

# “No Law to Apply”

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The three main tasks that courts perform are (1) finding facts, (2) applying law, and (3) exercising discretion. Judges commonly regard the exercise of discretion as their most challenging task.

The Supreme Court since 1971 has seemingly assumed that a court may not review administrative action when it has “no law to apply.” *Yet agencies probably go wrong more frequently in exercising discretion than in finding facts or applying law, and exercise of judicial discretion is needed to correct agencies’ abuse of discretion.*

The strange assumption that a court is helpless when it has no law to apply may have originated in a dictum in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). The Court spoke of the Administrative Procedure Act’s exception to the judicial review provisions for action “committed to agency discretion,” and it said of the exception:

The legislative history of the Administrative Procedure Act indicates that it [the exception to judicial review] is applicable in those rare instances where “statutes are drawn in such broad terms that in a given case there is no law to apply.” S. Rep. 752, 79th Cong., 1st Sess. 26 (1945).

The Court was *clearly mistaken* about the legislative history. The words the Court quoted from the Senate committee were those of the committee, but all that the committee said was:

If . . . statutes are drawn in such broad terms that in a given case there is no law to apply, courts have no statutory question to review.

The committee was obviously right in saying that courts have “no statutory question” when “there is no law to apply.” *The committee did not say and did not imply that a court should deny review when it has no law to apply.*

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Nothing in the statute and nothing in the legislative history supports the *Overton Park* dictum that a court may not review in absence of law to apply.

Furthermore, nothing in good sense supports the dictum. Administrative errors that are in need of judicial correction may involve facts, law, or discretion. When judicial review is appropriate, one main need may be for exercise of *judicial discretion* in reviewing the agency's exercise of discretion.

Judicial review of agency discretion is clearly appropriate whether or not a question of law is also involved. After all, the Administrative Procedure Act specifically provides: "The reviewing court shall . . . set aside agency action . . . found to be . . . an abuse of discretion," (subject to an exception for agency action committed to agency discretion, including military and foreign affairs decisions of the President). 5 U.S.C. § 706 (1982). Interpreting the APA is often difficult, but the difficulty does not involve the clear provisions that courts may review discretion as well as facts and law.

Congress stated quite clearly in the APA that it intended courts to review administrative action for abuse of discretion, and an abuse of discretion may or may not involve law.

What is or is not "an abuse of discretion" is sometimes governed by law, but usually it is not; a court's determination of whether an agency has abused its discretion usually does not involve application of law but involves nothing more than judicial discretion.

The relatively easy task of a court that is reviewing administrative action is to determine whether the agency has violated established law; the relatively difficult task is to determine whether, in the whole setting, the agency has abused its discretion. When law guides the court, the judges simply interpret and apply the law. But when the question is whether the agency has abused its discretion, the court has to do something more onerous than to apply law — it has to determine what is or is not an abuse of discretion, and that usually requires the court to exercise *judicial discretion*.

The most important decision denying review of administrative action on the ground of "no law to apply" may now be *Heckler v. Chaney*, 470 U.S. 821 (1985), and the best way to understand the strange phenomenon of "no law to apply" is probably by a strong focus on the single case. In what follows, we shall (I) summarize the main ideas in the *Chaney* opinion, (II) try to penetrate the "no law to apply" concept in the *Chaney* context, (III) quickly survey main Supreme Court positions about reviewability over two centuries, and (IV) advance a major idea, at variance with the *Chaney* decision, that reviewing courts have responsibility not only to apply law but also to exercise appropriate judicial discretion.

I. THE *Chaney* OPINION

The Supreme Court's position about reviewability of administrative discretion is amazingly unsteady. The Court went strongly in one direction in *Dunlop v. Bachowski*, 421 U.S. 560 (1975), and then it went strongly in the opposite direction in *Chaney* in 1985 on about the same question of reviewability of nonenforcement discretion.

