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The Supreme Court’s Use of Statutory Interpretation: *Morris v. Gressette*, APA Nonreviewability, and the Idea of a Legislative Scheme

Beginning in 1967 with its decision in *Abbott Laboratories v. Gardner*,¹ the Supreme Court expanded judicial reviewability of administrative decisions under section 10 of the Administrative Procedure Act (APA).² A later case, *Citizens to Preserve Overton Park, Inc. v. Volpe*,³ strengthened the impression that the Court was unwilling to withhold judicial review of an administrative action when such a preclusion of review was not explicitly contained in the relevant statute.⁴ In 1977, however, the Court in *Morris v. Gressette*⁵ withdrew from this position by holding nonreviewable the Attorney General’s decision not to challenge a South Carolina election law under section 5 of the Voting Rights Act of 1965,⁶ even though review was not explicitly precluded by the statute.

This Note examines analytical problems in implying APA nonreviewability common to *Morris* and *Overton Park*. The focus will be on the Court’s reasoning in each case, rather than on abstract principles of reviewability.⁷ In resolving questions of implied APA nonreviewability,⁸ the Court in these cases failed to analyze the relevant statute either carefully or consistently. Based on a close reading of the two cases and the statutes they construe, this Note proposes a course of

1. 387 U.S. 136 (1967) (regulations governing generic names in drug labeling and advertising reviewable in pre-enforcement suit for declaratory and injunctive relief).
5. 432 U.S. 491 (1977); see 1643-56 infra.
7. See Gelhorn & Robinson, Perspectives on Administrative Law, 75 COLUM. L. REV. 771, 780 (1975) (“In expressing our suspicion that the rules governing judicial review have no more substance at the core than a seedless grape, we profess no unique insight.”); Rabin, Administrative Law in Transition: A Discipline in Search of an Organizing Principle, 72 NW. U. L. REV. 120, 128, 130 (1977) (Supreme Court administrative law opinions ignore process and policy concerns, thus producing judicial review with “disembodied, abstract quality”).
8. See pp. 1637-40 infra.
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inquiry that gives specific content to the idea, discussed in *Morris*, of a "legislative scheme."9

Part I of the Note briefly surveys the issue of implied APA non-reviewability and frames that issue as a twofold problem of statutory interpretation; it is necessary to interpret both the APA and the administrative statute applicable to the particular controversy. The proposed course of inquiry into the entire legislative scheme is based on the analysis in the *Morris* opinion, which is discussed in Part II. Serious interpretive flaws in that opinion demonstrate the need for a more methodical approach. Part III, therefore, suggests certain refinements of the *Morris* analysis. Finally, the improved version of this course of inquiry is defended by a demonstration of how its use in *Overton Park* might have led to a different and more thoroughly reasoned interpretation of the pertinent statutes.

I. Implying APA Nonreviewability—A Twofold Problem of Statutory Interpretation

A. Interpreting the APA

The Administrative Procedure Act was passed in 194610 to ensure that federal agencies grew and functioned within the bounds of due process and accountability essential to American government.11 Section 10 provides generally for judicial review of agency action; it codifies the prior doctrine12 that courts may inquire whether an agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"13 and should therefore be overturned. Section 10 presents a formidable problem of statutory interpretation, because its general provision for judicial review has two exceptions—for cases where "statutes preclude judicial review" or where "agency action is committed to agency discretion by law."14

The tension between these two exceptions and section 10's tenor in favor of review has generated a vigorous and long-lived controversy.15

9. See 1640-42 infra.
15. For conflicting views on this controversy, see Berger, Administrative Arbitrariness: A Synthesis, 78 YALE L.J. 963, 966 n.9 (1969) (citing authorities).
The precise importance of the bifurcation is unclear: it is most important to note that judicial review may be precluded by implication\textsuperscript{16} and that implied preclusion may be based on either exception.\textsuperscript{17}

Scholars have attempted to clarify the two exceptions by drawing on general conceptions of judicial review and administrative discretion. The desire to shield the exercise of agency discretion from judicial review has been explained or supported by reference to tradition,\textsuperscript{18} to the nature of the subject matter under the agency's purview,\textsuperscript{19} or to the possible effects of review on agency efficiency.\textsuperscript{20} On the other hand, the agency's performance may indicate the need for a stronger judicial role in the "partnership" between court and agency,\textsuperscript{21} or there may be

\textsuperscript{16} Both before and after the enactment of the APA the Court has found judicial review of administrative action to be precluded by implication. See Morris v. Gressette, 432 U.S. 491 (1977); Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943).

\textsuperscript{17} There is disagreement about the definition of each exception. The range of possible understandings of the meaning of "committed to agency discretion" is divided into several discrete formulations in Note, Discretion in a Crystal Closet: Applying a Systemic Approach to Determine the Reviewability of Agency Discretion, 3 Rut.-Cam. L.J. 452, 456-74 (1972). Some commentators view the exception very narrowly. See L. Jaffe, supra note 12, at 374; Berger, supra note 15, at 970-72.

According to some definitions, the two exceptions overlap. For example, both exceptions may cover an implicit preclusion, and congressional "intent," see note 38 infra, may be relevant to either one. See Consumer Fed'n of America v. FTC, 515 F.2d 367, 369-73 (D.C. Cir. 1975); K. Davis, Administrative Law Treatise 945-51, 964-90 (Supp. 1970); Davis, "Judicial Control of Administrative Action": A Review, 66 Colum. L. Rev. 635, 651 (1966) (book review of L. Jaffe, Judicial Control of Administrative Action (1965)) (both preclusion of review and action committed to agency discretion may be revealed implicitly, e.g., by congressional intent). But see Berger, Administrative Arbitrariness: A Sequel, 51 Minn. L. Rev. 601, 628-29 (1967) ("statistics preclude review" refers only to preclusion on face of statute). For this reason, there is disagreement over whether the bifurcation itself is analytically useful. For opposing views on this question, see Berger, supra at 622-23, 628-30; Davis, Administrative Arbitrariness Is Not Always Reviewable, 51 Minn. L. Rev. 643, 652 n.30 (1967); Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion," 82 Harv. L. Rev. 307, 377 n.43 (1968) (claiming distinction insignificant). The Supreme Court has not spoken definitively about the bifurcation issue. Instead, when it has been confronted with statutes not explicitly precluding review, it has used statutory interpretation both in decisions such as Overton Park that refer to one of the exceptions, see pp. 1639-40 infra, and in decisions such as Morris that only discuss preclusion by implication generally, see pp. 1645-46 & note 64 infra.

\textsuperscript{18} See, e.g., J. Mashaw & R. Merrill, Introduction to the American Public Law System 861-69 (1975) (decisions involving award of government contracts, management of public lands, defense, and foreign affairs generally held nonreviewable); Rosenblum, A New Look at the General Counsel's Unreviewable Discretion Not to Issue a Complaint Under the NLRA, 86 Yale L.J. 1349, 1349-59, 1371-85 (1977) (NLRB General Counsel's unreviewable discretion taken for granted as established doctrine).

\textsuperscript{19} K. Davis, supra note 17, at 965 (Supp. 1970).

\textsuperscript{20} See Langevin v. Chenango Court, Inc., 447 F.2d 296, 303 (2d Cir. 1971) (judicial review of FHA approvals of rent increases would interfere with "need for expedition"); Saferstein, supra note 17, at 382-95 (1968) (discussing efficiency factors).

\textsuperscript{21} See Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971) (supervisory function of judicial review is "partnership" between agency and court in which court ensures that agency has carefully considered
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a perceived need to adapt the governing statute to changed conditions.\textsuperscript{22} These considerations have been used in arguments against insulating discretion from review, since review would further basic goals of the agency. Moreover, judicial review of some discretionary agency actions has been further justified as a way to protect important individual rights\textsuperscript{23} or group interests neglected by an imperfect political process.\textsuperscript{24}

All of these considerations are, however, problematic in two respects. First, they are for the most part too general; they do not relate the non-reviewability question to the actual operation of the relevant statute or to congressional policy in passing the statute. The pertinence of any one of these considerations depends on other determinations—whether, for example, one can discern a congressional purpose to administer a particular statute primarily to secure a basic constitutional right, rather than to achieve efficiency in a given area of commerce.\textsuperscript{25} Second, although the Supreme Court has repeatedly asserted that there is a weighty presumption in favor of review, which can be displaced only by a showing of “clear and convincing evidence” to the contrary,\textsuperscript{26} it has never adopted any of the principles described above. This Note, therefore, does not attempt to discover a uniform Supreme Court theory for implying APA nonreviewability.

In examining the way the Court analyzed the nonreviewability issue in \textit{Morris v. Gressette}\textsuperscript{27} and \textit{Citizens to Preserve Overton Park, Inc. v. Volpe},\textsuperscript{28} the Note will concentrate primarily on method rather than result. Both opinions based their inferences about implied preclusion


\textsuperscript{23} Id. at 39-41.


\textsuperscript{25} See Witherspoon, \textit{Administrative Discretion to Determine Statutory Meaning: “The Middle Road”: 1}, 40 \textit{Tex. L. Rev.} 751, 796-800 (1962) (discussing many types of legislative purpose).


\textsuperscript{27} 432 U.S. 491 (1977).

