NOTES

Administrative Law—Labor Law—Reviewability of the Secretary of Labor's Determination Not to File Suit Under Section 402 of the LMRDA—*Dunlop v. Bachowski*[1]—In a United Steelworkers of America (USWA) election held on February 13, 1973, Walter Bachowski was an unsuccessful candidate for district officer of District 20.[2] Claiming that violations of section 401 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)[3] had occurred, Bachowski requested the USWA to set aside the District 20 election. The Union refused to comply with Bachowski's request.[4] On June 21, 1973, after exhausting his intra-union remedies, Bachowski filed a complaint with the Secretary of Labor pursuant to section 402(a) of the LMRDA,[5] thus invoking section 402(b)[6] which requires the Secretary to investigate the complaint and to decide whether to file suit against the union to set aside the election.[7] After conducting an appropriate investigation, the Secretary determined not to file suit against the USWA to set aside the District 20 election.[8]

Upon receiving notice of the Secretary's decision, Bachowski filed suit in district court naming the Secretary and the USWA as defendants.[9] Bachowski sought a judgment declaring that the

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[1] 421 U.S. 560 (1975).

[2] *Id.* at 562. The election results were: Kluz (incumbent)—10,558, Bachowski—9,651, and Brummett—3,566. *Id.* In 1973, District 20 was the fourth largest district in the USWA with 67,419 members and 190 locals. *Id.* at 579.

[3] 29 U.S.C. § 481 (1970). Section 401 establishes requirements for union elections. Bachowski alleged four violations: (1) that some union members were denied the right to vote by secret ballot as required by § 401(a); (2) that observes were not allowed at the polling places and at the counting of ballots in violation of § 401(c); (3) that the union violated its own constitution and failed to allow voting in one local as required by § 401(e); and (4) that the union used dues to promote the candidacy of Kluz in violation of § 401(g). Brief for Respondent at 3, Dunlop v. Bachowski, 421 U.S. 560 (1975).

[4] 421 U.S. at 562.

[5] 29 U.S.C. § 482(a) (1970) provides in part: "A member of a labor organization—(1) who has exhausted the remedies available under the constitution and bylaws of such organization . . . may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title . . . ."

[6] 29 U.S.C. § 482(b) (1970) provides in part:

> The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election . . . .

[7] 421 U.S. at 562-63.

[8] Five other complaints were filed with the Secretary concerning district races in the USWA's February 13, 1973 election. The Secretary brought suit against the USWA based on two of the complaints. *Id.* at 563.

[9] It is not clear why the USWA was included as a defendant. Bachowski may have hoped that the court would set aside the District 20 election directly rather than remanding to the Secretary.

Secretary's action was arbitrary and capricious and an order compelling the Secretary to file suit against the USWA.[10] The district court dismissed the complaint on the grounds that under section 701(a) of the Administrative Procedure Act (APA)[11] the Secretary's decision whether to bring suit is not subject to judicial review.[12] The United States Court of Appeals for the Third Circuit, in reversing the district court, held that section 701(a) does not preclude judicial review of the Secretary's determination and ordered the Secretary to provide the plaintiff with a statement of the factors upon which the decision not to file suit was based.[13]

On writ of certiorari, the United States Supreme Court in an 8-1 decision HELD: (1) the Secretary's refusal to file suit under section 402 of the LMRDA is reviewable under sections 702 and 704 of the APA;[14] (2) the availability of this judicial review requires the Secretary to provide a complaining union member and the court with a statement of reasons supporting his determination;[15] and (3) the scope of this judicial review is limited to a determination of whether the Secretary's statement of reasons reveals that his decision is so irrational as to be arbitrary and capricious.[16] The Court's first holding, concerning the reviewability of the Secretary's decision, was based on a determination that the LMRDA contains no express or implied congressional intent to bar such review.[17] The final holding of the Court, establishing a limited scope of review, was based on the understanding that "the statute relies upon the special knowledge and discretion of the Secretary for the determination of both the probable violation and the probable effect, [and thus] the reviewing court is not authorized to substitute its judgment for the decision of the Secretary not to bring suit . . . ."[18] In order to effectuate this congressional intent while at the same time permitting intelligent judicial review of alleged

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[10] 421 U.S. at 563-64. In addition to Bachowski, one other USWA member whose complaint was rejected filed suit against the Secretary. See Valenta v. Brennan, Civil No. 74-11 (N.D. Ohio 1974).

[11] 5 U.S.C. § 701(a) (1970) which provides: "This chapter applies, according to the provisions thereof, except to the extent that —(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

[12] Bachowski v. Brennan, Civil No. 73-0954 (W.D. Pa. 1973). Technically, the district court dismissed the action for a lack of subject matter jurisdiction. Bachowski v. Brennan, 502 F.2d 79, 83 (3d Cir. 1974). The court of appeals, finding subject matter jurisdiction under 28 U.S.C. § 1337 (1970) (district court has jurisdiction over cases arising under act of Congress regulating commerce), treated the issue as whether Bachowski had stated a claim upon which relief could be granted. *Id.* at 82-83. The Supreme Court stated that in view of its determination that § 701(a) did not bar review, the technical grounds for the district court's dismissal were immaterial. 421 U.S. at 564 n.4. The distinction between subject matter jurisdiction and reviewability is discussed at note 25 *infra*.

[13] 502 F.2d at 86, 90.

[14] 421 U.S. at 566.

[15] *Id.* at 571.

[16] *Id.* at 572-73.

[17] *Id.* at 566-68.

[18] *Id.* at 571.

abuses of discretion, the Court, in its second holding, required the Secretary to provide a statement of reasons supporting his decision.[19]

Bachowski is significant on two levels. On a narrow level, the case resolves a *labor law* issue that has confused lower federal courts for several years; namely, whether the refusal of the Secretary to file suit under section 402(b) of the LMRDA is subject to judicial review.[20] On a broader level, *Bachowski* presents the most recent Supreme Court treatment of two of *administrative law's* most troublesome concepts: reviewability and the scope of review once an issue is determined to be reviewable.[21]

This note will explore the *Bachowski* decision in two parts; the first dealing with the reviewability aspects of the decision and the second dealing with the scope of review afforded by the Court. The availability of review under the APA is determined by section 701(a). Therefore, the reviewability issue will be analyzed by examining the lower federal courts' interpretation of section 701(a) and by exploring *Bachowski's* effect on that interpretation. This analysis will reveal that *Bachowski*, through its failure to recognize common law reviewability,

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[19] *Id.* at 571, 572-73. The statement of reasons is also designed to promote careful consideration of union members' complaints by forcing the Secretary to "cover the relevant points and eschew irrelevancies." *Id.* at 572.

The Court stated that the issue of whether a district court has the power to order the Secretary to file suit was not before the Court because there had not yet been an adjudication of whether the Secretary's action was arbitrary and capricious. *Id.* at 575 & n.12. Three arguments for finding that a court would be without power to issue such an order were noted, however. First, the order would violate the LMRDA's exclusive enforcement provisions. The Court's response to this argument was to assume that the Secretary would "proceed appropriately" when informed that he had abused his discretion. *Id.* at 575-76. Second, the USWA argued that such an order would violate Article II of the Constitution because the judiciary would be invading the executive's prosecutorial function. Brief for the USWA at 9-12, Dunlop v. Bachowski, 421 U.S. 560 (1975) [hereinafter cited as Brief for the USWA]. While the Court declined to address this contention, 421 U.S. 575 n.12, its response to the first objection seems applicable. There would be no separation of powers problem if the Secretary proceeded without the coercion of a court order. Third, the USWA argued that if the Secretary did institute suit at the request of the Court, Article III of the Constitution would be violated because of a lack of adversity between the Secretary and the union. Brief for the USWA at 12-13. The Court also refused to address this contention. 421 U.S. at 575 n.12. It is suggested, however, that the adversity problem could be solved by allowing the complaining union member to intervene in the Secretary's suit against the union. Such intervention is permitted by Trbovich v. United Mine Workers, 404 U.S. 528, 537 (1972).

[20] *Compare, e.g.*, DeVito v. Shultz, 300 F. Supp. 381, 383-84 (D.D.C. 1969) (Secretary's decision is reviewable) and Schonfeld v. Wirtz, 258 F. Supp. 705, 708-09 (S.D.N.Y. 1966) (same) *with* Katrinic v. Wirtz, 62 L.R.R.M. 2557 (D.D.C. 1966) (*semble*) (Secretary's decision is not reviewable) and Altman v. Wirtz, 56 L.R.R.M. 2651 (D.D.C. 1964) (same).

[21] That these concepts are in fact troublesome can be seen by the long debate between Kenneth Davis and Raoul Berger over whether an action committed to agency discretion may be reviewed for an abuse of discretion. Their conflict can be traced through ten articles and books. Their numerous works on the subject are collected in Mahinka, *The Problem of Nonreviewability: Judicial Control of Action Committed to Agency Discretion*, 20 VILL. L. REV. 1, 3 nn.10 & 13 (1974).

continues a trend toward the judicial elimination of section 701(a)(2) from the APA. The scope of review under the APA is determined by section 706.[22] An analysis of the federal courts' interpretation of section 706 and *Bachowski's* effect on that interpretation will ultimately reveal a recognition and modification of the concept of a limited scope of review.

I. THE REVIEWABILITY DETERMINATION

"Reviewability" determines whether an administrative action is subject to any judicial review.[23] This concept is to be distinguished from other doctrines that may prevent or dissuade a court from entertaining a suit, such as standing, exhaustion of remedies, ripeness, and finality.[24] Reviewability is also to be distinguished from subject matter jurisdiction, which refers to whether a particular court has been authorized to take cognizance of the general class of cases to which a particular case belongs.[25] There is a basic presumption that

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[22] 5 U.S.C. § 706 (1970) provides in part:

The reviewing court shall— . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

[23] K. DAVIS, ADMINISTRATIVE LAW TEXT § 28.01 (3d ed. 1972) [hereinafter cited as DAVIS, TEXT].

