 (stating that Congress can dodge blame by "placing the agency on the hook"); Pierce, *supra* note 61, at 69 ("The path of least resistance for any politician is to enact or retain the politically valuable rhetoric embodied in absolutist regulatory statutes; to decline to appropriate the funds necessary to implement the statutes; and then to chastise the agencies for failing to perform their statutorily assigned tasks.").

147. The Bush Administration's Clear Skies initiative, in which the administration declined to enforce existing air laws against major industries, has been cited as an example of this type of behavior. *See* Bressman, *Beyond Accountability*, *supra* note 82, at 507-08; *see also* Bressman, *Judicial Review of Agency Inaction*, *supra* note 49, at 1689 (noting that agencies frequently act in a manner to reward narrow interests and that agencies "are beholden to elected officials who cater to private interests while escaping responsibility for that result"); Lazarus, *supra* note 144, at 328-29 (noting how agency officials cooperated with Congress in underfunding the enforcement of environmental laws); Seidenfeld, *supra* note 144, at 459-63 (noting the risk of agency capture by regulated groups).

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the concentrated costs to participate in agency proceedings, provide information to the agency, and lobby the agency.[148]

Because of the increased deference courts will generally pay to agency decisions not to act, when it comes to substantive judicial review, agencies generally have great leeway in their ability to implement (or not implement) statutory mandates.[149] Moreover, the APA places few explicit procedural requirements on agencies that choose not to act—certainly no more than the bare-bones requirement that the agency provide a reasonable explanation of its decision not to act.[150] Thus, agencies (and/or congressional allies) may well be tempted to use agency inaction, rather than agency action, as their primary tool to avoid enforcement by the judicial branch and/or outside parties.[151]

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148. For empirical evidence of interest group influence on agency decisionmaking, see, for example, WESLEY A. MAGAT, ALAN J. KRUPNICK & WINSTON HARRINGTON, RULES IN THE MAKING: A STATISTICAL ANALYSIS OF REGULATORY AGENCY BEHAVIOR 147, 156-57, 170-71 (1986); LAWRENCE S. ROTHENBERG, REGULATION, ORGANIZATIONS, AND POLITICS: MOTOR FREIGHT POLICY AT THE INTERSTATE COMMERCE COMMISSION (1994); DAVID VOGEL, NATIONAL STYLES OF REGULATION: ENVIRONMENTAL POLICY IN GREAT BRITAIN AND THE UNITED STATES 164-68 (1986); Amy Whritenour Ando, *Waiting to be Protected Under the Endangered Species Act: The Political Economy of Regulatory Delay*, 42 J.L. & ECON. 29 (1999); Daniel P. Carpenter, *Groups, the Media, Agency Waiting Costs, and FDA Drug Approval*, 46 AM. J. POL. SCI. 490 (2002); Joseph Cooper & William F. West, *Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules*, 50 J. POL. 864, 879 (1988); Maureen L. Cropper et al., *The Determinants of Pesticide Regulation: A Statistical Analysis of EPA Decision Making*, 100 J. POL. ECON. 175 (1992); Lea-Rachel D. Kosnik, *Sources of Bureaucratic Delay: A Case Study of FERC Dam Relicensing*, 22 J.L. ECON. & ORG. 258, 285 (2005); Michael R. Moore, Elizabeth B. Maclin & David W. Kershner, *Testing Theories of Agency Behavior: Evidence from Hydropower Project Relicensing Decisions of the Federal Energy Regulatory Commission*, 77 LAND ECON. 423 (2001); Hilary Sigman, *The Pace of Progress at Superfund Sites: Policy Goals and Interest Group Influence*, 44 J.L. & ECON. 315 (2001).

149. Croley, *Public Interested Regulation*, *supra* note 136, at 34-35.

150. For instance, in the vast majority of individual adjudicatory decisions, an agency's decision not to take action will not be made explicit through a formal adjudicatory proceeding, where the APA places substantial procedural requirements on the agency, according to 5 U.S.C. § 554, but instead through informal decisions about which cases to pursue or not. Such informal adjudicatory decisions require almost no procedural steps under the APA, aside from providing a reasoned explanation for the decision to a court should the decision be reviewed judicially. *See* CHRISTINE A. KLEIN, FEDERICO CHEEVER, & BRET C. BIRDSONG, NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES 185 (2005). As for rulemaking decisions, the decision to terminate a rulemaking proceeding, reject a petition for rulemaking, or not to initiate a rulemaking in the first place at most would trigger the notice and comment obligations for informal rulemaking on the APA, and in many cases might not even trigger those requirements—leaving the procedural standard at the very low level of providing a reasoned explanation for the decision to a court.

151. *See* Croley, *Public Interested Regulation*, *supra* note 136, at 34-35; Peter L. Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 CORNELL L. REV. 280, 292 (1990) ("[O]pposition to government actions which harm [a small] group will often be a more productive investment of lobbying dollars than is support for actions which help the group. The courts in general hold administrative agencies to a far lower standard of judicial review when agencies fail to act than when they do affirmatively act."). Some

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Even more importantly, inaction allows both the Legislature and the Executive to reduce the ability of the public to monitor. Because of the lack of APA procedures, agencies usually need not make any announcements about whether they are choosing to act. If they do—as when they choose to terminate an ongoing rulemaking proceeding—those decisions can be buried in a short notice in a large volume of the Federal Register.[152] As for appropriations bills, often the relevant provisions can be tucked away inside a massive omnibus spending reconciliation bill.[153] Moreover, neither agency resource allocation decisions nor congressional appropriations decisions are likely to ever have nearly the same kind of political resonance that the passage of the original symbolic statute would have.[154] The press coverage of the symbolic statute's passage is likely to be far greater—and however inaccessible the text of the United States Code would be to the average citizen, it is still far more accessible than the intricacies of the appropriations and budget processes.[155] In essence,

scholars have argued that the public choice theory of regulation is undermined because only informal agency decisionmaking is without significant procedural requirements, and accordingly it would be relatively difficult for particular special interests to monopolize the administrative process. *See* Croley, *Theories of Regulation*, *supra* note 141, at 144-45. Given the importance of agency resource allocation decisions to the implementation of regulatory programs, agencies are unlikely to miss the opportunity to use inaction (a form of informal agency decisionmaking) to reach substantive outcomes. *See* Croley, *Public Interested Regulation*, *supra* note 136, at 34; *see also* Stewart, *supra* note 115, at 1754 & n.404 (noting judicial concerns that informal agency decisionmaking was being used to benefit regulated industry).

