Notes

OF TRUTH, PRAGMATISM, AND SOUR GRAPES: THE SECOND CIRCUIT'S DECISION IN *SEC V. CITIGROUP GLOBAL MARKETS*

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ABSTRACT

In his 2001 letter to Berkshire Hathaway shareholders Warren Buffett stated, "[Y]ou only find out who is swimming naked when the tide goes out."[1] *In the fall of 2008, the tide went out when Lehman Brothers collapsed and credit markets froze. Left exposed were the shoddy—and sometimes fraudulent—practices of participants in the theretofore esoteric industry of structured finance. Since then, the Securities and Exchange Commission (SEC) has extracted billions of dollars in settlements from the industry. A frequent enforcement tool of the SEC has been the consent judgment, a hybrid settlement that contains injunctive elements.*

This Note examines the role of the SEC in relation to Article III courts, specifically in the context of consent judgments. Drawing on the rich history of equitable practice and the doctrine of the separation of powers, this Note argues that SEC v. Citigroup Global Markets *was wrongly decided in that it excessively curtails the role of district courts in determining the propriety of equitable relief. The opinion not only contradicts longstanding precedent, but also goes too far in ceding a core function of the judiciary to the SEC. This Note shows that, as a result, the decision serves to undermine fundamental goals of the securities laws.*

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1. Letter from Warren Buffett, Chairman of the Bd. of Dirs., Berkshire Hathaway, to the shareholders of Berkshire Hathaway (Feb. 28, 2002), http://www.berkshirehathaway.com/letters/2001pdf.pdf [https://perma.cc/VR2Q-B6LU].

INTRODUCTION

In the run-up to the global financial crisis of 2008, Citigroup Global Markets, Inc. (Citi) sold long positions in negatively forecasted mortgage-backed assets to investors, in a product known as "Class V Funding III" (the Fund).[2] Citi claimed that the assets comprising the fund were selected by an independent third party, when in fact they were selected by Citi itself in an effort to unload poorly projected assets.[3] Further, and perhaps most egregiously, Citi took short positions in the same assets it sold long to investors as part of the Fund.[4] As a result of this fraud, investors lost over $700 million and Citi realized over $160 million in profits.[5]

The SEC brought parallel enforcement actions against Citi and trader Brian Stoker in October 2011, seeking, *inter alia*, injunctions authorized by Section 20(b) of the Securities Act of 1933.[6] District Judge Jed Rakoff initially refused to invoke the court's injunctive power to approve a pre-negotiated settlement where the settlement was unsupported by facts.[7] Both the SEC and Citi took interlocutory appeals.[8] The Second Circuit, in *SEC v. Citigroup Global Markets*,[9] ultimately held that Judge Rakoff abused his discretion by refusing a settlement between a public agency and a defendant.[10] In response to Judge Rakoff's overriding concern that the settlement contained

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2. SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup IV*), 752 F.3d 285, 289 (2d Cir. 2014).

3. *Id.*

4. *Id.*

5. *Id.* at 297 ("Although [the allegations] would appear to be tantamount to an allegation of knowing and fraudulent intent . . . the S.E.C., for reasons of its own, chose to charge Citi only with negligence . . . ." (quoting SEC v. Citigroup Glob. Mkts., Inc., 827 F. Supp. 2d 328, 330 (S.D.N.Y. 2011))). Judge Rakoff described the SEC's allegation as that of "a substantial securities fraud." *Id.*

6. *See generally* SEC v. Stoker, 865 F. Supp. 2d 457, 458 (S.D.N.Y. 2011) (providing background information and procedural history for both cases); *see also* Securities Act of 1933, 15 U.S.C. § 77t (2012) (authorizing the Commission to seek injunctions in the following provisions: Section 20(b) of the Securities Act of 1933, Section 21(d) of the Securities Exchange Act of 1934, Section 209 of the Investment Advisers Act of 1940, and Section 42(d) of the Investment Company Act of 1940).

7. SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup I*), 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011).

8. In an initial appellate decision, the Second Circuit granted a stay sought by both Citi and the SEC. Additionally, the panel withheld ruling on the merits and appointed pro bono counsel to represent the district court's position so that the merits panel would have the benefits of adversarial briefing. SEC v. Citigroup Glob. Mkts. Inc. (*Citigroup III*), 673 F.3d 158, 161 (2d Cir. 2012).

9. SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup IV*), 752 F.3d 285 (2d Cir. 2014).

10. *Id.*

sparse factual stipulations by which to measure it, the Second Circuit proclaimed that "[t]rials are primarily about the truth. Consent decrees are primarily about pragmatism."[11] Importantly, the Second Circuit held that the SEC is the sole arbiter of what is, or is not, in the public interest.[12] It thus vacated and remanded Judge Rakoff's decision.[13] With the menu so fixed, Judge Rakoff was left "with nothing but sour grapes" and thus approved the consent judgment.[14]

In *SEC v. Citigroup Global Markets*, the Second Circuit adopted a new legal standard that excessively curtails the discretion of district courts in evaluating consent judgments between government agencies and defendants.[15] Although the court boldly claimed that courts should not merely "rubber stamp[]"[16] the wishes of enforcement agencies, it is hard to see how courts that abide by this precedent can do anything but passively endorse government settlements. The ruling cedes to the SEC the determination of the public interest, which is the primary consideration in the decision to grant injunctive relief. Consideration of the public interest has historically been a core equitable function of the judiciary. The holding therefore contradicts precedent and violates the separation-of-powers doctrine.

This Note demonstrates the flaws of the *Citigroup* ruling. Part I explores the relationship between executive agencies and Article III courts as it pertains to judgments and statutory injunctions. Part II discusses SEC settlement practices, Judge Rakoff's initial decision to refuse the settlement, and the decision of the Second Circuit in *Citigroup*. Part III draws on discussions from the previous Sections to argue that *Citigroup* was wrongly decided.

I. AGENCIES & ARTICLE III COURTS

At the heart of the issue in *Citigroup* is a question of the role of courts vis-à-vis agencies where consent judgments are concerned.[17] That is, how much discretion do courts retain when an executive

11. *Id.* at 295.
12. *Id.* at 296.
13. *Id.* at 298.
14. SEC v. Citigroup Glob. Mkts. Inc., 34 F. Supp. 3d 379, 381 (S.D.N.Y. 2014).
15. *Citigroup IV*, 752 F.3d at 293.
16. *Id.* at 293 (quoting SEC v. Levine, 881 F.2d 1165, 1181 (2d Cir. 1989)).
17. *See* John C. Coffee Jr., *Collision Course: The SEC and Judge Rakoff*, N.Y. L.J. (Jan. 19, 2012) ("[*Citigroup*] poses fundamental questions about the relationship between administrative agencies and federal courts.").

agency seeks injunctive relief authorized by statute? This Part discusses precedent related to the doctrine of the separation of powers and statutory injunctions in an effort to illuminate the discussion in Part II.

A. Against Tyranny: The Doctrine of Separation of Powers

The Constitution established a government consisting of three branches: the legislature,[18] the executive,[19] and the judiciary.[20] The branches were not intended to be entirely separate in all of their roles, though each was designed to wield certain core functionalities that were to be vigilantly guarded against usurpation by other branches.[21] In this way, the Framers intended to prevent the concentration of power in any one branch.[22] In Federalist 47, James Madison states, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[23] In Federalist 51, Madison laid out his vision for a system of government in which the

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18. *See* U.S. CONST. art. I ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

19. *See id.* art. II ("The executive Power shall be vested in a President of the United States of America.").