\textsuperscript{28} 401 U.S. 402 (1971).
of review on an interpretation of the governing administrative statute, although the holdings and methods of the opinions differed. In *Overton Park*, Justice Marshall, writing for the majority, equated the "committed to agency discretion" exception with a statement in the APA's legislative history that review is only precluded when "'statutes are drawn in such broad terms that in a given case there is no law to apply.'" The Court did not explicitly identify a method by which one might interpret a statute to determine whether there was "law to apply" in reviewing agency action. The opinion did suggest, however, that a statute giving an agency a narrow and specific mandate argued for review while a statute allowing a wide-ranging balancing of interests argued against reviewability.

In *Morris* the Court found that review was precluded by implication and based this finding on an examination of "'the entire legislative scheme.'" Although this Note argues that the *Morris* Court reached an incorrect result, its mode of analysis is potentially a more thorough and precise way of interpreting statutes to determine implicit non-reviewability.

### B. "Legislative Scheme": A Problem in Statutory Interpretation

A court confronted with the contention that a given action is impliedly nonreviewable must engage in interstitial lawmaking: since the statute is by hypothesis silent on the subject of judicial review, the question must be resolved in a way that is consistent with all the goals and means of the legislation. The problem is that this task is often undertaken without any clear sense of the analytic steps that should be followed. This uncertainty may be partially explained by the concerns that are characteristic of the literature about statutory construction. Catalogues of maxims and "rules" of construction, discussion of cognitive and epistemological riddles implicit in the idea of a collective legislative "purpose," as well as arguments over the juris-

29. 401 U.S. at 410 (quoting S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945)).
prudential implications and principles of judicial lawmaking have all diverted the attention of scholars. As a result, little academic wisdom is available to a judge trying to define the “entire legislative scheme” in a given case, although some guidance may be derived from prior judicial opinions. The course of inquiry implicit in the opinion points toward some concrete features of an administrative mechanism that can be discerned in its statutory blueprint and thus can aid in resolving questions of implied nonreviewability.

As will be seen below, four lines of inquiry are present in the Court’s analysis of legislative scheme. The analysis starts from a presumption in favor of judicial review, then progresses by inquiring into the statute’s purpose, the scope of administrative authority it grants, and the possible impact of review on administration of the statute, only

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36. The problem of furthering a legislative purpose in cases that are clearly within the ambit of a statute but are not covered by a specific provision of the statute has been neglected. R. Dickerson, The Interpretation and Application of Statutes 250-51 (1975). Yet that is the very problem presented in implying nonreviewability. This is because most inquiries into the purpose or “equity” of a statute were for a long time undertaken in order to carve out an exception to, or to justify the extension of, the otherwise manifest scope of a statute. See Landis, Statutes and the Sources of Law, in Harv. Legal Essays 213, 218-30 (1934) (“equity” of statute may be used by courts to extend statute’s coverage to analogous cases); Note, The Legitimacy of Civil Law Reasoning in the Common Law: Justice Harlan’s Contribution, 82 Yale L.J. 258, 261-69, 279-80 (1972) (discussing technique of reasoning by analogy from statutes to create new law).

37. Justice Harlan was especially perceptive in delineating a legislative scheme. See, e.g., United States v. Standard Oil Co., 384 U.S. 224, 230 (1966) (dissenting from Court’s holding gasoline accidentally discharged “refuse matter” under § 13 of Rivers and Harbors Act); United States v. Republic Steel Corp., 362 U.S. 482, 493-510 (1960) (dissenting from Court’s holding fluid industrial discharge an “obstruction” under § 10 of Rivers and Harbors Act). In the area of nonreviewability, perhaps the most careful attempt to delineate the relevant features of a “legislative scheme” is the opinion of Judge Coffin in Hahn v. Gottlieb, 430 F.2d 1243, 1249-51 (1st Cir. 1970) (holding non-reviewable FHA approval of rent increases in subsidized housing).

38. Justice Powell not only used the word “purpose,” 432 U.S. at 501 (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967)), but also referred at various times to statutory meaning in terms such as what might be “inferred,” congressional “desire,” and what Congress “intended.” Id. at 501, 503, 504. The terms “legislative purpose” and “legislative intent” are often confused. See, e.g., Breitel, The Courts and Lawmaking, in Legal Institutions Today and Tomorrow 1, 27-28 (M. Paulsen ed. 1959) (using both terms, apparently treating them as synonymous); Johnstone, An Evaluation of the Rules of Statutory Interpretation, 3 U. Kan. L. Rev. 1, 13-16 (1954) (noting interchangeability of terms). To the extent that the two terms have distinct meanings, “intent” is a narrower concept referring to a volitional or cognitive state with respect to a specific issue, word, or question, while “purpose” is a broader concept including what the statute ought to accomplish and the means thereto. See R. Dickerson, supra note 36, at 67-102, 285. To avoid fruitless complexity the term “purpose” will be used throughout this Note because it seems more suitable in light of Justice Powell’s recurring admonition to consider the “entire legislative scheme.” 432 U.S. at 501-06; see Johnstone, supra at 15 & n.72.

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then reaching the final issue—the proper scope of judicial authority in making the statute work as Congress envisioned.\textsuperscript{30}

This course of inquiry is a welcome specification of "legislative scheme," for the term is frequently used but rarely defined.\textsuperscript{40} Its relevance to the issue of reviewability was not analyzed by the \textit{Morris} Court but is easily demonstrated in general terms. Because the "purpose" of a given statute usually represents a balancing of competing interests, one may describe that purpose as accomplishing a distribution of social benefits and burdens.\textsuperscript{41} Since a statute is likely to involve "the art of proliferating a purpose,"\textsuperscript{42} in which several goals are to be respected, the realization of any one goal may be limited by the necessity of honoring another.

In an administrative statute, an agency is chosen as the instrumentality for accomplishing this distribution of benefits and burdens. The second line of inquiry—into the scope of agency discretion—involves consideration of the latitude of judgment and action permitted an agency to accomplish its designated mission. This combination of goal and instrumentality constitutes the legislative scheme.

Once the features of a legislative scheme have been sketched in this way, under the \textit{Morris} analysis the court should consider whether granting or denying review would be consonant with the scheme, and thereby defer to Congress in matters of policy.\textsuperscript{43} The third and fourth lines of inquiry meet this requirement by considering the impact and proper scope of review.\textsuperscript{44} If, for example, a court has difficulty in choosing a standard of review that reflects the choices made in enacting the administrative statute, it should suspect that a grant of review might not be consonant with the legislative scheme.\textsuperscript{45} Or, if denial of

\textsuperscript{39} See 1646-52 supra \textit{(discussion of Morris opinion)}. Since the Court held that review was impliedly precluded, it did not go on to discuss the fourth line of inquiry—the exact scope of judicial review.

\textsuperscript{40} Between Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)—the source of the quotation in \textit{Morris}—and \textit{Morris}, the phrase was not used by the Court with reference to nonreviewability. The term was used in other areas, however, such as the analogous area of implied causes of action. \textit{See, e.g.}, Cort v. Ash, 422 U.S. 66, 78 (1975).

\textsuperscript{41} See, \textit{e.g.}, Note, supra note 36, at 273.


\textsuperscript{43} \textit{See} R. \textit{Dickerson}, supra note 36, at 7-9 (need for courts to defer to legislature).

\textsuperscript{44} Although defining a scope of review can be a determination of what degree of review is useful given the constraining considerations of purpose, scope of discretion, and impact of review, it can also involve an anticipation or revision of the overall reviewability determination. \textit{See note 123 supra}.

\textsuperscript{45} \textit{See} pp. 1656, 1658-64 & notes 116 & 123 supra \textit{(further discussion and application of the proposed course of inquiry, particularly with respect to withholding review).
review would permit an agency to frustrate a clear congressional goal, the court should be particularly willing to grant review.\textsuperscript{46}

If a court analyzes a legislative scheme in light of all available sources of meaning,\textsuperscript{47} it will be in a position to infer Congress's policy choices for the various interests involved in the dispute, and so to determine whether judicial review of the specific action involved would be a replication of or a departure from those choices and preferences. The Supreme Court's failure to pursue this course of inquiry with the requisite attention to detail was its principal error in deciding \textit{Morris}.

II. Analysis of Legislative Scheme in \textit{Morris v. Gressette}:

\textbf{Purpose Deflected}

\textit{Morris} was decided against the background of a persistent and century-old pattern of resistance to the Fifteenth Amendment.\textsuperscript{48} The case involved the Voting Rights Act of 1965 (VRA),\textsuperscript{49} which prohibits

\begin{itemize}
  \item \textsuperscript{46} See pp. 1646-56 infra (criticism of \textit{Morris} Court's nonreviewability holding).
  \item \textsuperscript{47} For examples of the sources of meaning that should be considered, see note 110 infra.