The Administrative Law Treatise says in section 28:6 that the *Bachowski* case "overshadows all other law" on the subject of unreviewable administrative action. In *Bachowski*, the Secretary of Labor, pursuant to the Labor-Management Reporting and Disclosure Act, refused to file civil suit to set aside an allegedly invalid union election. Despite the lack of law to apply, the Supreme Court held the Secretary's decision reviewable for arbitrariness. The *Chaney* case is essentially the opposite of *Bachowski*, and it is now the overshadowing case. The *Chaney* decision could prove to be as temporary as *Bachowski*, which lasted only ten years.

What is important about the *Chaney* case is not the narrow decision on the particular facts but the Court's comprehensive discussion of reviewability, a discussion that was mostly independent of the peculiar facts.

In *Chaney*, prisoners sentenced to execution asserted that use of specified drugs for lethal injection violated a statute. The question for the Supreme Court was not whether the statute was violated but whether the Food and Drug Administration's discretionary refusal "to take various investigatory and enforcement actions" was reviewable. The D.C. Circuit had held the FDA's refusal reviewable and had also held it an abuse of discretion. The Supreme Court held the refusal unreviewable.

What is vital is the basis for the Supreme Court's decision, because it may control many decisions about reviewability of administrative action. The key statement came in the Court's discussion of the APA provision, 5 U.S.C. § 701(a)(2), which exempts from review agency action committed to agency discretion by law. The Court asserted:

[E]ven where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.

470 U.S. at 830. The central idea of the *Chaney* opinion is that administrative action is unreviewable if the reviewing court has no meaningful standard to guide its review.

The *Chaney* guide to reviewability does not mean that reviewability requires a *statute* that provides a “meaningful standard.” The Court said only that the reviewing court must “have” such a standard; the Court did not say that the standard must come from the particular statute. Then what might be the source of the “meaningful standard”? Might it be the same source as that of the common law in general — judicial ideas about justice and propriety? From the beginning of the common law, Anglo-American courts have always been guided by such omnipresent standards as “justice,” “fairness,” and “reasonableness.” The meaning of those standards has been judicially created and further developed from case to case, and courts today continue to add, subtract, and modify such vague but vital standards that guide all judicial action.

*Without any mention of such broad standards that have always guided judicial development of the common law*, the Court in *Chaney* simply held that “review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion. In such a case, the statute (‘law’) can be taken to have ‘committed’ the decisionmaking to the agency’s judgment absolutely.” 470 U.S. at 830.

The Court did not say why such everpresent standards as “justice,” “fairness,” and “reasonableness” that necessarily guide all judicial action were insufficient. Those standards generally suffice on problems not governed by a constitutional provision or a statute. Because such standards were obviously available in the *Chaney* case, the Court’s statement that the statute committed the decisionmaking “to the agency’s judgment absolutely” is unconvincing. Nothing that Congress said or did indicated a legislative intent that administrative discretion should be totally free from the normal judicial review for abuse of discretion.

Even on new questions that have never before arisen, American courts do not customarily deem themselves without standards to decide them; when a court *finds* no previously existing standard, it often *creates* a standard, using as a base the traditions, customs, philosophies, attitudes, and assumptions that most judges share with each other.

Apart from administrative law, when an American court is confronted with an entirely new problem that is governed by no statute and by no prior decision, it *never* says it must give up for lack of law to apply; it creates whatever law is needed to decide the case. Should review of administrative action differ from all other law in that respect? Anyone who thinks about that question should conclude: Of course not.

The Supreme Court’s central assertion that judicial review must be denied “if the statute is drawn so that a court would have no

meaningful standard" fails to take into account not only judicial creativity in developing standards but also ignores the omnipresence of such standards as "justice," "fairness," "reasonableness," and "common sense." Courts often make *new law* without guides or standards that are particularly specified; courts *always* have guidance from legal traditions, philosophies, and understandings. Courts usually allow agencies to make law in about the same way that courts make law; for instance, countless statutes that an agency "may, in its discretion" take specified action are customarily valid even though the specific action the agency takes is not controlled by a "meaningful standard."