20. *See id.* art. III ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

21. *See* Mistretta v. United States, 488 U.S. 361, 370 (1989) ("[T]he separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches."); People v. Owens, 228 P.3d 969, 971–72 (Colo. 2010) (stating that "separate branches of government cannot operate in mutually exclusive, watertight compartments, but must cooperate with each other"); THE FEDERALIST NO. 47, at 101–05 (James Madison) (Michael A. Genovese ed., 2009) (refuting the idea that the branches of government should be entirely distinct while also stating that core functions of each branch should not be absorbed by other branches).

22. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492 (2010) (discussing the separation of powers doctrine as it applies to the executive); *see also* THE FEDERALIST NO. 48, *supra* note 21, at 107 (James Madison) ("It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others . . . .").

23. THE FEDERALIST NO. 47, *supra* note 21, at 101 (James Madison). Madison wrote under the pseudonym *Publius*, Latin for "Friend of the People." Publius was a Roman Consul who helped to overthrow the Roman monarchy around 509 BC. ALBERT FURTWANGLER, THE AUTHORITY OF PUBLIUS: A READING OF THE FEDERALIST PAPERS 51 (1984).

constituent branches both balance and check one another.[24] By vesting each branch with "opposite and rival interests," Madison believed that the "great difficulty" of creating a government that controls the governed as well as itself might be overcome.[25]

The functions of the spheres of government are not mutually exclusive, and some degree of overlap is essential to the practical administration of government.[26] Separation-of-powers doctrine is inapplicable with respect to purely ministerial or administrative functions.[27] But one branch violates the doctrine when it usurps the powers traditionally vested in another.[28]

The Ninth Circuit, in a decision affirmed by the Supreme Court, enunciated a clear standard for the separation-of-powers doctrine in *Chadha v. Immigration and Naturalization Service*:[29]

> [W]e define a constitutional violation of the separation of powers as an assumption by one branch of powers that are central or essential to the operation of a coordinate branch, provided also that the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the Government.[30]

Furthermore, when assumptions of power are sustained and routine, a violation is "more easily established."[31] The standard in *Chadha* was largely adopted from *Nixon v. Administrator of General Services*,[32] where the Supreme Court stated that the coordinate branches of government were not intended to be totally independent, and that the

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24. *See* THE FEDERALIST NO. 51, *supra* note 21, at 120 (James Madison) (Michael A. Genovese ed., 2009) ("But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.").

25. *Id.*

26. For a further discussion of overlapping government functions, see *supra* note 21 and accompanying text.

27. *See* Chadha v. INS, 634 F.2d 408, 424–25 (9th Cir. 1980), *aff'd*, 462 U.S. 919 (1983) (stating that some actions "not implicating a suspect form or degree of power" are undeserving of judicial attention).

28. *See* Mistretta v. United States, 488 U.S. 361, 398–402 (1989) (relying heavily on history to inform separation of powers analysis); Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 603 (1952) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.").

29. Chadha v. INS, 634 F.2d 408 (9th Cir. 1980).

30. *Id.* at 425.

31. *Id.*

32. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977).

locus of the inquiry should be on the degree to which intrusion prevents an aggrieved branch from fulfilling its constitutional duties.[33]

In *Heckler v. Chaney*,[34] the Supreme Court recognized a presumption of unreviewability when an agency declines to initiate or pursue an enforcement action.[35] Prison inmates convicted of capital crimes and sentenced to death by lethal injection alleged that use of certain drugs for lethal injection violated the Food, Drug, and Cosmetic Act[36] and sued the Food and Drug Administration (FDA) to prevent their use.[37] The FDA declined to take any enforcement action.[38] The D.C. Circuit held that the FDA's decision not to pursue the inmates' claims was an abuse of discretion and remanded the case so that the FDA would "fulfill its statutory function."[39]

Chief Justice Rehnquist, writing for the majority, began the Court's analysis with the Administrative Procedure Act's thresholds for judicial review of agency enforcement actions: there is a presumption of reviewability of agency enforcement actions unless review is expressly precluded in the relevant statute or the action is committed to agency discretion by law.[40] Actions may be deemed to be committed to agency discretion when there is "no law to apply."[41] The Court faulted the D.C. Circuit for its narrow construction of the "no law to apply" test in this case because that test is more aptly suited for instances concerning affirmative agency enforcement actions, as opposed to when an agency chooses *not* to act.[42] The Court reminded that it had long recognized a presumption in favor of unreviewability when agencies decide not to act.[43]

33. *See id.* ("In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence." (quoting United States v. Nixon, 418 U.S. 683, 707 (1974))).

34. Heckler v. Chaney, 470 U.S. 821 (1985).

35. *Id*. at 823.

36. Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301–399 (2012)).

37. *Chaney*, 470 U.S. at 823.

38. *Id.*

39. *Id.* at 826 (quoting Chaney v. Heckler, 718 F.2d 1174, 1191 (D.C. Cir. 1983)).

40. *Chaney*, 470 U.S. at 828; *see* 5 U.S.C. § 701(a)(1)–(2) (2012) (restricting judicial review under the APA in these two scenarios).

41. *Id.* at 830 (quoting *Chaney*, 718 F.2d at 1184); *see also* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (recognizing actions that are "committed to agency discretion" as "very narrow exception[s]" to the general rule of judicial reviewability).

42. *Chaney*, 470 U.S. at 831.

43. *Id.*

The Court offered three reasons supporting this presumption. First, agencies are uniquely situated to balance factors "which are peculiarly within [their] expertise," such as the cost of resources, likelihood of success, and opportunity costs.[44] Second, decisions not to take enforcement actions do not involve "*coercive* power over an individual's liberty or property rights, and thus [do] not infringe upon areas that courts often are called upon to protect."[45] Finally, the Court likened a decision not to enforce to a prosecutor's decision not to indict, recognizing a "special province of the Executive Branch" by virtue of the Take Care Clause of the Constitution.[46]

In *Baltimore Gas & Electric Co. v. Federal Energy Regulatory Commission*,[47] Baltimore Gas sued the Federal Energy Regulatory Commission (FERC) over its decision to settle a regulatory matter under the Natural Gas Act[48] with Columbia Gas.[49] The D.C. Circuit read *Chaney* as based in the separation-of-powers doctrine.[50] The court held that the power to enforce (or not enforce) the law is vested only in the executive branch, and "[w]hen the judiciary orders an executive agency to enforce the law it risks arrogating to itself a power the Constitution commits to the executive branch."[51]

The central holding in both *Chaney* and *Baltimore Gas* was that a court, acting alone, cannot compel an agency to act. A natural extension of these holdings is their converse: an agency cannot compel a court to act. This would seem to be especially true when an agency seeks to invoke a central and essential power of the courts, and when the relevant statute[52] and precedent expressly contemplate judicial independence. Otherwise, courts would be relegated to the role of a rubber stamper, regardless of the verbiage in which the decision is swaddled.

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44. *Id.*

45. *Id.* at 832.

46. *Chaney*, 470 U.S. at 832. The Take Care Clause refers to the Executive's duty to "take care that the laws be faithfully executed." U.S. CONST. art. II, § 3.