This pattern of resistance has forced the use of private lawsuits to enjoin enforcement of new election laws, notwithstanding the VRA's prohibition of such enforcement before a law is cleared under the Act. See p. 1644 & note 52 infra. In spite of the clear language of the VRA, its requirements for new state election laws have often been violated; there have been attempts to enforce new laws before clearance from Washington and even frequent failures to submit new laws for approval. See \textit{Perkins v. Matthews, 400 U.S. 379 (1971)}; United States v. Garner, 349 F. Supp. 1054 (N.D. Ga. 1972) (cases involving elections held pursuant to unapproved election laws); \textit{Civil Rights Oversight Subcomm. of the House Comm. on the Judiciary, 92d Cong., 2d Sess., Report on Enforcement of the Voting Rights Act of 1965 in Mississippi 5 (Comm. Print 1972)} (discussing blatant non-compliance with VRA) [hereinafter cited as \textit{Oversight Report}]; \textit{The Enforcement of the Voting Rights Act: Hearings Before the Civil Rights Oversight Subcomm. of the House Comm. on the Judiciary, 92d Cong., 1st Sess. 52-56, 58, 101, 255-56 (1971)} [hereinafter cited as \textit{Oversight Hearings}].

Another circumstance necessitating private suits was the Justice Department's inadequate discharge of its duties under the VRA. This evaluation was shared by members of Congress as well as civil rights lawyers, and was corroborated by Attorney General John Mitchell, who provoked considerable distress by his statement to the press that the Department was unable to enforce the VRA. \textit{Oversight Hearings, supra} at 8-9, 13, 238.

\end{itemize}
states and other political subdivisions from using election laws to restrict voting rights on the basis of race. Section 5 of the VRA prohibits covered jurisdictions from implementing new election laws without first obtaining clearance from either the Attorney General or the District Court for the District of Columbia.

Beginning in 1971, South Carolina's efforts to reapportion its state senate were the subject of extensive litigation and met with both a section 5 objection by the Attorney General and invalidation by a South Carolina federal district court. As a result of this litigation, the state legislature passed the law directly involved in *Morris*—Act 1205. Although the Act reapportioned the state senate districts, it retained the three suspect features of a prior plan to which the Attorney General had objected: multimember districts, numbered posts, and majority run-off primaries. Nonetheless, eleven days after the new plan was

50. 42 U.S.C. § 1973 (1970 & Supp. V 1975) ("No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color . . . .")


52. In November 1971, South Carolina enacted a plan, designated Act 932, to reapportion its state senate. 1971 S.C. Acts 2071; see Harper v. Levi, 520 F.2d 53, 58 (D.C. Cir. 1975). The plan included features that had been held to be indirect but effective obstructions of the Fifteenth Amendment: multi-member districts, numbered posts, and majority run-off primaries. Id. The majority run-off feature applied to all state elections in South Carolina. See S.C. Code § 7-17-600 (1976). As required by the VRA, the plan was submitted to the Attorney General for approval. See Harper v. Levi, 520 F.2d 53, 58 (D.C. Cir. 1975). Several private suits that sought to enjoin the scheme's enforcement were filed at the same time. They claimed that the new election scheme violated the Fourteenth and Fifteenth Amendments and the VRA. For the chronology of the legislation and lawsuits at this stage of the case, see Memorandum for the United States of Feb. 1, 1972, McCollum v. West, No. 71-1211 (D.S.C. 1972), reprinted in Brief for Appellees, Appendix B, at 5a, Morris v. Gressette, 432 U.S. 491 (1977).

In March 1972, during the pendency of the private suits, the Attorney General objected to Act 932 because he was unable to conclude that the three features listed above would not abridge minority voting rights in South Carolina. Letter from David L. Norman, Assistant Attorney General, to Daniel R. McLeod (Mar. 6, 1972) reprinted in Appendix at 26, Morris v. Gressette, 432 U.S. 491 (1977) (filed as appendix to briefs) [hereinafter cited as Appendix]; see Harper v. Levi, 520 F.2d 53, 58 (D.C. Cir. 1975). One month later, in April, the three-judge court that had convened to hear the private suit held that apportionment and residency provisions of the new election scheme violated the Fourteenth Amendment, but also held that the scheme did not violate the Fifteenth Amendment because there was no racial motivation; the court declined to consider the VRA claim because of the Attorney General's objection. Twiggs v. West, No. 71-1106 (D.S.C. Apr. 7, 1972), reprinted in Jurisdictional Statement, Appendix B, at 26a, Morris v. Gressette, 432 U.S. 491 (1977). The court ordered the state to enact a constitutional replacement within thirty days. Id. at 45a, 48a; see Harper v. Levi, 520 F.2d 53, 58 (D.C. Cir. 1975).


submitted for the Attorney General's approval, the South Carolina federal court, which had retained jurisdiction following its rejection of the earlier plan, held the new plan constitutional and ordered it into effect. In spite of his duty to make an independent determination under the VRA, in June 1972 Attorney General Kleindienst decided to "defer" to the judgment of the South Carolina court and thus did not enter a section 5 objection to the senate reapportionment plan.

Judicial review of this decision was sought and granted in the federal District Court for the District of Columbia. The Attorney General was ordered to perform his duty independently of the South Carolina court and he then objected to Act 1205 nunc pro tunc. The case of Morris v. Gressette arose when plaintiffs, relying on this nunc pro tunc objection, tried to enjoin enforcement of Act 1205.

The Supreme Court, in an opinion by Justice Powell, discerned the pivotal question in Morris to be whether review of the Attorney General's failure to object was authorized by the APA. Since the presumption is always in favor of review and no provision of the Voting Rights Act expressly precluded review of the Attorney General's decision, the Court considered whether judicial review was

- the multi-member district and numbered post provisions; the majority run-off requirement was enacted much earlier and is applicable to all elections in the state. See note 52 supra.
- Order of May 23, 1972, Twiggs v. West, No. 71-1106 (D.S.C.), reprinted in U.S. Brief, supra note 54, Appendix B, at 9a; see Harper v. Levi, 520 F.2d 53, 58 (D.C. Cir. 1975). This sort of order—one implementing a new election law before it has been approved in accordance with the VRA—prevents the Act from achieving its purposes. See p. 1632 & notes 106-09 infra. Such a validation order is both premature and misleadingly similar to the judgment the Attorney General himself must make. See Letter from David L. Norman, Assistant Attorney General, to Daniel R. McLeod (June 30, 1972), reprinted in Appendix, supra note 52, at 47 (treating decision of three-judge court in Fifteenth Amendment suit as res judicata in § 5 request for approval). One important difference between the two judgments is clear: the state has the burden of proof when seeking approval for the law from the Attorney General or the District of Columbia District Court, whereas the burden is on private plaintiffs in preclearance suits for injunctive relief. Harper v. Levi, 520 F.2d 53, 69-70 (D.C. Cir. 1975). For this reason, the Supreme Court has now disallowed consideration of Fifteenth Amendment questions and judicial implementation of reapportionment legislation before VRA clearance has been obtained. Connor v. Waller, 421 U.S. 656 (1975); see p. 1651 infra.
- See p. 1650 infra.
- See Letter, supra note 56.
- 432 U.S. at 501. If review were not authorized, presumably the Attorney General's earlier failure to object would stand as valid.
- Id. at 501; see pp. 1636 & 1639 and notes 3-4, 26 supra.
- 432 U.S. at 501.
precluded by implication. Justice Powell found implicit preclusion of review by analyzing "the role played by the Attorney General within 'the context of the entire legislative scheme'" created by the VRA. The analysis considered the purpose of the VRA, the impact of review on the statute's operation, and the scope of the Attorney General's discretion. Each step of the Court's analysis overlooked important aspects of the VRA; as a whole, the opinion seriously interferes with the Act's purposes.

A. Purpose

After noting that a statute is automatically cleared if the Attorney General does not object within sixty days of its submission to him, the majority moved directly to consideration of a small portion of the legislative history because it determined that the language of the Act itself did not give any strong indication of Congress's purpose with respect to judicial review. Because the purpose of the sixty-day mechanism was, arguably, to mitigate the severity of the section 5 remedy by providing a quicker method of clearance than the declaratory judgment route, and because judicial review of the Attorney General's decisions would to some extent prolong the process, the majority concluded that the statute impliedly precluded review.

The superficiality of this interpretation of legislative purpose is initially suggested by the Court's inattention to the statute's words. The Act expressly precluded review of certain enumerated determinations by the Attorney General without mentioning the decision not to object. Justice Powell noted the omission, but he rejected a "new

64. Id. In a long series of prior opinions the Court had rejected in strong terms arguments that review was impliedly precluded. See pp. 1636 & 1639 supra.
65. 432 U.S. at 501 (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967)). Justice Powell used the quoted phrase four times. Id. at 501, 503 n.29, 506 nn.22 & 23.
66. Id. at 503.
67. Id. at 504-05.
68. Id. at 506-07 & nn.23 & 24. Scope of review was not considered. See pp. 1641-42 & note 39 supra.
70. 432 U.S. at 503-06.
71. Id. at 501-02.
72. Id. at 503-05.
73. Id. at 505-07.
74. Section 4(b) of the Act precludes judicial review of certain factual determinations made by the Attorney General under §§ 4, 6 & 13 of the Act. 42 U.S.C. §§ 1973b, d, k.
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mechanical rule of statutory construction" that would "prevent a court from giving effect to congressional intent that otherwise was clear from 'the context of the entire legislative scheme.' "76 The rule of expressio unius est exclusio alterius may be mechanical, but it is hardly new.76 The Court's argument that a standard tool of statutory construction must give way to "'the entire legislative scheme'" would be less troubling if the Court had actually examined that entire scheme.77

The Court considered the purpose and operation of the sixty-day provision of section 5, but failed to make such inquiries about the Act as a whole.78 The Voting Rights Act of 1965 was an unusually severe measure to root out a persistent and pernicious inequity.79 The principal goal of the law was to protect racial minorities whose voting rights were denied or diluted by the imposition of a federal clearance authority between those voters and states that had used election laws to abridge voting rights.80 The severity of means chosen to implement this goal is an indication of Congress's extreme concern for minority voters. Because it considered only the secondary, qualifying purpose—clearing election laws expeditiously—the opinion failed to give the primary, remedial purpose due weight, and this failure fundamentally marred the Court's statutory interpretation.

