1986

Judicial Review of Administrative Discretion

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Repository Citation

Koch, Charles H., Jr., "Judicial Review of Administrative Discretion" (1986). Faculty Publications. 624.
https://scholarship.law.wm.edu/facpubs/624
Administrative law is dominated by the term *discretion*. Administrative agencies make many kinds of decisions involving a wide variety of issues; the resolution of a number of these issues emerges through the exercise of discretion. The term *discretion*, then, often defines the function of the agency and describes the role of the reviewing court. It is therefore essential that courts understand administrative discretion both to evaluate the agency's performance and to understand the courts' own function.¹

The term's importance and pervasiveness require a precise
meaning within administrative law. Although most courts that use the term believe it has such a meaning, the reality is that the term is used in numerous ways.\textsuperscript{2} This reality explains much of the confusion surrounding judicial review of administrative discretion. Because agreement on a single meaning is unrealistic, the best alternative is to identify different uses of the term and the judicial review associated with each.

The term \textit{discretion} has at least five different uses in administrative law.\textsuperscript{3} The authority to make individualizing decisions in the application of general rules can be characterized as "individualizing discretion." Freedom to fill in gaps in delegated authority in order to execute assigned administrative functions may be called "executing discretion." The power to take action to further societal goals is "policymaking discretion." If no review is permitted, the agency is exercising "unbridled discretion." Finally, if the decision cannot by its very nature be reviewed, the agency is exercising "numinous discretion." Different judicial functions flow from these distinctions.

Administrative systems that employ discretion are designed with the agencies, not the courts, having the primary decision-making responsibility. As a result, the judicial attitude when reviewing an exercise of discretion must be one of restraint, often extreme restraint. Further, all types of discretion are characterized by some sense that the agency needs a degree of freedom to make mistakes. Indeed one of their major distinguishing characteristics is the degree of freedom embodied in each form of discretion. Uses of the term \textit{discretion} can also be differentiated by types and amount of expertise, including specialized knowledge and experience, necessary for that variety of discretionary decisionmaking. The level of appropriate review often depends on relative competence to make decisions. While the five uses of the term \textit{discretion} share these common elements, each use calls for different intensity and type of review.

Of the five, only the first three types of discretion — individualizing, executing, and policymaking — are reviewable in the traditional sense. That is, in only these three types of discretion are the core discretionary decisions reviewable.\textsuperscript{4} Even as to these, the

\textsuperscript{2} See Friendly, \textit{Indiscretion About Discretion}, 31 \textit{Emory L.J.} 747, 754, 762 (1982). Other commentators have recognized that the term \textit{discretion} has different meanings. \textit{E.g.}, R. Dworkin, \textit{Taking Rights Seriously} 31-33 (1977); O. Fiss \& D. Rendleman, \textit{Injunctions} 106-07 (2d ed. 1984). Recently, Martin Shapiro described certain types of administrative action as varieties of discretion. Shapiro, \textit{Administrative Discretion: The Next Stage}, 92 \textit{Yale L.J.} 1487, 1500 (1983). These categories do not appear intended to be used in a system of judicial review. Indeed, Shapiro contends that the existing system for judicial review of administrative discretion has failed. Id. at 1534.

\textsuperscript{3} This Article identifies five discrete uses of discretion. The categories are not airtight, and the discretion at issue in individual cases will overlap. Nevertheless, the law will be improved if courts indicate which type of discretion they believe is under review.

\textsuperscript{4} "Core discretionary decision" refers to the central issue in an administrative determination involving the exercise of discretion.
extent of review is limited by the applicable standards of review, almost invariably arbitrariness or abuse of discretion. These standards of review, however, seem to have different meaning as they apply to each of these three types of discretion.

The remaining two uses of the term discretion — unbridled and numinous — do not permit judicial review of the core discretionary decision. That does not mean, however, that a reviewing court has no function with respect to such decisions; rather, it means that the judicial function must focus on factors other than the core discretionary decision itself.

I. The Three Reviewable Types of Discretion

The three reviewable types of discretion are generally covered by either the arbitrariness standard or the abuse of discretion standard. The same word formulas, however, appear to demand different judicial attitudes when applied to the three different uses of discretion. The differences appear sound.

The two standards express very similar levels of judicial scrutiny. Judge Carl McGowan stated in Natural Resources Defense Council, Inc. v. SEC that the tests for arbitrariness and abuse of discretion are far from discrete and should be viewed as cumulative. Rather than being cumulative, however, the two standards overlap. The abuse of discretion standard is often used instead of arbitrariness for discretionary decisions that involve nebulous or ambiguous supporting judgments. For decisions supported by more evaluative-type judgments, the review instruction is more likely to refer to the arbitrariness standard. Both standards, however, instruct the court to tolerate a high risk of error and to approach the administrative decision with a restrained critical attitude. Within this range of attitudes, the court subjects individualizing discretion, executing discretion, and policymaking discretion to different types of review based on the nature of the discretion rather than on the particular word formula used to express the standard of review. From these distinctions then, some precision in the judicial function may emerge.

A. Individualizing Discretion

The first, and perhaps the most pervasive, use of discretion in administrative law is the power to make individualizing decisions

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6. 606 F.2d 1031, 1049 (D.C. Cir. 1979).
in administering a program made up of general rules — statutory, judicial, or administrative. Discretion, used in this way, refers to the discretionary decisionmaker’s authority to adjust applicable rules at the margin in order to improve a program’s ability to do individual justice. That is, even where the general rule mandates a result, the implementing decisionmaker has some power to modify that result in a specific application if doing so will better carry out the general spirit of the program.7

Such discretion incorporates flexibility and a sense of fairness; most consider it to be a very positive feature of the administrative process.8 At least for the average citizen, the absence of individualizing discretion in an administrative scheme engenders feelings of injustice, and those directly affected by such a program are dissatisfied with inflexibility. Less evident is the proposition that administrative decisionmaking becomes worse if it sticks too closely to the rules. Despite these positive aspects of individualizing discretion, however, in our theory of social conduct we feel more secure if our bureaucrats are constrained by rules. Our attitude towards individualizing discretion reflects this conflict.9

The benefits of individual discretion create a dilemma for ad-

7. A classic example of this form of discretion is an equity court exercising its injunction powers. In that context, “[t]he discretion comes in the form of dispensation — the court is giving or is being asked to give dispensation from its own rules which otherwise dictate the issuance of the injunction.” O. Fiss & D. Rendleman, supra note 2, at 106.

8. Professor Kenneth Davis analyzed this type of discretion thoroughly in his seminal work, Discretionary Justice. “Discretion is a tool, indispensable for individualization of justice. . . . Rules alone, untempered by discretion, cannot cope with the complexities of modern government and of modern justice.” K. Davis, Discretionary Justice: A Preliminary Inquiry 25 (1969). Davis further stated: “For many circumstances the mechanical application of a rule means injustice; what is needed is individualized justice, that is, justice which to the appropriate extent is tailored to the needs of the individual case. Only through discretion can the goal of individualized justice be attained.” Id. at 19. Indeed, a major contribution of his book is to urge the benefits of a combination of such discretion and rules. Davis recognized that even this type of discretion is not without its negative aspects, but nevertheless urged, “Let us not oppose discretionary justice that is properly confined, structured, and checked.” Id. at 26.

In an almost equally influential work, Judge Henry Friendly discussed due process as a mechanism for “mass justice.” Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975) (Judge Friendly began using the term mass justice on page 1287, but he refers to its problems on page 1276.). Judge Friendly pointed out that our mistrust of bureaucrats often leads us to limit discretion in mass justice systems. But he, as did Davis, generally recognized the benefits of what I have called individualizing discretion, and urged restraint in restricting it. See id. at 1279-80.

9. An interesting example of a program consciously designed around a grant of individualizing discretion is the Civil Aeronautics Board’s (CAB) handling of handicapped passengers, which gave rise to Paralyzed Veterans of America v. CAB, 752 F.2d 694 (D.C. Cir.), cert. granted, 106 S. Ct. 244 (1985). The agency conferred limited authority on carriers and ultimately on flight personnel with respect to services available to handicapped passengers. Among other things, petitioners objected to the discretion granted to air carriers in dealing with canes and carry-on wheelchairs. 752 F.2d at 702. The court agreed with the agency that the grant of individualizing discretion to the carriers was the best means to balance airlines’ safety needs against the needs of handicapped passengers. Id. at 703. The court recognized the value of individualizing discretion where the general rule does not provide sufficient flexibility. See id. at 721-22. The exercise of individualizing discretion, even if incorrectly applied, would result in the best program overall. The court also recognized that some
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Administrative theory. The official is given freedom, not license. To what extent then should administrative officials be free, without judicial interference, to exercise individualizing discretion? The answer to this question affects our judgment as to the role courts play with respect to this type of discretion.¹⁰

As with the other forms of discretion, judicial authority over individualizing discretion is limited. Unlike the others, the constraints are not tied to judges' ability to exercise this type of discretion themselves. Judges are at least as able as bureaucrats to evaluate the individual adjustment of the rules. Although implementing officials do develop experience by handling individual cases within their particular program, this experience does not make them substantially superior to the courts in a given case.

Because administrative officials have no clear advantage in the exercise of individualizing discretion, judicial review is limited only by practical considerations such as administrative and judicial economy. Restrained judicial review protects courts from the burden of actively supervising the mass of individualizing decisions and protects the agencies, which would find it difficult to administer these programs if their individual decisions were frequently subjected to close judicial scrutiny. Thus, even though reviewing courts have the capacity to become involved in specific individual decisions, they are usually constrained by practical considerations from doing so.¹¹

Judicial restraint then must be exercised with considerable flexibility. Courts should generally consider correcting the administrative adjustments in individual decisions and should sometimes do so.¹² From these observations we might evolve a strategy for arbitrary or irrational decisions may be made; however, protection can be afforded by individual review. Id. at 723.

¹⁰. The Supreme Court has held that courts have similar types of discretion to fine tune the law. Hecht Co. v. Bowles, 312 U.S. 321, 329 (1944). Nevertheless, it would seem that courts do not have discretion to allow statutorily proscribed conduct to continue. See Platter, Statutory Violations and Equitable Discretion, 70 CALIF. L. REV. 524, 532 (1982).

¹¹. Judge Friendly, for example, urged with respect to judicial review of individualizing discretion in the mass justice systems:

[J]udicial review in the area of mass justice has largely been limited to questions of fair procedure, and there has been little attempt to obtain review for lack of substantial evidence or even for arbitrariness or capriciousness. Would that it may remain so! The spectacle of a new source of litigation of this magnitude is frightening. . . . Surely this is an area where courts should exercise self-restraint; the agencies can promote this by fair procedures and adequate statements of reasons, remembering that one sufficiently outrageous example may burst the dike.

Friendly, supra note 8, at 1294-95.


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review of individualizing discretion.

The court starts with the underlying general rule and must examine the extent to which the official’s individualizing decision is permitted by the administrative scheme. This evaluation requires the court to ensure that the official has chosen the correct general rule and has correctly interpreted it. Indeed, the court must assure that the decisionmaker exercised individualizing discretion and was not unduly wedded to the general rule. This is a question of law, and our system of judicial review instructs the court to decide whether it agrees with the agency.13

Having approved the official’s legal judgment, the court then begins to evaluate the core discretionary decision. The court’s review of the core discretionary decision is very limited. This limited scrutiny is usually expressed in our judicial review system by a standard that instructs courts to tolerate a relatively high risk of error.14 The word formula traditionally used is expressed as an arbitrariness standard or an “abuse” or “excess” of discretion standard. Because review of individualizing discretion relates to impermissible deviations from a general rule, it sometimes seems appropriate to use the word formulas “excess” or “abuse” of discretion. Nevertheless, in attitude this review mirrors arbitrariness review, and hence the two standards tend to overlap. They both express restraint aimed at controlling only for extreme risk of potential error. This evaluation depends on the context in which it is made; therefore, greater precision as to how a reviewing court should apply those standards to individualizing discretion is needed. In undertaking such review of individualizing discretion, the court might make the following judgments.