[24] Standing deals with whether a particular plaintiff can obtain review of a reviewable action. *See generally* DAVIS, TEXT, *supra* note 23, § 22.04 at 427; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459-545 (abr. student ed. 1965) [hereinafter cited as JAFFE]. Exhaustion of remedies, ripeness, and finality deal with whether a particular time is appropriate for review of a reviewable action. *See generally* DAVIS, TEXT, *supra* note 23, §§ 20.01, 21.01; JAFFE, *supra*, at 395-98, 424-26.

[25] In federal courts, reviewability and subject matter jurisdiction are frequently confused because of uncertainty as to whether the APA is an independent jurisdictional grant. *See generally* Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 326-31 (1967). In those circuits that recognize the APA as a separate jurisdictional grant, a determination of nonreviewability has the effect of a finding of a lack of subject matter jurisdiction where the complaint's only jurisdictional base is the APA. *See* Rothman v. Hospital Serv., 510 F.2d 956, 958 (9th Cir. 1975). Reviewability and subject matter jurisdiction are often confused where the court has jurisdiction under a grant of general jurisdiction. The district court in *Bachowski*, for example, dismissed the case for lack of subject matter jurisdiction because it found the action barred by section 701(a)

agency action is subject to judicial review.[26] Indeed, the Supreme Court has stated that "judicial review of agency action . . . will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."[27]

Under the general scheme of the APA, final agency action is judicially reviewable unless excepted by the Act. Section 702 of the APA provides that a person "suffering legal wrong because of agency action . . . is entitled to judicial review thereof."[28] Section 704 provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."[29] Section 701(a), however, creates important exceptions to the broad language of sections 702 and 704: "This chapter applies . . . except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."[30]

The difference between these two subdivisions depends initially on specific language differences.[31] The word "statute" in section 701(a)(1) indicates that an administrative action can be placed under that section only if there is a congressional intent to preclude review. Such an intent may be expressed in a statute's language or implied from a statute's purpose and legislative history.[32] Where such an intent to preclude review is present, the agency action will be categorized as falling within section 701(a)(1). The presumption of review, however, which the Supreme Court identified in *Abbott Laboratories v. Gardner*,[33] tends to restrict findings of express or implied preclusion. This judicial aversion to nonreviewability causes courts to construe statutes so as to avoid language that seems to be an express preclusion.[34] While courts are even more reluctant to find an implied preclusion, occasionally they do.[35] An example of implied

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of the APA. As the court of appeals pointed out, the district court had jurisdiction under 28 U.S.C. § 1337 (1970) because the cause of action arose out of an act regulating interstate commerce—the LMRDA. *Bachowski*, 502 F.2d at 82.

[26] Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967). *See generally* JAFFE, *supra* note 24, at 339-53.

[27] Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967).

[28] 5 U.S.C. § 702 (1970).

[29] 5 U.S.C. § 704 (1970).

[30] 5 U.S.C. § 701(a) (1970). For the complete text of § 701(a) see note 11 *supra*.

[31] For the text of § 701(a) see note 11 *supra*.

[32] Barlow v. Collins, 397 U.S. 159, 166-67 (1970); Hayes Int'l Corp. v. McLucas, 509 F.2d 247, 258-59 (5th Cir.), *cert. denied*, 96 S. Ct. 123 (1975); W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 217-20 (5th ed. 1974).

[33] 387 U.S. 136, 140 (1967).

[34] *See, e.g.*, Breen v. Selective Serv. Local Bd. No. 16, 396 U.S. 460, 467-68 (1970), where the Court held that suit to enjoin induction was not barred by a statute stating "no judicial review shall be made of the classification . . . of any registrant . . . except as a defense to a criminal prosecution;" Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233, 238-39 (1968); *cf.* Eskra v. Morton, 380 F. Supp. 205, 212-13 (W.D. Wis. 1974).

[35] Schilling v. Rogers, 363 U.S. 666, 674 (1960) (alternative holding) (*Schilling* is discussed in the text at notes 90-94 *infra*.); *cf.* Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 305-06 (1943) (Pre-APA).

preclusion is the nonreviewability of the National Labor Relations Board (NLRB) General Counsel's decision not to initiate an unfair labor practice complaint. In *Vaca v. Sipes,*[36] the Court adopted a lower court's conclusion that Congress intended such unfair labor practice complaints to protect a public, as opposed to a private, interest and consequently that Congress intended to bar judicial review designed to force their issuance.[37]

Categorization under section 701(a)(2) similarly depends on congressional intent; however, the relevant congressional intent for the purposes of this section is one to grant the agency broad discretion, not one to preclude judicial review.[38] The word "law" in section 701(a)(2) suggests that an action may be committed to agency discretion explicitly or by implication, and further, that an implied congressional intent to commit an action to agency discretion may be based either on statutory interpretation or on common law considerations since the word "law" is broader than the word "statute" used in section 701(a)(1).[39] These common law considerations include, among others, the courts' deference to agency expertise[40] and the peculiar nature of the administrative action involved.[41] The word "law" also suggests that constitutional principles—such as the separation of pow-

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[36] 386 U.S. 171, 182 & n.8 (1967). The Court's conclusion was based on the case of United Elec. Contractors Ass'n v. Ordman, 258 F. Supp. 758 (S.D.N.Y. 1965), *aff'd per curiam,* 366 F.2d 776 (2d Cir. 1966), *cert. denied,* 385 U.S. 1026 (1967). In *Electrical Contractors,* the district court stated that "[s]ection 3(d) of the NLRA precludes judicial review of the General Counsel's refusal to issue a complaint . . . ." 258 F. Supp. at 763. Standing alone, § 3 (d), which stated that the General Counsel "shall have final authority, in behalf of the Board, in respect of the . . . issuance of complaints . . . .", Labor Management Relations Act of 1947 § 3(d), 29 U.S.C. § 153(d) (1970), is no different than other finality clauses held insufficient to support a finding of express preclusion. See cases cited at note 34 *supra.* However, the court felt that § 3(d), in conjunction with the NLRA's specific statutory review provisions, Labor Management Relations Act of 1947 §§ 10(e)-(j), 29 U.S.C. §§ 160(e)-(j) (1970), and the discretionary nature of the General Counsel's decision, 258 F. Supp. at 761, did support a finding of implied statutory preclusion. *See generally* Note, 63 NW. U. L. REV. 106 (1968).

[37] *Accord,* Seafarers' Union v. NLRB, 88 L.R.R.M. 2629 (D.C. Cir. 1975); Hotel and Restaurant Employees Local 411 v. Gottfried, 36 AD. L.2D 466, 467 (W.D. Mich. 1974). *But cf.* Leedom v. Kyne, 358 U.S. 184, 189-90 (1958); Lentschke v. Nash, 84 L.R.R.M. 2833, 2834 (S.D. Tex. 1973). The similarity between the General Counsel's function under the NLRA and the Secretary of Labor's function under § 402 of the LMRDA has been commented upon in Hopson, *Judicial Review of the Secretary of Labor's Decision Not to Sue to Set Aside A Union Election Under Title IV of the LMRDA,* 18 WAYNE L. REV. 1281, 1297-98 (1972); and Case Comment, 50 B. U. L. REV. 310, 315-17 (1970). As discussed in the text at notes 131-33 *infra,* the Secretary unsuccessfully argued in *Bachowski* that this analogy supported a similar finding of implied statutory preclusion.

[38] 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 at 81 (1958) [hereinafter cited as DAVIS, TREATISE].

[39] *Id.*

[40] *See* Hahn v. Gottlieb, 430 F.2d 1243, 1249-51 (1st Cir. 1970); Daugherty v. United States, 86 L.R.R.M. 3075, 3078 (S.D. Tex. 1974).

[41] Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 317-19 (1958) (*Panama Canal* is discussed in the text at notes 95-98 *infra.*); Curran v. Laird, 420 F.2d 122 (D.C. Cir. 1969) (national defense); *see generally* JAFFE, *supra* note 24, at 363-71.

ers and political question doctrines[42]—may lead to the conclusion that an administrative action falls under section 701(a)(2).

The categorization of an administrative action under either section 701(a)(1) or 701(a)(2) is significant. Sections 702 and 704 of the APA authorize judicial review of final administrative actions.[43] Section 701(a), through the phrase "[t]his chapter applies . . . except to the extent that,"[44] limits the review authorized by sections 702 and 704. However, section 701(a) says nothing about making an administrative action ultimately nonreviewable. Once sections 702 and 704 no longer apply, due to the section 701(a) exception, an action may still be reviewable if some other statute or constitutional principle does not bar review and if common law reviewability was not eliminated by the enactment of the APA.

By definition, administrative actions falling under section 701(a)(1) are made nonreviewable by statute. In the absence of constitutional infirmities, a court is required to follow a discernible legislative intent to preclude review.[45] Consequently, the same congressional intent that placed an action under section 701(a)(1) requires a finding of ultimate nonreviewability. Thus, even if common law reviewability exists, it can have no application in section 701(a)(1) cases. Whether an administrative action that falls under section 701(a)(2) is thereby made nonreviewable is less certain. There is by definition no congressional intent to preclude review in a section 701(a)(2) case, or else the case would have fallen under section 701(a)(1). If, however, common law review survived the enactment of the APA, administrative actions that fall under section 701(a)(2) might still be reviewable.