Moreover, Justice Powell's reasoning about the purpose of the sixty-day alternative is weak even when considered in isolation from the


75. Id. at 506 n.22 (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967)).

76. The rule is no stranger to the Court. See, e.g., National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (expressio unius rule used to construe Rail Passenger Service Act). Whether the rule should be applied in a given case, or rejected as "mechanical," depends on the context: in some cases the omission of a term indicates a mere oversight, yet in other cases the explicit inclusion of analogous but distinct terms or provisions, such as the specific prohibition of review of some determinations, suggests deliberate exclusion. See, e.g., National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458-60 (1974) (explicit authorization of particular lawsuits suggests exclusion of others); 6 L. Loss, SECURITIES REGULATION 3870 (2d ed. Supp. 1969) (intention to deny cause of action under Rule 10b-5 may be inferred from creation of causes of action under analogous provisions of Securities Exchange Act). A discussion of the importance of context in ascertaining whether an omission should give rise to a negative implication is contained in R. Dickerson, supra note 36, at 41, 47, 234-35.

77. Although reliance on standard rules of construction may be less adequate than analysis of the entire legislative scheme, see p. 1640 & note 33 supra, the Court chose the least desirable course by using neither technique effectively.

78. 432 U.S. at 499-506.

79. See note 48 supra.

80. See pp. 1643-45 supra.
rest of the Act. He argued that provision for a sixty-day alternative to
the more protracted declaratory judgment method of clearance evinced
a congressional desire to “expedite” clearance of new laws, but such
evidence as there was for this inference readily supports a much nar-
rower conclusion. The only contemporary indication of the purpose
of the sixty-day alternative is a remark by Attorney General Katzen-
bach before the Senate Judiciary Committee. When read in its en-
tirety, Katzenbach’s statement implies a willingness not to delay
enforcement of the many sorts of election laws that were noncon-
troversial and plainly nondiscriminatory. This qualification does not
extend to the election law involved in Morris, for the use of num-
bered posts in multimember districts is the most controversial—and
the most frequently objected to—of all the types of changes submitted to
the Attorney General.

With regard to statutory purpose, then, the majority opinion in
Morris is doubly weak: it does not weigh the primary purpose of the
statute, and it also misinterprets the only purpose it does consider—the
secondary purpose of expediting enforcement of clearly nondiscrimina-
tory and noncontroversial new state election laws.

81. 432 U.S. at 504.
82. An earlier version of the VRA provided only the declaratory judgment method of
preclearance, and the addition of a second method is nowhere discussed in the Senate
or House Reports on the legislation. See id. at 503 & n.18; Harper v. Levi, 520 F.2d 53,
65 n.95 (D.C. Cir. 1975).
83. When being questioned by Senator Ervin about the requirement that new laws
be cleared by a declaratory judgment proceeding in the District of Columbia, and about
the authority of federal examiners to order voters registered when those voters were made
ineligible by discriminatory laws, Mr. Katzenbach defended this unusually strong power
by saying that case-by-case adjudication of state election laws to vindicate voting rights
took too long. While noting that some Senators felt the Attorney General already had too
much power under the proposed statute, Mr. Katzenbach suggested a less harsh way for
states to have new laws approved:

Now, there may be better ways of accomplishing this. I do not know if there are.
There are some here I can imagine, a good many provisions of State law, that could
be changed that would not in any way abridge or deny the right; and we, perhaps,
except for the fact that some members of the committee, I think, including yourself,
have had difficulty with giving the Attorney General discretion on some of these
things—perhaps this could be improved by applying it only to those laws which the
Attorney General takes exception to within a given period of time. Perhaps that
would remove some of the burdens.

Voting Rights: Hearings on S. 1564 Before the Senate Comm. on the Judiciary, 89th Cong.,
1st Sess. 237 (1965); see Oversight Report, supra note 48, at 11 (sixty-day alternative in-
tended to provide for changes that “could readily be assessed as nondiscriminatory”). The
interpretation in text is buttressed by the fact that the overwhelming majority of sub-
missions to the Attorney General are of the clearly nondiscriminatory, noncontroversial
NEWS 774, 783; Derfner, supra note 48, at 579 n.245.
NEWS 774, 783; Derfner, supra note 48, at 579 n.245. One may therefore argue that the
“expediting” purpose was irrelevant in Morris. See p. 1650 infra.

It is interesting to note that even while the Attorney General was justifying his def-
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B. Scope of Administrative Discretion

The scope of the discretion granted to the Attorney General by the Act was discussed in two footnotes in the Court's opinion. The majority interpreted the Act's purpose in such a way that not even an abrogation of the Attorney General's statutorily imposed duty would be subject to judicial review. They did not consider it significant that such a broad scope of unreviewable discretion might provide the Attorney General with an opportunity to trade votes in a Presidential election in exchange for approval of an election law. Although this may merely indicate faith in the Attorney General's integrity, as Justice Powell asserted, it is still remarkable that the Court specifically included a deliberate failure to enforce the Act among those decisions Congress intended to be unreviewable.

Two important features of the Attorney General's scope of authority under the VRA were overlooked by the Morris opinion. According to his own regulations, by which he is bound, the determination the Attorney General is required to make is essentially similar to that which would be made by the District of Columbia District Court in a declaratory judgment proceeding. In addition, the VRA's interposition to the South Carolina court, he admitted that Act 1205 was discriminatory. Memorandum of the United States in Response to the Court's Order of May 16, 1973 (filed July 16, 1973), Harper v. Kleindienst, 362 F. Supp. 742 (D.D.C. 1973), reprinted in Brief for Appellants, Appendix B, at 4a, 8a, Morris v. Gressette, 432 U.S. 491 (1977).

85. Id. at 506 n.23 & 507 n.24.
86. Id.
87. Compare id. (possibility of politically motivated abuse by Attorney General given "no weight" by majority) with id. at 507-09 (Marshall, J., dissenting) (criticizing majority's definition of Attorney General's unreviewable scope of authority).
88. Id. at 507 n.24. More often, courts leave open the possibility of review in cases of extraordinary administrative error, such as a relinquishing of enforcement responsibility. See, e.g., Dunlop v. Bachowski, 421 U.S. 560, 574 (1975). Justice Powell stated that there was "no evidence" of such an abuse in Morris, although the D.C. District Court found that the Attorney General had not fulfilled his statutory duty and had to be ordered to do so. Harper v. Kleindienst, 362 F. Supp. 742, 745-46 (D.D.C. 1973), aff'd sub nom. Harper v. Levi, 520 F.2d 53, 67 (D.C. Cir. 1975). This finding was accepted even by the Attorney General. U.S. Brief, supra note 54, at 20-36. The D.C. Circuit characterized the Attorney General's deferral as "improperly relinquishing[ing] his responsibility . . . .", 520 F.2d at 67. The Attorney General himself characterized the deferral as "not authorized by law." U.S. Brief, supra note 54, at 31.
90. 28 C.F.R. § 51.19 (1977) (burden of proof in 60-day proceeding same as in declaratory judgment in D.C. District Court). The similarity of the Attorney General's decision to a traditional judicial decision argues for reviewability. See pp. 1654-55 infra; Letter, supra note 56 (Attorney General's function under § 5 is to review submitted legislation "as nearly as possible in the same manner that the District Court for the District of Columbia would").
tion of central federal authorities, rather than local federal courts, between covered jurisdictions and their new election laws strongly suggests that the Attorney General is required to make an independent determination. Since Congress wanted to ensure the uniformity of a central authority and to avoid possible biases of local federal judges, deference to local courts contravenes this goal. This inference from the structure of the Act is corroborated by the Attorney General's own construction of section 5—that it is vital to the VRA's efficiency that he make an independent determination.

C. Scope of Review

Although the Court found the decision nonreviewable without addressing questions of scope of review, the very narrow scope of the particular judicial review requested in this case significantly diminishes its delaying effect. The Court could have limited a holding of reviewability to cases where the Attorney General appears to have relinquished his enforcement responsibility. This scope of review was advocated in the Attorney General's amicus brief; the delaying impact of such review would also be minimized because there was no factual dispute between the plaintiffs and the agency. Nor did plaintiffs urge the Court to second-guess an agency's expert judgment by revising a substantive decision: all that plaintiffs asked was that the Attorney General's independent discretion be exercised.

D. Impact of Review

After considering the legislative scheme, the Morris Court then discussed the impact of review on the two interests most deeply involved

91. When the VRA was passed in 1965, the central clearance provision was justified in neutral terms of "uniformity." See, e.g., 111 Cong. Rec. 10354-55 (1965) (remarks of Sen. Hart). But see id. at 8839 (remarks of Sen. McClellan) (perception that central clearance represented mistrust of Southern judges). When amendments to abolish this provision were considered in later debates on extending the VRA, proponents of the Act were more frank about its purpose. See 115 Cong. Rec. 38486 (1969) (remarks of Rep. McCulloch) (D.C. court "friendly to the cause of civil rights"); 121 Cong. Rec. 16900-01 (1975) (remarks of Rep. Edwards) (central clearance protects against "local pressures and customs").