First, the court must determine the extent to which the agency

13. This was the focus of the Section of Administrative Law of the American Bar Association recommendation as to review of discretion. It would amend section 706 to allow courts to “set aside” agency action if “[t]he agency has relied on factors that may not be taken into account under, or has ignored factors that must be taken into account under, any of the sources of law listed.” Section of Administrative Law, American Bar Association, A Restatement of Scope-of-Review Doctrine (adopted Feb. 8, 1986), reprinted in 38 An. L. REV. 235 (1986) [hereinafter cited as ABA Report]. The chairman of the relevant section committee, Ronald Levin, explained:

The inquiry prescribed in § (b)(2) is often characterized as one element in “abuse of discretion” review. Since the inquiry becomes relevant only when the agency has been found to be (or is assumed to be) wielding some discretionary authority, it is natural to say that the inquiry bears upon whether the agency “abused” or misused its discretion. But it is more helpful to characterize the inquiry as an aspect of the court’s law-declaring function. For, whereas “abuse of discretion” review is commonly conceived as a very deferential standard, the § (b)(2) inquiry is not a deferential one (except in the limited sense explained under § (f)). Of course, the broader the delegation Congress intended, the fewer the constraints that the statute can be correctly construed to impose; but the identification of those constraints is a matter for which primary decisional responsibility rests with the judiciary.


14. 2 C. KOCH, supra note 1, § 9.6, at 96-106.
has reached a decision that is faithful to the spirit of the applicable rule and the administrative scheme.\textsuperscript{15} The court must therefore ensure that the official's individual decision has not strayed an impermissible distance beyond the boundaries of the general rule; the official is to make individualizing adjustments in the general rule, not ignore or distort it. If there appears to be sufficient danger that the adjustment cannot be justified within the scope of the general rule, the court might reject the individual decision.

Next, the court must consider the propriety of the adjustment in the relevant rule. How an official decides that fairness or justice requires some modification in the rules, however, is somewhat mystical. Some force other than a literal reading of the rules drives the official to exercise individualizing discretion. The system depends on the official being motivated by values that will benefit both the individual and society. Thus, in evaluating the official's movement from the general rule to the individual decision, the court should limit its review to evaluating the relationship between the individualizing and the applicable rules. If the individualizing is consistent with a plausible individual adjustment of the applicable rules, the reviewing court should not examine further the personal mental process that led the official to the individual decision.

Nonetheless, the court must ensure that the individualizing decision was the product of the kind of intellectual consideration that is likely to result in a sound individualizing decision. The court should ask, for example, whether the decisionmaking process incorporated reasonably discoverable facts and weighed all relevant factors.\textsuperscript{16} In short, courts must ensure that the individualizing decisionmaker took a "hard look" at the decisions.\textsuperscript{17}

The court must also consider impermissible external pressures on the discretionary decisionmaking process. Care must be exercised, however, because officials are to some degree expected to bring to bear certain factors not directly related to the implementation of the general rule — factors such as experience or, sometimes, public opinion. The court should not be concerned that such proper extraneous factors skew the decision. Other extraneous factors cannot be permitted, and the court should control for

\textsuperscript{15} The revised model state APA describes this review as "outside the range of discretion delegated to the agency by any provision of law." \textsc{Model State Administrative Procedure Act} § 5-116(8)(i) (1961) (emphasis added).

\textsuperscript{16} However, this does not warrant a retreat to formalism.

the potential effect of such impermissible factors as political pressure or personal bias.

In addition to these inquiries, in some selected cases the court may be driven to evaluate the probability of error in the individual decision itself. Review for potential error, however, must recognize the benefits of leaving to the decisionmaker freedom to make some mistakes as to individuals. This means that the court should become directly involved in the core discretionary decision only under extreme circumstances. However, if it finds the probability of error to be unacceptably high in an individualizing decision it chooses to evaluate in this manner, it may find that the decision is arbitrary or an abuse of discretion. The court must remember that the arbitrariness or abuse standards always limit review to the extent of the risk of error, not error itself. That the court disagrees with the core discretionary decision is irrelevant as long as there is an adequate probability that the official might be right.

The purpose of individualizing discretion is to allow the agency to fine tune the rules — administrative, judicial, or statutory — to do individual justice; the court controls only for extreme risk of error in such judgments. In *Airmark Corp. v. FAA*, for example, Airmark and other small air carriers sued the Federal Aviation Administration (FAA) for failure to exempt them from aircraft noise regulation deadlines, and several large air carriers intervened. Congress, in several pieces of legislation, set deadlines for noise abatement for both foreign and domestic air carriers. In doing so, it intended that the FAA should have the authority to grant necessary exceptions. The conference committee set out criteria for granting these exemptions, and the FAA adopted compliance rules that incorporated them. The FAA received 145 petitions for exemptions and granted fifteen.

Both sides argued that the FAA's exemption authority was closely confined; the smaller carriers argued that the legislation compelled the agency to adopt a more lenient exemption policy, whereas the larger carriers argued that the agency's rules limited its exemption authority to "the most exceptional circumstances." The court found that the regulatory scheme incorporated the authority to use the exemptions to individualize where strict compliance would do undue harm. As the court stated, "[T]he FAA has broad discretion to determine whether the public

18. See *supra* notes 8-9 and accompanying text.
24. *Airmark*, 758 F.2d at 688.
25. Id. at 689.
interest would or would not be served by granting noncompliant carriers exemptions . . . .”26 Having recognized this broad individualizing discretion, the court considered “whether the FAA has exercised that authority in an arbitrary and capricious fashion.”27 The court thus limited its review authority, but did assert its authority to delve into the core decision. As it turned out, the court considered itself compelled to find that the agency's individualizing was “grossly inconsistent and patently arbitrary.”28

Even in the face of this extremely adverse reaction to the FAA's individualizing decisions, the court concluded that the agency, and not the court, should determine when exemptions should be granted or denied.29 The FAA retained broad discretion to individualize to protect against harsh application of its rules and relevant statutory provisions, although the court quite properly intervened when the individualizing decision was clearly inconsistent with the expressed standards.

The key is not whether the court was correct in holding the FAA's action arbitrary but rather how the court handled review of the individualizing discretion. First, the court recognized the value and appropriateness of individualizing discretion in general; it did not dwell on the legitimacy of such a delegation of discretion. With these preliminary barriers out of the way, the court quickly reached the decisive question of the exercise of the individualizing discretion itself.30 The court quite properly compared this action with the thrust of the standards as gleaned from the relevant statutory provisions and found that the decision was not a permissible adjustment.

In Sang Seup Shin v. INS,31 the D.C. Circuit went beyond the faithfulness of the individualizing to the general rule in the statute and tested for the probability of error in the individualizing. The Board of Immigration Appeals (BIA) of the Immigration and Naturalization Service (INS) refused to reopen a deportation decision even though the petitioner's wife had attained American citizenship.32 Conceding that the BIA's discretion concerning petitions-to-reopen is extremely broad, the court nevertheless found that the BIA had exceeded the boundaries of that discre-

26. Id. at 691.
27. Id.
28. Id. at 692.
29. Id. at 695.
30. This differs from some of the other forms of discretion. Even where the arbitrariness standard applies, that standard still permits considerable judicial authority over this type of discretion.
32. Id. at 123-24.
tion.\textsuperscript{33} The BIA had not explained apparently inconsistent applications,\textsuperscript{34} and the absence of reasoning or consistency was itself inconsistent with the grant of individualizing discretion. Therefore, the majority felt compelled to delve more deeply into the core discretionary decision.\textsuperscript{35} The majority evaluated the individual decision and found a substantial likelihood that the agency was mistaken in striking a balance between the "special and weighty equity" of relative status\textsuperscript{36} and the immigrant's disregard of the law.\textsuperscript{37} Although the court competently evaluated the exercise of individualizing discretion, it probably should not become this involved in every such exercise.\textsuperscript{38}

Whether a particular exercise of individualizing discretion warrants direct judicial involvement is a difficult threshold choice for a court. In deciding to review a specific individualizing decision, courts should not be criticized as long as they are highly selective in choosing to do so.

Courts might properly examine the core individualizing decision when there appears to be a pattern. When the relevant exercise of discretion might be an example of consistent conduct by the agency, the court might choose to evaluate the need for correction.

Because consistent misjudgments as to individualizing discretion are more appropriate for review, agency rules intended to guide that discretion might also be more closely reviewed than other types of rules. Rules that set a pattern for individualized decisionmaking by officials involve neither special expertise nor policy; they simply add as much consistency as possible to those individualizing decisions. A court might review closely an individual application of the guidance contained in such a rule. A court can certainly evaluate such guidance just as it can evaluate a pattern of individual decisions.

Individualizing discretion is thus a very special form of administrative activity. It allows the process to be sensitive, as well as fair and efficient; hence a reviewing court should approach this type of discretion with a positive attitude. Fortunately, most judges who are familiar with the administrative process recognize the value of individualizing discretion and instinctively attempt to review it in a manner that will preserve its positive aspects.

\begin{enumerate}
\item \textsuperscript{33} \textit{Id.} at 126.
\item \textsuperscript{34} \textit{Id.} at 127.
\item \textsuperscript{35} \textit{See id.} at 125. The dissent asserted that the BIA had explained both its failure to reopen and the possibility that this decision might appear inconsistent with prior decisions. \textit{Id.} at 128 (Starr, J., dissenting).
\item \textsuperscript{36} \textit{Id.} at 127.
\item \textsuperscript{37} \textit{See id.} at 126.
\item \textsuperscript{38} The court could have left this to the agency's individualizing discretion despite the court's ability to make its own decision, which may even have a higher probability of correctness, because the system demands such restraint. As the dissent pointed out, the majority failed to adequately consider the implications of not exercising restraint. \textit{Id.} at 128-30.
\end{enumerate}
B. Executing Discretion

A second use of the term *discretion* connotes a mandate to complete a task begun by the authorizing body. Typically, the term is used when Congress has conveyed power to an agency through generalized, vague, or incomplete instructions. Statutory authorizations often contain standards such as "feasible"39 and "public interest."40 Although these terms can invoke agency policymaking discretion,41 they more frequently demand a simple extension of the legislative mandate to carry forward the work begun by the authorizing statute.42

This use of the term *discretion* involves a readily accepted fundamental attribute of administrative agencies: the power to fill in the details.43 When instructions are general, vague, or incomplete, the agency has authority to execute the will of Congress. Therefore, I call this executing discretion.

Executing discretion may be intended by Congress without being expressed. Congress, for example, often legislates in broad terms on the assumption that the agency will fill in the necessary details, and most enabling legislation contains some degree of ex-

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40. In the famous Loeb Rhoades case, the SEC found a "wilful" and "serious" violation of the Securities Act but, nonetheless, refused to suspend the broker-dealer license because it found that a suspension was not in the public interest under that statute. In re Carl M. Loeb, Rhoades & Co. and Dominick & Dominick, 38 S.E.C. 843, 855 (1959).
41. See infra notes 63-124 and accompanying text.
42. 5 U.S.C. § 552 (1982). Exemption 3 of the Freedom of Information Act (FOIA) provides a pure example of this form of discretion. Id. § 552(b). Within this exemption, Congress attempted to give guidance as to the proper interpretation of the non-disclosure provisions of other statutes. In doing so, it distinguished two types of withholding authorizations: those clearly defining the document to be withheld and those giving the agency "discretion to withhold." The latter permitted the withholding as an exercise of discretion when accompanied by "particular criteria." That is, Congress permitted denial of a FOIA request in the exercise of agency discretion only in the form of an extension of the withholding mandate. Congress did not intend to authorize discretion to withhold more broadly. The discretion referred to here is not the authority to individualize or to make disclosure policy; Congress prohibited both under the FOIA. Congress's use of the term discretion is limited to the authority to carry forward a statutory direction. Indeed, the direction must be much more precise than we often find supporting this form of discretion; it must establish "particular criteria." Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980).
43. H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 14 (1962) (suggesting that the agency function as to general statutory language is "to define and clarify it — to canalize the broad stream into a number of narrower ones"); Stewart, The Limits of Administrative Law, in THE COURTS: SEPARATION OF POWERS 78 (B. Goulet ed. 1983) ("Administrative discretion is most evident when agencies adopt regulations in order to implement open-ended statutes.").
cuting discretion — often a good deal.44 Although executing discretion is often intended, it can also be granted inadvertently when Congress unintentionally leaves questions for the agency to answer.45 Indeed, some incompleteness, generality, and vagueness seem inevitable.