As a test of what is said in the preceding paragraph, let us hypothetically assume that a new *Chaney* case arises which is identical in all respects except that conclusive evidence is presented that the drug will cause several hours of extreme pain and that the formula can easily be changed in a designated way to make the death painless. Should the test still be whether "the statute is drawn so that a court would have no meaningful standard," or should the Court use the standards of reasonableness and common sense — standards that all courts always have?

What if the agency's chemists are overloaded and the agency is forced by its limited appropriation to decline to make some time-consuming studies, including the one in the *Chaney* case? Should the agency's determination of *that* question be reviewable? The answer need not be a flat yes or a flat no; it might be that a court will review only upon a strong showing of abuse of discretion. Courts should generally steer clear of questions about how an agency should make use of a limited staff, but probably a court should respond to a sufficient showing of serious abuse of discretion.

When a court has "no law to apply," it may still exercise *judicial discretion* in deciding what to do, and sometimes it may properly exercise discretion in creating the law it needs. Before the Supreme Court decided the *Overton Park* case, it had no doctrine about "no law to apply." That did not prevent it from making a decision; out of its decision and its opinion came its new law about "no law to apply."

## II. THE "NO LAW TO APPLY" CONCEPTION

The crucial words of the *Chaney* opinion are that "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of

discretion.”

Those words are part and parcel of the “no law to apply” conception that stems from *Overton Park*. The Court in *Overton Park* seemed to say that *a court may not review when it has no law to apply*. The *Chaney* opinion picks up that idea when it says that agency action is unreviewable in the absence of a meaningful standard against which to judge the agency’s exercise of discretion.

Since the broad standards that generally guide judicial action (such as justice, fairness, and reasonableness) are always present, why are those broad standards not sufficient in the *Chaney* case? The only answer is: The Court, without discussing such broad standards, held that “review is not to be had if the statute is drawn so that a court would have no meaningful standard. . . .” The Court did not address the question whether the everpresent standards were present and it did not discuss the question whether such standards suffice. Yet it *held* that it had “no meaningful standard,” without mentioning and apparently without considering such omnipresent standards as justice, fairness, and reasonableness.

The *Chaney* decision is clearly sound *if* the *Overton Park* idea is used as the starting point. But the *Overton Park* idea is *clearly* inconsistent with the APA, which sometimes requires review for “abuse of discretion.” *The question whether or not an agency has abused its discretion may or may not involve law; the particular question about abuse of discretion may be unique and review of it may call only for judicial judgment, not law. When a court determines whether an agency has abused its discretion, the court’s decision may rest wholly on the court’s own discretion and not at all upon law.*

### III. REVIEWABILITY LAW OVER TWO CENTURIES

From the beginning, the Supreme Court has deemed itself free to review some administrative action and not to review other administrative action. It has taken positions at nearly all points of the compass — some extreme in one direction, some extreme in the opposite direction, and some in the middle.

Looking at all the cases in large perspective seems to pull strongly toward some middle position; the extreme cases in both directions tend to offset each other.

The cases can readily be classified into three categories: Extreme unreviewability, extreme requirements of review and even of *de novo* review, and moderate decisions in a central category.

In the two centuries, the *Chaney* case has no rival in its entitlement to first place in the first category.

For three quarters of a century, a presumption of unreviewability of administrative action generally prevailed under *Martin v. Mott*,

25 U.S. (12 Wheat.) 19, 29 (1827), holding that an officer with authority to administer a statute was "the sole and exclusive judge" of the facts. In *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840), a naval officer's widow was denied review of refusal of a pension. The Court seemed to reverse the presumption of unreviewability in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), in which the Court said the Postmaster General's issuance of a fraud order was "a clear mistake of law . . . and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer." *Id.* at 110. That language could have been appropriately applied in the *Chaney* case.

The Court in the *American School* case of 1902 had no law to apply, so it did what was obviously sensible; it created law to apply, and the law it created was so good that in a broad sense it has prevailed ever since, with some exceptions.

The worst departure from the *American School* case in one direction might be the *Chaney* case, and the worst departure in the opposite direction might be three cases holding that the Constitution not only required review but *de novo* review — *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920) (rate fixing); *Ng Fung Ho v. White*, 259 U.S. 276 (1922) (deportation); and *Crowell v. Benson*, 285 U.S. 22 (1932) (workmen's compensation).