While the Supreme Court's holdings do not mandate that an action committed to agency discretion be nonreviewable,[46] some of its statements seem to support that conclusion. For example, in *Panama Canal Co. v. Grace Line, Inc.*,[47] the Court stated that the APA "excludes from the categories of cases subject to judicial review 'agency action' that is 'by law committed to agency discretion.' "[48] In *Abbott Laboratories*, the Court stated that the APA "embodies the basic presumption of judicial review . . . so long as no statute precludes such

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[42] Jensen v. Nat'l Marine Fisheries Serv., 512 F.2d 1189 (9th Cir. 1975) (treaty right); *cf.* United States v. Bush & Co., 310 U.S. 371, 380 (1940). Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 380-95 (1968) [hereinafter cited as Saferstein], presents a list of nine elements that may lead a court to conclude that an administrative action is committed to agency discretion.

[43] See text accompanying notes 28-29 *supra*.

[44] For the complete text of § 701(a) see note 11 *supra*.

[45] Whether Congress may preclude review of a claim that an administrative action violated constitutional guarantees is an open question. *See* Battaglia v. General Motors Corp., 190 F.2d 254, 257 (2d Cir. 1948); Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965, 993 & n.155 (1969) [hereinafter cited as Berger, *Synthesis*].

[46] See text accompanying notes 99-107 *infra*.

[47] 356 U.S. 309 (1958).

[48] *Id.* at 317.

relief or the action is not one committed by law to agency discretion . . . ."[49] Lower federal courts have, in fact, expressly held that categorization under section 701(a)(2) results in nonreviewability.[50] For example, in *Ferry v. Udall*,[51] where the decision to sell government land under the Isolated Tracts Act was held committed to the Secretary of Interior's discretion, the Ninth Circuit, without examining the possibility of common law reviewability, flatly stated: "[W]e are without power to review the Secretary's decision in this case."[52] An examination of the common law reviewability issue will be made below,[53] but the current view appears to be that there is no common law reviewability.[54]

Assuming, therefore, that categorization under section 701(a)(2) does result in nonreviewability, the problem arises of reconciling the language of that section with statements in *Abbott Laboratories* that judicial review "will not be cut off unless there is persuasive reason to believe that such was the *purpose of Congress*"[55] and that there is a "basic presumption of judicial review . . . ."[56] The first statement seems to require an interpretation of section 701(a)(2) that changes the word "law" to "statute." Common law and constitutional considerations are thus irrelevant to section 701(a)(2) if that section results in nonreviewability and if nonreviewability can be based only on a "pur-

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[49] 387 U.S. at 140. *Accord*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (the APA "provides that [agency action] . . . is subject to judicial review except where there is a statutory prohibition on review or where 'agency action is committed to agency discretion by law.' "); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 156 (1970) (the APA "provides that the provisions of the Act authorizing judicial review apply 'except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.' "); Barlow v. Collins, 397 U.S. 159, 165 (1970) (the APA "allows judicial review of agency action except where '(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.' ").

[50] *E.g.*, First Nat'l Bank of Smithfield v. First Nat'l Bank of Eastern N.C., 232 F. Supp. 725, 729 (E.D.N.C. 1964); Greyhound Corp. v. United States, 221 F. Supp. 440, 443 (N.D. Ill. 1963).

[51] 336 F.2d 706 (9th Cir. 1964).

[52] *Id.* at 711. *Accord*, Hahn v. Gottlieb, 430 F.2d 1243, 1251 (1st Cir. 1970) ("We therefore hold that the approval of rents and charges [by the FHA] is a 'matter committed to agency discretion by law', and thus not subject to judicial review."); Knight Newspapers, Inc. v. United States, 395 F.2d 353, 358 (6th Cir. 1968) (Since the APA "prohibits judicial review of agency action 'committed to agency discretion by law,' we are without power to review the Postmaster-General's decision denying a postage refund."); Daugherty v. United States, 86 L.R.R.M. 3075, 3077-78 (S.D. Tex. 1974) (action committed to agency discretion is "excepted from judicial review"). *See also* Littell v. Morton, 445 F.2d 1207, 1210 (4th Cir. 1971) (if the action fell under § 701(a)(2) the court would not have considered the issue of sovereign immunity because no review would have been available). *But cf.* Sierra Club v. Hickel, 467 F.2d 1048, 1051 (6th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973) (action fell under § 701(a)(2) but court still dealt with sovereign immunity issue).

[53] See text at notes 82-107 *infra*.

[54] *See, e.g.*, cases cited at note 50 *supra*.

[55] 387 U.S. at 140 (emphasis added).

[56] *Id.*

pose of Congress." The courts' apparent reconciliation of this problem has been to blur the distinctions between sections 701(a)(1) and 701(a)(2).[57] Determinations concerning common law and constitutional considerations are usually combined with determinations concerning congressional intent,[58] and an intent to grant broad discretion is equated with one to preclude review.[59]

Reconciliation of the language of section 701(a)(2) with the presumption of review, noted in the second of the *Abbott Laboratories* statements, involves similar problems. Virtually all administrative action involves the exercise of some discretion.[60] Therefore, if courts are to review agency action and to effectuate the presumption in favor of review, a method of limiting the number of cases falling under section 701(a)(2) must be developed.[61] In *Citizens to Preserve Overton Park, Inc. v. Volpe,*[62] the Court emphasized this desire to limit section 701(a)(2) by stating that the provision for action committed to agency discretion "is a very narrow exception."[63]

In general, the federal courts have employed two methods for narrowing the reach of section 701(a)(2): the "committed" approach, which seems to have been rejected,[64] and the "extent" approach. The committed approach focuses on the word "committed" in section 701(a)(2): "[t]his chapter applies . . . except to the extent that . . . (2) agency action is *committed* to agency discretion by law."[65] Under this approach, discretionary administrative actions are reviewable until they reach the level of being "committed" to agency discretion.[66] An action is considered to be committed to agency discretion where the enabling statute is drawn in permissive rather than mandatory

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[57] In *Bachowski,* for example, the Court dealt with § 701(a) without ever mentioning its subdivisions. 421 U.S. at 566. *But see* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) where the Court does distinguish between §§ 701(a)(1) and 701(a)(2) for the purpose of determining whether APA review was barred. See text at note 78 *infra.*

[58] See cases cited at notes 40 & 41 *supra.* Saferstein, *supra* note 42, at 377 n.43, even suggests that there is no meaningful distinction between §§ 701(a)(1) and 701(a)(2).

[59] Berger, in rejecting the view that there is no distinction between §§ 701(a)(1) and 701(a)(2), states that "[i]t is a common-place that one avoids constructions that result in surplusage or tautology." Berger, *Synthesis, supra* note 45, 977-78 n.66.

[60] Ferry v. Udall, 336 F.2d 706, 711 (9th Cir. 1964).

[61] In *Ferry,* the court stated that "[t]he analytical problem is that of determining when the agency action is 'committed to agency discretion' within the meaning of section [701(a)(2) of the APA], and when it merely 'involves' discretion which is nevertheless reviewable." 336 F.2d at 711.

[62] 401 U.S. 402 (1971).

[63] *Id.* at 410. The significance of this statement on the existence of common law reviewability is discussed in the text accompanying notes 106-107 *infra.*

[64] See text and notes at notes 71-73 *infra.*

[65] 5 U.S.C. § 701(a) (1970) (emphasis added).

[66] Professor Davis stated that "[e]mphasis should be put on the word 'committed.' Action 'committed' to agency discretion by law is that action which is so far committed as not to be reviewable, and agency action which is not so far committed is reviewable." DAVIS, TEXT, *supra* note 23, § 28.05 at 515.

terms.[67] In *Sierra Club v. Hardin,*[68] the court indicated that a permissive statute is one where the agency may refuse to act even if all statutory requirements are met, while a mandatory statute is one where the agency must act if all the statutory requirements are met.[69] The committed approach is exemplified by the Ninth Circuit's approach in *Ferry* where the court stated that "courts may not review a decision committed to the Secretary's discretion pursuant to a 'permissive type' statute, while they may do so where the decision was made pursuant to a 'mandatory type' statute . . . ."[70] That the distinction between permissive and mandatory statutes is unworkable in practice, however, soon became apparent.[71] In fact, in *Ness Investment Corp. v. Department of Agriculture,*[72] a case involving the reviewability of the Secretary of Agriculture's denial of a special use permit, the Ninth Circuit appears to have abandoned the approach altogether.[73]

The "extent" approach is a second method by which courts have narrowed the reach of section 701(a)(2). By focusing on the words "except to the extent that" in section 701(a)'s introductory clause,[74] courts have been able to treat section 701(a)(2) as withholding review by degrees.[75] Thus, an action falling under section 701(a)(2) is nonreviewable only *to the extent* it is committed to agency discretion by law.[76] Under the extent approach, the agency action is conceptualized as consisting of a number of separable elements, some of which are reviewable and others of which are nonreviewable.[77] In *Overton Park,*

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[67] The permissive *vs.* mandatory dichotomy was suggested in Schilling v. Rogers, 363 U.S. 666, 674 (1960) ("[T]he permissive terms in which [the statute is] drawn persuasively indicate that [its] administration was committed entirely to the discretionary judgment of the Executive Branch . . . .").

[68] 325 F. Supp. 99 (D. Alaska 1971).

[69] *Id.* at 112.

[70] 336 F.2d at 712. *Accord,* Mollohan v. Gray, 413 F.2d 349, 351 (9th Cir. 1969); United States v. Walker, 409 F.2d 477, 480 (9th Cir. 1969); Knight Newspapers, Inc. v. United States, 395 F.2d 353, 358 (6th Cir. 1968).