Whatever the source of executing discretion, the reviewing court has substantial authority over the exercise of such discretion. Although courts no longer seriously consider striking down executing discretion as an illegal delegation, the law may impose stricter scrutiny of the exercise of executing discretion than of the other types of discretion. In addition, when the agency is filling in gaps unintentionally left in the legislation, a reviewing court might properly scrutinize agency action even more closely than when Congress clearly intended the agency to fill in the details.

A functional distinction between executing discretion and the other types of discretion is the absence of an overwhelming need for administrative freedom and a less-than-clear intention to grant such freedom. As with the other uses of discretion, executing discretion connotes the freedom to make mistakes and, to some extent, to fall short of the highest possible standards of good government. Although such freedom is accepted as a necessary condition of the establishment of an administrative process, the nature of its grant does seem to give a reviewing court more room to reevaluate the agency’s exercise of this form of discretion. In other words, the agency usually assumes the authority to fill in the details and, although this assumption of power is generally quite proper and consistent with administrative law theory, courts need be less constrained by the danger of interfering with necessary freedom of action.

Another difference is executing discretion’s close relationship to questions of law. Executing discretion raises issues related, by their nature, to questions of law. The reviewing court’s authority over questions of law is plenary; it can substitute its judgment for the agency’s on those questions.46 Review of executing discretion often combines questions of law with questions of agency judgment. As a result, the court’s authority to review questions of law leads to stricter scrutiny of executing discretion than of other forms of discretion.

Also, in terms of comparative institutional competence, courts are less constrained in approaching administrative decisions in-

44. Indeed, this sort of legislation has been the focal point of the nondelegation debate. J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131-34 (1980). But even advocates of the nondelegation doctrine do not seriously contend that legislation can be so detailed that the agency has no freedom in execution. Therefore, this debate can be characterized as a disagreement over the permissible degree of executing discretion.

45. See Lawrence v. Commodity Futures Trading Comm’n, 759 F.2d 767, 772 (9th Cir. 1985) (“When the legislature has left a gap in a statute as to the details of its administration,” a court should accept a reasonable statutory interpretation made by the agency.).

46. 2 C. KOCH, supra note 1, § 9.18, at 131-34.
volving a substantial amount of executing discretion. For generations, reviewing courts have been limited by the concept of expertise. As to executing discretion, however, the force of comparative expertise is not as strong as in many other areas of administrative action. There are competing expertises at work in the exercise of such discretion. The agency may know more about the particular discipline and to that extent the agency's judgment should be lightly reviewed. Executing discretion, however, also involves questions, such as interpretations of law, over which the court has superior expertise. Therefore, as to this variety of discretion, more than any of the others, the reviewing court must determine whether it or the agency is more competent with respect to the particular judgment.

Although for these reasons the reviewing court may and should delve more deeply into executing discretion, it should show restraint. The authorization, incomplete or vague though it might be, does convey a standard by which the agency decision should be evaluated; the court is compelled to adhere to the standards that can be gleaned from the delegation. The meaning of these standards as developed by the agency has been given substantial deference, which should act as an additional restraint on a reviewing court in rejecting the agency's judgment as to the best means to extend the legislative judgments. Although the agency does not always have superior institutional competence in the exercise of executing discretion, such discretion can involve the agency's expertise in a way that should discourage judicial interference. Thus, the court should ensure that the agency stays true to the spirit of that scheme, but it should not stray into implementing judgments best left to the agency.

47. See Frug, The Ideology of Bureaucracy in American Law, 97 Harv. L. Rev. 1277, 1335 (1984) (Because judges are insulated from political pressures, they are "able to act in an appropriately ad hoc and nonbureaucratic way and to invite wide participation by representatives of competing interests.").

48. See, e.g., SEC v. Chenery Corp., 318 U.S. 80, 92-93 (1943) (Chenery I) (concluding that the SEC had "accumulate[d] an experience and insight denied to others").

49. There are also few resource-allocation reasons to dissuade a court from inquiring into these decisions. There are few instances of executing discretion and judicial review will have broad impact.

50. Whether or not the agency has unbridled discretion over a given issue must receive close judicial scrutiny; if it does have unbridled discretion, the exercise of that discretion cannot be reviewed. See infra text accompanying note 156.


52. E.g., Beerly v. DOT, 768 F.2d 942, 945-46 (7th Cir. 1985), cert. denied, 106 S. Ct. 1184 (1986). The expertise here involves giving detailed expression to the general legislative will and must be distinguished from the expert judgment that supports policymaking discretion. See infra text accompanying notes 72-73.

Because the core decision is similar in nature to a question of law, however, the court should often look closely at the implementing action itself. Because the power to extend the explicit delegation is derived from generality, incompleteness, and vagueness, the court must examine the basic support for the action. The agency's completion of the delegation may or may not improve the administrative scheme. Thus, review of executing discretion — and hence application of the arbitrariness and abuse standards in that context — affords the reviewing court considerable breadth.

In *Coal Exporters Association of the United States v. United States*, the D.C. Circuit recognized that some administrative programs are designed around agency discretion to implement incomplete or vague standards. Having conceded the existence and importance of such discretion, the court nevertheless concluded that the agency's decision was inconsistent with the congressional design. The case involved the exemption provision of the Staggers Rail Act of 1980. The Interstate Commerce Commission (ICC) acquired executing discretion through broad statutory standards such as "not necessary to carry out the transportation policy of [the Act]" and "not needed to protect shippers from the abuse of market power." The court recognized that the freedom granted by executing discretion still must be exercised as a proper extension of the legislative scheme and the agency's implementing decision must be evaluated as an acceptable extension of that scheme:

Here we admit that the Commission has substantial discretion.

54. For example, in *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir.), cert. denied, 106 S. Ct. 313 (1985), the court found that the National Labor Relations Board (NLRB) failed to recognize that the broad standard conferred executing discretion and that the NLRB acted improperly by not exercising it. *Id.* at 942, 950, 956. The NLRB interpreted section 7 of the National Labor Relations Act (NLRA) as compelling a narrow definition of "concerted activities." *Id.* at 942 n.1 (quoting section 7 of the NLRA, 29 U.S.C. § 157 (1982)). However, the court disagreed with the NLRB. As this is also a question of law, the court was perfectly correct in instructing the agency of the boundaries of that discretion and compelling it to exercise that discretion according to the breadth of the legislative standard. *Id.* at 948 (stating that "the Board's opinion is wrong as it holds that the agency is without discretion to construe [the broad statutory standard]").

55. This approach may justify the Supreme Court's opinion in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), which at least one commentator found confusing. See Comment, *One Step Forward, Two Steps Back: The Court and the Scope of Broad Discretion in Sure-Tan, Inc. v. NLRB*, 134 U. Pa. L. Rev. 703, 715-16 (1986).


57. 745 F.2d at 96.


59. *Coal Exporters Ass'n*, 745 F.2d at 79. Neither standard significantly confines the agency, but the court did not discuss whether the broad delegation violated the nondelegation doctrine. Instead, the court accepted the propriety of an administrative scheme designed around standards that give the agency tremendous freedom in its executing decisions:

[The act is] a recognition that an administrative agency is better suited than Congress to evaluate on a continuing basis the specific need for the various aspects of the regulatory scheme in particular contexts. There is no doubt that the exemption provision was intended to give ICC very broad authority [but it also incorporated legislative standards].

*Id.* at 82.
as to how to carry out Congress's instruction concerning the accommodation of shipper and rail carrier interests, but wherever the bounds of discretion are, we have no doubt that the agency's accommodation, as announced and applied in this case, "is not one that Congress would have sanctioned." 60

Therefore, in reviewing executing discretion, as with the other forms of discretion, the court has overriding authority to reverse agency questions of law, 61 limited only by self-restraint and presumption of regularity. 62 The agency's executing discretion takes over when it is acting within legislative boundaries, and its discretion has primacy that must be recognized by the reviewing court. Nonetheless, the court can subject core discretionary decisions to considerable scrutiny.

C. Policymaking Discretion

The third use of the term discretion covers the authority to make "policy." 63 Policymaking is considered particularly appropriate for administrative agencies. 64 Conversely, even under current theories of judicial license, courts are not primarily responsible for making policy. Policymaking is often characterized as the zenith of administrative authority: the point at which courts have the least authority and agencies the most. It is not rare for this authority to be referred to as discretion.

When exercised by an agency, policymaking discretion appears similar to executing discretion in that legislative guidance is very general; however, it differs in a fundamental way. Policymaking discretion is not merely the power to extend legislation or fill in details. In policymaking, the agency is performing functions similar to those performed by the legislative body itself rather than

60. Id. at 96 (quoting Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 845 (1984)).
61. See, e.g., Citizens State Bank v. FDIC, 751 F.2d 209, 217 (8th Cir. 1984) ("The scope of an agency's discretion is limited to its powers . . . a matter suitable for judicial resolution.").
62. 2 C. KOCH, supra note 1, at 89.
63. Policy is an imprecise word. Policy includes those decisions that advance or protect some collective goal of the community as a whole (as opposed to those decisions that respect or secure some individual or group right). See Dworkin, Hard Cases, 88 HARV. L. REV. 1057, 1058 (1975), reprinted in R. DWORKIN, supra note 2, chap. 4. Policy decisions are based on aggregate values; they do not focus on individual goals or on the resolution of individual situations. Obviously, the two are somewhat interrelated but it is possible to separate those decisions that reflect general or societal goals from other types of decisions.
64. Policymaking is the major work of government. While modern government is expected to provide individual dispute-resolution machinery, the fundamental purpose of government is to carry out general societal goals. As has often been observed, in our complicated society the legislative branch cannot perform all or perhaps even a major part of this function. See generally Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 J.L. ECON. & ORG. 81 (1985). Thus, agencies are often given major policymaking functions.
expanding on the work of the legislative body.\textsuperscript{65} Whereas the agency follows a defined path when exercising executing discretion, it defines the path itself in exercising policymaking discretion.\textsuperscript{66}

A grant of policymaking discretion is not without guidance, but the guidance defines societal goals and thus differs in kind from the guidance that accompanies executing discretion. The legislature assigns the agency such discretion because it sees an advantage in injecting the consideration of societal goals into the administrative process.

Policymaking discretion, more than any other form of administrative action, directly involves two major principles of administrative law: public interest and expertise. The broad goal of public interest is the administrative system’s effort to build quasi-democratic values into administrative decisions. The incorporation of expertise attempts to consciously shift the decision into the hands of a body specially designed for that purpose.

First, agency policymaking should and can be guided by public interest, meaning that the agency can make these decisions with attention to public will. In short, Congress, in assigning policymaking to the agency, did not intend the search for public opinion to end. The assignment of policymaking discretion shifted responsibility for further development of public opinion to the agency. In some ways, of course, the agency’s mechanisms for discerning public opinion are inferior to the legislature’s and the assignment to the agency is the result of other considerations.\textsuperscript{67} In other instances, the delegation evidences a desire on the part of the legislature that the agency continue being sensitive to the public will.\textsuperscript{68}

In policymaking, the agency must strike society’s balance from among competing values.\textsuperscript{69} Indeed, some policymaking discretion is given to the agency so that it — not political officials — will create policy, perhaps in an atmosphere of objectivity. Sometimes the delegation ensures that the agency rather than the legislature

\textsuperscript{65} See Levin, Identifying Questions of Law in Administrative Law, 74 GEO. L.J. 1, 22 (1985).