47. Balt. Gas & Elec. Co. v. FERC, 252 F.3d 456 (D.C. Cir. 2001).

48. Natural Gas Act, Pub. L. No. 75-688, 52 Stat. 821 (1938) (codified as amended at 15 U.S.C. §§ 717–717w (2012)).

49. *Balt. Gas & Elec. Co.*, 252 F.3d at 457.

50. *See id.* at 459 ("Indeed, [*Chaney*'s] recognition that the courts must not require agencies to initiate enforcement actions may well be a requirement of the separation of powers commanded by our Constitution.").

51. *Id.*

52. *See infra* note 61 (discussing the relevant language in the Securities Act of 1933); *see also infra* Part III.B (providing the relevant language).

The doctrine of separation of powers has specific application within the context of statutory injunctions. Although courts might not refer to the doctrine by name, the opinions and holdings evince a concerted effort to prevent the usurpation of injunctive powers by the executive branch.[53]

B. Separation of Powers in the Context of Statutory Injunctions

An early, and still controlling, case on whether agencies are entitled to injunctions as a matter of right under a statute authorizing injunctive relief is *Hecht Co. v. Bowles*.[54] In that case, the Price Administrator of the Office of Price Administration was seeking to enforce section 205(a) of the Emergency Price Control Act of 1942,[55] which established maximum prices for certain goods.[56] The Act stated that "upon a showing by the Administrator that such a person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."[57] It was undisputed that Hecht, a large department store, had violated the substantive provisions of the Act.[58] The issue before the Supreme Court was whether an injunction was mandatory upon proof of a violation of the Act, as the appellate court below held.[59]

The Administrator urged that he was entitled to injunctive relief as a matter of right, per the Act's plain language.[60] In support of this position, the Administrator distinguished the language of the Act from that of other statutes, including the Securities Act of 1933 (1933 Act) and the Securities Exchange Act of 1934 (1934 Act) at issue in *Citigroup*, which he claimed left room for judicial discretion.[61] The

53. *Cf.* THE FEDERALIST NO. 47, *supra* note 21, at 103 (James Madison) ("Were [the power of the judiciary] joined to the executive power, THE JUDGE might behave with all the violence of AN OPPRESSOR.").

54. Hecht Co. v. Bowles, 321 U.S. 321 (1944).

55. Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23.

56. *Hecht Co.*, 321 U.S. at 321–22.

57. Emergency Price Control Act of 1942 § 205(a), 56 Stat. at 33.

58. *Hecht Co.*, 321 U.S. at 324 ("There is no substantial controversy over the facts. . . . In its answer petitioner pleaded among other things that any failure or neglect to comply with the regulation was involuntary and was corrected as soon as discovered.").

59. *Id.* at 322.

60. *See id.* at 326 ("Respondent insists that the mandatory character of § 205(a) is clear from its language, history and purpose.").

61. *Id.* at 327. *Compare* Emergency Price Control Act of 1942 § 205(a), 50 U.S.C. App. § 925(a) (1946) (stating that upon a showing of a violation, an injunction *shall* issue), *with*

Administrator urged the Court to adopt a simple, logical construction of the statute: if a violation is proven, then an injunction will issue. The Administrator argued that this construction differed from that of other statutorily authorized injunctions which included phrases like "upon a proper showing," or "for cause shown," that imply a more discretionary role for courts.[62]

Ultimately, the Supreme Court disagreed with the Administrator.[63] As an initial matter, the Court did not accept that the plain language of the Act mandated the issuance of an injunction.[64] The Court said that the language in the Act was a grant of jurisdiction to the courts to issue injunctions, not a command to do so.[65] At the heart of the Court's opinion was the history of equity practice and courts' traditionally wide latitude to craft equitable orders with respect to the individual circumstances of each case.[66] The Court continued, "The essence of equity jurisdiction has been *the power of the Chancellor* to do equity and to mold each decree to the necessities of the particular case."[67] Moreover, injunctions have always been intended to deter future conduct, not to punish past conduct.[68] If Congress had intended such a drastic break from tradition, the Court held, it would have made that intent clear through explicit language in the statute.[69] Thus, the Court resolved the ambiguity "in accordance with . . . traditional practices, as conditioned by the necessities of the public interest."[70] The *Hecht* Court was careful to impress, however, that courts should not grant injunctive relief "grudgingly."[71] When an agency seeks approval of a consent decree, the propriety of injunctive

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Securities Act of 1933 § 20(b), 15 U.S.C. § 77t(b) (2012) (stating that an injunction will issue only upon "a proper showing" that the law has been or likely will be broken, thus implicating a significant role for the judge who must determine if a proper showing has been made).

62. *Hecht Co.*, 321 U.S. at 327.

63. *Id.* at 328.

64. *Id.* ("We cannot say that [the court] lacks the power to make that choice. Thus it seems that § 205(a) falls short of making mandatory the issuance of an injunction merely because the Administrator asks it.").

65. *Id.* at 329.

66. *Id.*

67. *Id.* (emphasis added).

68. *Id.*

69. *Id.* at 330.

70. *Id.*

71. *Id.* The Court pointed out that executive agencies and Article III courts are two tools that are meant to give effect, "through co-ordinated action," to the aims of Congress, and that courts must exercise their discretion consistent with the underlying purposes of the Act. *Id.*

relief is dictated by concerns of the public interest, not the private concerns of the litigants.[72]

In *Yakus v. United States*,[73] the Supreme Court again confronted the issue of injunctions under the Emergency Price Control Act.[74] The Court reiterated that the award of an injunction "has never been regarded as strictly a matter of right,"[75] but rather as a matter of "sound judicial discretion."[76] The Court held that when injunctive relief would adversely affect the public interest it may rightly be withheld, even if such a decision causes injury to the moving party.[77] In closing, the Court impressed that, "[c]ourts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."[78]

C. Factors Informing Principles of Traditional Equity

Whereas *Hecht* and *Yakus* provide valuable insight into the scope of a court's equitable powers, the following cases are illustrative of the factors that inform a court's decision regarding the propriety of injunctive relief. In *SEC v. Culpepper*,[79] the SEC sought to enjoin the defendant from further offerings of unregistered stock, despite the fact that the defendant had ceased dealing in the unregistered stock prior to the SEC's action.[80] The Second Circuit held that the cessation of the illegal activities was immaterial,[81] but that the burden is on the moving party to show "some cognizable danger of recurrent violation" due to the prospective nature of

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72. *Id.* at 331 ("For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases.").

73. Yakus v. United States, 321 U.S. 414 (1944).

74. *Id.* at 418. Petitioners were convicted in the trial court of selling cuts of meat at prices above the statutory ceiling. *Id.* The Emergency Price Control Act established an administrative method by which regulations promulgated under the Act could be challenged. *Id.* Included was a provision that disallowed any interlocutory injunctive relief, meaning that a regulation would remain in force until there was a full adjudication of the claim. *Id.* The petitioners claimed that the statutory preclusion of interlocutory injunctive relief violated their right to due process. *Id.* The Court disagreed, holding that Congress could permissibly choose to protect the public from wartime inflation by precluding interlocutory relief. *Id.* at 27–28.

75. *Id.* at 440.

76. *Id.*

77. *Id.*

78. *Id.* at 441 (quoting Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937)).

79. SEC v. Culpepper, 270 F.2d 241 (2d Cir. 1959).

80. *Id.* at 245.