152. *See* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 424-33 (2007) (discussing the difficulty that regulatory beneficiaries have in monitoring informal agency action); *cf.* Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671, 682-83 (1992) (noting that the requirement that agencies provide explanations for their decisions reduces monitoring costs for the public and thus opportunities for agencies to hide special-interest rewards).

153. *See* D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS 13-14 (1991) (discussing the rise of the use of continuing appropriations resolutions in the late twentieth century and the increase in power provided to appropriations committees).

154. *See* Ferejohn, *supra* note 104, at 455 (describing agency administrative processes as less public than legislative processes).

155. As two scholars have put it: "[T]hese internal dynamics play out behind the scenes, invisible to all but a handful of sophisticated academics and Washington insiders. Surely, the 'median voter' would be surprised to discover that a small group of well-positioned legislators have such a powerful and potentially undermining influence on laws passed by earlier majorities." DeShazo & Freeman, *supra* note 144, at 1448; *see also* R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 102-03, 119-20 (1990) (noting how large appropriations and reconciliation bills can mask political choices); Levine & Forrence, *supra* note 141, at 185 (acknowledging the difficulty citizens have in monitoring the complex administrative process); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV 405, 416 (1989) [hereinafter Sunstein, *Interpreting Statutes*] ("[C]itizens have access to the statutory words and can most readily order their affairs in response to those words."). Appropriations bills are often a mystery to members of Congress not on the appropriations committees, let alone the public at large. *See, e.g.*,

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agencies and Congress can use the symbolic substantive statute, filled with public interest language that promises action on a particular issue, to "mask" the actual implementation that betrays that promise—and thereby reduce or eliminate any political costs for failing to address the substantive question.[156] In doing so, both agencies and Congress can increase the monitoring costs for the public on the issue and therefore their ability to operate without significant public constraints.[157]

There is often little, if anything, that courts can do to address much of this statutory masking without sharply intruding upon the inherent discretion of the Executive Branch to allocate resources. However, judicial enforcement is possible in the most blatant of cases—where the Legislature makes an explicit promise to the electorate that specific goal X shall be achieved by the government (whether or not at time Y in the future). That kind of specific promise is most likely to deceive the broader public. Most sensible citizens might discount vapid generalities about eliminating crime

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CHRISTOPHER H. FOREMAN, JR., SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION 98-102 (1988) (pointing out that appropriations committee reports often contain key language to guide agencies that cannot be easily revised or controlled by Congress as a whole).

156. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 95-96 (1994) (noting that administrative action is often "less observable and more complex" and therefore "the advantages of concentrated interests are greater and the likelihood of minoritarian influence increases," with environmental issues being a particularly strong example of the risk); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 232-33 & n.47 (1986) [hereinafter Macey, *Interest Group Model*] ("Interest groups and politicians have incentives to engage in activities that make it more difficult for the public to discover the special interest group nature of legislation. This often is accomplished by the subterfuge of masking special interest legislation with a public interest façade."); SCHLOZMAN & TIERNEY, *supra* note 140, at 311, 314-15, 395-96 (commenting that the key to interest group success is in the implementation of statutes, not just the passage of statutes, and arguing that interest groups are more likely to be successful in influencing low-profile implementation decisions than high-profile decisions, particularly when the goal is to block government action rather than initiate government action); Martin Shapiro, *Dishonest Corporatism: Who Guards the Guardians in an Age of Soft Law and Negotiated Regulation?*, *in* CREATING COMPETITIVE MARKETS: THE POLITICS OF REGULATORY REFORM 319, 327-30 (Marc K. Landy, Martin A. Levin, & Martin Shaprio eds., 2007) (arguing that close cooperation in regulatory policy between government and business may result in hidden arrangements that undermine achievement of the public interest).

157. As Neil Komesar has put it:

> What a politician would never do on the soap box, he or she can afford to do in the more complex, more hidden world of the bureaucracy. A politician may declare an abiding concern for the environment and even support broad (albeit vague) legislation and at the same time block implementation by halting prosecution under the guise of some procedural or jurisdictional rationale or by inhibiting particular prosecutions through pressure on the implementing agency. In turn, more sophisticated, concentrated interests may feel satisfied to know that what they appeared to have lost in the legislature they can recover in the administrative process.

KOMESAR, *supra* note 156, at 96.

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or pollution as mere puffery. However, a promise to regulate toxic waste discharges to rivers by June 1992 is specific.[158] If car dealers made that kind of promise to customers, they could be liable in court if they did not follow through on it. The same should be true in government. If the Legislature does not like the substantive results when the judiciary enforces those clear duties—perhaps because it places too much of a bite on the regulated community—then it will be forced to at least go on the record, repeal the duty, and make its intentions clear.[159] If the Executive does not have enough funds to implement the duty, and the Legislature will not provide the funds, the responsibility will at least be more clearly assigned to the Legislature and not to the agency (in this case).[160]

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158. *See* 33 U.S.C. § 1314(l) (2000); *see also* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, POLICY (2d ed. 1996).

159. "[W]e would prefer to see a statute repealed, amended, or reauthorized, than to see it systematically undermined out of public view." DeShazo & Freeman, *supra* note 144, at 1504-05 (adding that the result of forcing changes to occur through the legislative process would be to "render the trade-offs transparent to the voters, which would generate greater electoral accountability"); *see also* Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 619 (1992) (arguing that courts should strictly enforce statutes with "public-regarding" purposes, even those broadly worded, in order to counteract public choice failures in the administrative and legislative branches).

Repeal could happen not just through a direct amendment of the underlying substantive law, but also through a congressional repeal of the underlying appropriations authority that directly and specifically targets the substantive program at issue. In such a situation, there will be tension between Congress's clear statements in the substantive law and its clear statements in the appropriations statutes. Perhaps the best solution would be to follow the path taken by the Ninth Circuit—find that a recalcitrant agency is in violation of the law for failure to complete its obligations in a timely manner, but also refuse to impose sanctions against the agency, since after all, its failures are only due to congressional action. *See* Envtl. Def. Ctr. v. Babbitt, 73 F.3d 867 (9th Cir. 1995). This result both highlights the contradictions in congressional action while also respecting the legal status of congressional appropriations decisions.