\textsuperscript{66} For example, section 5 of the Federal Trade Commission Act empowers the Federal Trade Commission (FTC) to determine what practices are “unfair methods of competition.” The legislative history shows that the term had a recognized meaning at the time of passage. See 51 CONG. REC. 14,929 (1914) (statement of Rep. Covington). Therefore, to some extent this delegation confers what I have called executing discretion to define that term more concretely. However, over the years the FTC has assumed the authority, with judicial blessing, to make policy that implements the spirit of that legislation rather than merely defining its applicability to specific practices. See, e.g., FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); FTC v. Motion Picture Advertising Serv. Co., 345 U.S. 914 (1953). \textit{But} see FTC v. Bunte Bros., 312 U.S. 349, 353-55 (1941) (holding that the FTC may not regulate matters traditionally left to local customs).

\textsuperscript{67} The agency, however, may be superior to the legislature in finding public opinion, e.g., regional rulemaking hearings.

\textsuperscript{68} See Mashaw, supra note 64, at 92.

will bear the brunt of the inevitable dissatisfaction with one choice as among valid and desirable alternatives.\textsuperscript{70}

Courts, generally speaking, lack the ability to find public opinion. Indeed, the judiciary is to some extent intentionally antidemocratic and certainly should not be looking for the popular result.\textsuperscript{71} True, agencies are also somewhat resistant to public opinion but they do tend to be more responsive to popular will than are courts. Thus, agencies are better policymakers because of some sensitivity to public interest.

Second, policymaking discretion represents the ultimate assignment to expert agency judgment. In some sense, expertise is merely the acquisition of superior knowledge, and the agency can surpass judges in this regard. However, expertise includes another asset: superior ability to synthesize information into a judgment. Even assuming that courts could accumulate particular information, they cannot make the same use of the information as the expert agencies. Administrative policymaking often represents this second asset of expertise.\textsuperscript{72} Courts cannot, even with all of the necessary information, acquire the requisite expert judgment as to accomplishment of societal goals; an agency is assigned or occasionally created to bring this kind of expert judgment to a particular problem.\textsuperscript{73} This ability justifies the exercise of policymaking discretion by agencies. It is a major reason why the legislature assigned the task to the agency and why courts should meticulously avoid circumventing that choice.\textsuperscript{74}

When this broader perspective is important, the agency rather than the court should have the dominant role. Courts react to individual cases and rarely have the luxury of a broad overview of the problem. Moreover, administrative policymakers have expert advice readily available, whereas courts have an inferior capacity for obtaining such advice. Thus the agency's policymaking is superior to the court's both in obtaining information and making judgments based on that information.

Further, the judicial process is a very poor policymaking proce-

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\item J. Freedman, supra note 70, at 44-46.
\end{enumerate}
dure, whereas some administrative processes are superior policymaking mechanisms.\textsuperscript{75} Rulemaking is an excellent policymaking mechanism.\textsuperscript{76} Even individual administrative adjudications seem superior to judicial adjudications for this purpose. For example, administrative adjudications can seek public opinion through broad intervention.\textsuperscript{77} An agency can also seek comments from interested parties when it decides to make policy in an adjudication, even if it does not choose to undertake rulemaking.\textsuperscript{78} Moreover, an agency is more apt to announce policy prospectively, often without applying it to the parties in the adjudication, and thereby avoid mixing policymaking with the resolution of individual rights or duties.

Not only is extreme judicial restraint in reviewing policymaking discretion supported by administrative superiority in expertise and ability to discern public interest, it is also supported by the need for considerable freedom in the exercise of its policymaking discretion. Although present in many forms of discretion, this need for freedom may be highest in policymaking.\textsuperscript{79} Policymaking decisions cannot be made with great confidence and cannot or should not be tested very strictly. Because any policymaking involves substantial uncertainty, it is important that courts do not inadvertently assume authority they are neither intended to have nor capable of exercising. In the context of policymaking, courts should not evaluate the decision too critically lest judicial policymaking judgment replace administrative policymaking.

Modern courts, especially appellate courts, are in the habit of making policy-based decisions\textsuperscript{80} despite considerable debate over whether judges should do so.\textsuperscript{81} It is difficult for judges to abandon this habit of thought when reviewing agency action, especially in an era when distrust of government bureaucracies is at its highest. Whatever the advisability of courts relying on policy arguments in other adjudications, they should rarely do so when reviewing the

\textsuperscript{75} See Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1168-69 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980).

\textsuperscript{76} 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.38 (2d ed. 1978).


\textsuperscript{79} But see Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1307-09 (1976) (judges are uniquely qualified to oversee public policy decisions).

\textsuperscript{80} See B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1921) ("Here, indeed, is the point of contact between the legislator's work and [the judge's]. . . . Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law."); Greenawalt, Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges, 75 COLUM. L. REV. 359 (1975) (stating that denial of judicial discretion conflicts with the usual perception of the role of judges).

\textsuperscript{81} Compare Greenawalt, Policy, Rights, and Judicial Decisions, 11 GA. L. REV. 991 (1977) (rejecting Dworkin's view that judges do, and should, decide complex civil cases on grounds of principle rather than policy) with Dworkin, A Reply by Ronald Dworkin, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 263-68 (M. Cohen ed. 1984) (arguing that Greenawalt interprets the concept of "principle" too narrowly).
policy judgments of a body that has been assigned the policymaking task and was designed to implement it. 82

Expertise, incorporation of public views, and the need for freedom in the decisionmaker combine to give courts a very limited role in review of policymaking discretion. As with individualizing and executing discretion, this limited judicial review is usually expressed by the arbitrariness or abuse of discretion standards, but these standards convey a particularly restricted judicial role when applied to the exercise of policymaking discretion. These terms instruct the court to approach the exercise of administrative policymaking with an attitude of extreme restraint and a tolerance for a high risk of error.

Unfortunately, the difficulty of distinguishing between policy and law sometimes misleads courts into overly active review. Conclusions of "law" also express broad societal goals, i.e., policy. Because courts are traditionally the final arbiters of questions of law, 83 they are sometimes confused as to their authority when societal goals are involved. Even though both policy and law involve societal goals, however, there is a substantial difference. Questions of law involve the search for the policy embodied in a statute or evolved through the common law, whereas administrative policymaking involves policy questions of first impression (albeit under the guidance of the legislation). This fundamental distinction supports the vast difference between the judicial roles as to law and policy. 84

An example of the impact of a mistake here is the D.C. Circuit's efforts in WNCN Listeners Guild v. FCC. 85 The case involved the Federal Communications Commission's (FCC) efforts to join the stampede towards deregulation. In a prior case, Citizens Committee to Save WEFM v. FCC, 86 the D.C. Circuit held that the FCC should hold a hearing when there was a protest of a radio broadcaster's efforts to abandon a distinctive programming format. 87 After rulemaking, the FCC issued a policy statement disagreeing with WEFM, arguing that unregulated competition would better serve the public interest in diversity of entertainment. 88 The FCC contended that its policy judgment should take precedence over

82. See, e.g., Natural Resources Defense Council, Inc. v. NRC, 685 F.2d 459, 517 (D.C. Cir. 1982) (Wilkey, J., dissenting) (criticizing the majority for assuming a "role as high public protector of all that is good from perceived evils of the nuclear age"), rev'd, 462 U.S. 87 (1983).
83. 2 C. KocH, supra note 1, § 9.18, at 131-35.
84. For an expansive discussion of identifying questions of law, see Levin, supra note 65.
86. 506 F.2d 246 (D.C. Cir. 1973) (en banc).
87. Id. at 266.
88. WNCN, 610 F.2d at 841.
the court's judgment. 99

The court found that it "has neither the experience nor the constitutional authority to make 'policy' as that word is understood. . . . But in matters of interpreting the 'law' the final say is constitutionally committed to the judiciary." 90 While recognizing that the "distinction between law and policy is never clear-cut," the court found that resolution of this controversy required an interpretation of the Federal Communications Act "in which the judicial word is final." 91

The Supreme Court reversed, holding that the decision to permit the market to decide program format was a question of policy rather than law. 92 Thus, it held that the judicial function was extremely limited because the question was left to the "broad discretion" of the FCC. 93 The Court stated that because the appellate court had conceded "that it possessed neither the expertise nor the authority to make policy decisions in this area," 94 it should have permitted the agency to carry out the function for which it was designed. 95 Although the Supreme Court used "deference" language in referring to the FCC's judgment, it meant that the reviewing court must show extreme restraint in reviewing a core policymaking decision. 96

How then should a court review the exercise of policymaking discretion? The court has ultimate authority to determine whether Congress assigned responsibility to the agency to make decisions about a certain range of societal goals; this is a question of law. 97 Of course, as in WNCN, the court cannot usurp policymaking authority by doing more than simply defining the legislative grant. Once the reviewing court has determined that the agency was properly exercising policymaking discretion, it has

99. Id. at 845.
90. Id. at 854-55.
91. Id. at 855. The court also approached the controversy in terms of allocation of authority over factual questions: "To the extent that the Commission was not questioning this court's legal judgment, but was attempting to demonstrate that faulty premises underlay that judgment, we agree that it was within its competence as an agency better equipped to develop legislative-type facts than is this court." Id. It found, however, that the factfinding in support of the policy statement was inadequate; therefore, the factual conclusions did not contradict the court's legal judgment. See id. at 854-58.
92. 450 U.S. at 592-99, 604.
93. Id. at 594.
94. Id. at 592.
95. The Court explained:
[W]e recognized [in FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978)] that the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations. . . . These predictions are within the institutional competence of the Commission. Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference.
96. See id. at 596, 598, 602-03.
97. See Levin, supra note 65, at 16 (using discretion to mean policymaking discretion).
very little authority over the decision itself. The extent of this authority is best expressed by Judge Harold Leventhal's "hard look" doctrine: the court should ensure that the agency has taken a hard look at the policy question, but once the court determines that the agency has undertaken a careful and complete analysis, the court's role with respect to the core discretionary decision comes to an abrupt end.

A clear example of the special problems a court faces with respect to policymaking discretion is presented in Deukmejian v. Nuclear Regulatory Commission. Several groups of concerned citizens sought review of a Nuclear Regulatory Commission (NRC) licensing decision. The D.C. Circuit concluded that, except for two minor matters, the NRC acted within its "legal discretion." The court first looked at the statute to determine whether the decision was consistent with the administrative scheme's goals.

The court then discussed the judiciary's role in nuclear regulation and noted several occasions when the Supreme Court had admonished the D.C. Circuit to stay out of nuclear policymaking. Based on these past pronouncements, the court stated that the

98. See, e.g., Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971); Leventhal, supra note 17, at 511.
99. Although Judge Leventhal's hard look doctrine might be applied to a variety of issues, e.g., supra note 17, it seems to be attached most consistently and comfortably to policymaking discretion. See Sunstein, Deregulation and the Hard-Look Doctrine, 1983 SUP. CT. REV. 177, 181; see also Sunstein, In Defense of the Hard Look: Judicial Activism and Administrative Law, 7 HARV. J.L. & PUB. POL'y 51 (1984); New York State Comm'n on Cable Television v. FCC, 749 F.2d 804, 807-08 (D.C. Cir. 1984) (stating that when the agency has made a reasonable accommodation of conflicting policies, judicial review may only determine whether the agency has exceeded its authority or acted arbitrarily).

As Judge McGowan stated:

What we are entitled to at all events is a careful identification by the Secretary, when his proposed standards are challenged, of the reasons why he chooses to follow one course rather than another. Where the choice purports to be based on the existence of certain determinable facts, the Secretary must, in form as well as substance, find those facts from evidence in the record. By the same token, when the Secretary is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, he should so state and go on to identify the considerations he found persuasive.

Industrial Union Dep't v. Hodgson, 499 F.2d 467, 475-76 (D.C. Cir. 1974); see Hercules, Inc. v. EPA, 598 F.2d 91, 106 (D.C. Cir. 1978); Environmental Defense Fund v. EPA, 598 F.2d 62, 82, 90 (D.C. Cir. 1978).