81. *Id.* at 250–51.

injunctions.[82] In assessing the showing by the moving party, "[t]he chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it."[83]

Later, in *SEC v. Manor Nursing Centers*,[84] the Second Circuit considered a number of factors in assessing the propriety of an injunction granted below.[85] Generally, the court instructed that, "in deciding whether to grant injunctive relief, a district court is called upon to assess all those considerations of fairness that have been the traditional concern of equity courts."[86] The district court in *Manor Nursing* granted ancillary relief in the form of disgorgement of profits.[87] The appellants challenged this sanction on the grounds that disgorgement of profits, unlike an injunction, was not explicitly authorized under the 1933 and 1934 Acts.[88] The panel held that courts have "general equity powers" under the 1933 and 1934 Acts, however, and that "[o]nce the equity jurisdiction of the district court has been properly invoked by a showing of a securities-law violation, the court possesses the necessary power to fashion an appropriate remedy."[89] Such wide-ranging judicial discretion was thus typical in the Second Circuit at one time.

Eight years later, in *SEC v. Bonastia*,[90] the Third Circuit announced a list of factors that courts should consider when weighing whether to grant injunctive relief.[91] The Third Circuit held that the court's determination should ultimately be guided by whether future

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82. *Id.* at 250 (quoting United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)).

83. *Id.*

84. SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082 (2d Cir. 1972). The case involved violations of the antifraud provision of the Securities Act of 1933. *Id.* at 1088.

85. *See id.* at 1100–01 (considering the likelihood of future violations based on past violations, the egregiousness of past violations, the degree of remorse, and assurances of future compliance).

86. *Id.* at 1102.

87. *Id.* at 1103.

88. *Id.*

89. *Id.*

90. SEC v. Bonastia, 614 F.2d 908 (3d Cir. 1980).

91. *See id.* at 912–13 ("[A]mong other things, the degree of scienter involved on the part of the defendant, the isolated or recurrent nature of the infraction, the defendant's recognition of the wrongful nature of his conduct, the sincerity of his assurances against future violations, and the likelihood . . . that future violations might occur."). The Third Circuit reversed the district court, stating that the district court's myopic view on only one factor, whether the defendant still dealt in securities, was an abuse of its discretion. *Id.*

violations were likely based on the totality of the circumstances.[92] The court determined that the repeated violations committed with scienter weighed heavily in favor of an injunction, regardless of the petitioner's current occupation.[93] The multifactor framework has been applied in other circuits as well.[94] The *Bonastia* panel closed by stating, "When a district court refuses to apply well-settled legal precepts to a conceded set of facts, it acts outside its allowable discretion."[95]

In *In re Tutu Water Wells CERCLA Litigation*,[96] the Third Circuit cautioned that before approving a consent judgment under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[97] a reviewing judge must adjudge both the procedural and substantive propriety of the consent agreement.[98]

In *Mitchell v. Hodges Contracting Co.*,[99] the Secretary of Labor sought an injunction authorized by statute against a construction firm for violations of the Fair Labor Standards Act.[100] The Fifth Circuit held that statutory injunctions do not issue as a matter of right.[101]

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92. *Id.*

93. *See id.* at 913 ("[H]ere we have a situation in which the repetitiveness of the violations weighs heavily in favor of the imposition of an injunction. Furthermore . . . [the defendant] acted with scienter of the violations. That scienter was clearly established underscores the propriety of injunctive relief . . . ." (citations omitted)).

94. *See* SEC v. Youmans, 729 F.2d 413, 415 (6th Cir. 1984) (considering, in addition to the *Bonastia* factors, "the egregiousness of the violation," and "the defendant's age and health"); SEC v. Blatt, 583 F.2d 1325, 1334 (5th Cir. 1978) ("The trial court should consider several factors in deciding whether to issue an injunction in light of past violations. The critical question in issuing the injunction and also the ultimate test on review is whether defendant's past conduct indicates that there is a reasonable likelihood of further violations in the future.").

95. *Blatt*, 583 F.2d at 1334.

96. *In re* Tutu Water Wells CERCLA Litig., 326 F.3d 201 (3d Cir. 2003).

97. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675 (2012).

98. *See In re Tutu Water Wells CERCLA Litig*., 326 F.3d at 208 (describing the substantive inquiry as ensuring that the settlement reflects comparative fault); *see also* United States v. George A. Whiting Paper Co., 644 F.3d 368, 372 (7th Cir. 2011) (stating that consent judgment should be approved if consistent with CERCLA, and is substantively and procedurally fair). Although a distinction might be made between CERCLA and the securities laws, in *Tutu Water Wells*, substantive consideration was a judge-made requirement. How do we reconcile substantive judicial scrutiny where the EPA is concerned and not the SEC?

99. Mitchell v. Hodges Contracting Co., 238 F.2d 380 (5th Cir. 1956).

100. *See id.* at 381 (alleging that the contractor violated work-hour, pay, and recordkeeping provisions of the Act). Despite finding the defendant guilty of the violations, the court nonetheless, refused to grant an injunction. *Id.*

101. *Id.*

Rather, the decision of whether to issue an injunction and the injunction's terms "must inevitably be left to the sound discretion of the judge."[102] The judge's discretion should be informed by, *inter alia*, the sincerity and candor of the defendant: when these factors have been properly evaluated, the decision of the district judge will be left undisturbed.[103] The Fifth Circuit expanded on this analysis in *Mitchell v. Bland*,[104] under similar factual circumstances.[105] The court held that, even if the panel accepted the Secretary of Labor's arguments that the district court's findings were erroneous, "the Court would have been justified in either granting or denying injunctive relief under the broad discretion lodged in it by accepted equitable principles."[106]

Judge Friendly's opinion in *SEC v. Commonwealth Chemical Securities*,[107] in which he cautioned that injunctive relief can have significant collateral consequences for firms, exemplifies judicial reticence to grant such relief.[108] Judge Friendly noted that courts had become "more circumspect" in their acquiescence to SEC requests for injunctions due to a recognition that injunctions were often more than the "mild prophylactic" that they are sometimes described to be.[109] In denying an injunction against price manipulation, Judge Friendly explicitly cited the SEC's lack of factual basis.[110]

Other courts, too, have applied the principle that an injunction sought by the SEC can be denied for want of factual evidence. For example, in *United States v. Hooker Chemicals & Plastics Corp.*,[111] a district court reviewing a consent decree announced a deferential standard of review, so long as the court was satisfied of the factual underpinnings of the settlement.[112] The defendant in *Hooker* was an

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102. *Id.*

103. *See id.* at 381–82 (describing the trial judge as the best witness of the parties' demeanors and stating, "[w]here these have been properly evaluated, the action of the Trial Court, whether granting or denying an injunction, will be sustained").

104. Mitchell v. Bland, 241 F.2d 808 (5th Cir. 1957).

105. *See id.* at 809. There, the Secretary of Labor was seeking an injunction for violations of the Fair Labor Standards Act. *Id.* The district court refused to issue an injunction. *Id.*

106. *Id.* at 809–10.

107. SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90 (2d Cir. 1978).

108. *Id.* at 99.

109. *Id.*

110. *See id.* at 100 ("Since we have held the evidence was insufficient to find that Ms. Sharpe engaged in or aided and abetted the manipulation, there is no basis for enjoining her with respect to conduct of that sort.").