[71] *See, e.g.,* Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1098 (D.C. Cir. 1970); Nor-Am Agricultural Products, Inc. v. Hardin, 435 F.2d 1133, 1141-42 (7th Cir.), *rev'd on other grounds,* 435 F.2d 1151 (1970) *(en banc), petition for cert. dismissed,* 402 U.S. 935 (1971). In Suwannee Steamship Co. v. United States, 354 F. Supp. 1361, 1368-69 (Cust. Ct. 1973), the court stated, "[r]eliance on the 'permissive versus mandatory' test for nonreviewability . . . is fast being laid to rest by . . . federal courts."

[72] 512 F.2d 706 (9th Cir. 1975).

[73] 512 F.2d at 714-15 & n.14. *Accord,* Strickland v. Morton, 519 F.2d 467, 471 (9th Cir. 1975).

[74] For the text of § 701(a)(2) see note 11 *supra.*

[75] Davis has stated that the APA is "carefully framed to avoid the all-or-none fallacy . . . ." Davis, *Unreviewable Administrative Action,* 15 F.R.D. 411, 428 (1954). *See generally* Saferstein, *supra* note 42, at 372, 395-96.

[76] When dealing with § 701(a), courts frequently overlook the language, "to the extent that." See statements cited in note 49 *supra.*

[77] When fashioning limited scopes of review, courts also rely on the words, "to the extent that." When dealing with scope of review, however, courts conceptualize *judicial review* as consisting of a number of separable issues rather than *agency action* as consisting of a number of separable elements. See text at notes 156 *infra.*

the Supreme Court suggested the appropriateness of this view by stating that the APA's legislative history reveals that section 701(a)(2) is applicable "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' "[78]

An example of the extent approach is *East Oakland-Fruitvale Planning Council v. Rumsfeld*[79] where the Ninth Circuit, after holding that the refusal of the Director of the Office of Economic Opportunity to override a governor's veto of funds for an advocacy group was nonreviewable, stated:

> It does not follow, however, that no aspect of the Director's action can be reviewed. Agency action is made unreviewable by 5 U.S.C. § 701(a)(2) only "to the extent" that, it is committed to agency discretion. . . .
>
> Accordingly, separable issues appropriate for judicial determination are to be reviewed, though other aspects of the agency action may be committed to the agency's expertise and discretion.[80]

The court concluded that the Director's ultimate decision not to override the governor's veto was a separable, nonreviewable element but that review could be provided to determine if the Director had considered only relevant factors.[81]

The need to reconcile the language of section 701(a)(2) with the presumption of review through either the committed or extent approaches could be eliminated altogether by the recognition of common law reviewability. Prior to the enactment of the APA in 1946, administrative action was subject to judicial review at common law.[82] The question thus becomes whether by enacting the APA, Congress eliminated common law judicial review. If common law reviewability still exists, the need to limit the application of section 701(a)(2), through either the committed or extent approach, would be obviated because the inapplicability of the APA would not necessarily result in nonreviewability. Such an interpretation would preserve both the congressional purpose behind the enactment of section 701(a)(2)[83] and

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[78] 401 U.S. at 410.

[79] 471 F.2d 524 (9th Cir. 1972).

[80] *Id.* at 533.

[81] *Id.* at 534-35.

[82] *See, e.g.*, Dismuke v. United States, 297 U.S. 167, 171-73 (1936); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 108-11 (1902). *See generally* DAVIS, TEXT, *supra* note 23, § 28.02 at 510; DAVIS, TREATISE, *supra* note 38, §§ 28.04, 28.05.

[83] The presence of § 701(a)(2) in the APA indicates that there must have been some purpose behind its enactment. Unfortunately, that purpose is not revealed in the APA's legislative history. The Senate Judiciary Committee report stated that "[t]he basic exception of matters committed to agency discretion would apply even if not stated at the outset," but it is unclear as to why it should apply and what effect its application has. S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945). One explanation for the presence of § 701(a)(2) is suggested in the text at notes 88-89 *infra*.

the judicial preference for providing at least some review of all agency actions.

The proposition that common law reviewability still exists is supported by the language of section 559 of the APA,[84] the 1966 revision of section 701(a) of the APA, and some of the case law interpreting the APA. Section 559 provides that the APA's review provisions "do not limit or repeal additional requirements imposed by statute or otherwise recognized by law."[85] Common law review of action committed to agency discretion could be an "additional [requirement] . . . otherwise recognized by law." In addition, the APA was originally drawn in 1946 in terms suggesting that a person aggrieved was not "entitled" to judicial review if an action was committed to agency discretion.[86] In the 1966 revision of the APA, this language was modified[87] to read "this chapter applies." There would have been no need to modify the seemingly absolute prohibition in the 1946 Act with the less than absolute reference to "this chapter" in the 1966 Act if there could be no review outside the APA. While the legislative history is silent as to the reason for this change, it may be that Congress wished to emphasize that common law reviewability was not superseded by the APA. Moreover, a reason why Congress might have wanted to preserve common law reviewability is readily apparent. The APA expanded the scope of judicial review of administrative action.[88] By retaining common law reviewability, the courts would be free, once an action was categorized as falling under section 701(a)(2), to develop less intrusive means of inquiry where the need for discretion and review could be balanced.[89]

The Supreme Court's statements in *Schilling v. Rogers*[90] provide support for the view that common law reviewability survived the enactment of the APA. In *Schilling,* the plaintiff sought judicial review of an agency determination that he was not entitled to compensation for property confiscated by the United States in connection with World War II.[91] The plaintiff claimed that even if review was barred

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[84] 5 U.S.C. § 559 (1970).

[85] *Id.*

[86] "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." Administrative Procedure Act of 1946, ch. 324, § 10, 60 Stat. 243.

[87] Act of Sept. 6, 1966, Pub. L. No. 89-554, § 701(a), 80 Stat. 392.

[88] In Brownell v. Tom We Shung, 352 U.S. 180, 185 (1956), the Court refers to "the expanded mode of review granted by" the APA. Again in Rusk v. Cort, 369 U.S. 367, 379 (1962), the APA is called "broadly remedial."

[89] Once free of the APA, a court's review might also be more searching. This possibility is remote, however, because the statutory, common law, and constitutional considerations that place an action under § 701(a)(2) would seemingly mandate less intrusive review. *See* DAVIS, TEXT, *supra* note 23, § 217 at 515.

[90] 363 U.S. 666 (1960).

[91] *Id.* at 669-70.

under the APA, he was entitled to *some* review because the agency's denial was arbitrary and capricious.[92] The Court, after finding that the action was not reviewable under the APA,[93] indicated that in some situations non-APA review might be available:

> This is not a case in which it is charged either that an administrative official has refused or failed to exercise a statutory discretion, or that he has acted beyond the scope of his powers, where the availability of judicial review would be attended by quite different considerations than those controlling here.[94]

The only other case in which the Supreme Court appears to have held that an administrative action was categorized under section 701(a)(2) is *Panama Canal Co. v. Grace Line, Inc.*[95] While the Court did refuse to review the merits of the agency's decision not to initiate rate readjustment proceedings,[96] it did not place the agency's action entirely beyond review. For example, the Court appears to have determined that the decision was not arbitrary and capricious by stating, "[t]hese are matters on which experts may disagree . . . ."[97] In addition, the Court warned that it would "intrude" if the agency refused to take a prescribed action.[98]

It is true that in some cases where the Supreme Court has held an action reviewable under the APA, the Court has made statements suggesting that if the action had fallen under section 701(a)(2), the result would have been nonreviewability.[99] However, a careful examina-

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[92] *Id.* at 676.

[93] *Id.* at 670, 676.

[94] *Id.* at 676-77. *Accord,* Gutnayer v. McGranery, 108 F. Supp. 290, 291-92 (D.D.C. 1952), *modified sub nom.* Brownell v. Gutnayer, 212 F.2d 462 (D.C. Cir. 1954) (order under Displaced Persons Act not reviewable under the APA but nevertheless reviewable for arbitrary and capricious action); *cf.* Heikkila v. Barber, 345 U.S. 229, 235 (1953) (deportation order not reviewable under APA but nevertheless reviewable on habeas corpus petition); Hiatt v. Compagna, 178 F.2d 42, 44-45, 47 (5th Cir. 1949), *aff'd by equally divided court per curiam,* 340 U.S. 880 (1950), *on remand,* 100 F. Supp. 74, 80-81 (N.D. Ga. 1951) (order revoking parole not reviewable under APA but nevertheless reviewable on habeas corpus petition to determine whether it is supported by substantial evidence and therefore not arbitrary or an abuse of discretion). It is interesting to note that in *Abbott Laboratories,* 387 U.S. at 140, the Court, when considering the effect of the APA on common law reviewability, uses the word "reinforced" rather than "replaced."

[95] 356 U.S. 309 (1958).

[96] "We think the initiation of a proceeding for readjustment of the tolls of the Panama Canal is a matter that Congress has left to the discretion of the Panama Canal Co." *Id.* at 317.

[97] *Id.* at 317. This interpretation of *Panama Canal* has been suggested by Berger, *Synthesis, supra* note 45, at 971 n.32.