100. 751 F.2d 1287 (D.C. Cir. 1984), aff'd on rehearing sub nom. San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26 (D.C. Cir. 1986) (en banc).

101. 751 F.2d at 1293.

102. Id. at 1294. In Vermont Yankee, the Supreme Court stated:

The fundamental policy questions appropriately resolved in Congress and in the state legislature are not subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the
APA's abuse of discretion review did not allow the court to "seize upon the fortuity of appeal to usurp those governmental functions properly accorded the political branches," a term clearly intended to include both Congress and the agencies. The court held that its function was to determine if the agency had policymaking discretion and to ensure that the relevant decision, which involved issues at the "frontiers of science," did not transgress the boundaries of agency discretion. Thus, the court recognized the basis for administrative policymaking discretion: democratic factors, agency expertise, and the advantages of the administrative process in those areas.

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the D.C. Circuit again fared poorly in its efforts to usurp authority over policymaking discretion. The Environmental Protection Agency allowed the states to consider each plant as a "bubble" including all of the plant's pollution-producing devices. As a result, equipment could be added or replaced without a permit so long as the total emissions of the plant, or bubble, were not increased. The D.C. Circuit struck down the plant-wide definition of stationary source; the Supreme Court reversed, criticizing the appellate court for adopting a "static judicial definition." Because the Supreme Court found that it is to review judgments, not opinions, it evaluated the appellate court's holding. The Court noted that if the will of Congress is clear in the statute, the agency must follow that will. However, if the statute is silent or ambigu-

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States within their appropriate agencies which must eventually make that judgment.


Similarly, in the sequel to *Vermont Yankee*, the Supreme Court again admonished the D.C. Circuit:

Resolution of these fundamental policy questions lies, however, with Congress and the agencies to which Congress has delegated authority . . . . Congress has assigned the courts only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes.


103. Deukmejian, 751 F.2d at 1296.

104. "Ultimate resolution of contested agency actions properly lies within the province of the courts. Because courts lack the scientific and technical expertise of regulatory agencies, however, the judicial role on review is limited to determining whether the agency has complied with relevant statutory and regulatory requirements." Id. at 1307.

105. Id. Given its dissertation on the role of courts, the D.C. Circuit was somewhat disingenuous in reviewing some very specific scientific conclusions of the NRC. Despite disagreeing with those conclusions, it failed to remand — no doubt in the hope of avoiding Supreme Court review.

106. Judge Patricia Wald would have reversed the agency on a specific technical finding. She is obviously confident that she can make technical decisions through traditional appellate process that will improve on the agency's technical judgments made through scientific methods. Wald, *Making "Informed" Decisions on the District of Columbia Circuit*, 50 GEO. WASH. L. REV. 135, 153 (1982).


108. Id. at 842.

109. Id.
ous with respect to a specific issue, then the agency, not the court, has policymaking authority. The judicial function is limited to ensuring that the "agency's answer is based on a permissible construction of the statute."\(^\text{110}\) The agency's authority is not simply the discretion to complete what the statute began; rather it is the authority to design the regulatory scheme. Thus, as the Court had stated previously, the agency must make "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute."\(^\text{111}\) The Court in *Chevron* noted that the Clean Air Act was "a lengthy, detailed, technical, complex, and comprehensive response to a major social issue,"\(^\text{112}\) and that Congress left to the agency the job of resolving the policies involved.\(^\text{113}\) Courts, it found, are not the proper institutions for resolving these issues because "[j]udges are not experts in the field, and are not part of either political branch of the Government."\(^\text{114}\) Thus, the Court found that reviewing courts should not be involved in policymaking discretion beyond ensuring that policymaking discretion existed under the statute and the agency took care in its decisions.\(^\text{115}\)

D. Some Conclusions About the Review Standard for Discretion

The review standard applied to the three reviewable types of discretion is almost invariably arbitrariness or abuse of discretion. Sometimes one or the other of these word formulas seems more appropriate, but they are similar in meaning. In short, they instruct the reviewing court to tolerate a relatively high risk of error in discretionary decisions.

However, the actual level of review differs according to the type of discretion, even though the word formula for the applicable standard is the same. Thus, we can find more precision in these standards by analyzing how they should be applied to the three reviewable forms of discretion — individualizing, executing, and policymaking.

Individualizing discretion allows the implementing official to make adjustments in the applicable rule, whether statutory, administrative, or judicial. The power may be expressed or implied, but even if it is not, it is probably inherent in most administrative schemes. Its purpose is to add flexibility to the administrative pro-

\(^{110}\) *Id.* at 843.


\(^{112}\) 467 U.S. at 848.

\(^{113}\) *See id.* at 862.

\(^{114}\) *Id.* at 865.

\(^{115}\) *See id.* at 865-66.
cess; it is not a function of expertise. For this reason, reviewing courts have the capacity to review these judgments in some depth. The great mass of these decisions, however, demands that courts refrain from doing so.

How does this all relate the application of the arbitrariness or abuse of discretion standards to individualizing discretion? The basic notion of these standards is that the reviewing court should tolerate a relatively high risk of error and curb its most critical attitudes. In a category of decisions in which they share almost equal capacity with the agency, however, these standards may suggest a fairly searching inquiry; although the search is for risk of error, not error itself, i.e., disagreement.

The proper judicial approach to individualizing discretion suggests the following inquiries: the court should determine that the core discretionary decision is a permissible deviation from the general rule and that it is a plausible adjustment in that rule; and the court should ensure that the decision is the result of sound intellectual consideration (that the official took a hard look).

After these inquiries, however, the court may choose to delve more deeply into the core discretionary decision. Practical considerations demand that it carefully select the cases in which it does so. Because the court has nearly equal capacity with the agency, its inquiry can be substantial so long as it has a sound basis for going this far, e.g., the presence of a pattern of similar questionable agency decisions.

The arbitrariness and abuse of discretion standards also permit a searching judicial inquiry into the exercise of executing discretion. Yet the considerations are quite different. The courts have a substantial function here because the decisions are in the nature of questions of law. The decisions are not implementing adjustments of an applicable rule, as is the exercise of individualizing discretion, but an extension of some rule. These are the kind of questions courts are particularly capable of addressing. On the other hand, unlike the exercise of individualizing discretion, the exercise of executing discretion may involve special agency expertise.

The key then to determining the judicial role with respect to executing discretion is institutional competence. When the agency has superior capacity, then the court should give the agency considerable freedom in exercising executing discretion. When the agency capacity is not superior, the court may engage in a more searching inquiry. This inquiry should still focus on potential error, not agreement, and tolerate a fairly high risk of error.

The arbitrariness and abuse of discretion standards demand a great deal of judicial restraint when applied to policymaking discretion. Policymaking discretion differs fundamentally from executing discretion. The latter involves an extension along a path defined by the legislation; the former involves defining the path itself. For whatever reason, the agency has been assigned this
function and the reviewing court will arrogate power if it inquires too deeply into its exercise. Although the arbitrariness and abuse of discretion standards leave courts with an active, if very different, monitoring role with respect to individualizing and executing discretion, these standards substantially restrict review when applied to policymaking discretion.

Here, review is dominated by the hard look doctrine. The court should ensure that the agency took a hard look at the policy issue. However, once it has concluded that the agency did, the court's function comes to an abrupt end. It is not to inquire further into the core discretionary decision.

Of course, review of all three types of discretion is not limited to the core decision; it must control for mistakes of law, procedural inadequacies, improper external pressures and influences, and constitutional abuses. The review function as to the other elements of the agency action may be covered by a different standard.

The threshold question for the court is always whether the agency correctly applied the law. Courts are the final arbiters of questions of law, and hence their review of this threshold question demands that they agree with the legal conclusions of the agency. They can substitute their judgment for a legal conclusion with which they disagree. However, they must not expand their review of discretionary decisions by turning them into a question of law. They must meticulously avoid expanding their function through their power to decide questions of law.

One crucial question of law is the scope of the discretion assigned to the agency, and the first step in reaching the discretionary decision itself is to determine whether the agency acted within its discretion. If courts apply the categories suggested above, their next step is to find what kind of discretion they are reviewing. As suggested, the extent of their review of the core discretionary decision will be governed by this determination.

Courts also have plenary power in reviewing procedures. Some care should be taken here also because review of procedures is an easy way to take over substantive issues. A court is tempted to impose more formal procedures as a subterfuge to get at the substantive decision. Moreover, while more procedures will certainly improve the exercise of discretion in some instances, mere
resort to formalizing procedures can do substantial harm.\textsuperscript{120}

It is essential that reviewing courts not impose more procedures on a program requiring the exercise of discretion merely because it cannot think of anything better to do. Additional procedures can as easily harm these programs as help them.\textsuperscript{121} In lieu of doubtful procedural remedies for defective exercises of these three types of discretion, the court should usually confine itself to remedies aimed at any substantive defect. Often constructing a remedy is difficult, and courts are left with returning the decision to the agency and instructing it to try again.

One useful alternative remedy for a defective exercise of discretion may be required rulemaking.\textsuperscript{122} It has long been held that a court cannot interfere in an agency's choice of procedures,\textsuperscript{123} but, as a remedy, the court would be instructing the agency to correct its own inadequate exercise of discretion.\textsuperscript{124} Such an order would infringe to a lesser degree on the administrative authority than an order compelling the agency to reach different conclusions in such cases.

In addition to review of the exercise of discretion, law, and procedure, the court must, of course, examine the external environment surrounding the exercise of discretion. Courts must review the external characteristics of the particular discretionary decisionmaking to assure that the decision is not skewed by improper forces outside the process. Because of the different nature of the three forms of discretion, the permissible external considerations may differ, and hence this review also tends to differ among the three types of discretion.

II. Review of the Two "Unreviewable" Types of Discretion

The first three uses of the term discretion are reviewable, albeit under limited standards of review. However, there are types of discretion that are considered "unreviewable." I have divided such discretion into two categories: unbridled discretion and noxious discretion. A reviewing court cannot review the core discretionary decision made in the exercise of either of these types of

\textsuperscript{120} See Friendly, \textit{supra} note 8, at 1280. Evidence that more procedures add accuracy is nonexistent, \textit{see} \textit{Social Security Hearings and Appeals}, \textit{supra} note 12, at xx-xxi (stating that "there is no accepted external standard for evaluating accuracy"), and the other benefits of many procedural elements are at best debatable. Review of procedures for exercising individualizing discretion is important and a court should not be reticent to undertake such review; nevertheless, a court should not impose additional procedures on a program using individualizing discretion merely because it cannot think of anything better to do. The reviewing court must understand the benefits of individualizing discretion and not diminish those benefits by cavalier procedural demands.

\textsuperscript{121} This is the one way to express the teaching of the due process cases. \textit{See} Matthews v. Eldridge, 424 U.S. 310, 348-49 (1976).

\textsuperscript{122} \textit{K. Davis}, \textit{supra} note 8, at 57-58.


\textsuperscript{124} 2 \textit{C. Koch}, \textit{supra} note 1, § 2.15, at 77.
discretion. However, the agency’s authority to exercise the discretion and the environment in which it is exercised are reviewable. A reviewing court’s function with respect to these reviewable aspects of unreviewable discretion differs as between the two uses of the term. More importantly, the foundation for unreviewability of these two types of discretion differs fundamentally, and this difference may substantially affect the support for the unreviewability of each.

A. Unbridled Discretion

The average person seems to use the term discretion to mean decisionmaking authority that cannot be reversed by a higher authority. Indeed, Webster’s defines discretion as “individual choice or judgment.”125 This use of discretion may apply to decisions at every level of importance. A baseball umpire has such discretion, as does a parent in most instances, a general in the field of battle, and a pilot about to unload a bomb. To some extent, every person has this form of discretion on many occasions. We may call this type of unreviewable discretion “unbridled discretion.”

Unbridled discretion is created by two methods in the administrative scheme: through inadvertence or through legal doctrine. Inadvertent unbridled discretion results because no higher authority is provided by the process and each administrative process inevitably includes a good deal of such unbridled discretion.126 Here we focus on the second—unbridled discretion created by legal doctrine.

