

# REVIEWING REVIEWABILITY

Rose Carmen Goldberg\*

## INTRODUCTION

*Heckler v. Chaney*<sup>1</sup> stands out amongst the Supreme Court's reviewability case law for its particularly narrow basis of decision—agency action versus inaction. I argue that this approach is flawed. I start by critically comparing *Chaney* to other key reviewability cases and discussing two downsides to the action-inaction framework that these juxtapositions reveal. First, it is manipulable. Action and inaction are not subject to strict definition, which can result in inconsistent holdings. Second, it distracts courts from cases' real-life stakes by prompting them to focus on a dividing line divorced from underlying interests. Next, I consider counterarguments to my interpretation of these two features as pitfalls. I conclude that the action-inaction framework should be modified instead of replaced, despite its flaws. It has benefits that make it worth saving.

## I. CRITICAL COMPARISONS

### A. *Chaney v. Abbott*

In *Chaney*, inmates brought suit to compel the Food and Drug Administration (FDA) to take enforcement action to restrict access to drugs used in lethal injections.<sup>2</sup> The Court declined to weigh in on the legality of the agency's decision to forgo enforcement measures, finding that the presumption of unreviewability of agency inaction had not been overcome.<sup>3</sup> In *Abbott Laboratories v. Gardner*,<sup>4</sup> on the other hand, the Court found that a suit brought by drug companies against the FDA did raise issues fit for judicial review. The companies

---

\* J.D., Yale Law School, 2015; M.P.A., Columbia University, 2008; B.A., St. John's College, Santa Fe, New Mexico, 2006.

<sup>1</sup> 470 U.S. 821 (1985).

<sup>2</sup> *Id.* at 823.

<sup>3</sup> *Id.* at 837-38.

<sup>4</sup> 387 U.S. 136 (1967).

had challenged a regulation requiring printed materials for prescription drugs to name generic counterparts.<sup>5</sup>

Comparing *Chaney* and *Abbott* illustrates the manipulability of the action-inaction standard. The Court uses different definitions of action in each case without a clear basis for doing so, and these definitional distinctions are significant. Indeed, use of different definitions might have resulted in opposite outcomes. For instance, if the Court had applied *Abbott's* definition in *Chaney*, it might have found review warranted. In finding the FDA's action reviewable, the *Abbott* Court asserted that reviewable action "includes any 'rule,' defined by the [APA] as 'an agency statement of *general or particular* applicability and *future effect* designed to implement, interpret, or *prescribe* law or *policy*.'"<sup>6</sup> The agency behavior in *Chaney* falls under this definition too. The FDA's statement that it would not pursue enforcement is "general or particular," of "future effect," and "prescribes" its "policy" of non-enforcement in such cases.

One could argue, however, that the Court could not apply the *Abbott* definition in *Chaney*. *Abbott's* reviewability definition derives its authority from APA § 704, which specifically creates a cause of action for review of agency action. This empowering provision only applies if the APA's two reviewability exceptions (§ 701(a)(1) and (2)) do not. The *Chaney* Court found the second exception, which establishes that actions "committed to agency discretion" are not reviewable, applicable.<sup>7</sup> This precludes application of § 704 in *Chaney*. So according to at least one interpretation of the APA, the Court legitimately applied different definitions in these two cases.

This defense is unsatisfying. Arguably, the FDA was no more operating in a zone of discretion in *Chaney* than in *Abbott*. In each, review was sought for an enforcement decision. That the decisions were contrary (pro- versus anti-enforcement) is not a relevant difference. The reasoning behind the *Chaney* Court's assertion that non-enforcement is left to agency discretion applies to planned enforcement as well. According to *Chaney*, non-enforcement is generally left "to an agency's absolute discretion" because it involves prioritization of resources and evaluation of odds of success.<sup>8</sup> Positive enforcement decisions rest on these very same factors. In this light, *Abbott* and *Chaney* both appear to fall under the APA's second exception for agency discretion and review is not appropriate in either. It follows, then, that the APA does not provide an airtight justification for these two cases' divergent definitions of reviewability.

Conversely, use of the *Chaney* definition in *Abbott* could have led *Abbott* to come out the other way. The *Chaney* Court defines reviewable action as an "exercise [of] power."<sup>9</sup> By way of illustration, it points to an agency's approval

---

<sup>5</sup> *Id.* at 139.

<sup>6</sup> *Id.* at 149 (emphases added).