[98] *Panama Canal,* 356 U.S. at 318. In addition, the case was decided before the revision of the APA, when the language was less ambiguous as to the availability of common law review. See text at notes 87-91 *supra.*

[99] See the cases and statements at note 49 and accompanying text *supra.*

tion of statements in *Abbott Laboratories,*[100] *Overton Park,*[101] *Association of Data Processing Service Organizations, Inc. v. Camp,*[102] and *Barlow v. Collins*[103] supports an argument that the Court was merely stating that if section 701(a)(2) had applied, the *APA* could not provide review.[104] Indeed, the Court was not faced with the issue of what effect section 701(a)(2) had on common law reviewability because the section was found not to apply in those cases.[105] Even the Supreme Court's efforts to emasculate section 701(a)(2) in *Overton Park,* limiting its applicability to those rare instances where there is "no law to apply,"[106] does not necessarily indicate that the Court believes that there is no review available outside of the APA. Rather the Court could have been emphasizing that only in unusual circumstances will a discretionary administrative action be exempted from the more demanding APA review.[107]

Thus, the Supreme Court has not, in either its holdings or dicta, explicitly rejected the existence of common law review. If common law review does exist, a court could be freed of the burden of reconciling the language of section 701(a)(2) with the presumption of review. Instead, a court could concentrate on fashioning a scope of review that strikes a balance between agency discretion and judicial intrusion.

The major weakness of the common law approach is that a court

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[100] 387 U.S. 136, 140 (1967).

[101] 401 U.S. 402, 410 (1971).

[102] 397 U.S. 150, 156 (1970).

[103] 397 U.S. 159, 165 (1970).

[104] More of a problem is presented by Justice Brennan's statement in his *Barlow* dissent that if an action falls under either §§ 701(a)(1) or 701(a)(2), "the plaintiff is out of court . . . because Congress has stripped the judiciary of authority to review agency action." *Barlow,* 397 U.S. at 173-74. One explanation could be that Brennan's dissent was designed to show how the majority had confused the concepts of reviewability and standing. Reviewability was never at issue in Brennan's dissent. Therefore, Brennan could have used the words "out of court" to emphasize that a lack of standing and nonreviewability can "look alike" without considering their significance for the issue of reviewability. In addition, it is not clear if Brennan meant Congress stripped the courts of authority to review in the APA or in the underlying substantive statute. If the former, the statement does suggest that review is impossible outside the APA. If the latter, the statement may mean that there are statutes where the intent to preclude review can be implied from the presence of discretion.

[105] *Abbott Laboratories,* 387 U.S. at 141-46; *Overton Park,* 401 U.S. at 413; *Data Processing,* 397 U.S. at 156-57; *Barlow,* 397 U.S. at 165-66.

[106] 402 U.S. at 410.

[107] *Accord,* Brownell v. Tom We Shung, 352 U.S. 180, 185 (1956). Of course, it is possible that common law *non*reviewability could exist along with common law reviewability. Thus, a plaintiff would be little better off once outside the APA if actions committed to agency discretion by law were nonreviewable at common law. Berger questions whether there ever was common law nonreviewability of arbitrary or capricious actions. Berger, *Synthesis, supra* note 45, at 965-66 & nn. 5-8. If there was common law nonreviewability, the Supreme Court has apparently eliminated it. *See, e.g., Abbott Laboratories,* 387 U.S. at 140 ("[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.").

might be separated unnecessarily from the detailed body of law that has developed under the APA. Once outside of the APA's review provisions, a court may feel free to modify, in addition to scope of review, doctrines such as standing, ripeness, exhaustion, and finality. Consequently, the balance struck between discretion and intrusion through modifications of scope of review could be destroyed by restrictive or expansive approaches to these other administrative law doctrines.

Against this backdrop of general administrative law principles, the Supreme Court decided *Bachowski*. In *Bachowski*, the Court reaffirmed the existing interpretation of section 701(a)(1). *Bachowski* is likely to have, however, a disruptive effect on the existing interpretation of section 701(a)(2) because the Court, in reaching its conclusion, failed to distinguish between the two subdivisions of section 701(a). The Court ambiguously concluded that "the Secretary's decision not to sue is not excepted from judicial review by 5 U.S.C. § 701(a) . . . ."[108] Subsequent discussion leaves little doubt that the action did not fall under section 701(a)(1).[109] As to section 701(a)(2), however, the Court's language indicates that it was inapplicable[110] while its treatment of the scope of review suggests that it was applicable.[111]

As noted above, an administrative action can be categorized under section 701(a)(1) based on an express or implied statutory preclusion.[112] In *Bachowski*, the Secretary made both arguments and both were rejected.[113] The Secretary's express preclusion claim was that under section 403 of the LMRDA,[114] suit by the Secretary is the exclusive method for challenging a completed union election.[115] That Bachowski's suit was in reality such a challenge to the USWA's election, thus violating the Secretary's exclusive powers, could be seen

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[108] 421 U.S. at 566.

[109] The Secretary urges that the structure of the statutory scheme, its objectives, its legislative history, the nature of the administrative action involved, and the conditions spelled out with respect thereto, combine to evince a congressional meaning to prohibit judicial review of his decision. We have examined the materials the Secretary relies upon. They do not reveal to us any congressional purpose to prohibit judicial review.

Id. at 567.

[110] The Court's statement that sections "702 and 704 subject the Secretary's decision to judicial review under the standard specified in § 706(2)(A)," *id.* at 566, indicates that the action was not removed from the APA through the operation of section 701(a)(2).

[111] The Court created a scope of review that differs from that which would apply if the case were governed by section 706. See text at notes 179-94 *infra*.

[112] See note 32 and accompanying text *supra*.

[113] 421 U.S. at 566-67, 567-68, 567 n.7.

[114] 29 U.S.C. § 483 (1970). The relevant portion of § 403 is "[e]xisting rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this subchapter. The remedy provided by this subchapter for challenging an election already conducted shall be exclusive."

[115] Brief for Petitioner at 10-11, Dunlop v. Bachowski, 421 U.S. 560 (1975) [hereinafter cited as Brief for Petitioner].

from the inclusion of the Union as a defendant.[116] In *DeVito v. Shultz*,[117] the district court rejected a similar express preclusion argument.[118] The Supreme Court in *Bachowski* similarly rejected the argument, stating that the "LMRDA contains no provision that explicitly prohibits judicial review . . . . Section [403] is . . . not a prohibition against judicial review but simply underscores the exclusivity of the [section 402] procedures in post-election cases."[119] The Court seems to have concluded that section 403 is not concerned with judicial review at all. The section merely emphasizes that rights secured by the LMRDA may be enforced through private actions *before* an election but only through the Secretary's action *after* an election.[120] Thus, the Court, while agreeing that the Secretary's post-election remedy is exclusive, did not equate exclusivity with a preclusion of review. In light of the narrow interpretation given to express preclusion clauses generally,[121] the Court's determination that section 403 does not expressly preclude review appears correct.

The Secretary made two implied preclusion arguments. First, the Secretary claimed that the language and legislative history of the LMRDA reveal an intent to preclude review.[122] Second, the Secretary argued that his role was analogous to that of the NLRB's General Counsel when issuing an unfair labor practice complaint and that, consequently, he should similarly be entitled to nonreviewable discretion.[123]

The legislative history of the LMRDA[124] includes numerous statements which appear to support the first implied preclusion argument. For example, one Senate report contains the statement that the remedy provided in section 402 of the LMRDA would be "the sole remedy and private litigation would be precluded."[125] In another instance, the same Senate report emphasizes that one of the LMRDA's aims is to clear any cloud over union offices *quickly*.[126] Statements such as these, in conjunction with the exclusivity clause of section 403[127] and the sixty day time limit of section 402(b),[128] could reasonably in-

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[116] See note 9 *supra*.

[117] 300 F. Supp. 381, 382 (D.D.C.), *rehearing*, 72 L.R.R.M. 2682 (1969).

[118] "While this remedy is exclusive it does not follow that the Federal Courts are necessarily without power or jurisdiction . . . ." 300 F. Supp. at 382.

[119] 421 U.S. at 566-67.

[120] *See generally* Calhoon v. Harvey, 379 U.S. 134 (1964); Comment, 42 U. Chi. L. Rev. 166 (1974).

[121] See note 34 *supra*.

[122] Brief for Petitioner at 12-16, 23.

[123] *Id.* at 25-27.

[124] The LMRDA's legislative history has been the subject of extensive analysis. Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851 (1960); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819 (1960); Note, 78 HARV. L. REV. 1617 (1965).

[125] S. REP. NO. 187, 86th Cong., 1st Sess. 21 (1959).

[126] *Id.* Wirtz v. Local 153, Glass Bottle Blowers, 389 U.S. 463, 468 n.7 (1968).

[127] For the text of § 403 see note 114 *supra*.

[128] For the text of § 402(b) see note 6 *supra*.

dicate a congressional intent to preclude all judicial review in order to prevent private litigation and delay. Indeed, a number of lower federal courts have reached that conclusion.[129] In *Bachowski,* however, the Court simply stated, without further explanation: "We have examined the materials the Secretary relies upon. They do not reveal to us any congressional purpose to prohibit judicial review .... We therefore reject the Secretary's [first implied] argument as without merit."[130]

The Supreme Court's only reference to the Secretary's second implied preclusion argument—analogizing his role to that of the NLRB's General Counsel—is in a footnote which states: "We agree with the Court of Appeals ... that there is no merit in the Secretary's contention that his decision is an unreviewable exercise of prosecutorial discretion."[131] The court of appeals rejected the Secretary's argument on the grounds that the General Counsel, when issuing an unfair labor practice complaint, is concerned with vindicating a *public* interest while the Secretary, when suing to set aside a defective election, is additionally concerned with remedying a *private* wrong.[132] In closing, the court of appeals indicated that holding the Secretary's decision nonreviewable would leave the complaining union member without a remedy.[133]

The most troubling aspect of *Bachowski* is the Court's failure to make an explicit finding with regard to section 701(a)(2). In spite of the Court's language implying that the Secretary's action was not excepted from the review provisions of the APA,[134] the Court's treatment of the scope of review issue requires the conclusion that to

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[129] Ravaschieri v. Schultz, 75 L.R.R.M. 2272, 2275 (S.D.N.Y. 1970); McArthy v. Wirtz, 65 L.R.R.M. 2411, 2412-13 (E.D. Mo. 1967); Katrinic v. Wirtz, 62 L.R.R.M. 2557 (D.D.C. 1966) (*semble*); Altman v. Wirtz, 56 L.R.R.M. 2651 (D.D.C. 1964) (*semble*).