160. *See* Pierce, *supra* note 61, at 88 (noting the possibility that strict judicial enforcement of deadlines will "increase the pressure on the politically accountable branches to take some . . . actions that can yield an improvement in agencies' performance," whether through structural reform, elimination of deadlines and other substantive requirements, or increases in resources, while lax judicial enforcement of deadlines will result in less pressure); Sargentich, *supra* note 48, at 606 (Agency "problems of being overworked and underfunded should be taken to Congress and the President"); Patricia M. Wald, *Judicial Review in the Time of Cholera*, 49 ADMIN. L. REV. 659, 662-63 (1997) (arguing for strict judicial review because it will require Congress to confront questions of resource allocation: "Why should one branch, the courts, be asked to lower its standards for performing constitutionally assigned tasks while the other, Congress, is allowed to play the prince on stage and the pauper behind the scenes?"); *see also* WILLIAM L. CARY, POLITICS AND THE REGULATORY AGENCIES 57 (1967) (arguing that it is normatively preferable to have decisions made explicitly by Congress in full public view, than in informal and secret ways by agencies that are vulnerable to industry pressure). This conclusion contrasts with commentary that has argued that courts should defer to congressional decisions not to fund agencies because they are declarations that the issue in question is low priority. *See* DeLong, *supra* note 144, at 442.

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There is one final puzzle here. The APA is a statutory creation of Congress, and it is the source of the judicially-enforced duty in § 706(1) that requires agencies to comply with congressional deadlines. However, if Congress may in part want to impose deadlines that it does not want agencies to be able to comply with, why would Congress want courts to enforce § 706(1), and indeed why would Congress have created § 706(1) in the first place? At heart, I believe the answer lies in the words "in part." Certainly there will be times when members of Congress will find it advantageous for agencies not to comply with mandatory deadlines. However, there may also be times when they do not—such as when Congress put in mandatory language because it truly wanted the agency to act. There may also be times when Congress may want the agencies to act but the President does not. In such a case, § 706(1) provides a useful tool of control for Congress in the never ending battle between the Legislature and Executive for control over the bureaucracy. Because members of Congress enacting the APA in 1946 could not have known, a priori, in which circumstances they would truly want a deadline to be enforced and when they would not, they apparently made a choice (consciously or unconsciously) that they would be better off with enforceability as an insurance mechanism against wild variations of future agencies from congressional intent[161]—thus, the existence of § 706(1).

To summarize, a strong reason exists for courts to intervene and enforce "clear duties" against agencies. The "clear duty" doctrine puts at least some limits on the deception that elected representatives in the Legislature, an elected Executive, and unelected agency bureaucrats can attempt to practice on the citizenry.[162] In doing so, it corrects in part (and perhaps only in small part) what could be a serious public choice flaw in government.[163]

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161. *Cf.* Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1036, 1054, 1058 (2006) (developing a model that shows that a legislature will prefer judicial implementation of statutes when it has a strong desire to ensure consistent interpretation over time); Matthew C. Stephenson, *"When the Devil Turns . . . ": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59 (2003) (arguing that political branches may create an independent judiciary as an insurance mechanism against wild variations in policy outcomes in the future).

162. *See* Sunstein, *Constitutionalism After the New Deal*, *supra* note 48, at 458 n.160, 472-73 (noting the importance of judicial review of agency decisions to ensure implementation of statutory programs); *see also* DeShazo & Freeman, *supra* note 144, at 1504 ("[W]e think it normatively problematic that a small handful of powerful and well-placed legislators can exert pressure on agencies to frustrate statutory directives intended to have general and diffuse effects out of self-interest.").

163. One might respond that the dynamic just described is not a flaw at all, but instead is simply the natural result of individuals with very strong preferences being better able to organize and influence the political process—and that there is nothing necessarily wrong

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C. A Typology of Judicial Review Based on Resource Allocation

Putting the previously developed principles together, it is possible to lay out a typology of how courts should be addressing resource allocation questions. In category one, resource allocation concerns and statutory supremacy are both significant concerns. An example of this type of situation would include judicial review of an agency failure to initiate a regulatory task that has been specifically mandated by Congress. In such situations, statutory supremacy concerns would trump concerns about resource allocation but judicial review should be limited to the question of whether the agency has complied with its statutory obligations.

In category two, resource allocation concerns clearly outweigh concerns about statutory supremacy. Examples of this category would include situations where an agency has not even initiated consideration of whether to deal with a particular problem, as well as high-volume, informal agency decisions about individual compliance with the law. In such situations, we would exclude judicial review entirely, or allow at most a highly deferential and cursory review.

In category three, resource allocation concerns are minimal and statutory supremacy concerns are high. The most extreme example would be a completed agency rulemaking decision where Congress has laid out stringent standards for the agency's decision. Here, judicial review should not consider the question of resource allocation at all, or at most make it a minimal factor in the review.[164] Agency compliance with its statutory responsibilities would be paramount.

In category four, neither resource allocation concerns nor statutory supremacy concerns are high. An example might be a completed agency action in an area where Congress has given the agency great latitude in its

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with a democratic system registering not just the preferences of citizens, but their intensity as well. *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 49-58 (1991) (noting that, absent a normative baseline to measure political outcomes, public choice theory does not in and of itself provide a basis for criticizing those outcomes). To the extent that citizens with stronger preferences are able to maintain their political advantage through their use of organizational advantages to manipulate the political process through the passage of symbolic statutes that are subsequently not implemented, I would argue that there is a serious normative concern. *See* Levine & Forrence, *supra* note 141, at 176-77 (defining "special interests" as policies that result only because of differential levels of "information, organization, and transaction and monitoring costs").

164. The difference between judicial review of an agency refusal to initiate proceedings and judicial review of completed proceedings can be shown by comparing *Heckler v. Chaney*, 470 U.S. 821, 837-38 (1985) (denying judicial review of agency decision not to initiate enforcement), with *FTC v. Klesner*, 280 U.S. 19, 30 (1929) (reviewing agency decision to initiate administrative proceedings and concluding agency had improperly filed complaint).

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decisionmaking. Here, the level of judicial review will depend in large part on other factors, such as deference to agency expertise.