111. United States v. Hooker Chems. & Plastics Corp., 540 F. Supp. 1067 (W.D.N.Y. 1982).

112. *Id.* at 1072–73.

industrial enterprise accused of disposing of 80,000 tons of toxic waste in a landfill, creating the potential to contaminate nearby waterways.[113] The EPA sued Hooker, and soon thereafter the parties entered into a settlement containing injunctive relief and monetary damages.[114] The court, "[r]ecognizing that the resolution of these issues by agreement could have tremendous impact upon the residents of the community and, indeed, upon all of the surrounding areas," ordered the parties to appear before the court to explain the settlement provisions and answer any questions from the court.[115] In addition, the parties held a public hearing at a local university regarding the settlement and held a public notice-and-comment period for the settlement, thereby hearing and addressing concerns of the general public.[116]

After these procedures played out, the court was still "convince[d] . . . that many questions remained unanswered and [that] many concerns had not been addressed during the prior hearing" and thus ordered further hearings "in an attempt to clarify the highly technical and complex settlement."[117] After eight days of hearings, over two thousand pages of court transcripts, and testimony from fifteen expert witnesses, the court was satisfied that the record was "complete [and] fully developed."[118] Only after these protracted factual inquiries did the court agree to pass judgment on the settlement.

In its assessment of the consent decree, the court in *Hooker* first recognized a "clear policy in favor of encouraging settlements."[119] The role of the reviewing court was to "assure itself that the terms of the decree are fair and adequate and are not unlawful, unreasonable, or against public policy."[120] Further, a court has a "limited duty to inquire into the technical terms and factual disputes underlying the proposed settlement."[121] In its assessment, a court may consider the

113. *Id.* at 1070.

114. *Id.*

115. *Id.* at 1071.

116. *Id.*

117. *Id.*

118. *Id.* at 1071–72.

119. *Id.* at 1072 (quoting Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767, 771 (2d Cir. 1975)).

120. *Id.*

121. *Id.*

strength of the plaintiff's case,[122] the good-faith efforts of negotiators,[123] risks of litigation,[124] and whether the putative decree is in line with statutory objectives.[125]

Not only are facts important to understanding the substantive terms of the consent decree as exemplified by *Hooker*, but facts also determine the degree of deference a judge should show an agency seeking injunctive relief.[126] In *FTC v. Standard Financial Management Corp.*,[127] judicial independence was of paramount importance.[128] The court cautioned against "judicial inertia," and determined that the measure of deference owed to an agency "depends on the persuasive power of the agency's proposal and rationale, given whatever practical considerations may impinge and the full panoply of the attendant circumstances."[129] Moreover, "rather than blindly following the agency's lead, [a court] must make its own inquiry into the issue of reasonableness before entering judgment."[130] The notion that the degree of deference is to be determined by the strength of the plaintiff's claims has found traction in other circuits as well.[131] Indeed, in *EEOC v. Hiram Walker & Sons, Inc.*,[132] the Seventh Circuit declared this to be the most important factor in the decision on a consent judgment.[133] In this light, Judge Rakoff's decision in *Citigroup* was far from an abuse of discretion, and instead wholly within the mainstream. To Judge Rakoff, the SEC's case—unsupported by any factual stipulations—was weak, and thus the SEC was given relatively little deference.

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122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1073.

126. *See* FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 408 (1st Cir. 1987) (measuring the amount of deference by the strength of the government's case).

127. FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404 (1st Cir. 1987).

128. *Id.*

129. *Id.*

130. *Id.*

131. *See* Flinn v. FMC Corp., 528 F.2d 1169, 1172 (4th Cir. 1975) ("The most important factor to be considered in determining whether there has been such a clear abuse of discretion is whether the trial court gave proper consideration to the strength of the plaintiffs' claims on the merits[.]"); *see also* United States v. Oregon, 913 F.2d 576, 580–81 (9th Cir. 1990) (discussing the standard of review for consent decrees); Walsh v. Great Atl. & Pac. Tea Co., Inc., 726 F.2d 956, 965 (3d Cir. 1983) (stating that the most important determination in reviewing a class-action settlement was whether it was likely the underlying legal claims could be proven).

132. EEOC v. Hiram Walker & Sons, Inc., 768 F.2d 884 (7th Cir. 1985).

133. *Id.* at 889.

Judicial independence is pervasive whenever consent judgments are sought. In the antitrust context, *FTC v. Weyerhaeuser Co.*[134] is illustrative. The Federal Trade Commission (FTC) sought a preliminary injunction to block a merger it alleged violated antitrust laws.[135] After acknowledging that the court owed a degree of deference to the FTC, the D.C. Circuit maintained that a "judge remains obligated to exercise independent judgment on the propriety of issuance of a temporary restraining order or preliminary injunction. A court does not exercise independent judgment when it responds automatically to the agency's threshold showings. To exercise such judgment, the court must take genuine account of 'the equities.'"[136]

In *eBay Inc. v. MercExchange, L.L.C.*[137] the Supreme Court underscored the importance of the fundamental principles of equity.[138] Justice Thomas, writing for the majority, stated that the traditional considerations of equity must be considered when injunctive relief is sought and that no general rule or formula may govern its application.[139] Upon suing eBay for patent infringement and obtaining a favorable verdict, MercExchange had sought to permanently enjoin eBay from further infringement.[140] The district court refused the motion, stating that MercExchange fell within a broad class to which injunctive relief was unavailable.[141] Invoking a similarly broad brush (albeit in favor of issuance), the Federal Circuit reversed and held that a permanent injunction should always issue when a patent has been determined to be both valid and infringed.[142]

The Supreme Court, with eight justices concurring and one recusal, rejected categorical rules and injunctions as of right.[143] The

134. FTC v. Weyerhaeuser Co., 665 F.2d 1072 (D.C. Cir. 1981).

135. *Id.* at 1074.

136. *Id.* at 1082 (citation omitted).

137. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).

138. *See id.* at 391–92 (stating that the traditional equity considerations are at play whenever permanent injunctive relief is sought, unless Congress explicitly departs from that scheme).

139. *See id.* at 392–93. ("[T]raditional equitable principles do not permit such broad classifications.").

140. *Id.* at 391.

141. *Id.* at 393 (explaining that the district court reasoned that because MercExchange was willing to license its patent, and was not itself pursuing the patent, a permanent injunction was unavailable).

142. *Id.* at 393–94.

143. *See id.* at 392–93 (stating that blanket rules and principles of equity are irreconcilable). Justice Thomas delivered the opinion of the Court, while Justices Scalia and Ginsburg joined a

Court admonished that traditional equity principles are always in effect but for an express mandate from Congress.[144] In his concurrence, Chief Justice Roberts instructed that history is the lodestar of equity.[145] Although *eBay* concerned a permanent injunction under the Patent Act, Justice Thomas's language was broad and has been interpreted to apply in a variety of contexts.[146] The importance of history in the opinion and its concurrences leaves little room for doubt that equitable precedent looms large and should not lightly be set aside in the name of pragmatism or deference.

It is important to note that Congress can, and has from time to time, restricted or guided the discretion of courts sitting in equity.[147] Because equity practice has a "background of several hundred years of history,"[148] however, this is not accomplished without an express congressional mandate.[149] The best announcement of this notion comes from the Supreme Court in *Porter v. Warner Holding Co.*:[150]

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and

concurrence by Chief Justice Roberts and Justices Stevens, Souter, and Breyer joined a concurrence by Justice Kennedy. Justice Alito took no part in the consideration of the case. *Id.* at 388.

144. *See id.* at 391–92 ("As this Court has long recognized, a major departure from the long tradition of equity practice should not be lightly implied.").