93. The delaying effect was merely asserted by the majority. See 432 U.S. at 503-06.

94. The Attorney General argued that judicial review should be limited to such an improper relinquishing of responsibility. U.S. Brief, supra note 54, at 29-30.
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in VRA disputes—state governments and minority voters. The majority asserted that the effect of review on states would be to "'add acrimony,'"95 because it might "delay the implementation of validly enacted, nondiscriminatory state legislation."96 The extent, frequency, and likelihood of dilatory uses of judicial review, however, were not discussed. Indeed, it is apparent that Justice Powell's assessment of the potential impact of judicial review was unrealistic, and that any possible impact would probably be consonant with the statute's purpose.97 After Connor v. Waller,98 decided before Morris, deference to district court decisions in private pre-enforcement suits will not recur because district courts are no longer allowed to make the type of premature judgment to which Attorney General Kleindienst deferred.99 In this sense, the particular review requested was unique and could have no delaying effect on the approval of future election laws.

The potential impact of granting the narrow scope of review requested was thus much smaller than the Court suggested; that impact certainly appears acceptable when viewed in the context of other cases where the Court has granted more intrusive review.100 Indeed, since elections need not be delayed pending approval of a new election law, it is not clear from the opinion that the delaying impact of review could ever be significant. Elections can simply be held in accordance with the status quo in the jurisdiction.101 Above all, should it ever come to a choice between imposing the risk of a discriminatory voting law upon minorities and imposing the risk of administrative delay upon an enacting jurisdiction, Congress's value choice in the VRA is plainly discernible. The Court must be guided in resolving reviewability issues, as it was not in Morris, by Congress's policy in the statute.

The Court briefly considered the impact on minority plaintiffs of withholding review and found that the opportunity to file private

95. 432 U.S. at 504 n.19 (quoting Georgia v. United States, 411 U.S. 526, 541 (1973)). Justice Powell uses the phrase to make a point different from that made in the earlier Georgia case.
96. 432 U.S. at 503.
97. See Oversight Report, supra note 48, at 11 ("Congress intended that the burden of delay fall upon the submitting jurisdiction."); cf. pp. 1638-39 supra (whether a given consideration should influence a reviewability decision depends on the statute's purpose).
99. Additionally, the Attorney General had discontinued the policy of deference to such premature decisions. U.S. Brief, supra note 54, at 10; see Morris v. Gressette, 432 U.S. 491, 497 n.8 (1977).
suits under the Fifteenth Amendment mitigated that impact sufficiently to "reinforce" the denial of review. This may mean that the Court found such suits an adequate remedy, even when discriminatory legislation is not objected to by an erring Attorney General. Congress, however, found that private Fifteenth Amendment suits were not adequate, a finding the Court noted but did not evaluate. Since the purpose of section 5 in the VRA is to avoid the need for private suits, the Court's analysis seems precisely backward.

The impact on minority voters of denying review is not limited to remitting them to private suits. As Justice Marshall noted in dissent, once an election is held under a discriminatory law, and only prospective relief is granted upon a subsequent determination of the law's infirmity, it may be years before another opportunity to exercise the franchise arises. Since the VRA expires in 1982, postponement in these circumstances may lead to permanent denial of the Act's protection. When the Attorney General's decision to permit a covered jurisdiction to enforce a discriminatory election law out of deference to a local court is held unreviewable, the impact on the people protected by the statute is plainly inconsistent with the aim of extinguishing "nearly a century of widespread resistance to the Fifteenth Amendment."

III. Refinement of the Morris Analysis of Legislative Scheme for Inferring Nonreviewability

A close reading of the Morris opinion indicates that its analysis—an examination of the legislative scheme and the impact of review on the scheme—should be improved in three ways. First, available sources

102. 432 U.S. at 505.
103. See pp. 1649 & 1650 and notes 88 & 94 supra.
104. See 432 U.S. at 504-06. Justice Powell echoed appellees' argument that the perceived inadequacy of Fifteenth Amendment suits before the VRA was diminished by the enactment of that law, Brief for Appellees at 31-32, but whatever validity that contention may have is undercut to the extent that the Attorney General is allowed to relinquish his decisionmaking authority to local federal district courts—the very forums avoided by the VRA, see p. 1650 & note 91 supra.
105. 432 U.S. at 516-17 (Marshall, J., dissenting).
of meaning should be more thoroughly canvassed. Second, the four-phase inquiry into purpose, scope of agency discretion, scope of review, and impact should be made more specific and focused. Finally, the interdependency of the four phases of inquiry should be considered.

The first refinement responds to the Morris Court's disregard of important information about the VRA. The context of the Act's passage, the continuing resistance to its enforcement, and the congressional concern for the protection of minority voting rights occasioned by these conditions and evidenced in the legislative history were all overlooked by the majority. Moreover, although the agency's perspective on the legislative scheme is frequently valuable, Justice Powell gave no explicit weight to the Attorney General's amicus brief arguing for review. Finally, the implication contained in the statutory language—that review was not precluded—was noted by Justice Powell in a footnote but given little weight.

Next, the four-phase inquiry into purpose, scope of agency discretion, permissible scope of review, and impact of review needs to be made more focused and specific. No amount of information about a legislative scheme will be very useful unless each of the four lines of inquiry is detailed enough to detect truly significant indicia of congressional policy. The following considerations add specificity to the idea of a legislative scheme as defined earlier.

110. These sources include:
   i. The text of the particular administrative statute;
   ii. The circumstances surrounding the statute's enactment;
   iii. Legislative history;
   iv. Experience with the statute's administration, based on briefs or affidavits from agency personnel as well as parties seeking or opposing review.

111. See pp. 1646-48 supra.

112. But see United Hous. Foundation, Inc. v. Forman, 421 U.S. 837, 858 n.25 (1975) (Court will give little weight to SEC argument that contradicts earlier position held by that agency).

113. See pp. 1649-50 supra.

114. See pp. 1646-47 supra.

115. See pp. 1640-43 supra (definition of "legislative scheme"); cf. pp. 1664-65 infra (generalized version of four-phase inquiry); pp. 1656-64 infra (discussion of Overton Park based on four lines of inquiry). Courts and scholars have recognized the importance of some of the factors identified here, see, e.g., Hahn v. Gottlieb, 430 F.2d 1243, 1249-51 (1st Cir. 1970); Mahinka, supra note 21, at 35-48; Saferstein, supra note 17, at 382-95; Witherspoon, supra note 25, at 796-800, but most have failed to weight the various reviewability factors they propose so as to replicate the weighting of values in the relevant statute.

The proposed course of inquiry is not intended to displace the general principle that courts should be slow to find review precluded by implication in cases involving harm to constitutionally protected interests or an agency exceeding its statutory jurisdiction. See, e.g., Langevin v. Chenango Court, Inc., 447 F.2d 296, 303-04 (2d Cir. 1971); Hahn v. Gottlieb, 430 F.2d 1243, 1251 (1st Cir. 1970). Nor is this proposal meant to revise the general presumption in favor of review, see p. 1645 & note 62 supra; it only intended to provide a focused method for moving beyond the threshold of that presumption in a given case.
With respect to purpose, the Morris Court should have noted that the plaintiffs requesting review were the particular beneficiaries of the legislative scheme, that the means chosen were extreme and qualified by a relatively narrow subsidiary purpose, and the balancing of interests heavily favored minority voters over covered states. The Court might, in addition, have interpreted the scope of the Attorney General's discretion more narrowly had it noted that only one factor was to

116. The inquiry into purpose might be broken down as follows:
   i. What is the relation of any class of persons to a public good the law sought to promote or public evil it sought to eliminate (e.g., direct or indirect recipients of a benefit or obligation)? See p. 1642 & note 41 supra.
   ii. Were the means chosen for this objective minimal, substantial but qualified, or extreme?
   iii. To what extent do the means chosen represent a policy judgment, or a balancing of competing interests, that must be weighed against the good or evil addressed by the statute? See pp. 1641-43 supra.

This definition of purpose may appear to be a disguised standing requirement, but it is not. The combination of these three factors is designed to detect aggregates of several (possibly competing) statutory goals. The existence of such an aggregate may weigh against reviewability because to the extent that there is less clear "law to apply," and to the extent that there are several goals or classes of beneficiaries, the more likely is judicial review to be erratic, ad hoc, and dissonant in relation to the scheme's operation. See p. 1656 & note 123 infra. For a discussion of problems of adjudicating controversies involving several competing goals, see Henderson, Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication, 73 Colum. L. Rev. 1531, 1534-42 (1973).

117. Scope of agency discretion could be more specifically inquired into as follows:
   i. To what extent is the agency charged with managing a given activity efficiently rather than encouraging or discouraging an activity?
   ii. How much responsibility is left with the agency for developing the policy of the scheme, either because of the failure of Congress to agree on some points or to anticipate the needs of changing circumstances?
   iii. To what extent is the agency charged with conflict resolution, and to what extent is it bound to follow specific principles in doing so?
   iv. To what extent, in light of the above only, are informal decisionmaking and "technical expertise" necessary to the statute's operation?