Of course, there are situations that will fall somewhere in between the extremes of each of these four categories. For instance, an agency's abandonment of a partially completed rulemaking proceeding implicates moderate levels of concern over agency resource allocation, but also some level of concern about the impact of the agency's decision on statutory supremacy. A middle level of judicial review might be desirable in that context. The following chart lays out on a two-axis scale how various decisions might rank. The top regions implicate high levels of resource allocation concern, and therefore greater deference to the agency; areas to the left implicate high levels of statutory supremacy concerns, and therefore, less deference to the agency.[165] Of course, as noted earlier, this typology only considers two of the many possible factors that the courts will consider in reviewing agency decisionmaking.

165. *See also infra* Table 1, which provides a rough overview of the rank order of judicial review of agency decisions based on deference due to resource allocation concerns.

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FIGURE 1
Typology Chart for Judicial Review of Agency Decisionmaking and Resource Allocation

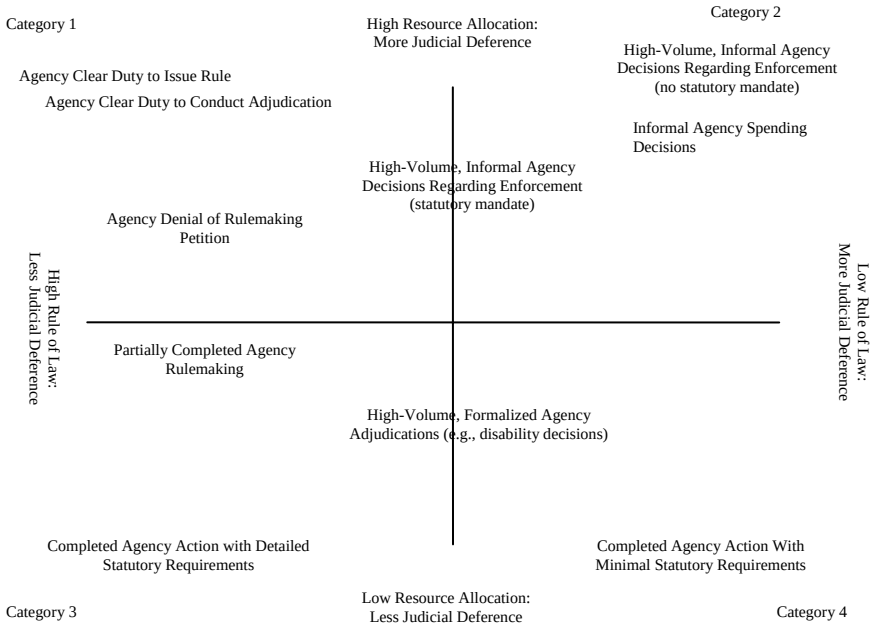

TABLE 1
Judicial Review of Agency Decisionmaking and Deference by Courts to Agencies Based on Resource Allocation

Higher Level of Deference	High-Volume Informal Agency Decisions Regarding Individual Enforcement Decisions with No Statutory Mandate (*Heckler v. Cheney*)
	Informal Agency Spending Decisions
	Agency Denial of Rulemaking Petition
	Partially Completed Agency Rulemaking
	Completed Agency Action with Minimal Statutory Requirements
	Agency Clear Duty to Conduct Adjudication
	Agency Clear Duty to Issue Regulation
Lower Level of Deference	Completed Agency Regulation or Adjudication with

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	Detailed Statutory Requirements

As previously demonstrated, this typology in fact aligns closely with how the courts generally review agency decisionmaking, whether it is action or inaction.[166] The principle of judicial deference to resource allocation therefore has great descriptive power in explaining the level of judicial review across much of administrative law—and it also explains one of the fundamental reviewability doctrines in administrative law. Moreover, the principle has normative power as a bulwark against public choice failures in the political process, while at the same time ensuring proper deference to the crucial administrative task of allocating resources in an enormous federal bureaucracy.

III. IMPLICATIONS

I have now laid out the affirmative case for why the concept of resource allocation is essential to administrative law. Equally important, I have laid out how and why resource allocation does not usually interfere with judicial review of most types of agency decisionmaking, but instead, at most calls for deference by the courts. Agency inaction is not a form of agency decisionmaking that is fundamentally different from agency action and is somehow unreviewable by courts. Like agency action, judicial review of agency inaction is a result in part of the trade-off courts make between deferring to agency resource allocation and upholding congressional commands, or as Professor Bressman puts it, ensuring that agencies do not act arbitrarily.

My analysis provides strong support for the Court's reasoning and analysis in *Massachusetts v. EPA*. At least one recent commentator has argued that the Court's decision to make the EPA's refusal to issue greenhouse gas regulations reviewable was wrong because "[d]ecisions to initiate a prosecution or a rulemaking—or not to start them—generally are not reviewed by courts."[167] However, as shown above, courts have reviewed agency decisions not to issue rules, and should be reviewing such decisions. Far from being a novel extension of administrative law theory, the Court's decision was both descriptively and normatively well-grounded.

166. *See also* Biber, *supra* note 8, at 10-14 (describing levels of deference in the context of judicial review of agency action and inaction).

167. Ronald A. Cass, Massachusetts v. EPA*: The Inconvenient Truth About Precedent*, 93 VA. L. REV. IN BRIEF 73, 78, May 21, 2007, *available at* http://virginialawreview.org/inbrief/2007/05/21/cass.pdf.

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A. Responding to the Individual Rights Approach

However, I have not yet rebutted the argument that courts should be intervening only in the administrative process to protect individual rights, and that accordingly, courts should not be in the business of forcing agencies to act, which would only result in increased regulation and a reduction in individual rights. As previously noted, this argument based on negative liberty is not only present in the academic literature, but it is also a theme in the Court's decision in *Heckler* and more broadly in its standing jurisprudence.