145. *Id.* at 395 (Roberts, C.J., concurring) ("When it comes to discerning and applying those standards [of equity], in this area as others, 'a page of history is worth a volume of logic.'" (quoting N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921))).

146. It is worth noting that Justice Thomas cited two opinions that did not concern intellectual property. *Id.* at 391 (citing Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982); Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531 (1987)); s*ee also* Salinger v. Colting, 607 F.3d 68, 77–78 (2d Cir. 2010) ("[N]othing in the text or the logic of *eBay* suggests that its rule is limited to patent cases. On the contrary, *eBay* strongly indicates that the traditional principles of equity it employed are the presumptive standard for injunctions in any context." (footnote omitted)).

147. *See* Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) (stating that the principles of equity jurisdiction will not be forsaken without a clear Congressional mandate); *see also Weinberger*, 456 U.S. at 313–14 ("Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles.").

148. *Hecht Co.*, 321 U.S. at 329.

149. *See id.* at 330 ("We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied.").

150. Porter v. Warner Holding Co., 328 U.S. 395 (1946).

> inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.[151]

As demonstrated, equitable practice with regard to statutory injunctions has a rich and long history, a history which was largely ignored by the Second Circuit in *Citigroup*. The Second Circuit ignored the requirement of a "conceded set of facts," on which to apply "well-settled legal precepts," which is precisely what Judge Rakoff sought.[152] Judge Rakoff's attempts to evaluate the substantive propriety of the settlement were frustrated by the granting of the power to determine the public interest to the SEC.[153] The *Citigroup* holding is antipodean to the proposition in *Commonwealth Chemical Securities*, that an injunction sought by the SEC can be denied for want of factual evidence.[154] Finally, the rule of the Second Circuit, that reviewing courts should generally be satisfied by the SEC's mere averments, stands in stark contrast to the notion of independent judgment as described by the D.C. Circuit in *FTC v. Weyerhaeuser*.[155] The next Part develops these criticisms more formally and argues that *Citigroup* was wrongly decided.

II. SEC SETTLEMENT PRACTICES AND THE DECISIONS IN *CITIGROUP*

SEC v. Citigroup Global Markets did not occur in a vacuum. A proper understanding of events and circumstances that preceded the suit is critical to a full understanding of the opinion. Although a full treatment of the 2008 global financial crisis is beyond the scope of this Note, two crisis-related topics are explored below: the SEC's use of

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151. *Id.* at 398; *see also* Brown v. Swann, 35 U.S. 497, 503 (1836) ("The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.").

152. *See* SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup I*), 827 F. Supp. 2d 328, 333 (S.D.N.Y. 2011) (discussing lack of factual basis as the "fundamental[]" reason for denying the consent judgment).

153. *See In re* Tutu Water Wells CERCLA Litig., 326 F.3d 201, 206 (3d Cir. 2003) (explaining that consent decrees further the public interest if they promote efficient remediation of hazardous waste).

154. *See* SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 100 (2d Cir. 1978) ("Since we have held the evidence was insufficient to find that [the defendant] engaged in or aided and abetted the manipulation, there is no basis for enjoining her with respect to conduct of that sort.").

155. *See* FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1082 (D.C. Cir. 1981) ("Independent judgment is not exercised when a court responds automatically to the agency's threshold showings. To exercise such judgment, the court must take genuine account of the equities.").

"neither-admit-nor-deny" settlements and the facts underlying *Citigroup*. After that, Section C discusses in depth the Second Circuit's opinion.

A. *"Hallowed by History, but Not by Reason"*[156]*: The SEC's Use of Neither-Admit-Nor-Deny Settlements*

The SEC is the principal securities-market conduct regulator in the United States.[157] In fulfilling its mandate, the SEC has a large toolbox of enforcement mechanisms.[158] Generally speaking, the SEC may bring a civil action in federal court or an administrative action before an administrative law judge.[159] Irrespective of the forum in which an action is initiated, over 90 percent of SEC actions are resolved via settlement.[160] Commonly, these settlements allow a defendant to "neither admit nor deny" wrongdoing.[161] Neither-admit-nor-deny settlements allow a defendant to settle an action without having to admit any wrongdoing, while at the same time barring that defendant from denying having engaged in unlawful conduct.[162] Neither-admit-nor-deny settlements, although not the only

156. *Citigroup I*, 827 F. Supp. at 332 ("[T]he S.E.C.'s long-standing policy—hallowed by history, but not by reason—of allowing defendants to enter into Consent Judgments without admitting or denying the underlying allegations, deprives the Court of even the most minimal assurance that the substantial injunctive relief it is being asked to impose has any basis in fact." (footnote omitted)).

157. *See generally* James R. Doty, *The Role of the Securities and Exchange Commission in an Internationalized Marketplace*, 60 FORDHAM L. REV. S77 (1992) (discussing the development of the role of the SEC).

158. *See* Danné L. Johnson, *SEC Settlement: Agency Self-Interest or Public Interest*, 12 FORDHAM J. CORP. & FIN. L. 627, 645 (2007) (discussing the remedies available to the SEC that do not require judicial approval, including cease-and-desist orders, suspension/revocation of SEC registration, censure, bars from future association broker-dealer or investment adviser, pecuniary fines, and disgorgement, among others).

159. *Id.* at 645–46.

160. *See* SEC v. Clifton, 700 F.2d 744, 748 (D.C. Cir. 1983) (providing the 90-percent figure); Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 87, 92 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) ("The SEC also settles almost all its enforcement actions."). At least one source has the figure as high as 98 percent. Priyah Kaul, *Admit or Deny: A Call for Reform of the SEC's "Neither-Admit-Nor-Deny" Policy*, 48 U. MICH. J.L. REFORM 535, 536 (2015).

161. *Examining the Settlement Practices of U.S. Financial Regulators: Hearing Before the H. Comm. on Fin. Servs.*, 112th Cong. 77 (2012) [hereinafter *Khuzami*] (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission).

162. Johnson, *supra* note 158, at 647.

enforcement tool available to the SEC,[163] are commonly used by the SEC.[164]

The SEC justifies its widespread use of neither-admit-nor-deny settlements on the grounds that they are more efficient than litigation in terms of time and cost for both the SEC and, generally, the defendant.[165] These settlements are further justified on the grounds that requiring a firm to admit to unlawful conduct could prevent the firm from denying such conduct in later actions, thus exposing the firm to an unknown amount of future damages in an unknown number of future actions.[166] Firms would thus be incentivized to litigate, and fewer enforcement actions would be brought overall due to resource constraints. Courts have generally approved such settlements in a wide variety of contexts, not limited to securities violations.[167]

The practice of allowing neither-admit-nor-deny settlements is not without its critics, however.[168] Some observers lament that this enforcement mechanism lacks potency and credibility.[169] More damning is the criticism that the SEC is more concerned with fanfare

163. Since 2011, the SEC has made much use of Deferred Prosecution Agreements (DPAs), in which the SEC agrees to withhold prosecution in exchange for certain concessions, usually including the cessation of the activities giving rise to the action. DPAs do not require approval or adjudication by a court. *See* Press Release, SEC, Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement (May 17, 2011), http://www.sec.gov/news/press/2011/2011-112.htm [http://perma.cc/E3NJ-UD7D].

164. *See* Buell, *supra* note 160, at 89 ("[T]he 'neither admit nor deny' settlement is a fixture in SEC practice.").

165. *See Khuzami*, *supra* note 161, at 79 (statement of Robert Khuzami) (stating that full adjudications in every case would lead to fewer enforcement actions).