The issue of leaving an agency with the responsibility for developing the policy of a legislative scheme is discussed in Freedman, Crisis and Legitimacy in the Administrative Process, 27 Stan. L. Rev. 1041, 1054-55, 1072-73 (1975).

The significance of agency expertise, in general and particularly in its bearing upon judicial oversight of administrative action, continues to be hotly debated. For a range of views on this issue, see Ethyl Corp. v. EPA, 541 F.2d 1, 33-37 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976); id. at 66-68 (Bazelon, C.J., concurring); id. at 68-69 (separate statement of Leventhal, J.); id. at 110-12 (Wilkey, J., dissenting); Freedman, supra at 1056-64; Getman & Goldberg, The Myth of Labor Board Expertise, 39 U. Chi. L. Rev. 681 (1972). The need for informal decisionmaking and technical expertise may seem unpersuasive as an argument against reviewability because such expertise can be imparted to a reviewing court. For another reason, however, review in such a case may be problematic. An administrative law judge may well have a day-to-day factual perspective that allows him, for example, to evaluate a Social Security disability claim against the entire spectrum of claimants and to develop at least that part of fairness that is uniformity. In this setting, as well as many analogous examples of informal action, the occasional intervention of a court is most likely to create anomalously favorable outcomes for a few beneficiaries rather than more "accurate" dispositions. See National Center for Administrative Justice, Final Report, Study of the Social Security Administration Hearing and Appeals Process, Part V—Judicial Review 253 (unpublished report 1977).
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govern his decision—whether an election law has the purpose or effect of abridging minority voting rights—and there is little doubt that avoiding this abridgement was the dominant purpose on which Congress agreed in passing the Act.\footnote{118} Moreover, in considering whether an appropriate scope of review\footnote{119} might be fashioned, it would have been appropriate to hold that the review requested—to compel exercise of statutory enforcement responsibility that had been relinquished—was sufficiently narrow to insulate the Attorney General's judgment from the danger of excessive judicial revision.

Indeed, even a broader scope of review might have been appropriate in \textit{Morris}; in contrast with legislative schemes in which the administrative decisionmaking is either more technical or more open-ended, the Attorney General's section 5 determinations involve expertise possessed by courts.\footnote{120} Finally, the Court should have devoted more attention to the possible impact of its reviewability holding.\footnote{121} The majority failed to consider whether the foreseeable impact of granting review was more consonant with the overall distribution of benefits and burdens in the statute than was the impact of denying review. As a result, black voters in South Carolina, on behalf of whom Congress fashioned one of the most extreme remedies in American history, were denied the very protection Congress took such pains to provide.\footnote{122}

\footnote{118}{See \textit{Georgia v. United States}, 411 U.S. 526, 536-38 (1973).}
\footnote{119}{Once a court has outlined the salient features of a legislative scheme in some detail, see notes 116 \\& 117 \textit{supra}, it can consider the proper role of judicial review in the scheme:
\begin{enumerate}
\item Is it inappropriate for a court to review the agency decision involved either because of the absence of congressional guidelines with which to evaluate the facts and the agency's action or because of an especially unusual or technical factual issue?
\item Is it improper for a court to review the decision, either in light of the proposed four lines of inquiry or because of separation of powers?
\end{enumerate}
The last factor should be construed to cover an exceedingly narrow range of situations. See, e.g., \textit{Curran v. Laird}, 420 F.2d 122, 128-33 (D.C. Cir. 1969) (en banc) (holding non-reviewable classification of ships in national defense reserve fleet).}
\footnote{120}{See pp. 1659-62 \textit{infra}.}
\footnote{121}{The essential issue here is whether the granting of review would alter or replicate the balance of values and distribution of benefits and obligations implicit in the legislative scheme's purpose and scope of discretion, as defined in notes 116-17, 119 \textit{supra}.}
\footnote{122}{This criticism of the Court's opinion is open to the objection that it overstates the effect of the holding on minority voting rights in South Carolina, since the Attorney General still retains his enforcement powers under the VRA. This argument has two weaknesses. First, once a discriminatory law has been cleared under § 5, the Attorney General is powerless to mitigate that law's discriminatory effect. He can only object to discrimination in connection with electing state senators in South Carolina if the state changes its senate election scheme before 1982. See p. 1652 \\& notes 107-08 \textit{supra}. More importantly, under the Supreme Court's recent interpretation of § 5, the Attorney General may be unable to act even if South Carolina's method of electing state senators changes before 1982: whatever level of discrimination is implicit in Act 1205 may become a "safe harbor" so that future changes, as long as they are not more discriminatory than Act 1205, may not be objected to in a § 5 proceeding. See \textit{Beer v. United States}, 425 U.S. 130, 199-42.}
The third proposal for refinement of the *Morris* analysis of legislative scheme requires that relationships among the four lines of inquiry be explored with care. In particular, a court must consider what scope of review is consonant with the legislative scheme—the competing statutory purposes and the agency's discretion in resolving them—before it makes its determination of reviewability. If, as in *Morris*, there is a form of review that meshes well with the scheme, the APA's presumption of reviewability will be difficult to overcome. But if the permissible scope of review is so narrow as to make judicial review an impotent formality, one may suspect that the action has indeed been "committed to agency discretion by law."

IV. Applying the Method: A Close Look at *Citizens to Preserve Overton Park, Inc. v. Volpe*

The proposed refinements of the *Morris* analysis of legislative scheme emerge from a close examination of the opinion in that case. This refined *Morris* analysis can be applied to the landmark case of *Citizens to Preserve Overton Park, Inc. v. Volpe*, thereby producing a more

(1976); *id. at 146* (Marshall, J., dissenting). Both of these points were alluded to by Justice Marshall in dissent in *Morris*. 432 U.S. at 517.

The second weakness of the argument that the Attorney General retains his power to act is more basic. When a court insulates an abuse of official responsibility from judicial correction, that holding does not become innocuous by virtue of the mere probability that officials will not avail themselves of the holding's potential for abuse. *See Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (danger of Court's decision approving internment of Japanese Americans extends beyond immediate circumstances because its principle "lies about like a loaded weapon ready for the hand of any authority").

123. *See Curran v. Laird*, 420 F.2d 122, 132 (D.C. Cir. 1969) (en banc) (finding of implicit nonreviewability appropriate when permissible scope of review so narrow as to make judicial review merely "precatory"). This problem—granting a uselessly narrow scope of review when the legislative scheme indicated that the agency decision probably should have been found nonreviewable instead—is exemplified by the Court's decision in *Dunlop v. Bachowski*, 421 U.S. 560 (1975). *See Note, Dunlop v. Bachowski and the Limits of Judicial Review under Title IV of the LMRDA: A Proposal for Administrative Reform, 86 YALE L.J. 885, 889-903 (1977).*

Another way to look at scope of agency discretion and scope of review is to note that they are inversely related: a sufficiently wide scope of discretion may make the appropriate scope of review so narrow as to imply nonreviewability. Even advocates of a very narrow definition of nonreviewability concede this. *See, e.g.*, Mahinka, *supra* note 21, at 5-6.

The issues of scope of review and reviewability may be different only in formulation. If a given agency action involves two determinations, a court can achieve the same result either by finding judicial review precluded as to one but not the other, or by finding the action reviewable but only one of the determinations within the scope of review. This is made even clearer by *Bachowski*. *See Note, supra* (discussing relation between reviewability and narrow scope of review in Court's decision to allow review of Secretary of Labor's decision not to sue under LMRDA). Similarly, in his discussion of scope of review, Professor Jaffe uses similar techniques to modify what seems elsewhere in his book to be an argument for reviewability in all cases. *See L. JAFFE, supra* note 12, at 572-73.

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thorough and persuasive interpretation of the legislative scheme involved in that case.

The legislative genesis of the Overton Park controversy was statutory language in a provision of the Department of Transportation Act of 1966 (DOTA), and an identical provision of the Federal Aid Highway Act of 1968 (FAHA), both of which restrained the Secretary of Transportation from approving the expenditure of federal funds for interstate highways through parkland. These provisions are part of a general plan to develop an efficient national transportation system; the Acts spell out the procedures and decisionmaking authority by which that objective is to be attained.

Overton Park involved a plan to route the Memphis portion of Interstate 40 through one of that city's parks. In December 1969, thirteen years after the initial route approval and after thousands of residents along the park route had been moved and hundreds of buildings had been destroyed, various plaintiffs filed the complaint in Citizens to Preserve Overton Park, Inc. v. Volpe, which requested judicial review under the APA of the routing decision and a halt to the highway's construction. The Supreme Court, in an opinion by Justice Marshall, held that whether the Secretary of Transportation's decision was reviewable was a question "easily answered" in the affirmative. Although the opinion inferred a very strong congressional preference for park preservation over other values from rather equivocal materials,

131. 309 F. Supp. at 1194.
132. 401 U.S. at 410.
133. See Note, supra note 21, at 1133.
the Court's definition of the scope of review on remand implicitly modified its interpretation of the statute.\(^{134}\)

A. Purpose

The *Overton* Court analyzed the question of implicit preclusion of review by deciding whether there was "law to apply";\(^{135}\) the majority found such law in a dominant congressional purpose to preserve parkland from being taken to build highways.\(^{136}\) Application of the refined *Morris* analysis of legislative scheme shows this interpretation to be too simple. As in *Morris*, the scheme involved a primary purpose, a subsidiary purpose, and a qualification of the subsidiary purpose, and the Court considered only the second of these.