The problem with the individual rights argument is that—even assuming that the primary purpose of judicial review should be to protect individual rights—it says nothing about why courts should or should not be reviewing agency inaction. The individual rights argument implicitly assumes that agency action will tend towards interference with personal liberty. However, this is not necessarily true. After all, in an era of deregulation, for instance, an agency's decision to repeal a regulation is an agency action that would clearly be subject to judicial review, yet it would (arguably) create more personal liberty. For instance, an agency might decide to repeal a regulation requiring car manufacturers to provide passive restraints, such as airbags or automatic seatbelts, in the automobiles they produce. Such a decision would clearly increase—at least in a narrow sense—the individual liberty of the car manufacturers, but it is hardly an agency decision not to act. Instead, it is very clearly an agency decision to act, and the Supreme Court has treated it as such.[168] Similarly, an agency might decide to grant an exemption for an industry from a licensing or rule requirement—that decision would be an agency act, but again, it would increase liberty for that particular industry. Reciprocally, refusal to act on a waiver petition would reduce liberty for that particular industry. Indeed, there is a dramatic historic example of agency action leading to deregulation—the efforts by the Civil Aeronautics Board to deregulate the airline industry, which were so successful that they essentially forced Congress to codify that deregulation through statutory changes.[169]

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168. An agency's decision to repeal a regulation is not treated deferentially like an agency's decision not to regulate, but instead under the same standard as an agency's decision to issue a regulation and regulate. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40-42 (1983).

169. *See* Bradley Behrman, *Civil Aeronautics Board*, *in* THE POLITICS OF REGULATION 75 (James Q. Wilson ed., 1980). As an example of agency inaction leading to regulation, there is evidence that after his 1980 election win, President Reagan had the Interstate Commerce Commission delay or refuse to issue new trucking licenses as a political

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One could avoid this dilemma by changing the dichotomy from agency action versus inaction to agency decisions that infringe on individual liberty and agency decisions that do not.[170] But such a dichotomy is plainly unworkable.[171] While it may be difficult to distinguish between agency action and inaction, as discussed above, it would be almost impossible to distinguish between agency decisions that infringe on liberty and those that do not.[172] For instance, does an agency's decision to grant an exemption from a licensing requirement to a particular corporation increase liberty? Perhaps, but it also increases the burden on the corporation's competitors who are still subject to the licensing requirement, and in that sense, surely decreases their own individual liberty by effectively restricting their ability to compete, conduct their business, and make a profit.[173] Or how about an agency's decision to grant a license to a business seeking to enter a regulated industry? On the one hand, the agency's decision increases liberty, since it removes an absolute barrier on the business. On the other hand, the agency's decision limits liberty because the license will carry conditions and require the business to obey the agency's various regulations.[174]

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reward to the Teamsters Union, partially undoing deregulatory efforts by the ICC before 1980. *See* B. DAN WOOD & RICHARD W. WATERMAN, BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY 35-37 (1994).

170. *See Active Judges and Passive Restraints*, REGULATION, July-Aug. 1982, at 10.

171. It is also a distinction that the Supreme Court has already rejected. In the pre-APA judicial review case law, a distinction between an agency decision to regulate and not to regulate was developed for a while under the Supreme Court's "negative order" doctrine, with an agency decision not to regulate constituting an unreviewable "negative order." Only an agency decision requiring a private party to act in some way constituted a reviewable order. *See* Rochester Tel. Corp. v. United States, 307 U.S. 125, 126-29 (1939) (describing the doctrine). The Supreme Court explicitly rejected this distinction and concluded that any agency action that finally determines legal rights or obligations was reviewable. *Id.* at 140-43 (rejecting the doctrine).

172. *See* Sunstein, *Reviewing Agency Inaction*, *supra* note 54, at 666 n.85 (stating that "the very concepts of 'inaction' and 'action' are coherent only if one has a background understanding of the normal or desirable functions of government").

173. Indeed, it is precisely this situation that has led the Court to recognize competitor standing and allow businesses to challenge the grants of licenses or license exemptions to competitors. *See, e.g.*, Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970).

174. For an example of the difficulties of determining whether an agency's action is coercive and restrictive, see *Transp. Intelligence, Inc. v. FCC*, 336 F.3d 1058, 1062-64 (D.C. Cir. 2003), and *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 674-75 (D.C. Cir. 1994)—case law regarding whether agency waivers of licensing requirements is reviewable. There are numerous examples of judicial review of agency actions that prompted (sometimes enormous) expansion of regulatory programs. *See, e.g.*, R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 71-192 (1983) (describing judicial review of EPA decisions regarding air pollution that resulted in dramatic expansion of regulatory powers under the Clean Air Act).

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Finally, in our federal system of government, there is yet another flaw with any attempt to connect an action/inaction distinction with a negative-liberty/positive-liberty dichotomy. Just because the federal government chooses to regulate or not deregulate does not by any means ensure that there is no regulation at all. States may instead choose to fill the vacuum of a lack of federal regulation. Indeed, a federal agency's decision not to regulate may result in less "negative liberty" than a decision to regulate—take, for instance, the example of a federal agency issuing regulations that have the effect of preempting state regulation that is stricter.

In short, the dichotomy between negative liberty and positive liberty—whether it is correct, and whether it has a proper role in our constitutional system—is not one that can justify a difference in judicial review between agency action and agency inaction. In our present-day administrative state, where regulations have been woven into the fabric of most every element of our economy, the claim that an agency's decision not to act inherently preserves negative liberty is simply incorrect.

Even assuming these objections can be overcome, there is a more fundamental problem with this rationale for limited judicial review of agency inaction. It assumes a particular vision of the role of government—a vision that has been sharply contested throughout the history of the Republic. It is a libertarian vision that is inherently skeptical of governmental power, and while this vision has deep roots in our political system, the contrary vision of a strong central government that provides for the commonweal has equally deep roots.[175] This libertarian vision has been sharply criticized for providing an overly narrow vision of liberty—after all, what about the liberty of individuals to be free to breathe clean air? Why should that be valued any less than the liberty of a corporation to conduct its business without governmental regulation?[176]

Indeed, the APA legislative history provides no indication that its drafters were concerned about courts forcing agencies to exercise their coercive authority.[177] Nor is this a concern in the pre-APA mandamus case

175. *See, e.g.*, David P. Currie, *The Constitution in Congress: The Public Lands, 1829-1861*, 70 U. CHI. L. REV. 783 (2003) (describing the conflict in the pre-Civil War arena over the proper constitutional role of the federal government in supporting internal improvements and economic development).

176. *See, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 186-87, 219-20 (1992); Cass R. Sunstein, *Reviewing Agency Inaction*, *supra* note 54, at 666-68 (comparing the *Heckler* rationale that courts should not attempt to impose regulation on private parties to the Lochner-era of judicial review); *see also* Bressman, *Judicial Review of Agency Inaction*, *supra* note 49, at 1695-96 (agreeing with Sunstein).