[130] 421 U.S. at 567-68.

[131] *Id.* at 567 n.7.

[132] Bachowski v. Brennan, 502 F.2d 79, 87 & n.11 (3rd Cir. 1974).

[133] *Id.* at 87-88. The court of appeals' distinctions do not withstand analysis. The major aim of the LMRDA is to benefit the public by ensuring free and democractic union elections, not to provide complaining union members with publicly financed legal counsel. Wirtz v. Local 153, Glass Bottle Blowers, 389 U.S. 463, 469-71 (1968). In addition, private parties stand to gain back pay or other benefits from a successful unfair labor practice suit. Brief for Petitioner at 30. Finally, the failure of the Secretary of Labor to institute a suit under section 402(b) of the LMRDA does not leave the complaining union member totally without a remedy. Ross v. International Bhd. of Elec. Workers, 513 F.2d 840 (9th Cir. 1975) (suit seeking recovery of monetary damages for election-related torts not precluded by § 402 of LMRDA). The Court should have rejected the analogy argument not because the roles of the Secretary and the General Counsel are distinguishable, but rather because the NLRB cases are probably incorrectly decided. The nonreviewability of the General Counsel's decision was determined before the Supreme Court had emphasized the presumption of reviewability in cases such as *Overton Park* and *Abbott Laboratories.* The evidence of a congressional intent to preclude review found in cases such as United Elec. Contractors Ass'n v. Ordman, 258 F. Supp. 758 (S.D.N.Y. 1965), and approved in Vaca v. Sipes, 386 U.S. 171, 182 & n.8 (1967), see note 36 *supra,* is weak when compared to the evidence rejected in *Bachowski.* The demise of the nonreviewability of the General Counsel's decision has been predicted. Case Comment, 50 B.U. L. REV. 310, 320 (1970).

[134] See note 110 *supra.*

some extent the provisions of the APA were, in fact, inapplicable to the Secretary's decision to sue under section 402 of the LMRDA. The Court modified the scope of review usually available under the APA[135] by requiring review to be based on a statement of reasons rather than the whole administrative record[136] and by prohibiting all review of the factual basis of the Secretary's conclusions.[137] This modification is contrary to the language and legislative history of the APA. The Senate report accompanying the enactment of the APA states that once section 701(a)(2) is found inapplicable, "[t]hen the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record."[138] In addition, these modifications seem to violate section 559 of the APA, which states that a "[s]ubsequent statute may not be held to supersede or modify [the APA's review provisions] . . . except to the extent that it does so expressly."[139] The Court in *Bachowski* relied on a "congressional purpose narrowly to limit the scope of judicial review of the Secretary's decision . . . ."[140] This conclusion, however, is based on a survey of the Act's legislative history,[141] not on any *express* provision of the LMRDA as required by section 559 of the APA.[142]

Despite this absence of any express modification, the Court seems to have concluded that those provisions of section 706 that require review based on the whole record and that allow challenges to factual determinations do not apply to the Secretary's decision under the LMRDA. The only way the Court could reach that conclusion is by assuming that section 701(a)(2) excepted the Secretary's decision from the operation of section 706 and the APA's other review provisions.[143] Thus, the Court's treatment of the scope of review

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[135] The Court's limitations on its scope of review are treated more fully in the text at notes 179-201 *infra*. Here scope of review is discussed only in enough detail to show that the action fell under § 701(a)(2).

[136] 421 U.S. at 571-73. See text at notes 172-177 *infra*.

[137] *Id.* at 573.

[138] S. REP. NO. 572, 79th Cong., 1st Sess. 26 (1945).

[139] 5 U.S.C. § 559 (1970).

[140] 421 U.S. at 568.

[141] *Id.* at 568-71. Relying on this legislative history, the Court concluded that since Congress relied on the knowledge and discretion of the Secretary for effective implementation, a court is "not authorized to substitute its judgment for the decision of the Secretary not to bring suit . . . ." *Id.* at 571. In *Overton Park*, 401 U.S. at 416, the Court similarly concluded that it was not empowered to substitute its judgment for that of the agency, but did not find it necessary to limit the normal scope of review under § 706(2)(A).

[142] There is ample evidence in the LMRDA's language and legislative history of an intent to grant the Secretary broad discretion, but there is no evidence of an intent to expressly modify the provisions of the APA. Indeed, § 606 of the LMRDA seems to reject that notion by stating that "[t]he provisions of the Administrative Procedure Act shall be applicable to . . . any adjudication authorized or required pursuant to the provisions of this chapter." 29 U.S.C. § 526 (1970).

[143] It is difficult to imagine a more highly discretionary agency action than the Secretary's decision to file suit under § 402 of the LMRDA. The lower federal courts, when faced with the precise issue presented in *Bachowski*, often found the decision

issue indicates that to some extent the Secretary's decision did fall under section 701(a)(2) and that, as a result, the review provisions of the APA did not apply.

Viewed as an "extent approach" case, the Court in *Bachowski* seemed to adopt the conceptualization of reviewability that divides the administrative action into reviewable and nonreviewable elements.[144] The Court determined that, while the Secretary's ultimate decision could be reviewed for abuse of discretion, the factual basis of the Secretary's conclusions could not be challenged.[145] Thus, in *Bachowski,* the Court seems to have adopted the method suggested in *Overton Park* for reconciling the language of section 701(a)(2) with the presumption of review.[146]

The Court was justifiably concerned with reconciling the congressional intent to grant the Secretary broad discretion with the APA's expansive review provisions. It may be questioned, however, whether these considerations are better reconciled through the extent approach or through the invocation of common law review. As an extent case, *Bachowski* may result in the piecemeal denial of full APA review for an increasing number of discretionary administrative actions. Administrative agencies, in the wake of *Bachowski,* are likely to argue that the legislative histories of their enabling statutes also evince a "congressional purpose narrowly to limit the scope of judicial review," and thus require a limited *Bachowski*-type review. Courts, believing that the scope of review under section 706 may be modified in the absence of an express modification, are likely to agree, resulting in the removal of more and more administrative actions from full APA review. If the Court in *Bachowski* had found that the Secretary's decision fell entirely under section 701(a)(2) but was still subject to common law review, the likelihood of restricting full APA review for less dis-

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committed to the Secretary's discretion by law. *E.g.,* Ravaschieri v. Shultz, 75 L.R.R.M. 2272, 2275 (S.D.N.Y. 1970). In *Bachowski,* Justice Rehnquist explicitly found that the Secretary's decision was "precisely the kind of 'agency action . . . committed to agency discretion by law' exempted from the judicial review provisions of the APA." 421 U.S. at 595. The Secretary's broad discretion has also been recognized by courts when interpreting other aspects of § 402(b) of the LMRDA. For example, § 402(b) states that if the Secretary finds probable cause to believe a violation of the LMRDA's election provisions has occurred, he "shall . . . bring a civil action . . . to set aside the invalid election . . . ." 29 U.S.C. § 482(b) (1970). Although § 402(b) seems to require the Secretary to file suit whenever a violation of § 401 is discovered, the Supreme Court has determined that the Secretary may not file suit until he determines that the violation probably affected the election's outcome. Wirtz v. Local 153, Glass Bottle Blowers, 389 U.S. 463, 472 (1968). In DeVito v. Shultz, 72 L.R.R.M. 2682, 2683 (D.D.C. 1969), the court suggested that the Secretary's discretion is so great that he need not file suit even where he has probable cause to believe the outcome of the election was affected if he has a rational basis for declining to sue. *But see* Howard v. Hodgson, 490 F.2d 1194, 1197 (8th Cir. 1974). If such a highly discretionary administrative action can be found not committed to agency discretion by law, section 701(a)(2) is likely to be stripped of all vitality in the wake of *Bachowski.*

[144] See text at note 77 *supra.*

[145] 421 U.S. at 573.

[146] See text at note 78 *supra.*

cretionary administrative actions would be reduced. Courts are likely to be better able to withstand an onslaught of *Bachowski*-type claims by agencies if acceptance of their claims results not in modifications of the APA but rather in the total inapplicability of the APA's review provisions.

In any event, only upon a showing of discretion as high as that present in *Bachowski* should any of the provisions of the APA be excluded. If courts can resist the urge toward excessive modification of the APA and if the findings of implied modifications can be made compatible with section 559 of the APA,[147] the extent approach, apparently adopted by the Court in *Bachowski,* is an acceptable way of preserving administrative discretion while at the same time providing judicial review.

II. THE SCOPE OF REVIEW DETERMINATION

After holding an agency action reviewable, a court must still determine the proper scope of review—the intensity of the judicial inquiry into the reviewable action.[148] The usual scope of review in federal courts is that specified in section 706 of the APA.[149] Section 706(2) identifies six standards which courts should apply when exercising normal section 706 review.[150] In *Citizens to Preserve Overton Park v. Volpe,*[151] the Supreme Court held that when reviewing an administrative action under section 706, a court may *always* set aside actions that are an abuse of discretion, in violation of constitutional rights, in excess of statutory jurisdiction, or in violation of procedural requirements.[152] The substantial evidence and de novo review standards, however, were held applicable only where reviewing an adjudicatory hearing that produces a factual record.[153]

When dealing with highly discretionary administrative actions a court may determine that the normal scope of review will frustrate the agency's purpose. In such situations, courts have adopted limited scopes of review sua sponte in order to provide review without eliminating the value of discretion.[154] The concept of a limited scope of review, while occasionally recognized, is seldom analyzed.[155] It will be analyzed here by developing an interpretation of section 706 of the APA which focuses on the meaning of a limited scope of review and by suggesting the effect of *Bachowski* on that interpretation.