The two statutes involved, the DOTA and FAHA, were primarily concerned with creating an efficient national transportation system.\(^{137}\) Unlike the scheme in *Morris*, the legislative scheme was a general welfare program that was not intended to benefit an isolable group of persons.\(^{138}\) While the plaintiffs in *Morris* sought to invoke review based on the VRA's primary purpose, the plaintiffs in *Overton Park* argued that the statutes' subsidiary purpose of protecting parks had been abrogated. The subsidiary purpose in the DOTA and FAHA, however, was subject to a very broad qualification: the Secretary was prevented from taking parkland only where there were "feasible and prudent" alternatives.\(^{139}\) This qualification reflects a congressional desire, evident in the legislative history, to avoid the excessive disruption and destruction of homes and businesses that might be entailed in the routing of highways through developed parts of cities rather than through urban parks.\(^{140}\)

B. Scope of Agency Discretion

How the Court defined scope of agency discretion is central to an understanding of *Overton Park*. The Court grounded its finding of

\(^{134}\) See p. 1662 infra.
\(^{135}\) 401 U.S. at 410-13.
\(^{136}\) Id. at 411, 413.
\(^{138}\) Mashaw, *supra* note 127, at 34.
\(^{140}\) See S. Rep. No. 1340, 90th Cong., 2d Sess. 19 (1968) (other "high priorities" must be weighed; use of parkland preferable to moving large numbers of people); H. Rep. No. 1584, 90th Cong., 2d Sess. 12 (1968) (provision meant to broaden, not narrow, Secretary's discretion to include consideration of several factors, such as disruption of community and commercial patterns).
reviewability on a very narrow reading of agency discretion, and application of the scope of discretion portion of the proposed course of inquiry to Overton Park yields the most persuasive evidence for a contrary holding.

Even more than in Morris, inattention to statutory language marred the Court's interpretation in Overton Park. First, it is not clear that the two provisions allegedly violated by Secretary Volpe applied to the facts of Overton Park at all, since the precise words restraining the Department of Transportation from funding highways through parkland applied only to parks "of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof." Given that both the Memphis City Council and the Memphis Parks Commission officially expressed a preference for the Overton Park route over proposed alternatives, it cannot simply be assumed, as the Court apparently did, that this requirement was met.

The argument that the relevant statutes had a "clear" and "plain" meaning becomes even less persuasive if one turns to the more de-
tailed examination of scope of agency discretion proposed in this Note. The routing of highways involves several competing interests, the optimal balancing of which is a very delicate task. The interests potentially affected by choice of highway route include pockets of minority or low income housing, less densely populated and more affluent suburban fringes, downtown businesses that employ workers from an entire urban area, and parks or wilderness areas of environmental or aesthetic value. In light of this complexity, it is understandable that Congress failed to give the Department of Transportation a narrow and unambiguous mandate.

The question of the amount of responsibility delegated to the agency to develop the policy of the scheme is at the heart of Overton Park. Although the Court rejected the Secretary's contention that he was to perform a "wide-ranging balancing of competing interests," a study of the process of enactment of both the 1966 and 1968 provisions reveals a notable similarity: in both laws the language finally enacted reflects a compromise between the Senate and the House, whose strongly opposing views resulted in equivocal language that left to the agency the policy tasks of balancing and reconciliation. In 1966, the Senate's effort to prohibit the Secretary from taking parkland unless there were no "feasible" alternatives was modified by the House, in conference, to expand the Secretary's discretion by narrowing the prohibition to cases where the alternatives were neither feasible nor "prudent." This commendation to the Secretary's prudence—as a conscious result of compromise between the Senate and the House—suggests a good deal more discretion than was found by the Supreme Court.

146. See Mashaw, supra note 127, at 3-4.
147. 401 U.S. at 411; see Brief for the Secretary of Transportation, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), at 20-21 [hereinafter cited as Transportation Brief].
148. For additional discussion of the legislative history, see Project, supra note 141; 1970 Term, supra note 141. A thorough chronology of the legislation concerning parks and highways is found in Gray, Section 4(f) of the Department of Transportation Act, 32 Md. L. Rev. 327 (1973), although that article unduly minimizes the diversity of viewpoints regarding the legislation on the part of opposing forces within Congress.
151. This more discretionary interpretation is corroborated by a few comments on the floor of the House that indicate that the purpose of the legislation was not simply to protect parks, but rather to do so in a way that did not harm other human values represented by residential, religious, educational, and commercial centers in a community. See Project, supra note 141, at 321 n.24.
A similar process took place in 1968, when the "local approval" language discussed above was added. Like the 1966 addition of the word "prudent," the 1968 requirement expanded the number of conceivable situations in which highways could be built through parks and still be federally funded. The most dramatic evidence for the "balancing of interests" interpretation of the Secretary's discretion is a statement made on the Senate floor in 1968 by Senator Jackson: "It is highly important, in my judgment, to carry on the previously expressed intent of Congress on this question of the balance that must be struck between expanding transportation systems and the preservation of our public parklands." The variety of values to be considered, the failure of Congress to agree on a narrow scope of agency discretion, and the parkland preservation issue were more clearly in the limelight in 1968, when the Department of Transportation Act was amended and an identical section was added to the renewal of the federal funding program, the FAHA. Because of fierce battles over highway routing throughout the nation, which spilled over into well-known lawsuits, the lines were drawn in Congress. Controversies over the Three Sisters Bridge in Washington, D.C., and the Brackenridge Park freeway in San Antonio, Texas, were especially well known. See Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 400 U.S. 968 (1970) (dissents from denial of certiorari); D.C. Fed'n of Civic Ass'ns v. Volpe, 434 F.2d 436 (D.C. Cir. 1970); Mashaw, supra note 127, at 22-24, 33-51. The parkland section of the FAHA proposed by the House was less mandatory and clear than the original DOTA parkland provision, H.R. 17134, 90th Cong., 2d Sess. § 17 (1968), reprinted in 114 CONG. REC. 19393, 19749 (1968), but this relaxation was rejected by the Senate, see S. 3418, reprinted in 114 CONG. REC. 19531 (1968) (Senate revision of bill, rejecting more permissive House version); 114 CONG. REC. 19529-30 (1968) remarks of Senator Jackson.

152. See p. 1659 supra.

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153. Cf. pp. 1642-43 supra (discussing balancing and qualification of legislative purposes). The congressional desire to qualify the subsidiary purpose of protecting parkland, as evidenced in committee reports, has already been noted. See p. 1658 & note 140 supra. Although floor debates are less reliable than committee reports as evidence of congressional purpose, see R. Dickerson, supra note 36, at 154-59 (1975); A. Lenhoff, Comments, Cases and Other Materials on Legislation 787-96 (1949), the degree to which the provisions as finally enacted were a compromise balancing conflicting values is reflected in a lengthy exchange on the Senate floor immediately preceding the Senate's approval of the conference version of the bill. Senator Randolph, the floor manager of the bill and chairman of the conference committee, defended the conference version from charges that the preference for parks had been watered down by saying that it was a hard fight and the Senate side had done its best. 114 CONG. REC. 24032-37 (1968). Senator Cooper's remarks, which were relied on by Justice Marshall to counterbalance the interpretation of the statutes advanced by the Secretary of Transportation, see p. 1660 & note 147 supra, and by this Note, are suspect because Senator Cooper believed the bill offered too much opportunity for routing highways through parks, and he therefore voted against the measure. See 401 U.S. at 412 n.29; 114 CONG. REC. 24032-33, 24038 (1968).

154. 114 CONG. REC. 19529-30 (1968) (emphasis added). Senator Jackson was responsible for the original, and most strongly worded, version of the parkland provision in the 1966 Senate version of the DOTA. Id.

155. See pp. 1658-59 supra.

156. See pp. 1660 & 1661 supra.
and the technical expertise involved in highway decisionmaking\textsuperscript{157} are all aspects of the scope of agency discretion that, had the Court considered them, would have argued for a much different interpretation of the means component of the legislative scheme in \textit{Overton Park}.\textsuperscript{158}

C. \textit{Scope of Review on Remand}

The inferences regarding purpose and scope of discretion, inasmuch as they suggest implicit nonreviewability and an absence of clear guidelines for a reviewing court to apply, should have led to an affirmance of the Sixth Circuit's denial of review.\textsuperscript{159} The \textit{Overton} Court disagreed, however, and therefore formulated a definition of the scope of permissible review on remand to the district court. The Court's directions to the district court\textsuperscript{160} were hedged in a way that appears to mitigate the effect of the opinion's broad interpretation of the statute and narrow interpretation of the Secretary's discretion.\textsuperscript{161} The lower court was directed to consider whether the agency made an "error of judgment," but was admonished not to "substitute its judgment for that of the agency."\textsuperscript{162} It was permitted to ask Transportation officials to testify and explain their decisions, but was warned against excessive scrutiny of "the mental processes of administrative decisionmakers."\textsuperscript{163}

These instructions modified indirectly and ambiguously the Court's earlier, extreme interpretation of the parkland provisions by protecting the Secretary's decision from overly harsh scrutiny and by holding out the possibility that his taking of parkland in this instance might be justifiable. Had the Court considered these issues relevant to the threshold question of reviewability, as it should have done, it would have had additional reason to deny review.