177. There is plenty of concern in that legislative history about the expansion of administrative agencies exercising their coercive authority, and that concern was the basis

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law.[178] Instead, the legislative history and the pre-APA case law limits itself to broad discussions about deferring to agency "discretion."

Finally, the individual rights approach fails to incorporate the lessons of public choice theory. In his article, Scalia celebrated the fact that "important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy."[179] For Scalia, judicial enforcement of programs that benefit the majority pose the risk of courts overstepping their bounds, imposing their political prejudices.[180] Scalia justifies his conclusion by arguing that "[t]here is surely no reason to believe that an alleged governmental default of such general impact" would harm most (if not all) of the population who "would not receive fair consideration in the normal political process."[181] Public

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for the procedural reforms implemented in the APA. *See* S. REP. NO. 79-752, at 193-94 (1945) (discussing procedural requirements imposed by the APA); H.R. REP. NO. 79-1980, at 242-44 (1946) (discussing the need for standardized procedural requirements given the great expansion of the administrative state); *see also* Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 232 (1986) (describing how the APA was inspired by anti-New Deal reaction to growth of regulatory agencies); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1559, 1678 (1996) (chronicling how the APA began as an effort by conservatives to kill the New Deal and, as a result of compromise, became a more moderate check on agency powers). This is not to deny that elements of the conservative coalition that initiated the reform efforts that eventually led to the APA sought to use increased procedural restrictions and judicial review of agency decisionmaking to obstruct regulatory action. *See* Shepherd, *supra*, at 1600, 1606, 1680. However, given the compromising nature of the APA as passed by Congress, one can hardly interpret the act as intended to stymie all agency regulation. *See id*. at 1649-83; *see also* Stewart & Sunstein, *supra* note 66, at 1248 (noting compromise nature of APA). Moreover, increasing procedural requirements and judicial review in order to reduce regulatory power over individual rights is an entirely different matter from whether courts should prod agencies into taking steps to regulate—steps that would have to comply with the APA's procedural reforms in any case. Indeed, a number of conservatives who pushed for strict procedural requirements and judicial review of agency action also advocated for a petition system by which parties could seek agency action, with judicial review of such denials. *See* Shepherd, *supra*, at 1665. Presumably, the rationale was that conservatives wanted the ability to petition agencies to either repeal rules or grant licenses or waivers—i.e., agency action for deregulatory purposes.

178. Scholars have argued that until the 1960s and 1970s, courts were generally unwilling to hear the claims of regulatory beneficiaries seeking to challenge agency decisionmaking, using doctrines such as standing to deny any review. *See, e.g.*, Stewart & Sunstein, *supra* note 66; Stewart, *supra* note 115. Even if true, however, these arguments do not address the question of whether courts would consider claims concerning agency inaction. As noted above, agency inaction can involve questions that harm regulatory subjects as well as regulatory beneficiaries.

179. Scalia, *Doctrine of Standing*, *supra* note 43, at 897.

180. *Id.* at 895-96 (arguing that the doctrine of standing is essential to restricting the courts' role to protecting minority rights).

181. *Id*. at 896; *see also* Melnick, *Political Roots*, *supra* note 131, at 596-97 (arguing against standing for environmental groups because they "have clout in Washington. We should encourage them to spend less time in court and more time lobbying the House Appropriations Committee.").

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choice theory teaches the exact opposite—it is precisely those types of defaults that might be most likely not to receive fair consideration in the normal political process, assuming an asymmetry between the distribution

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of costs and benefits.[182] Thus, the individual rights approach as a rationale for not allowing courts to enforce at least egregious breaches of governmental duties is fatally flawed.[183]

B. Broader Implications for the Administrative Law Literature

This same flaw infects a strand of academic commentary that calls for sweeping judicial review of regulatory legislation and action in order to cutback or eliminate the regulatory state.[184] This literature, ironically based on public choice theory, argues that stringent judicial review of regulatory legislation would prevent rent-seeking by concentrated interests and restrict the inherent propensity of the regulatory state to harm the public interest.[185] The doctrinal tools usually relied on are sweeping interpretations and strict enforcement of constitutional provisions such as the Takings Clause, the Commerce Clause, and the Contracts Clause.[186] While these scholars

182. These concerns were familiar to the Founding Fathers, albeit not under the "public choice" label. *See* Bressman, *Beyond Accountability*, *supra* note 82, at 498.

183. *See* Sargentich, *supra* note 48, at 616 (also raising this critique of the individual rights approach). As a result, broad and sweeping exceptions to judicial review of agency inaction, for example, will result in asymmetries where the regulated community's narrow interests will be overrepresented in the political and judicial process, while the broader interests of the public will be underrepresented. Bressman, *Judicial Review of Agency Inaction*, *supra* note 49, at 1692-93.

184. *See generally* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 3 (Univ. of Chicago Press 1980) (analyzing the history of judicial review); James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government*, *in* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 3, 4 (James D. Gwartney & Richard E. Wagner eds., 1988) (discussing the importance of constitutional controls over legislative actions).

185. *See* MANUEL F. COHEN & GEORGE J. STIGLER, CAN REGULATORY AGENCIES PROTECT CONSUMERS? 14-16, 47-50, 83-84 (Am. Enterprise Inst. for Pub. Policy Research ed., 1971) (laying out the debate on regulation as a means to promote competition); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 165, 263-65 (Harvard Univ. Press 1985) (discussing judicial review of land use regulation); SIEGAN, *supra* note 185, at 22, 120-21, 143, 188-89, 191-93, 269, 277-86 (explaining how historically, the legislature favored special interests rather than the public interest); Peter H. Aranson, *Procedural and Substantive Constitutional Protection of Economic Liberties*, *in* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 285, 290-91; Gwartney & Wagner, *supra* note 184, at 22-23.