Even when a statute seems to provide for no review, the Supreme Court may review. For instance, an immigration statute that said nothing about review was amended in 1917 to provide that "the decision of the Secretary . . . shall be final." The Court held that "the ambiguous word 'final'" did not cut off judicial review. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955).

A reasonable and sound middle view was taken in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), in which the Court made a full analysis of the APA and firmly declared that "judicial review of a final agency action . . . will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." The *Abbott* case pulled toward reviewability by asserting strongly that the APA "provides specifically . . . for review of final agency action for which there is no other adequate remedy in a court."

Throughout the two centuries, criminal prosecutors' discretion has been generally free from judicial review for abuse of discretion. Even so, it has been less than completely unreviewable. For instance, the Court recently summarized the law by saying in *Wayte v. United*

*States*, 470 U.S. 598, 608 (1985), that

although prosecutorial discretion is broad it is not “‘unfettered.’ Selectivity in the enforcement of criminal laws is . . . subject to constitutional restraints.” *United States v. Batchelder*, 442 U.S. 114, 125 (1979).

*Did not the Court have equal reason in the Chaney case for saying that the Food and Drug Administration was subject to constitutional restraints?*

The *Wayte* and *Chaney* cases were before the Court at the same time, and yet the two decisions are essentially opposites. Why did the Court not say in *Wayte* what it said in *Chaney* — that “review is not to be had if the statute is drawn so that a court would have no meaningful standard”? Why did the Court not say in *Chaney* what it said in *Wayte* — that discretionary selectivity is “subject to constitutional restraints”? The only standard in each case was the general idea of reasonableness; that standard was enough for review in *Wayte* but not in *Chaney*. The contrast between *Wayte* and *Chaney* is sharp; the only way to explain the two cases when they are considered together is by observing that the Supreme Court assumes that it has absolute discretion to choose between reviewing and not reviewing. The Court departed from its customary stance of reasonably explaining how its action fits into what it has done before, or at least trying to justify its departure from past positions. It almost always avoids opposite positions in two cases pending at the same time.

Looking back, in the large perspective of two centuries, four cases stand out as especially extreme, so extreme as to appear to be aberrations. They are the *Chaney* case, cutting off review of unguided administrative discretion, and the three cases of 1920-32 that the Constitution requires *de novo* review.

The best judicial thinking has been widely distributed, but especially admirable for its invention of guides that have lasted for nearly a century is the *American School* opinion of 1902. Surely almost everyone is likely to agree that the worst thinking has been in the four most extreme cases, three at one extreme and one at the opposite extreme.

The Court’s appraisal of its own capacity might be the lowest in the *Chaney* opinion that it has ever been. The Court seems to say that it is unable to decide a question of justice or reasonableness unless *a statute* has stated “a meaningful standard.” The Court *clearly* has that capacity; throughout its history it has developed common law and it has given meaning to due process. Yet in the *Chaney* opinion, it asserts helplessness unless *Congress* has provided “a meaningful standard.” That is its main holding, for it says without qualification that “even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to

judge the agency's exercise of discretion." 470 U.S. at 830.

Our glance at two centuries of reviewability of administrative action makes the contrast seem unbelievable between (1) the 1920, 1922, and 1932 position of the Supreme Court that the Constitution requires not merely review but *de novo* review, and (2) the 1985 position of the Supreme Court that in absence of a statutory statement of a standard courts are helpless to review administrative action *at all*.

Both extremes are harmful. A middle position is much better. The *Abbott* position is a middle one, but the court rejected it in the *Chaney* case.

In light of the long history, one may be reasonably sure that the Court's preference for the extreme *Chaney* view will not long endure. But the Court is unlikely to return to the opposite extreme. In the long run, something in the middle should and will prevail, and the *Abbott* position is a leading contender for that honor.