166. *See id.* ("The reality is that many companies likely would refuse to settle cases if they were required to affirmatively admit unlawful conduct or facts related to that conduct."); *see also* James B. Stewart, *The S.E.C. Has a Message for Firms Not Used to Admitting Guilt*, N.Y. TIMES, June 22, 2013, at B6 ("If they admit culpability to the S.E.C., plaintiffs will cite that in their cases, and that could mean hundred[s] of millions or billions in damages . . . .").

167. *Khuzami*, *supra* note 161, at 80–81 (statement of Robert Khuzami) ("In enforcing the securities, antitrust, environmental, consumer protection, public health, and civil rights laws, federal courts have entered consent judgments in actions resolved by federal agencies . . . ." (footnotes omitted)).

168. *See* Buell, *supra* note 160, at 89 ("Does any of this accomplish enough, especially if this instance of wrongdoing occurred even though this firm or peer firms were subject to these forms of liability in the past?").

169. *See id.* ("The replacement of a private citizen as plaintiff with the federal securities cop adds some gravity to the proceedings, but the routine practice of concluding cases without any finding or admission of wrongdoing by the firm may substantially blunt that effect.").

and press conferences than achieving just results.[170] A fundamental criticism of neither-admit-nor-deny settlements is that enforcement carried out on the public's behalf should do more than fill government coffers.[171] Professor Samuel Buell writes that "[i]t is practically an abdication of responsibility for a public enforcer to resolve almost all its cases with no conclusion by the legal process as to whether wrongdoing occurred."[172]

It is worth reflecting on the impact of a settlement in which the defendant neither admits nor denies wrongdoing on the overall objectives of the securities laws. Investor confidence is essential to well-functioning markets, and promoting investor confidence was one impetus for the 1934 Act.[173] Central to investor confidence is a belief that enforcement actions will effectively deter future wrongdoing by market participants. It is difficult to discern how the deterrence and signaling functions of SEC enforcement are fulfilled when neither-admit-nor-deny settlements are regarded as a mere "cost of doing business."[174] Some on the bench have expressed misgivings about this type of settlement as well.[175] Indeed, in a suit against Bank of America (BoA), Judge Rakoff called neither-admit-nor-deny settlements "half-baked justice at best."[176]

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170. SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup I*), 827 F. Supp. 2d 328, 333 (S.D.N.Y. 2011) ("It is harder to discern from the limited information before the Court what the S.E.C. is getting from this settlement other than a quick headline."); Buell, *supra* note 160, at 97.

171. *See* Buell, *supra* note 160 at 99 ("Regulatory enforcement is pursued on behalf of the public, who for good reasons would very much like to be told whether the firm is a lawbreaker and, if so, exactly how and to what extent. The public would much prefer to learn this from an admission or a careful adjudicatory process than from the mere allegation of it in a federal agency's complaint that, beyond at most a motion to dismiss, is never subject to the scrutiny of legal process.").

172. *Id.* Professor Buell later retreats from this position somewhat, but it is nonetheless illustrative of a common criticism of neither-admit-nor-deny settlements. *See id.* (reflecting that he is "being quite unfair" in his criticisms of the SEC's practices and that "[t]he SEC's 'neither admit nor deny' practice has a good rationale").

173. *See* S. REP. No. 73-1455, at 284 (1934) (discussing investor confidence as essential to performance of markets and fluctuations in asset prices, divorced from fundamentals); *see also* James D. Cox, Randall S. Thomas & Dana Kiku, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737, 759 (2003) (describing deterrence of financial fraud as a mission of SEC).

174. Stewart, *supra* note 166, at B6.

175. *See, e.g.*, SEC v. Bank of Am. Corp., Nos. 09 Civ. 6829, 10 Civ. 0215, 2010 WL 624581, at *6 (S.D.N.Y. Feb. 22, 2010) (granting SEC's consent motion albeit "shaking its head" at the SEC's "modest and misdirected sanctions" imposed upon a defendant that "trie[d] to escape the implications of hiding material information from its shareholders").

176. *See id.* at *5 ("While better than nothing, this [settlement] is half-baked justice at best.").

In *SEC v. Bank of America Corp.*,[177] the SEC alleged that BoA lied to its shareholders in a proxy statement.[178] In order to achieve approval of BoA's $50 billion acquisition of Merrill Lynch (Merrill), BoA's proxy statement disclosed that Merrill had agreed to withhold executive bonuses in the period prior to the closing of the deal.[179] After closing, it came to light that Merrill paid $5.8 billion in bonuses to its executives.[180] BoA made no corrective disclosure.[181] The SEC filed a complaint alleging that BoA "materially lied" to shareholders and sought a $150 million fine.[182] Judge Rakoff was frustrated not only because he perceived the penalty as paltry, but also because shareholders would be on the hook for the misdeeds of management.[183]

Judge Rakoff initially refused to approve the consent decree for want of factual support. Only after multiple supplemental Statements of Fact and "hundreds of pages of deposition testimony and other evidentiary materials"[184] did Judge Rakoff reluctantly approve the settlement.[185] *Bank of America* can thus be seen as foreshadowing *Citigroup*.

B. Factual and Procedural History of SEC v. Citigroup Global Markets

The story of *Citigroup*'s ascension to the Second Circuit reads like a Shakespearean drama: proceeding in different acts, with unlikely alliances, and the ultimate downfall of the protagonist in the final act. It is in fair New York, "where we lay our scene."[186]

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177. SEC v. Bank of Am. Corp., Nos. 09 Civ. 6829, 10 Civ. 0215, 2010 WL 624581 (S.D.N.Y. Feb. 22, 2010).

178. *See id.* at *1 (finding that the proxy statement "failed to adequately disclose" details about bonus payments).

179. *See id.* ("[A] prudent Bank shareholder, if informed of the aforementioned facts, would have thought twice about approving the merger . . . .").

180. *Id.*

181. *Id.*

182. SEC v. Bank of Am. Corp., 653 F. Supp. 2d 507, 508 (S.D.N.Y. 2009),

183. *See id*. ("This proposal to have the victims of the violation pay an additional penalty for their own victimization was enough to give the Court pause.").

184. *Bank of Am. Corp.*, 2010 WL 624581, at *1.

185. *See id.* at *5 ("While better than nothing, this [settlement] is half-baked justice at best.").

186. *See* WILLIAM SHAKESPEARE, ROMEO & JULIET act 1, prologue (Cambridge ed., University Press 1955) ("In fair Verona, where we lay our scene . . . .").

In October 2011, the SEC filed a suit against Citi alleging "a serious securities fraud."[187] According to the SEC's complaint, Citi created a billion-dollar fund in the nascent stages of the subprime mortgage crisis that it filled with negatively forecasted assets in an attempt to rid itself of that exposure.[188] In marketing this fund to investors, Citi claimed that the constituent assets were selected by an independent investment adviser, when in fact the assets were selected by Citi itself.[189] Citi then took short positions in the same assets that were included in the Fund.[190] The Fund netted Citi $160 million in profits while investors lost more than $700 million.[191]

Although the SEC's complaint alleged the elements of fraud, the SEC, "for reasons of its own," charged Citi only with negligence.[192] The SEC alleged that Citi knew it would have had trouble selling the Fund to investors if they had known that the Fund was being used as a vehicle for Citi to unload (and short) its poorly projected assets.[193]

In a simultaneous filing, the SEC sought the court's approval of a pre-negotiated consent judgment with Citi, including a neither-admit-nor-deny clause.[194] The consent judgment had three primary provisions. First, it sought to "permanently restrain[] and enjoin[]" Citi from future violations of the same kind. Second, it called for disgorgement of $160 million in profits, plus $30 million in interest, and an additional $95 million civil penalty. And, third, it called for changes to certain internal controls of Citi for a period of three years.[195]

Even in light of agency deference, the district court concluded that it could not approve the consent judgment.[196] The court ruled that before it can invoke its injunctive powers, it must be satisfied that the proposed settlement "is fair, reasonable, adequate, and in the public interest."[197] The court determined that the putative settlement met

187. SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup IV*), 752 F.3d 285, 289 (2d Cir. 2014).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 297.