186. *See* EPSTEIN, *supra* note 185, at 19-20, 30-31, 214-15, 263-65, 277-82, 299-300 (discussing the Takings clause); SIEGAN, *supra* note 184, at 7, 316-21 (explaining the use of constitutional clauses to protect property rights); Aranson, *supra* note 185, at 301-11 (contending that over the last two centuries, constitutional protections for property rights under the takings clauses, the contracts clause, and the commerce clause have been eroded by Supreme Court decisions); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984) (discussing the Supreme Court's interpretation of the Contract Clause); Gwartney & Wagner, *Public Choice and the Conduct of Representative Government*, *supra* note 184, at 23-25 (describing Congress's tax and spending power); Richard E. Wagner & James D. Gwartney, *Public Choice & Constitutional Order*, *in* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS, *supra* note 184, at 29, 37-40, 77-80, 82-83 (discussing the constitutional provisions that provide protection from takings and the freedom to contract); *see also* Croley, *Theories of Regulation*, *supra* note 141, at 40-41

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correctly note the importance of public choice theory, their solution is 180 degrees wrong. To the extent we are concerned about concentrated interests, in many cases, the concerns are about concentrated interests preventing government action that will benefit the public as a whole.[187] As discussed above, concentrated interests may use the public promise of government action—and the low-profile failure to fulfill that promise—to undercut the broader public monitoring and mobilization efforts by the broader public to force public interested government action. Judicial review to force agency action in the face of explicit congressional promises of action in fact prevents the worst sorts of this type of activity. In other words, the public choice analysis properly understood leads to calls for courts to intervene to force regulatory action, not to prevent it—at least where the political branches have made explicit public promises to undertake such action.[188]

Indeed, this Article's conclusions are similar to scholars who, while recognizing the concerns raised by public choice theory for the regulatory state, have not called for aggressive judicial action to uproot the administrative state, but instead have argued that limited judicial action can result in improved legislative and administrative regulatory action. For instance, Professor Jonathan Macey has called for courts, when presented with regulatory statutes that purport to advance the public interest but are in fact truly special interest bargains, to take the statutes at face value and interpret them in a way to advance the public interest.[189] In doing so, the argument runs, the courts will make it more costly for special interest

(categorizing this group of scholars as "public choice" theorists, and stating that "for the public choice theory regulatory reform means not reform of the regime, but its abandonment"); Elhauge, *supra* note 163, at 44 (noting same); Kahn, *supra* note 151, at 280, 283-87; Macey, *Interest Group Model*, *supra* note 156, at 226 (identifying this thread of argument in the scholarly literature); Jerry L. Mashaw, *Constitutional Deregulation: Notes Towards a Public, Public Law*, 54 TUL. L. REV. 849 (1980) (arguing for a weaker version of judicial review to prevent special interest regulation). In reaching these conclusions, these scholars often equate all groups that attempt to mobilize and lobby the government—whether they purport to represent industry, consumers, or environmental interests—as "special interests" that are seeking "rents" and therefore are normatively undesirable. *See* Mashaw, *Economics of Politics*, *supra* note 141, at 132-33.

187. *See* Elhauge, *supra* note 163, at 43 n.54 (stressing the problems generated by the influence of well-organized interest groups).

188. *See also* Kahn, *supra* note 151, at 287, 292-95 (arguing that "schemes designed to obstruct the power of government to adopt regulation . . . risk serious error" because such "[b]arriers to government action would bias the political process" against regulation, a threat that is particularly dangerous since the system may already be biased against regulatory action, and further noting that the public choice literature has ignored this possibility); *id*. at 308-09 (noting that regulation that provides broad benefits to the public at the expense of regulation of a number of different industries is unlikely to be the result of special-interest lobbying).

189. *See* Macey, *Interest Group Model*, *supra* note 156.

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groups to pursue narrowly focused legislation at the expense of the public

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interest—either special interest groups will be required to be open about their efforts to extract rents (and run the risk of political backlash) or they can seek to conceal their efforts (and run the risk of having courts construe the statute in a very different way).[190]

Like Macey's proposal, and other similar efforts to develop statutory interpretation principles that restrict rent-seeking,[191] strong judicial enforcement of explicit congressional deadlines would not require courts to strike down statutes, reorder the regulatory state, or otherwise interfere with the political process in a manner that raises serious concerns about democratic legitimacy.[192] Instead, by simply interpreting and applying the statutory language of Congress, strict enforcement of deadlines means that courts are upholding the commands of the most politically accountable branch of government—the Legislature.

In contrast to Macey's proposal and other similar proposals, however, strict enforcement of congressional commands does not require courts to undertake contestable and uncertain analyses of what is a "public interested" statute or to determine what the purpose of a "public interested" statute is.[193] Instead, courts simply must determine whether Congress has clearly imposed a duty on an agency to take an action. If so, the courts should (generally speaking) enforce that duty. In doing so, the salutary results laid out above will necessarily follow—efforts by special interests, Congress, and the agencies to obfuscate exactly what steps the government is taking to address problems that have diffuse costs will be undermined,

190. *Id*. at 250-55 (explaining judicial statutory interpretation).

191. *See, e.g.*, William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 291 (1988) (advocating the development of constitutional rules to reduce rent-seeking); Sunstein, *Interpreting Statutes*, *supra* note 155, at 478 (discussing judicial interpretation of regulatory statutes); Easterbrook, *supra* note 66.

192. *See* Macey, *Interest Group Model*, *supra* note 156, at 241-42 (noting that extensive judicial review of legislation for rent-seeking would require drastic revision of regulations and intrusive judicial review).

193. *See id*. at 254 (recommending that courts should interpret statutes "so as to serve the public" but never specifying the terms of what it means for a statute to "serve the public"); *see also* Elhauge, *supra* note 163, at 48-59 (noting that claims that courts should rule in order to advance the "public interest" and to prevent public choice failures in administrative law necessarily depend on often unarticulated normative determinations about what the "public interest" is); *id*. at 45, 59-66 (noting problems with Macey's, Sunstein's, and Eskridge's theories on these grounds); Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 472-73 (1988) (asserting the difficulty of distinguishing between government activities involving rent-seeking and activities "that represent wealth-increasing 'public interest'"); Mashaw, *Economics of Politics*, *supra* note 141, at 155 (noting the difficulty of reaching such conclusions).

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and public choice failures will necessarily be reduced, even if only marginally.[194]

194. Thus, courts will not be called upon to make difficult decisions about whether the political decisions made by the agency are appropriate or inappropriate. *Cf.* CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 199-203 (1990) (calling on agencies to be explicit about political judgments and courts to review those political judgments for their appropriateness). By focusing judicial review on the situations where a public choice failure might be most likely to occur, courts may nonetheless be able to at least correct some of the worst political abuses. *Id*. at 174-75, 180-81, 184 (criticizing courts for ignoring the clear implications of politics for agency decisionmaking).