Such unbridled discretion can result from either common law evolution or implied or express legislative preclusion. The most obvious examples involve express statutory prohibitions against judicial review; but, over time, several areas of government action, such as military or prosecutorial decisions, have been withdrawn from judicial review.

Choices based on characteristics peculiar to the administrative scheme might justify such unbridled discretion. Generally, it ex-

125. WEBSTER'S NEW COLLEGIATE DICTIONARY 324 (8th ed. 1979).
126. See P. SCHUCK, SUING THE GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONG 66 (1983). Usually these decisions are so trivial that control is not contemplated. However, even these decisions may be important. The decision to have a memorandum retyped is unreviewable, but that decision may affect the rights of a large number of people, including the typist, those awaiting the memorandum, and those awaiting the decision based on the memorandum. When these decisions produce particularly egregious results, they may be removed from the unbridled discretion of the official either as a class or individually. Generally, however, the authority merely exists without analysis or serious question. It is unnecessary to relate this type of unbridled discretion to the judicial review system even though it includes a massive, and in the aggregate, important body of administrative discretion.
ists due to a perceived need to end the process or due to a decision about the efficient allocation of decisionmaking resources. However, administrative decisions assigned to agencies' unbridled discretion can be reviewed in the sense that courts have the capacity to evaluate the type of decision; but courts are for some reason forbidden from reviewing them. That is, the discretion in this section covers the situations in which the court is not permitted to review but they have the ability to do so; in contrast to numinous discretion, discussed in the next section, which covers discretionary decisions courts are not able to review. It is further suggested that this distinction could soften the doctrine of unreviewability as to unbridled discretion.

Unbridled discretion is complete. For reasons that have little to do with the potential value of court involvement, the court has no authority over the core decision. The only question is the threshold question: Is this an issue that was assigned to the unreviewable authority of the agency? If the answer is yes, the court's function ends. It has no function as to that part of the decision; not even a limited function as defined by one of the limiting standards of review. (The court is left like Bob Uecker in the cheap seats, impotently yelling its criticism with the rest of us.)

However, some functions remain for the courts. The existence of unbridled discretion is a question of law over which courts have ultimate authority; hence courts play a significant authority-defining role in administrative schemes in which unbridled discretion might exist. They may also check for procedural inadequacies, or mistakes as to the criteria under which an individual decision is made. Of course, even if the decision is covered by unbridled discretion — and therefore completely removed from judicial scrutiny — courts will review the constitutionality of the underlying statute. If the decision is only partially covered by unbridled discretion, the court must review the remaining questions.

Because the existence or scope of unbridled discretion defines the review function, the major issue on review is whether unbridled discretion covers a particular administrative decision or portion of a decision. This question can be broken down into those situations where the legislature has made the decision unreviewable and those situations where the agency has been given the ultimate authority by evolved legal doctrine. The power of courts to limit the unreviewability of unbridled discretion may depend on its source.

127. Nonetheless, the decision here is polar. If the discretion exists, the court cannot review the core decision; if the discretion does not cover the decision, the court's review is controlled by some other doctrine. If the court finds the decision outside the unbridled discretion, the standard of review becomes a new and open question.
129. Within a particular decision, only certain issues are commonly unreviewable; other parts of the decision may still be reviewed. The discretion is "unbridled" only as to the unreviewable issues.
Express grants of unbridled discretion result from the expressed design of the legislative delegation. Some federal statutes make certain agency decisions unreviewable. The APA provides for this type of unreviewability in section 701(a)(1). The extent to which the preclusion must be clear on the face of the statute is controversial. Some argue that only express language can render an administrative decision unreviewable. Others argue that traditional tools of legislative interpretation, such as legislative history and rules of statutory construction, should be used where the statute is unclear. The latter approach is consistent with the ordinary way of reading statutes and the need to protect administrative programs from undesired judicial interference.

The first approach, however, expresses the modern aversion to unreviewability. If the system requires express preclusion, fewer decisions will be removed from judicial supervision. This view also recognizes that courts are perfectly capable of reviewing the type of decisions that might involve unbridled discretion and that those decisions are usually unreviewable only due to such factors as judicial or administrative economy. The undisputed role of the judiciary in the administrative system probably supports the view that unreviewability should be at least clearly intended if not necessarily clearly expressed.

Unbridled discretion exists because it exists. A legislature should confer unbridled discretion on an agency only upon careful reflection. Therefore, interpretation of statutes that might confer unbridled discretion should ensure that unreviewability is the legislative intention. This may not limit the court to the four corners

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130. *E.g.*, 38 U.S.C. § 211a (1982). Section 211 states: [T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision . . . .

132. 2 C. KOCH, supra note 1, § 9.32, at 144.
133. *See* H.R. REP. No. 1980, 79th Cong., 2d Sess. 41 (1946), *reprinted in Legislative History of the Administrative Procedure Act* 233, 275 (1946). The Supreme Court has both closely restricted the search for statutory preclusion and permitted broader searches of the usual aids to statutory construction. Thus, on one hand, Justice Sandra Day O'Connor, in *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984), stated:

> Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.

*Id.* at 345. On the other hand, the Supreme Court, in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), required express language to support unreviewability. *Id.* at 141.
of the statute, but it comes close to doing so.\textsuperscript{134}

Not all unbridled discretion, however, is created by statute; some unbridled discretion has evolved over time. As in the case of statutorily created unbridled discretion, these sources must be carefully scrutinized.

It is often thought that this unreviewability is expressed in the APA by section 701(a)(2).\textsuperscript{135} The term "by law" might be said to instruct a court to infer unreviewability where some law, other than specific statutory language referred to in section 701(a)(1), prohibits review.\textsuperscript{136} If section 701(a)(2) is so interpreted, either subsection (a)(1) or (a)(2), if applied to a particular agency decision, may create unbridled discretion. That is, because either a statute or evolved doctrine precludes review, a court has no function with respect to the issues covered.\textsuperscript{137}

Section 701(a)(2) should be very strictly construed to the extent it covers the creation of unbridled discretion, and traditional law or evolved legal doctrine supporting unreviewability of such discretion should be closely confined. Section 701(a)(2) has been interpreted as carrying the same presumption against unreviewability invoked for statutory preclusion.\textsuperscript{138} Indeed, because part of the law that creates such unreviewability results from judicially evolved doctrine, courts may have the power to cut back on such preclusion.

\textsuperscript{134} Unbridled discretion should be so extraordinary that it should almost always be based on a clear expression of legislative will. Although the law generally allows courts to rely on legislative history, it is not unheard of for the law to restrict judicial power to go beyond statutory language. In interpreting the language of the Freedom of Information Act exemptions, 5 U.S.C. § 552(b) (1982), for example, courts have been restricted to the words of the statute. Getman v. NLRB, 450 F.2d 670, 677-78 (D.C. Cir. 1971); Soucie v. David, 448 F.2d 1067, 1076-77 (D.C. Cir. 1971); Wellford v. Hardin, 444 F.2d 21, 24-25 (4th Cir. 1971). Techniques of statutory interpretation involving extraneous aids are extremely imprecise, requiring courts to stick to the statute's language unless that language is unclear. N. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 46.01, at 73-74 (4th ed. 1984); James v. United States, 760 F.2d 590, 593-95 (5th Cir.), cert. granted, 106 S. Ct. 379 (1985); Barnes v. Cohen, 749 F.2d 1009, 1013 (3d Cir. 1984), cert. denied, 105 S. Ct. 2126 (1985). Because unreviewability creates unbridled discretion, the law should adopt a doctrine of strict interpretation. Except in very rare circumstances, such decisions should be unreviewable only if the statute clearly so provides.

\textsuperscript{135} 5 U.S.C. § 701(a)(2) (1982) (providing that "agency action [may be] committed to agency discretion by law").

\textsuperscript{136} Id. § 701(a)(1) (providing that "statutes [may] preclude judicial review").

\textsuperscript{137} Decisions involving discretion which by its nature cannot be reviewed create another kind of discretion: numinous discretion. Numinous discretion is also unreviewable; not because a statute or law makes it unreviewable but because review is impossible. This kind of discretion might also be covered by section 701 (a)(2). Legislative history suggests that the APA's drafters meant to include both concepts in the subsection. S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945), reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 212 (1946). Regardless, two kinds of unreviewable discretion not created by direct statutory language exist: that which cannot be reviewed and that which may not be reviewed. Id. Coverage of the two raises entirely different questions and they should not be confused. The second — unbridled discretion — should not be easily inferred from the law.

\textsuperscript{138} But see Langevin v. Chenango Court, Inc., 447 F.2d 296, 302-03 (2d Cir. 1971) (unreviewability of FHA action); Hahn v. Gottlieb, 430 F.2d 1243, 1249 (1st Cir. 1970) (same).
Clearly, courts should not expand those areas for which present doctrine precludes review. Courts should infer unbridled discretion only when there is clear law against review. In *Intercity Transportation v. United States*, the D.C. Circuit outlined three criteria for identifying those cases in which unreviewability might be inferred. It interpreted section 701(a)(2) as allowing the inference of unreviewable or unbridled discretion "where there is little need to safeguard petitioner's interests, review would impair the effectiveness of agency administration, and the disputed issue is not appropriately drawn for judicial review." Although there may be authority for establishing new unbridled discretion under this section, a court should rarely do so.

Unbridled discretion is traditionally applied to military or foreign affairs. The specter of judicial control or management of government action in these areas has created a strongly established doctrine against justiciability of any cases involving challenges in those areas. A number of cases have confirmed the continued strength of that doctrine. However, the legal doctrine supporting this unbridled discretion might be carefully confined without judicial usurpation of authority.

Care must be taken in these areas because unreviewability here has some constitutional basis. It is a fundamental notion that military and foreign affairs shall be controlled by the political branches. Therefore, it might not be possible for courts to eliminate or even restrict doctrines that provide for unreviewability as to these subjects. However, it seems that, while courts should be sensitive to the constitutional problem, they might interpret the scope of the unreviewability in narrow ways. Nonetheless, if the "law" referred to in section 701(a)(2) refers to constitutional law, courts have little room to maneuver.

However, the relevant law may not be based on constitutional doctrine or statutory preclusion and courts may have substantial power to restructure the legal doctrine that prevents review. For example, the unreviewability doctrine may not be immutable with

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139. The "no law to apply" doctrine should be used only for numinous discretion, which by nature cannot be reviewed. See infra text accompanying notes 189-91.
140. 737 F.2d 103 (D.C. Cir. 1984).
141. Id. at 107.
142. See, e.g., Miranda v. Secretary of Treasury, 766 F.2d 1, 3 (1st Cir. 1985) (upholding license denial by the secretary of state acting under the authority of the Trading With the Enemy Act); Crockett v. Reagan, 720 F.2d 1355, 1356 (D.C. Cir. 1983) (dismissing a suit challenging the legality of military aid to El Salvador), cert. denied, 467 U.S. 1251 (1984); Dickson v. Ford, 521 F.2d 234, 235 (5th Cir. 1975) (per curiam) (upholding the dismissal of a taxpayer challenge to military and economic assistance to Israel), cert. denied, 424 U.S. 954 (1976).
respect to prosecutorial discretion: a law enforcement agency's decision whether or not to bring action. Such discretion is unbridled although it is not by nature beyond the capacity of the courts. Nor is there any statutory or constitutional law that demands preclusion. Here the court has the power to modify the traditional doctrine of unreviewability.