#### IV. REVIEW OF ADMINISTRATIVE DISCRETION ON THE BASIS OF JUDICIAL DISCRETION, WITHOUT APPLYING LAW

Courts often review administrative action when they have no law to apply. The APA, 5 U.S.C. § 706(2)(A), requires that agency action be set aside if found to be "an abuse of discretion." What is or is not "an abuse of discretion" is for the reviewing court to determine, and making the determination of whether discretion has been abused may or may not be guided by law. Often that particular problem is unique and the question whether the agency has abused its discretion is a matter for *judicial discretion*, in whole or in part. Specifically what is or is not an abuse of discretion may be fully guided by law, guided in part, or guided not at all. The question whether an agency has abused its discretion is thus often, in whole or in part, a matter for judicial judgment or discretion.

When a reviewing court exercises its own discretion in deciding, without applying law, whether or not the agency has abused its discretion, the lack of law for the court to apply does not mean that the administrative action is unreviewable.

Some of the most delicate decisionmaking by reviewing courts involves exercise of *judicial discretion*. A court cannot determine the reasonableness of administrative action except by using the court's own subjective judgment; that is about the same as saying that a court cannot determine whether the agency has abused its discretion except by using the court's own subjective judgment.

Despite the language of the *Overton Park* case and of the cases that follow it, “no law to apply” does not mean no judicial review, for a court, without law to apply, may exercise judicial judgment or judicial discretion in deciding whether or not to find the agency’s action an abuse of discretion.

What has just been said in this part IV is in some degree at variance with the *Chaney* opinion, for the main holding was that “review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” 470 U.S. at 830. A reviewing court *always* has the meaningful standard of reasonableness, that is, the court’s own judicial judgment about reasonableness. Judges in general are experts in reasonableness, and their judgment about reasonableness is a vital part of judicial review of administrative action. Whether or not a reviewing court has “law to apply” in reviewing administrative action, it can *always* use its expertness in appraising reasonableness of administrative action.

Some of the recent case law, including the *Chaney* case, is temporarily at variance with what has been said in this part IV. But the pre-*Overton Park* law is generally in accord, and so is most of the post-*Overton Park* law.

In absence of specific statutory language limiting review, few if any federal judges are likely to find that absence of law to apply prevents a reviewing court from determining as a matter of judicial judgment or discretion whether particular administrative action is reasonable.

In other words, *law to apply is not generally a prerequisite to judicial review of administrative action.*

Examples of Supreme Court decisions that are fully in accord with what has just been said are numerous. A single example should suffice. In *Motor Vehicle Manufacturers Association v. State Farm Mutual*, 463 U.S. 29 (1983), the National Highway Traffic Safety Administration rescinded a requirement of automatic seatbelts or airbags, and the Supreme Court held the rescission to be arbitrary and capricious. The basis for the holding was the Court’s own judgment or discretion that “given the judgment made in 1977 that airbags are an effective and cost-beneficial life-saving technology, the mandatory passive restraint rule may not be abandoned without any consideration whatsoever of an airbags-only requirement.” *Id.* at 51. *In the quoted words, the Court was not applying law; it was exercising judicial discretion in the light of the unique facts.*

The idea that a court that is reviewing administrative action is helpless when it has no law to apply has done a great deal of harm. *In absence of law to apply, a reviewing court may exercise its own discretion in deciding whether or not the agency has abused its dis-*

cretion; to the extent that the *Chaney* case holds otherwise, it will not endure.

Another way to say what has just been said is obvious and extremely elementary but it has to be emphasized in italics: *The Court in its Overton Park and Chaney opinions has assumed that the tasks of judges in reviewing for abuse of discretion are two — finding facts and applying law. The necessary reality is that the tasks of judges who review for abuse of discretion are three — finding facts, applying law, and exercising judicial discretion.*

## V. CONCLUSION

The precise point where the Supreme Court went wrong in the *Chaney* opinion was in its assumption that a reviewing court had to deem itself helpless on account of absence of law to apply. That assumption was unfortunate for two overlapping reasons: (1) Law requiring justice, fairness, and reasonableness is always present in any American court, never absent. (2) Even if a reviewing court takes the position that it has no law to apply, it normally can and should exercise *judicial discretion* in deciding whether the agency has abused its discretion.