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C. Implications for Other Doctrines in Administrative Law

The implications of the resource allocation principle go far beyond the academic literature. The success of the resource allocation principle in explaining judicial review under both § 706(1) and § 706(2) of the APA shows promise for helping us understand other areas of administrative law. In particular, the principle might be useful in explaining a range of administrative law doctrines that potentially implicate separation of powers concerns—concerns that include resource allocation and prioritization. For instance, judicial deference to agency resource allocation might shed light on doctrines such as standing for plaintiffs to sue,[195] the question of whether a plaintiff is challenging a particular agency "action" such that review under the APA is available,[196] and the question of whether an agency decision is "final" and "ripe" such that judicial review is available.[197] These are all doctrines where the analysis by the courts has tended to be remarkably fluid, even confused.

To the extent that the Supreme Court has articulated a foundational principle for standing (and to a lesser extent, other doctrines such as ripeness), it has been a vision of judicial review as intended to protect individual rights.[198] According to some of the more prominent statements by the Court, that vision, if properly followed, would call for a narrow, formalistic interpretation and application of current standing doctrine, which would prevent parties such as regulatory beneficiaries

195. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (requiring that, to have standing, the plaintiff must show a "concrete and particularized, and []actual or imminent . . . invasion of a legally protected interest").

196. *See* Norton v. S. Utah Wilderness Alliance (*SUWA*), 542 U.S. 55, 61 (2004) (enunciating the APA requirement that the plaintiff suing be '"[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute"' (quoting 5 U.S.C. § 702 (2000))); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882-83 (1990) (requiring first, that the plaintiff identify the agency action that affects him and second, that the plaintiff show that he has "suffered legal wrong" because of the agency action).

197. *See* Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 732 (1998) (discussing ripeness); Bennett v. Spear, 520 U.S. 154, 178 (1997) (ruling that the lower court erred for dismissing a claim on the basis of finality).

198. *See Lujan*, 504 U.S. at 555.

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from being able to sue in court.[199] If, in the context of judicial review of agency decisions not to act, the "individual rights" principle is not coherent or normatively desirable, and the resource allocation principle is a superior basis for understanding when judicial review should proceed, then very different conclusions about the basis, scope, and future direction of standing jurisprudence would have to be drawn. The resource allocation principle would have courts step in where agencies are flouting the will of Congress, but otherwise defer to agency decisions about resource allocation, regardless of whether there are particular individual rights that are being infringed upon. In other words, the resource allocation principle might shape standing and other doctrines in a very different way while still potentially responding to the important separation of powers concerns that are at the heart of what it means to have an Article III court judicially review the actions of the Article II Executive.

Finally, resource allocation may also be a promising tool to understand the proper scope of the Supreme Court's *Chevron* doctrine, under which courts defer to administrative agency interpretation of ambiguous statutes.[200] The Court in *Chevron* justified such deference on the basis of agency expertise and democratic accountability.[201] The two steps of *Chevron* bear striking similarities to the trade-off developed here between statutory supremacy and resource allocation; where the congressional statement is clear, it should trump the agency's discretion, but where Congress has not made a clear statement, deference to the agency is appropriate.[202] Indeed, if resource allocation is truly fundamental to the ability of the Executive Branch to develop and implement policy (as I have argued above), then the proper basis for *Chevron* deference may be resource allocation concerns, not expertise or accountability.

CONCLUSION

As noted above, the resource allocation principle is certainly not the only factor in administrative law; factors such as agency expertise, democratic accountability, the procedures followed by the agency, congressional language, and certainly the stakes at issue in the agency's

199. *See id.* at 559-67, 571-78 (majority opinion).
200. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984).
201. *Id.*
202. *Id.* at 842-43.

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decision will all matter for the standards of judicial review. In situations where neither resource allocation nor statutory supremacy are primary concerns, for example, these other factors will often be outcome determinative.

Nonetheless, in a wide range of administrative law, the proper balance between deferring to agency resource allocation and upholding congressional mandates is a vital factor in judicial review of agency decisionmaking—particularly in areas where there are questions of whether agency decisions are even reviewable by the courts. And striking that balance will be particularly important in the context of judicial review of agency inaction.

Judicial review of agency inaction will only increase in importance in the future, as two recent cases in the Supreme Court make clear. In both *Norton v. SUWA* and *Massachusetts v. EPA*, the Supreme Court confronted questions about whether and how it should force agencies to take actions to address rising environmental concerns—increasing damage to the public lands from the use of recreational off-road vehicles, and greenhouse gas emissions from automobiles, respectively.[203] In both cases, the Court had to grapple with difficult questions about the proper role that the courts should play in prodding the Executive Branch to take action—questions that are at heart of the Executive Branch's prerogative to allocate its resources.[204]

The stakes in this type of litigation can also be high—as high as any of the stakes in the more "traditional" field of judicial review of agency action. The media coverage of the Court's decision in *Massachusetts v. EPA* and the potential political fallout of that decision for the national discussion about the proper policy response to the threat of global warming, are evidence of those stakes. The potential consequences of EPA regulation of motor vehicle emissions of greenhouse gasses—or of a broader statutory scheme that the decision might prompt Congress to act—are sweeping, both in terms of the environmental implications and the implications for the national economy.[205]

These cases are not likely to be an aberration. Federal regulatory agencies will continue to apply, implement, and develop their regulatory programs under the sweeping regulatory statutes passed by Congress in the 1960s and 1970s. Accordingly, the responsibility for agenda-setting will continue to lie (perhaps increasingly so) with these agencies. The

203. *See* Norton v. S. Utah Wilderness Alliance (*SUWA*), 542 U.S. 55, 57-58 (2004); Massachusetts v. EPA, 127 S. Ct. 1438, 1446-47 (2007).
204. *See SUWA*, 542 U.S. at 71-72.
205. *See* Freeman & Vermeule, *supra* note 2 (manuscript at 2, 29).

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framework I have developed above would tell us that courts do have a role to play in this agenda-setting process—through a deferential, but nonetheless important, review process to ensure fidelity to congressional mandates and non-arbitrary decisionmaking.

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