\textsuperscript{157} Some reasons for preferring the decisionmaking of an agency in the matter of highway routing, rather than that of judicial oversight and revision, are discussed in Note, D.C. Federation of Civic Associations v. Volpe: Blessing or Burden?, 27 Stan. L. Rev. 125, 132-38 (1974) (reasons include need for uniformity, developed fact-gathering ability, and technical expertise in handling problems of highway safety).

\textsuperscript{158} See p. 1642 \textit{supra}.


\textsuperscript{160} 401 U.S. at 413-21.

\textsuperscript{161} The broad interpretation of the statute is even more clearly expressed in the separate opinion of Justices Black and Brennan. 401 U.S. at 421-22. The generally accepted interpretation of the Court's holding in \textit{Overton Park} takes the first half of the majority opinion, which interprets the statutes, at face value. See pp. 1658-59 \textit{supra} (citing sources); Note, 60 Geo. L. Rev. 1101, 1105-08, 1112, 1114 (1972); Note, \textit{supra} note 17, at 454-56, 463-74; Note, 1972 Wis. L. Rev. 613, 625-26. For a contrary interpretation, see p. 1663 and notes 164 & 165 \textit{infra}.

\textsuperscript{162} 401 U.S. at 416.

\textsuperscript{163} Id. at 420.
D. **Impact of Review on Remand**

Whether or not the remand directions were intended to be equivocal, their ambiguity compounded the inherent undesirability of review in this case by permitting an extremely wide-ranging review. The impact of that review was, predictably, strongly detrimental to the legislative scheme. When the Court was deciding whether the Secretary's decision should be reviewable according to the "arbitrary and capricious" standard, the proposed course of inquiry, if applied, would have required consideration of whether any of the foreseeable outcomes of granting judicial review would be especially contrary to the statutory scheme. Three outcomes were foreseeable at that point. After the case was remanded to the district court for further explanation from the agency, that court might approve the park route, it might overturn the park route but find another route satisfactory, or it might find no route satisfactory.

Certainly the first outcome would be no great strain on the scheme:

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164. The equivocal quality of the opinion has been noted. See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1, 34 n.74 (D.C. Cir.) (en banc), cert. denied, 421 U.S. 941 (1976) (in discussing proper standard of review of EPA regulations governing lead content of gasoline, court of appeals describes Supreme Court's intent in *Overton Park* as "difficult to plumb"); Note, supra note 21, at 1122, 1124 (Court's remand directions permitted substantial evidence standard even though opinion ostensibly rejected this possibility).

165. Chief Judge Bailey Brown, after a 25-day trial, held that the Secretary had misconstrued his authority, although his decision was reasonable within his permitted range of discretion; the court then remanded the case to the Department of Transportation for a routing decision in accordance with its statutory responsibility. Citizens to Preserve Overton Park, Inc. v. Volpe, 335 F. Supp. 873, 885 (W.D. Tenn. 1972). The Secretary then decided that neither the park route nor any other route was acceptable, whereupon Tennessee petitioned the court to remand to the Secretary once more on the theory that he must find some route acceptable. The court granted the petition, but the Sixth Circuit reversed, holding that the Secretary was not required to approve any route. Citizens to Preserve Overton Park, Inc. v. Brinegar, 494 F.2d 1212 (6th Cir. 1974), rev'g Citizens to Preserve Overton Park, Inc. v. Volpe, 337 F. Supp. 846 (W.D. Tenn. 1973).

Perhaps mindful of the consequences of its remand in *Overton Park*, the Court in *Dunlop v. Bachowski*, 421 U.S. 560 (1975), made a very clear attempt to prevent an excessively probing review on remand, but this attempt did not succeed. See Note, supra note 123, at 899 n.55. The Court's finding of reviewability in these two cases, coupled with a discordantly narrow scope of review, see p. 1656 & note 123 supra, appears more reasonable when the threat of judicial review of informal action is viewed primarily as an incentive for agencies to provide a contemporaneous statement of reasons explaining informal action. See *Dunlop v. Bachowski*, 421 U.S. 560, 593-94 (1975 (Rehnquist, J., concurring in the result in part and dissenting in part) (claiming judicial review unjustified in light of Secretary's statement of reasons); *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973) (in remanding case to court of appeals, Supreme Court suggests Comptroller of Currency's contemporaneous explanation of denial of national bank charter should weigh heavily in favor of upholding his decision). Suggestions by the Court to this effect have been noted. See Clagett, *Informal Action-Adjudication-Rule Making: Some Recent Developments in Federal Administrative Law*, 1971 Duke L.J. 51, 61-65; Verkuil, *Judicial Review of Informal Rulemaking*, 60 Va. L. Rev. 105, 212-14 (1974); 1970 Term, supra note 141, at 321-22.

166. See p. 1642-43 and notes 43-46 supra.
it would require as an additional cost for completing the highway only a full statement of reasons for the routing decision, and it is frequently urged that a statement of reasons is a salutary requirement for all informal agency action.\textsuperscript{167} The costs of the second and third outcomes would have been far greater, and the undesirable impact of these must have been clear to the Court from the briefs.\textsuperscript{168} The two alternate routes passed through many churches, schools, businesses, houses, a university, a hospital, and a home for the aged; moreover petitioners' suggestions for further minimizing harm to the Park were either wildly impractical or likely to be even more deleterious.\textsuperscript{169} Finally, to abandon the Park route would have turned the whole decade-long effort into an exercise in futility, leaving 2,000 residents dislocated, hundreds of houses and other buildings destroyed, and portions of the unusable highway already completed,\textsuperscript{170} and would have been contrary to Congress's desire to avoid such disruption.\textsuperscript{171} Yet, due to the Court's extreme construction of the statute's purpose and ambiguous directions on remand, this third possible outcome, with an impact most deleterious to the legislative scheme, was the eventual consequence of the Court's decision in favor of reviewability.\textsuperscript{172} No highway was built at all.\textsuperscript{173}


168. See p. 1657 \textit{supra} and note 169 \textit{infra}.

169. Citizens to Preserve Overton Park, Inc. v. Volpe, 432 F.2d 1307, 1311-12 (6th Cir. 1970), rev'd, 401 U.S. 402 (1971); \textit{id.}, 335 F. Supp. 873, 880-81 (W.D. Tenn. 1972) (on remand); Affidavit of Edgar H. Swick, \textit{reprinted in Overton Appendix}, \textit{supra} note 128, at 27; Letter from David M. Pack, \textit{supra} note 129, at 67. One of the petitioners' suggestions was the use of a bored tunnel under the Park, which would have damaged the tree roots unless it was buried so deeply as to cost over $100 million, whereas the cost of the Secretary's proposal was about $3.5 million. Letter from F.C. Turner to John A. Volpe, (Oct. 14, 1969), \textit{reprinted in Overton Appendix}, \textit{supra} note 128, at 39.

Plaintiffs claimed the Secretary failed to consider a third and more feasible alternative to the Park route, but the court on remand held that the Secretary could reasonably have eliminated the route in question from consideration. Citizens to Preserve Overton Park, Inc. v. Volpe, 309 F. Supp. 1189, 1195 (W.D. Tenn. 1970), aff'd, 432 F.2d 1307, 1312 (6th Cir. 1970), rev'd, 401 U.S. 402 (1971); \textit{id.}, 335 F. Supp. 873, 877-78 (W.D. Tenn. 1972) (on remand); Affidavit of Edgar H. Swick, \textit{supra} note 128; Letter from David M. Pack, \textit{supra} note 129; Affidavit of Virgil A. Rawlings, \textit{supra} note 129.

170. See p. 1658 & note 138 \textit{supra}.

171. See note 165 \textit{supra}.

172. \textit{See} note 165 \textit{supra}.

Statutory Interpretation

Conclusion

A full analysis of the legislative scheme established by Congress is a prerequisite of thorough and persuasive opinions deciding whether judicial review of an agency's actions is precluded by implication. After the Morris Court's serious misinterpretation of congressional policy in the Voting Rights Act scheme, the need for a detailed course of inquiry into the nature of a legislative scheme is more evident than ever. In light of the requirement of judicial deference to Congress in matters of policy, and the Supreme Court's innovative use of statutory interpretation, the Court should adopt a more attentive approach to analysis of a legislative scheme.

174. The many and significant areas in which the Court has used statutory interpretation as an innovative tool suggest further avenues of inquiry. See, e.g., Adamer Wrecking Co. v. United States, 98 S. Ct. 566, 577 (1978) (Stevens, J., dissenting from Court's invalidation of EPA asbestos regulation); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (statutory interpretation used to restrict coverage of Title VII of Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975)). Since the Court clarified the conditions for implying a cause of action in Cort v. Ash, 422 U.S. 66 (1975), the multitude of implied cause of action cases has focused great attention on the importance of a "legislative scheme," although the Cort opinion, which stresses this factor, gives little guidance about applying it. This emphasizes the need for a principled and analytical approach to statutory construction. For an illustration of the complex statutory interpretation problems encountered in applying the Cort test, see Abrahamson v. Fleschner, 568 F.2d 862 (2d Cir. 1977), cert. denied, 46 U.S.L.W. 3710 (U.S. May 15, 1978). See note 141 supra.