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[147] See text at notes 139-142 *supra.*

[148] DAVIS, TEXT, *supra* note 23, § 28.01 at 509.

[149] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413 (1971).

[150] For the text of § 706 see note 22 *supra.*

[151] 401 U.S. 402 (1971).

[152] *Id.* at 413-14.

[153] *Id.* at 414-15. *Accord,* Camp v. Pitts, 411 U.S. 138, 141-42 (1973) (*per curiam*); Board of Education v. HEW, 396 F. Supp. 203, 211 (S.D. Ohio 1975).

[154] See cases cited notes 157-164 *infra.*

[155] *See* Saferstein, *supra* note 42, at 390-96; DAVIS, TEXT, *supra* note 23, § 29.07.

A limited scope of review differs from the normal section 706 scope of review by the exclusion of one or more of the standards of review specified in section 706(2). The authority for this process of exclusion can be found in the part of section 701(a) that reads "[t]his chapter applies ... except to the extent that ... agency action is committed to agency discretion by law."[156] Thus, if *judicial review* is conceptualized as consisting of a number of separable issues —including review for abuse of discretion, statutory violations, and constitutional violations—a court may review an element of an administrative action for violations of statutory or constitutional provisions but refuse to review for an abuse of discretion because, to "that extent," the element is committed to agency discretion. When employing a limited scope of review, the lower federal courts usually adopt the constitutional, jurisdictional, and procedural standards of section 706.[157] For example, in *Ness Investment Corp. v. Department of Agriculture,*[158] the court held that the Secretary of Agriculture's denial of a special use permit, an action in part committed to agency discretion by law, was reviewable for violations of statutory, regulatory, and constitutional provisions.

There appears to be no case in which the substantial evidence or de novo review standards have been included in a limited scope of review. This is to be expected because these two standards represent the most "unlimited" review available under section 706. In addition, factual records are seldom produced by an agency when taking an action committed to its discretion.[159]

There has been a great dispute over the applicability of the abuse of discretion standard to a limited scope of review.[160] In *Strickland v. Morton,*[161] for example, the court held that a discretionary administrative action was reviewable to determine whether the agency had exceeded statutory authority, but not reviewable where the claim

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[156] For the text of § 701(a) see note 11 *supra.*

[157] Strickland v. Morton, 519 F.2d 467, 471 (9th Cir. 1975) (discretionary action ca be reviewed where issue is whether agency violated statute, regulation, or Constitution); Scanwell Laboratories, Inc. v. Schaffer, 424 F.2d 847, 859 (D.C. Cir. 1970) (discretionary action can be reviewed where the issue is whether the agency acted illegally); Pence v. Morton, 391 F. Supp. 1021, 1025 (D. Alaska 1975) (discretionary action can be reviewed where the issue is constitutional violation); *cf.* Wells v. Southern Airways, Inc., 517 F.2d 132, 134 (5th Cir. 1975) (final administrative action can be reviewed where issue is whether there was an "absence of fundamental due process").

[158] 512 F.2d 706, 715 (9th Cir. 1975).

[159] In *Overton Park,* 401 U.S. at 415, the Court stated that the Secretary of Transportation's action was "not designed to produce a record that is to be the basis of agency action—the basic requirement for substantial-evidence review." *Accord,* Rothman v. Hospital Serv., 510 F.2d 956, 959-69 (9th Cir. 1975), where the court refused to subject a discretionary action of the Secretary of HEW to the substantial evidence test because of the lack of a factual record.

[160] Berger feels that a court may always review for an abuse of discretion while Davis believes that in some instances a court may not. *Compare* Berger, *Synthesis, supra* note 45, *with* DAVIS, TEXT, *supra* note 23, § 28.05.

[161] 519 F.2d 467 (9th Cir. 1975).

was merely that the agency had abused its discretion by deciding adversely to the complainant.[162] A contrary conclusion was reached in *Littell v. Morton,*[163] where the court expressly held that a court exercising limited review may "determine if there was an abuse of ... discretion.[164]

Once the abuse of discretion standard is adopted, a court employing a limited scope of review must define that standard. Through definition, however, courts have been known to deny review for an abuse of discretion while claiming to provide it. For example, in *Ness Investment,*[165] the court stated that it would review for an "abuse of discretion" where the complaint alleged violations of constitutional, statutory, regulatory, or other legal mandates or restrictions.[166] Under such a definition, a plaintiff who alleges an abuse of discretion under section 706(2)(A) receives a degree of review no different than that available under section 706(2)(B), (C), and (D).[167]

In *Overton Park,* the Supreme Court defined an abuse of discretion as a decision that is not based on a consideration of all the relevant factors or that reveals a clear error in judgment.[168] Where a relevant factor has not been considered, the case is remanded to the agency with instructions to consider it.[169] When all the relevant factors have been considered, a clear error of judgment occurs where there is no rational basis for the decision.[170] Prior to *Bachowski,* no court employing a limited scope of review used the *Overton Park* definition of an abuse of discretion.[171]

In addition to selectively excluding standards of review, a court may also limit its scope of review by restricting the evidentiary base on which it decides the merits of challenges to administrative actions. Section 706 of the APA requires a reviewing court to make its decision based on the "whole record."[172] The Senate Judiciary Committee report states that when reviewing the "whole record" a court must "not look only to the case presented by one party [but must consider all relevant factors] since other evidence may weaken or even indisputa-

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[162] *Id.* at 471. *Accord,* Ness Inv. Corp. v. Department of Agriculature, 512 F.2d 706, 715 (9th Cir. 1975); *cf.* Pence v. Morton, 391 F. Supp. 1021, 1025 (D. Alaska 1975).

[163] 445 F.2d 1207 (4th Cir. 1971).

[164] *Id.* at 1211. *Accord,* Knight Newspapers, Inc. v. United States, 395 F.2d 353, 359 (6th Cir. 1968); Northeast Community Organization, Inc. v. Weinberger, 378 F. Supp. 1287, 1297 (D. Md. 1974); Suwannee Steamship Co. v. United States, 354 F. Supp. 1361, 1364 (Cust. Ct. 1973).

[165] 512 F.2d 706 (9th Cir. 1975).

[166] *Id.* at 715.

[167] For the text of § 706 see note 22 *supra.*

[168] 401 U.S. at 416.

[169] *Id.* at 420. *See also* Camp v. Pitts, 411 U.S. 138, 143 (1973) (*per curiam*).

[170] *See, e.g.,* Bowman Trans., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285-86 (1974).

[171] See text at notes 187-89 *infra.*

[172] For the text of § 706 see note 22 *supra.*

bly destroy that case."[173] In *Overton Park* and *Camp v. Pitts*[174] the Court applied the whole record requirement to review nonadjudicatory agency action.[175] Realizing that the whole record of an informal administrative action may not be embodied in written documents, however, the Court did authorize reviewing courts to take the testimony of agency officials where the record is unclear.[176] In *Bachowski,* the Court appears to have rejected this whole record requirement in its limited scope of review.[177]

Any court which held that an action falling under section 701(a)(2) is reviewable at common law would be faced with the task of constructing a common law limited scope of review. It is unlikely that a common law limited scope of review would differ substantially from that developed under the APA. When deciding which issues are reviewable, a court receives little guidance from the APA. Indeed, Professor Davis has suggested that limited scopes of review, even under the APA, are a judicial creation.[178] Consequently, when providing common law review, courts are likely to turn to similar judicial techniques in order to preserve discretion while providing review.

Bachowski appears to be the first case in which the Supreme Court has created a limited scope of review. That the Court was in fact limiting its scope of review is revealed by the majority's reliance on a "congressional purpose narrowly to limit the scope of judicial review . . . ."[179] Chief Justice Burger cited this limitation by stating that "the Court has fashioned an exceedingly narrow scope of review of the Secretary's determination not to bring an action . . . ."[180]

In terms of the selective application of section 706(2) standards as a means of limiting the scope of review, the Court indicated that the Secretary's decision was subject to judicial review under the constitutional, jurisdictional, procedural, and abuse of discretion standards specified in section 706.[181] Reviewing discretionary administrative actions for constitutional, jurisdictional, and procedural violations is

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[173] S. DOC. NO. 248, 79th Cong., 2d Sess. 214 (1946). *See also* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951); DAVIS, TEXT, *supra* note 23, § 29.03.

[174] 411 U.S. 138, 142 (1973) (*per curiam*).

[175] In *Overton Park,* the Court stated that review on the "whole record" requires review "to be based on the full administrative record that was before the Secretary at the time he made his decision." 401 U.S. at 419.

[176] *Id.* at 420.

[177] See text at notes 190-94 *infra.*

[178] By the very terms of the APA, the scope of review may be less than what is specified in section 706 for section 701 provides—"this chapter applies . . . except to the extent that agency action is committed to agency discretion by law." The scope of review may accordingly . . . be scaled down . . . . And some of the law that scales down scope of review is judge-made law.

DAVIS, TEXT, *supra* note 23, § 29.07 at 535.

[179] 421 U.S. at 568.

[180] *Id.* at 590.