<sup>7</sup> *Chaney*, 470 U.S. at 832.

<sup>8</sup> *Id.* at 831.

<sup>9</sup> *Id.* at 832.

of a building proposal in *Citizens to Preserve Overton Park v. Volpe*.<sup>10</sup> Through the lens of *Overton Park*, *Abbott* resembles *Chaney*; neither involved an “exercise [of] power” in the sense that *Overton Park* did.<sup>11</sup> In *Overton Park*, the building approval can be viewed as an exercise of power in that it changed parties’ ability to enjoy a park. In other words, the agency exercised power over private parties by *concretely* changing their rights. In *Abbott* and *Chaney*, in contrast, the change resulting from the agency’s behavior was uncertain or non-existent. In *Abbott*, whether the prescription drug regulations would result in change for particular parties, the petitioner drug companies or otherwise, was uncertain since the precise path of enforcement was still unclear. The FDA had not enforced the regulations yet when the case reached the Court.<sup>12</sup> Similarly, in *Chaney* the Court found that the FDA’s refusal to enforce was not an exercise of power because it did not result in tangible change for the inmates.<sup>13</sup> The FDA’s inertia left the supply of lethal injection drugs at its status quo. This analysis suggests that the Court could have applied the *Chaney* definition in *Abbott*.<sup>14</sup> Both were demands for review without real agency action. Thus, the action-inaction framework entails the risk of definitional inconsistency. It gives courts the freedom to bend definitions when resolving essentially similar issues, perhaps to reach preferred outcomes.

#### B. *Chaney v. CBS*

Juxtaposition of *Chaney* and *CBS v. United States*<sup>15</sup> reveals a second cost to the action-inaction framework—distraction from the interests at stake. *Chaney*’s narrow focus on the action-inaction divide obscures the underlying interests. The *Chaney* Court devotes its analysis to assessing the “*general* unsuitability for judicial review of agency decisions to refuse enforcement.”<sup>16</sup> It only superficially acknowledges that review is being sought for potentially painful death through lethal injection.<sup>17</sup> Such judicial inattentiveness could give agencies broad license to inflict harm so long as their behavior can be depicted as inaction. That this characterization might be colorable in some cases is not

---

<sup>10</sup> *Id.* at 831-33 (discussing *Overton Park*, 401 U.S. 402 (1971)).

<sup>11</sup> *Id.*

<sup>12</sup> See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-40 (1967) (discussing whether the FDCA precluded pre-enforcement review of regulation).

<sup>13</sup> *Chaney*, 470 U.S. at 832.

<sup>14</sup> *Chaney* was decided after *Abbott*, so *Abbott* could not actually have relied on *Chaney*. My point is that the Court could have used a definition comparable to *Chaney*’s in *Abbott*.

<sup>15</sup> 316 U.S. 407 (1942).

<sup>16</sup> *Chaney*, 470 U.S. at 831 (emphasis added).

<sup>17</sup> *Id.* at 838 (dismissing the fact that the respondents were facing the death penalty as irrelevant to the analysis).

cause for lessened concern. “Mightn’t people be injured, and statutes be undone, as much by inaction and nonenforcement as by overzealous action?”<sup>18</sup>

In contrast to *Chaney*, *CBS* gives decisive weight to the interests at stake. In *CBS*, the Court finds the Federal Communications Commission’s (FCC) promulgation of radio contract regulations reviewable. In so holding, the *CBS* Court focuses on the “threat of irreparable injury” in finding that the agency’s behavior is subject to review.<sup>19</sup> Although the *CBS* Court does mention the action-inaction standard, it does so only obliquely and to disclaim its relevance. It asserts that the lack of enforcement action does not counsel against review, and points to the practical effect as dispositive: “The regulations are not any the less reviewable because their promulgation did not operate of their own force to deny or cancel a license. It is enough that failure to comply with them penalizes.”<sup>20</sup>

There are strong grounds for arguing that application of *CBS*’ practical effect standard in *Chaney* would have resulted in a finding of reviewability. Chiefly, the threat of irreparable injury in *Chaney* was greater than in *CBS*. Physical pain, like the suffering the *Chaney* death row respondents were at risk of, is irreparable insofar as the experience cannot be undone. In the death penalty context, irreparability could be viewed as complete. Death puts *ex post* remedy of any kind out of reach for the injured. In contrast, the harm that could result if the *CBS* contracts were cancelled is at least partially reparable; financial restitution could go a long way.