The failure to carefully consider the basis for unreviewability as to such unbridled discretion led to the mistake made in the much-criticized Supreme Court opinion in Heckler v. Chaney. Prison inmates brought actions to compel the Food and Drug Administration (FDA) to take enforcement action against the use of lethal injections to carry out the death penalty, arguing that the drugs used were not approved by the FDA for human executions. The issue was whether the decision not to act against this drug use was committed to agency discretion in a way that precluded review. The district court, the circuit court, and the Supreme Court all began with Justice Thurgood Marshall's test for reviewability in Overton Park: whether there was "law to apply." The D.C. Circuit found law to apply but the Supreme Court disagreed. As Justice William Rehnquist noted, "This case turns on the important question of the extent to which determinations by the FDA not to exercise its enforcement authority . . . may be judicially reviewed." The Court started with the presumption that a decision not to act is unreviewable. This unreviewability, it found, has evolved into a well-established doctrine that was not changed by the APA. Congress can change such law and is considered to have done so when it creates law to apply in the decision not to act, but the Court concluded that Congress had not created law to apply.

The Supreme Court's decision in Dunlop v. Bachowski, relied on by the appellate court in Chaney, found the decision not to act reviewable because the legislation "presents an example of statutory language which supplied sufficient standards to rebut the presumption of unreviewability . . . . The statute being administered quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power." In Chaney, the Court denied that its decision in Bachowski was based on

146. Id. at 1652.
147. Id. at 1654.
149. The legislative history of the APA suggests that this is the test. S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945), reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 212 (1946) ("If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review.").
150. 105 S. Ct. at 1654 (emphasis in original).
151. Id. at 1656.
153. Chaney, 105 S. Ct. at 1657.
“pragmatic considerations” and asserted that “[t]he danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance.” The decision not to act, the Court concluded, should not be considered committed to the unreviewable discretion of the agency if Congress “has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion.” The Court made it clear that it was not up to the courts to do so. Thus, it left to Congress the choice to provide review of decisions not to act.

However, the unbridled discretion at issue here is not based on any immutable doctrine. The Court could pare down prosecutorial discretion not to act because that discretion has been developed by the courts. Nothing inherent in enforcement decisions makes them unreviewable. Courts have the capacity for reviewing such decisions. Although some evolved concepts of unbridled discretion, such as foreign or military affairs decisions, may be based on constitutional doctrine, this is not true of other types, such as prosecutorial discretion. Despite a tradition of unreviewability of enforcement decisions, nothing prevents courts from limiting or reversing that tradition. Hence, the Supreme Court in Chaney had more authority than it found to change the common law that creates unbridled discretion not to act. The argument it presents supports very limited review, perhaps, but not unreviewability.

Unbridled discretion should not be confused with one of the three reviewable types of discretion discussed above. It is true that in this country prosecutors and police, for example, have prosecutorial and enforcement discretion, but there is no other reason than tradition that it should be unbridled. Often this discretion involves the necessary and beneficial discretion to individualize and can allow the system to do individual justice; prosecutors and police should not be inflexible even where the law is clear. Yet, as has been discussed, individualizing discretion can be reviewed in a limited way to assure that its exercise is consistent with the spirit of the statute. The benefits of broad prosecutorial discretion then are available without conferring unbridled discretion on the officials who exercise it. Unbridled discretion constitutes absolute authority not directly related to doing justice. Only tradition supports this unbridled discretion and legal doctrine could change this discretion into, say, individualizing dis-

154. Id.
155. Id.
156. Of course, constitutional questions would always be reviewable. Id. at 1659.
cretion. The law could develop as to this, and other types of traditional unbridled discretion, towards limited reviewability. Courts are freer to evolve such legal doctrine than they believe.

At the least, the existence of unbridled discretion should be clearly mandated. A court must obey the law, but it should also interpret sources of unbridled discretion very narrowly. Confusing it with the other uses of the term discretion can and has created bad theory of discretion and bad law about discretion. Those who insist on strict construction under the statutory preclusion provision of the APA are correct. Cases that construe common law concerning unbridled administrative discretion narrowly are equally correct. In short, there is very little good about unbridled discretion — it is at best a necessary evil brought about by such expediencies as the need to end the process or save resources for more important decisions. Therefore, the law should incorporate a very strong preference against its proliferation, and, indeed, should move away from inferring such discretion where it is not clearly established by statute or the Constitution.

B. Numinous Discretion

There is a use of the term *discretion* that is hard to define and even harder to justify. Nevertheless, it does exist and it seems necessary to the administrative system. This use of discretion covers those situations in which the agency must answer indefinite questions in the context of extreme uncertainty. A reviewing court cannot demand that a decision based on this kind of discretion be correct or even within a certain tolerance of potential correctness. This kind of discretion cannot be held to some expressed, implied, or derived standard. For this reason, I call the exercise of such decisionmaking authority “numinous discretion.”

In reviewing individualizing, executing, and policymaking discretion, a court can review according to the proper standard, which tells the court how much risk of error it must tolerate. Decisions reached in the exercise of unbridled discretion could be tested under one of these standards, but that review is not permitted.\(^{157}\) Numinous discretion is unique because it cannot be tested for error or probability of error. Jurisprudential literature might identify this form of discretion as the “strong sense” of the term.\(^{158}\) Professor Louis Jaffe has observed this use of the term

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\(^{157}\) If permitted to do so, a court could test these decisions for the risk of error prescribed by the standard. 2 C. Koch, *supra* note 1, § 9.2, at 85.

\(^{158}\) Dworkin has explained the meaning of this strong sense of the term:

Sometimes we use “discretion” in a weak sense, simply to say that for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment. . . . We use “discretion” sometimes not merely to say that an official must use judgment in applying the standards set [for] him by authority, or that no one will review that exercise of judgment, but to say that on some issue he is simply not bound by standards set by the authority in question. . . . An official’s discretion means not that he is free to decide without recourse to standards of sense and fairness, but only that his decision is not controlled by a standard fur-
discretion in the administrative process. He recognized that review of discretion involves a variety of different functions based on the fundamental existence of "a purported application of the statutory grants of power to the facts as found." He separated these grants according to the three types of "rules" they might create. Two of these three types involve decision making where the application of facts is conclusive. In contrast, the third type of decision making is entirely different in character — the authorization merely suggests what type of facts are relevant but does not make them conclusive. When the grant is of this nature, the agency must exercise numinous discretion. For such discretionary decision making, any standard that might be found or derived from the grant only guides the decision; it cannot control the exercise of this form of discretion because this type of decision making involves more than the mere application of standards. When this type of decision is asked of the agency process, the agency must exercise "true discretion" or discretion in the strong sense — numinous discretion.

It is difficult to accept numinous discretion; we expect a scientific search for the right answer from all decision makers. Nevertheless, some, perhaps many, decisions must be made about questions with vague contours in an atmosphere of extreme uncertainty. Agencies are often forced to make such decisions and courts must review those decisions differently from any other form of administrative decision making. As Professor Ronald Dworkin noted, the official "can be criticized, but not for being disobedient." That is, the exercise of this form of discretion cannot be evaluated against some standard of correctness.

Although it may be difficult to accept the concept of such decision making, it surfaces in many aspects of our lives. For example, I once met a doctoral candidate who claimed his dissertation would demonstrate that Huckleberry Finn is homosexual. I assert that nowhere in the novels is Huck described as gay — hence

R. Dworkin, supra note 2, at 31-33.

159. L. Jaffe, Judicial Control of Administrative Action 555-56 (1965).
160. Id. at 555.
161. Id.
162. R. Dworkin, supra note 2, at 33.
163. I am indebted to Professor Dworkin for the concept of this example. See Dworkin, No Right Answer?, 53 N.Y.U. L. Rev. 1, 19-20 (1978).
we must argue from the text as to whether he is gay.\textsuperscript{164} There is no way to prove conclusively that Huck is or is not gay. Huck is just a character in a body of literature. He has no life story outside Twain's books. In the most literal sense he is not gay or not not gay. He may be dirty or foulmouthed or orphaned, but he has no sexual proclivities.

Fortunately, people can make a living arguing about such things and writing research materials about them. But no one can prove Huck is gay. Now, the panel of scholars that pass on the dissertation will no doubt consider whether the argument is plausible, but they will not be able to reach a conclusion as to whether Huck is gay. Even if Mark Twain himself were to emerge, like Marshall McLuhan in \textit{Annie Hall}, and proclaim that if he had considered the question he would have made Huck gay, there is still no definitive answer to the question.

Now, assume Congress sets up a Literary Character Sexual Proclivity Commission (LCSPC or, if they put it in the Defense Department, LiChaSeProC). How would this agency decide whether Huck is gay? I contend that they could not. But they would be required by statute to decide and, under the circumstances, the agency would have no choice but to reach a conclusion. This is a delegation of numinous discretion.

Suppose the agency decides that Huck is not gay. How could a court review its conclusions? The reviewing court could disagree and could even substitute its numinous discretion for that of the agency, ruling that Huck will henceforth be gay; but the court cannot evaluate the agency's decision for error or even probability of error. The exercise of this type of decisionmaking simply cannot be shared by another authority nor can its results be evaluated without appropriating the decisionmaking function.

In many instances, agencies are given such decisionmaking responsibilities.\textsuperscript{165} More to the point, courts are sometimes asked to review such decisions. Because numinous discretion can only be exercised by one authority, a court that is not careful to recognize this kind of discretion may inadvertently usurp authority.\textsuperscript{166} If the court reverses the agency, it is assuming the numinous discretionary authority and not merely monitoring its use.\textsuperscript{167}

Perhaps the most famous example of numinous discretion is the central issue in the FDA's peanut butter rule debacle — whether peanut butter should have eighty-seven percent or ninety percent peanuts.\textsuperscript{168} What is the correct percentage of peanuts in peanut butter anyway? Surely this controversy dragged on because of the

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\item \textsuperscript{164} I have read four books in which Huck appears as a character and find nothing, other than reference to pretty girls, to suggest his sexual preferences.
\item \textsuperscript{165} \textit{E.g.,} S. BREYER, \textit{REGULATION AND ITS REFORM} 106-07, 115, 136 (1982).
\item \textsuperscript{166} 2 C. KOCH, \textit{supra note 1}, § 9.34, at 147.
\item \textsuperscript{167} Koch, Confining Judicial Authority Over Administrative Action, 49 Mo. L. REV. 183, 214-15 (1984).
\item \textsuperscript{168} Hamilton, Rulemaking on a Record by the Food and Drug Administration, 50 TEX. L. REV. 1132, 1144 (1972).
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nature of the decision more so than any defects in the rulemaking procedures. The correct answer simply could not, no matter how long it took, be demonstrated. Of course the agency could compile materials relating to the issue. In fact, the parties piled 7,736 pages of junk into the record during nine years, but nothing could show that eighty-seven percent was more or less correct (or even had a greater likelihood of correctness) than ninety percent. Ultimately, the FDA officials had to make an educated choice between the two numbers; whether it took a week or nine years to do so. Although some extreme content regulation or percentage would have been beyond FDA authority as outside its statutory mandate, the range of equally correct answers was very broad. In short, the agency had numinous discretion within that range and there is no way a reviewing court could have monitored the agency’s choice without substituting judicial numinous discretion for the agency’s numinous discretion. Numinous discretion is involved in a number of administrative decisions.

There is a tendency to consider numinous discretion as the suspension of reasoned or considered decisionmaking. However, when correctly applied it is not only a proper administrative function — it is one of the strengths of the administrative process. Decisions must often be made in the context of extreme uncertainty and failure to make an uncertain decision is itself a decision not to act. Thus, whether compelled by statute or by circumstance, agencies are often called upon to make decisions that cannot be defended as being correct or even within a tolerance of correctness.