[181] *Id.* at 566, 574.

not unusual.[182] The ease with which the Court adopted the abuse of discretion standard, however, is surprising in light of the debate over whether discretionary administrative actions should be reviewed for abuses of discretion.[183] The Court's approach suggests that those issues usually considered by a court when deciding whether to review for an abuse of discretion are more appropriately considered when determining the proper evidentiary basis of review. For example, when deciding if the Secretary's decision not to sue under section 402(b) of the LMRDA should be reviewed for an abuse of discretion, the lower federal courts have faced such issues as whether review for an abuse of discretion would inhibit the Secretary's use of discretion to the detriment of the congressional purpose of promoting intra-union democracy while preserving union autonomy,[184] and whether the threat of such review will cause the Secretary to perform his screening task more fairly and thoroughly.[185] In contrast, the Supreme Court in *Bachowski* never considered these factors in deciding whether to review for an abuse of discretion. Instead, the Court made these considerations the basis for requiring such review to be based upon the statement of reasons.[186]

The Court's definition of an abuse of discretion emerges from its comments concerning how the district court should evaluate the Secretary's statement of reasons. The district court was directed to determine whether the Secretary's decision has a rational and defensible basis or whether it was reached for an "impermissible reason or for no reason at all."[187] In addition, the district court was empowered to request the Secretary to supplement his statement if it inadequately reveals his reasons.[188] This approach is an adoption of *Overton Park's* definition of an abuse of discretion: discretion is abused if an action is not based on all the relevant factors or is clearly an error of judgment.[189]

Perhaps the most significant contribution of *Bachowski* to the concept of a limited scope of review is its attempt to restrict the basis of review to a statement of reasons for the administrative decision. The idea of requiring the Secretary to provide a statement of reasons originated in the district court's decision in *DeVito v. Shultz.*[190] Prior to

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[182] See text at notes 157-58 *supra.*

[183] See text at notes 161-64 *supra.*

[184] *See, e.g.,* Ravaschieri v. Shultz, 75 L.R.R.M. 2272, 2275 (S.D.N.Y. 1970); DeVito v. Shultz, 300 F. Supp. 381, 382 (D.D.C. 1969).

[185] *See* Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse,* 81 YALE L.J. 407, 500 (1972) where the authors suggest that the Secretary may occasionally refuse to sue under § 402 in order to preserve congenial relations with union officers with whom he must deal in management disputes.

[186] *See* 421 U.S. at 568-71.

[187] *Id.* at 573. Similar criteria are suggested in DeVito v. Shultz, 72 L.R.R.M. 2682, 2683 (D.D.C. 1969).

[188] 421 U.S. at 574-75.

[189] See text at notes 168-71 *supra.*

[190] 300 F. Supp. 380, 384 (D.D.C. 1969).

Bachowski, however, there was disagreement as to what function such a statement was to play. The court of appeals in *Bachowski,* for example, ordered the Secretary to provide a statement of reasons but considered it more as a discovery device to aid the plaintiff in preparing for a hearing challenging the factual bases for the Secretary's conclusions.[191] The Supreme Court, on the other hand, declared that in most cases the statement of reasons would be the *sole basis* upon which the Secretary's decision not to sue under section 402(b) of the LMRDA would be reviewed.[192] Not only would there be no factual hearing, but the reviewing court would not be permitted to base its decision on the whole administrative record. Moreover, the statement of reasons would not be required to contain detailed findings of fact, although it must reveal "the grounds of decision and the essential facts upon which the Secretary's inferences are based."[193] Thus, a court would be precluded from deciding a plaintiff's challenge to the factual bases for the Secretary's conclusions.[194]

The Secretary, pursuant to the order of the court of appeals, had prepared a statement of reasons in the *Bachowski* case.[195] While the Court expressed no opinion as to the sufficiency of this statement, it may be analyzed to determine the practical operation of the statement of reasons requirement. On its face, the statement suggests that the Secretary's conclusion lacked a rational basis. The Secretary's reason for refusing to file suit was that the discovered violations did not affect the outcome of the election.[196] The Secretary's investigation, however, which covered 80 of District 20's 190 locals, revealed that violations of section 401 of the LMRDA may have invalidated 884 votes.[197] Considering that Bachowski lost the election by only 907 votes, the Secretary, in effect, claimed that investigation of the other 110 locals would not reveal 23 invalid votes. The laws of probability belie the rationality of the Secretary's conclusion. The Secretary may, however, have had other reasons for refusing to initiate the suit. For example, the Secretary may have believed that the violations would be unprovable in court. Consequently, the district court will probably provide the Secretary with an opportunity to supplement his statement with additional reasons.

It should be noted that the statement of reasons approach is confined to allegations of an abuse of discretion. Where a complaint alleges that an action of the Secretary is beyond the bounds of the Act, defiant of the Act, or unconstitutional, the Court apparently would allow review "beyond the confines of the reasons statement

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[191] *Bachowski,* 502 F.2d at 90.

[192] 421 U.S. at 572-73.

[193] *Id.* at 573-74.

[194] *Id.* at 573.

[195] The statement is printed as an appendix to the Supreme Court's opinion. *Id.* at 578-90.

[196] *Id.* at 589.

[197] *Id.* at 588.

. . . ."[198] The nature of this extended review, however, is not entirely clear. There is a suggestion that this review would consist of a "trial type hearing."[199] With the exception of those few cases entitled to de novo review under section 706(2)(F),[200] however, judicial review under the APA is more an appellate-type review. The Court probably does not mean to expand the category of cases entitled to de novo review under section 706(2)(F). A more reasonable assumption is that this extended review would encompass the whole administrative record

In summary, the differentiation between the abuse of discretion standard and the constitutional and statutory standards highlights *Bachowski's* unique approach to the creation of a limited scope of review. The Court, while concerned with preserving the value of administrative discretion, never considered prohibiting review for abuses of discretion. Rather, discretion is preserved by limiting the evidentiary basis of the inquiry. Review for constitutional or statutory violations, though more "grave,"[201] is less intrusive. The inquiry will not be directed at the factual basis for the findings of no probable violation or no probable effect. Therefore, in such situations, a court's determination may be based on the whole administrative record.

Bachowski's statement of reasons approach is likely to be a useful tool for balancing the competing demands for administrative discretion and judicial review. However, the Court's basis for limiting its scope of review is unclear because of its inadequate treatment of section 701(a)(2). If the Secretary's decision was not committed to discretion by law then the decision was not excepted by section 701(a)(2) from the standards of section 706. Thus, the Court seems to have been without authority to alter the scope of review under section 706 in the absence of an express modification of the APA in the LMRDA. If, on the other hand, some aspects of the Secretary's decision did fall under section 701(a)(2) then these aspects were not governed by the review provisions of the APA, and the Court's claim that it was indeed reviewing under the APA is misleading.

CONCLUSION

The *Bachowski* decision establishes certain guidelines which are important to plaintiffs seeking judicial review of administrative actions. The plaintiff should first argue that neither of section 701(a)'s subdivisions apply to the action in question. If successful, the plaintiff

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[198] *Id.* at 574.

[199] *Id.* at 573-74. One of Bachowski's claims that will be dealt with on remand is that the Secretary's action was clearly beyond the bounds of the Act and that Bachowski is therefore entitled to a trial-type hearing. Plaintiff's verified motion for further proceedings and relief on remand, Bachowski v. Brennan, Civil No. 73-0954 (W.D. Pa. 1973).

[200] *See Overton Park,* 401 U.S. at 414-15.

[201] 421 U.S. at 574.

would be entitled to "unlimited" section 706 review. If the court should find in the underlying statute a congressional intent to preclude review under section 701(a)(1), a result which is becoming increasingly rare, the plaintiff would be reduced to arguing the unconstitutionality of such an enactment. If section 701(a)(2) of the APA applies, the plaintiff should argue that the result is not automatic nonreviewability. The plaintiff should point out that under the current interpretation of section 701(a)(2), the court may separate the discretionary action into reviewable and nonreviewable elements. Alternatively, the plaintiff could argue that section 701(a)(2)'s immediate effect is only to remove the action from the APA and that once outside the APA, the action is still reviewable under common law. While *Bachowski* might hinder such a claim, its treatment of the scope of review issue tends to support the existence of common law review. If the court adopts either the extent or common law approach to section 701(a)(2), the plaintiff should urge the court to adopt a scope of review that includes the abuse of discretion standard. *Bachowski* supports such a claim because it allows the court to review even highly discretionary actions for an abuse of discretion, provided the evidentiary base is limited to something less than the whole administrative record.

DENNIS LAFIURA

Copyright — Validity of Copyright Renewal — Evidentiary Effect of Renewal Certificate — *Epoch Producing Corp. v. Killiam Shows, Inc.* [1] — David W. Griffith produced and directed the motion picture classic *The Birth of a Nation* in 1914.[2] The David W. Griffith Corporation [hereinafter DWG], a corporation personally controlled by Griffith, copyrighted *The Birth* as an unpublished work in 1915, and in the same year acquired a copyright in the published work by exhibiting the film with notice of copyright.[3] Two months later DWG assigned both copyrights to Epoch Producing Corporation [hereinafter Epoch] and Thomas Dixon, author of the novel on which *The Birth* was

[1] 522 F.2d 737 (2d Cir. 1975).

[2] *Id.* at 740.

[3] *Id.* Statutory copyright in an unpublished work is acquired by depositing a copy and registering the work with the Copyright Office. 17 U.S.C. § 12 (1970). Statutory copyright in the published work is acquired by publication of the work with notice of copyright. 17 U.S.C. § 10 (1970); Washingtonian Publishing Co. v. Pearson, 306 U.S. 30, 35-42 (1939). Although copyright in the published work is thus acquired without registration with the Copyright Office, the proprietor is not entitled to bring an infringement action unless the copyright in the work has been so registered. 17 U.S.C. § 13 (1970). *See* 522 F.2d at 740-41 n.2. When copyright in the published work has been registered, the Copyright Office issues a certificate of registration. 17 U.S.C. § 11 (1970). The contents of the certificate of registration are designated in 17 U.S.C. § 209 (1970).