A counterargument could be raised that in quantitative terms, the potential injury in *CBS* was greater. More money was likely at stake, and the lost contracts might have affected more people (through broadcasting changes) than a few prisoners’ suffering. Yet however drastic these effects, the state rightly tends to view threats to life and limb as more serious. To provide but one example, the death penalty is generally reserved for those guilty of physical violence. The *Chaney* Court does not provide justification for the fact that its holding, when viewed next to the earlier *CBS* ruling, departs from this hierarchy of harms. Rather, it appears more focused on the action-inaction divide. This incongruity counsels against use of this narrow standard.

## II. COUNTERARGUMENTS TO THE PITFALL PERSPECTIVE

The foregoing critique of the action-inaction framework rests on at least two assumptions. Namely, definitional manipulability and distraction from real-life stakes are each unequivocally negative. These premises are vulnerable to several counterarguments. For one, questions of reviewability involving differ-

---

<sup>18</sup> Stephen Breyer et al., *Administrative Law and Regulatory Policy* 845 (7th ed. 2011).

<sup>19</sup> *CBS*, 316 U.S. at 423.

<sup>20</sup> *Id.* at 417.

ent agencies might warrant different definitions because agencies perform diverse functions. For instance, an FCC-appropriate definition might characterize action as a taking, with an eye to the FCC's focus on levying fines. In contrast, Department of Health and Human Services' (HHS) cases might call for a definition that centers on bestowal, since benefits might be viewed as HHS' primary mandate. Manipulability facilitates such tailoring.

Even if definitional flexibility is viewed as a negative, perhaps because the window it opens for judicial caprice is viewed as countervailing, this risk is not exclusive to the action-inaction framework. Notably, the *CBS* practical effect standard is also susceptible to manipulation. Use of this standard could give rise to different results depending on whether the underlying metric is quantitative or qualitative, for instance. Moreover, even the most strictly defined standard cannot completely stifle definitional freedom. Different dictionaries sometimes paint the exact same term in different colors and courts can, albeit more or less persuasively, point to contextual differences to justify a different gloss. Thus, replacing the action-inaction standard would at best lessen definitional discretion; it would not remove it.

Action-inaction defenders could further argue that it only creates a presumption. *Chaney* highlights this point: “[W]e emphasize that the decision is only *presumptively* unreviewable.”<sup>21</sup> This raises the possibility that the standard might not completely distract courts from real stakes. Factors outside the action-inaction divide could be the basis of rebuttal. Yet *Chaney* restricts what can serve as this counterweight, giving the power of rebuttal to Congress alone: “[T]he presumption may be rebutted where the substantive statute has provided guidelines.”<sup>22</sup> So some cases might be irrefutably unreviewable irrespective of their high stakes. *Chaney* is a case in point.

Unrebuttable unreviewability and the attendant distraction from real stakes might be most likely in cases primarily affecting the politically powerless, like the prisoners in *Chaney*. Congress has relatively little incentive to legislate specifically for their protection, with the consequence that the guidelines *Chaney* requires for rebuttal might be lacking. Justice Marshall's concurrence in *Chaney* extends the cause for concern beyond the politically powerless, providing grounds for a general distaste for the narrow scope of rebuttability. He points to motives agencies might have to refuse to enforce (e.g., “vindictiveness or retaliation”) that Congress might not specify but that should nonetheless be subject to review.<sup>23</sup> Indeed, in its current form, rebuttability is no panacea. At best it is a partial and selective counter to distraction from human circumstances.

---

<sup>21</sup> *Chaney*, 470 U.S. at 832 (emphasis added).

<sup>22</sup> *Id.* at 832-33.

<sup>23</sup> *Id.* at 852 (Marshall, J., concurring) (citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980)).

Yet distraction from real-life stakes, like manipulability, is not without potential benefits. It might guard against emotional judicial decision-making that departs from the law. It might also help judges cabin their analyses to reviewability, whereas close consideration of facts might tempt them to consider how controversies should ultimately be resolved. This could bias reviewability determinations. So perhaps the action-inaction framework is not wholly flawed, and the critical question is not what should replace it. Rather, through recognition of the standard's bivalence, the query shifts. How can the Court capitalize on the standard's benefits while tempering its risks? Reconsideration of the grounds for rebutting presumptions of unreviewability, with Justice Marshall and this essay's concerns in mind, would be a fruitful start in answering this question.