The essence of such decisionmaking is that knowable factors

169. Id.
170. E.g., Corn Prods. Co. v. FDA, 427 F.2d 511 (3d Cir.), cert. denied sub nom. Derby Foods, Inc. v. FDA, 400 U.S. 957 (1970). Courts, like the Third Circuit in reviewing the peanut butter rule, often try to review such issues but instinctively avoid the dilemma suggested here by assigning the burden of persuasion. Because potential correctness cannot be demonstrated, the side with the burden of persuasion simply loses.
171. The purest examples of numinous discretion are trivial: Why is a 30-day filing deadline better than a 45-day deadline or 10 copies better than 8? The General Assembly of Virginia, for example, recently determined that state employees could be reimbursed for no more than $35.00 per day for meals and lodging. 1980 Va. Acts 224 (amending VA. CODE ANN. § 14.1-5 (1979)). I defy anyone to demonstrate that $35.00 is more correct and reasonable than $38.49. Many exercises of numinous discretion are not trivial, however. Decisions requiring a concrete vision of the future are ready examples of important administrative decisions centered around the exercise of numinous discretion. This is true even though some day the correct answer will be available; the future will be now.
172. “It may be that terms like 'choice,' 'discretion,' and 'judicial legislation' fail to do justice to the phenomenology of considered decision: its felt involuntary or even inevitable character which often marks the termination of deliberation on conflicting considerations.” Hart, Problems of Philosophy of Law, in 6 ENCYCLOPEDIA OF PHILOSOPHY 264, 271 (P. Edwards ed. 1972).
pass through an unknowable process toward a decision. Jaffe explains that this type of discretion compels
the administrator to resort to a whole complex of additional concepts and attitudes, official and personal, some of which . . . he may not express, some which he may be unaware of . . . . The mind focuses attention for a period of time on a group of authoritative decisional factors. But ultimately it reaches decision by an intuitive leap.\footnote{173}

The process to decision can be analogized to an intuitive mental process. Intuition is knowing without conscious reasoning; it is the ability of the subconscious mind to synthesize variables in a more complex way than can the conscious mind.\footnote{174} For instance, one can recognize the color blue but be hard-pressed to define the color in words. It would be even more difficult to be asked to define the color and then select it from among other colors according to the definition. Selecting the color from among other colors would not only be simpler but more accurate if the senses — the intuitive process — were permitted to act.

The equivalent of intuitive thinking in a bureaucracy is combining various talents and strengths in a group decisionmaking process. This blending of decisionmaking elements creates what might be called "decisional synergism."\footnote{175} Blending the experience and knowledge of a number of individuals develops a better decision than does the sum of each individual's experience and expertise.\footnote{176}

One of the advantages of the administrative process is that it can create diverse groups of decisionmakers and bring them to bear in a variety of combinations, producing a synergistic effect. Just as an individual thinking intuitively synthesizes an immeasurable array of data, an administrative process can bring together a variety of instincts, values, sensitivities, experience, and knowledge. The advantage of the agency decisionmaking is not limited to the special procedures designed for specific types of questions; it includes the specially-designed blending of contributors to the decision.

The essence of review of these decisions cannot be understood without recognizing that the advantage of some administrative decisionmaking lies in the interaction of these decisionmaking elements. Often this interaction can be rationalized and structured, but sometimes it must be given free rein, just as intuition must be free. A court that fails to distinguish the exercise of numinous discretion from other forms of agency decisionmaking robs the administrative process of its richness and eliminates one of its great-

\footnote{173. L. JAFFE, supra note 159, at 555-56; see also Hart, supra note 172, at 264, 270 ("The presence or absence of logic in the appraisal of decisions may be a reality whether the decisions are reached by calculation or by an intuitive leap.").}

\footnote{174. See P. ANGELES, DICTIONARY OF PHILOSOPHY 137 (1981) (defining intuition as "[t]he power (ability) to have immediate, direct knowledge of something without the use of reason").}

\footnote{175. Koch, supra note 167, at 213.}

\footnote{176. See id.}
est strengths. A court that tries to interfere in numinous discretion not only usurps authority but diminishes the decision-making in a way for which it cannot compensate. In no other type of discretion must the court exercise more care.

Freedom is the crucial element in this type of decisionmaking, even more so here than with the other types of discretion. Uncertainty is so great that there is no way to evaluate the decision even in terms of probability of correctness. As with Huck Finn's sexual proclivity, the answer is neither right nor wrong. Yet the agency must make some "rough judgment" or no decision is possible. The absence of any sense of correctness forces us to rely upon the interaction of decisionmaking elements rather than upon the qualities of the decision itself. For this reason, the mental process involved in numinous discretion cannot be shared with or evaluated by the court.

Nevertheless, courts do have some function with respect to the exercise of such discretion. First, as always, the court has ultimate authority over the question of law: Does the agency have numinous authority? If the agency does, the court must focus its attention on the environment surrounding the decisionmaking process and on the external elements bearing on that decision. Initially the court must ensure that the decisionmaking process is fair and just. As Dworkin stated, "An official's discretion means not that he is free to decide without recourse to standards of sense and fairness, but only that his decision is not controlled by the standard furnished by the particular authority . . . ." Next the court must determine whether all proper and relevant decisional elements have been brought together in a way calculated to take full advantage of decisional synergism and that all relevant factors entered the synergistic decisionmaking process. Having gained this assurance, the court must ensure that the administrative decision reflects the appropriate use of these elements. As Jaffe stated, the decisionmaker "may freely use all permissible elements, though an excessive emphasis on one to the exclusion of other elements may be an 'abuse of discretion.'"

177. See S. Breyer, supra note 165, at 117.
178. Thus, we rely upon the "more informed uncertainty" of the expert agency. Id. at 141; see Frug, supra note 47, at 1318 ("Bureaucracy, in [the expertise] model, is not an impersonal machine but a social system, a way of mobilizing all aspects of human personality in order to transform individuals into a functioning group.").
179. S. Breyer, supra note 165, at 148.
180. It is well-established that courts cannot properly delve into this mental process. E.g., Morgan v. United States, 304 U.S. 1, 18 (1938) (stating that "it is not the function of the court to probe the mental processes of the agency head").
181. R. Dworkin, supra note 2, at 33.
182. L. Jaffe, supra note 159, at 555.
Therefore, review tends to focus on the agency’s explanation for its discretionary choice. Such a discretionary decision cannot be supported in the same way a judgment can, but it can be justified, giving consideration to relevant factors as well as explaining the elements of experience and expertise that entered into the decisionmaking. Requiring reasoned decisionmaking does not inject the court into the exercise of discretion as long as the court looks only at the soundness of the discretionary decisionmaking process.

In addition to ensuring that the decisional process functions properly and that all relevant factors entered the discretionary decisionmaking process, the court must consider external pressures that might have affected the operation of that process. Numinous discretion is not exercised in a vacuum, and the court must ensure that an agency is not improperly influenced. The court must distinguish unacceptable pressures from beneficial ones. Therefore, the reviewing court must take care to sort out those pressures that properly channel discretion from those that improperly skew the decision. A reviewing court might, for example, overturn discretionary action because the discretionary decision is the result of bias or influence. Although the mere existence of such elements is not enough to conclude that the exercise of discretion is tainted, it might justify a finding of abuse of discretion when there is substantial potential that impermissible pressures disrupted the internal workings of the decisionmaking process. The subtlety necessary for this analysis is shown by the fact that only a very limited variety of bias has been found inappropriate for administrative decisionmaking. On the other hand, a likelihood that some prohibited form of bias or influence has distorted the discretionary process would justify a finding of abuse.

Nonetheless, the core discretionary decision that is the result of numinous discretion cannot be reviewed. The APA provides for the inherent unreviewability of numinous discretion. Section 701(a)(2) precludes review of discretionary decisions that are “committed to agency discretion by law.” The introductory phrase in section 701 — “to the extent that” — should be read with this provision. The section can then be interpreted as precluding review when the assignment of discretion is so complete that judicial scrutiny would be improper and the decision is so committed to agency discretion as to foreclose the possibility of a role for the courts. In short, this subsection of the APA can be

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186. S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945), reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 212 (1946) (“If, for example, statutes
said to preclude review of numinous discretion.

The best judicial effort to deal with numinous discretion is the Supreme Court's opinion in *Citizens to Preserve Overton Park v. Volpe*.\(^{187}\) In trying to make sense out of section 701(a)(2), the Court developed a useful perspective on the special type of agency decision that it calls "wide discretion"\(^{188}\) — numinous discretion here. In interpreting this section, the Court provided a standard for determining whether a decision is so committed to agency discretion as to make it beyond judicial scrutiny by its very nature. Discretion of this strength, as opposed to that covered by the abuse standard of section 706, is numinous discretion. Therefore, this case is particularly instructive in identifying such discretion even though it focused on the interpretation of section 701.

Arguing against judicial authority over the Secretary of Transportation's decision to approve a highway through a public park, the government in *Overton Park* contended that such decisions were so committed to the secretary's discretion as to preclude review. The Court found that an agency decision could be beyond review only when there was "no law to apply."\(^{189}\) The Court meant by "no law to apply" that there are no standards by which to evaluate the decision. If there are no standards to apply, a court cannot review a decision without usurping the discretionary function assigned to the agency.\(^{190}\) The decision is to be the result of the agency's intuitive or numinous discretionary process, not a court's.\(^{191}\)

Therefore, the scope of unreviewability of discretionary decisionmaking, as interpreted by the Supreme Court in *Overton Park*, fits the conclusion already reached about the nature of numinous discretion. When there are standards by which the decision can be evaluated, whether expressed by or derived from the law, courts can exercise proper review by using these standards. If no standards exist, or the standards are intended only to guide the agency decision, the decision involves numinous discretion. As the Supreme Court stated, there is "no law to apply" when no standards exist or when the standards are not mandatory. Although these decisions can be monitored by courts searching for the ex-

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\(^{188}\) *Id.* at 411.

\(^{189}\) *Id.* at 410.

\(^{190}\) H.R. REP. NO. 1980, 79th Cong., 2d Sess. 41 (1946), reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 275 (1946) ("Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning.").

ternal defects discussed above, the core of the decision cannot be judged for error or risk of error.

One example of the application of this concept of unreviewable discretion is Greenwood Utilities Commission v. Hodel. A municipal power agency questioned the allocation of power to it by the Department of Energy. In the Flood Control Act, Congress gave the Department authority to distribute excess power generated at flood control dams. The Eleventh Circuit found that this decision was committed to the Department's unreviewable discretion under section 701(a)(2) because there was "no law to apply." It found that the Act merely established "a series of general directives" and did not create a standard by which a court could review the agency's distribution decision.

The court relied on the Supreme Court's opinion in Heckler v. Chaney. Although the Supreme Court reaffirmed the significance of numinous discretion in Chaney, the Chaney court in the case before it may have mistaken numinous discretion for the other form of unreviewable discretion covered by subsection 701(a)(2): unbridled discretion created by legal doctrine. The agency decision in Chaney may have been unreviewable, but not because it was an inherently discretionary decision. Decisions not to enforce are not precluded from review by their nature; they are precluded from review by the common law of review of agency action. As noted earlier, this type of unreviewable discretion differs markedly from numinous discretion. For this reason, the Chaney Court may have been less constrained to rework the law of unreviewable discretion than it believed. Although apparently under the impression that it was facing the same type of discretion that was at issue in Overton Park — numinous discretion — it probably was not.

The "wide discretion" at issue in Overton Park is by nature unreviewable and cannot be made reviewable. In this way it differs from all other uses of the term discretion and has properties that limit how it can be conferred or confined. The only alternative for Congress is to assign such discretion to another body. The only

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192. 764 F.2d 1459 (11th Cir. 1985).
195. Greenwood, 764 F.2d at 1464.
197. Davis asserts that the "no law to apply" test neither follows the APA's legislative history nor reflects the reality of judicial behavior. K. Davis, Statement before the 46th Annual Judicial Conference of the District of Columbia Circuit (May 21, 1985) (available from the clerk of the D.C. Circuit). Perhaps the idea of numinous discretion meets his dissatisfaction with the expression of that test. His examples of judicial review where there is no law to apply involve cases where the court could evaluate the decision without necessarily substituting their discretion for the agency's discretion. These cases did not involve numinous discretion, because the issue was not by nature incapable of being reviewed. What Davis is objecting to, put in my terms, is the inappropriate inference of unbridled discretion.
198. See supra text accompanying note 144.
199. See supra text accompanying notes 145-56.
alternative for a court is to take the discretion away from the agency and either exercise it itself or determine that the discretion has been assigned to another institution. Numinous discretion cannot be shared or subdivided between the agency and the court. Once the court determines that an agency has such discretion, it must leave the core decision alone.