193. *Id.* at 289.

194. *Id.*

195. SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup I*), 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011).

196. *Id.* at 335.

197. *Id.* at 330 (citations omitted). The court continued,

none of those requirements.[198] The court also cited the public's interest in knowing the truth, as well as the fear of courts becoming "mere handmaiden[s]" of government agencies.[199] In this regard it is critical that Judge Rakoff refused the decree not because he required an admission of liability, but because he was provided no facts by which to assess the settlement.[200]

In particular, Judge Rakoff was curious how the settlement amounts were reached and, relatedly, why Citi's settlement was substantially less than an SEC settlement with Goldman Sachs when the two firms engaged in similar conduct but Goldman's was less severe.[201] Moreover, he wanted to know why important terms and remedial measures contained in Goldman's settlement were not included in Citigroup's, despite Goldman's cooperation with the investigation and Citigroup's failure to cooperate.[202] Earlier in the proceedings, Judge Rakoff submitted other questions to the litigants, including inquiries into how the SEC ensures compliance with injunctions and how many contempt proceedings it has brought to enforce such injunctions against large banks.[203] The answer was zero.[204] Judge Rakoff further faulted the SEC's policy of settling actions without requiring defendants to admit or deny the underlying allegations as "depriv[ing] the Court of even the most minimal assurance that the substantial injunctive relief it is being asked to

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> [I]t is clear that before a court may employ its injunctive and contempt powers in support of an administrative settlement, it is required, even after giving substantial deference to the views of the administrative agency, to be satisfied that it is not being used as a tool to enforce an agreement that is unfair, unreasonable, inadequate, or in contravention of the public interest.

Id. at 332.

198. *Id.* at 332.

199. In full, the court stated,

> [W]hen a public agency asks a court to become its partner in enforcement by imposing wide-ranging injunctive remedies on a defendant, enforced by the formidable judicial power of contempt, the court, and the public, need some knowledge of what the underlying facts are: for otherwise, the court becomes a mere handmaiden to a settlement privately negotiated on the basis on unknown facts, while the public is deprived of ever knowing the truth in a matter of obvious public importance.

Id.

200. *See* Coffee, *supra* note 17, at 2 ("[The court's] protest is that it has no information about the strength of the case is hardly the same as demanding that the defendant stipulate to the allegations in the SEC's complaint.").

201. *Citigroup I*, 827 F. Supp. 2d at 334–35 n.7.

202. *Id.*

203. SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup IV*), 752 F.3d 285, 289–90 (2d Cir. 2014).

204. Coffee, *supra* note 17, at 3.

impose has any basis in fact."[205] Additionally, he expressed displeasure with the fact that settlements of this type are most frequently viewed as a mere cost of doing business.[206]

As the public interest was concerned, Judge Rakoff cautioned that the "successful resolution of [the parties'] competing interests cannot be automatically equated with the public interest."[207] In particular, the court was concerned not only that Citi got a sweet deal,[208] but also that defrauded investors would be disadvantaged in two related ways should they seek to recoup their losses through private litigation.[209] Not only are private litigants prevented from bringing securities claims based on negligence, but the neither-admit-nor-deny settlement deprived investors of any collateral estoppel assistance.[210]

In his concluding remarks, Judge Rakoff cautioned against judicial action not based in fact, calling it "inherently dangerous,"[211] and noted that when injunctive power is not based on facts "it serves no lawful or moral purpose and is simply an engine of oppression."[212] Judge Rakoff then refused to enter the settlement and proceeded to set a date for trial.[213] Both the SEC and Citi took interlocutory appeals and filed for a stay of proceedings pending the results of those appeals.[214]

Judge Rakoff denied the parties' motions to stay.[215] Unbeknownst to the district court, however, the SEC had filed an "emergency motion" in the Second Circuit seeking a stay pending the outcome of its interlocutory appeal or, alternatively, a temporary

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205. *Citigroup I*, 827 F. Supp. 2d at 332.

206. *See id.* at 333 ("As for common experience, a consent judgment that does not involve any admissions and that results in only very modest penalties is just as frequently viewed, particularly in the business community, as a cost of doing business . . . . This, indeed, is Citigroup's position in this very case.").

207. *Id.* at 335.

208. *See id.* at 333 ("If the allegations of the Complaint are true, this is a very good deal for Citigroup; and, even if they are untrue, it is a mild and modest cost of doing business."); *see also id.* at 334 (describing the $95 million fine as "pocket change" to Citi).

209. *See id.* at 334 (describing how investors were dealt a "double blow").

210. *Id.*

211. *Id.* at 335.

212. *Id.*

213. *Id.*

214. SEC v. Citigroup Glob. Mkts. Inc. (*Citigroup II*), 827 F. Supp. 2d 336, 336–37 (S.D.N.Y. 2011).

215. *Id.* at 340.

stay.[216] In an amazing (if serendipitous) feat of judicial timing, the Second Circuit granted the SEC's motion for a temporary stay in a terse per curiam opinion[217] just one minute before the district court published its opinion denying the parties' motion to stay.[218]

C. Fixing the Menu: The Second Circuit's Decision

After a fair amount of procedural skirmishing,[219] the Second Circuit ultimately held that Judge Rakoff's refusal to accept the settlement between the SEC and Citi was an abuse of discretion.[220] The court's analysis consisted of three distinct issues: the appellate court's jurisdiction to hear the appeal, the propriety of a consent decree being conditioned on an admission of liability, and the level of deference owed to the SEC.[221] Consistent with the Second Circuit's analysis, the analysis here will focus mainly on the third question.

1. *Did the Second Circuit Have Jurisdiction to Hear the Appeal*? The panel first considered whether it had jurisdiction to hear the interlocutory appeal. The Final Judgment Rule generally limits appeals to final dispositions, so as to avoid protracted litigation and piecemeal review of litigation.[222] But the Final Judgment Rule is not without exceptions.[223] When lower courts issue interlocutory orders

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216. *See id.* (explaining that the SEC filed an emergency motion without notification to the court and was "seeking a stay pending appeal or, in the alternative, a temporary stay, and representing that the motion was unopposed by Citigroup").

217. SEC v. Citigroup Glob. Mkts. Inc., Nos. 11-5227(L), 11-5242(XAP), 2011 WL 6937373, at *1 (2d Cir. Dec. 27, 2011).

218. *See Citigroup II*, 827 F. Supp. 2d at 341 (providing procedural posture).

219. Because both the SEC and Citi argued for the stay, the motions panel considered only briefs from one side of the dispute. *Citigroup III*, 673 F.3d 158, 161 (2d Cir. 2012). Perhaps unsurprisingly, the three-judge panel granted the stay. *Id.* at 169. First, the panel stated that Judge Rakoff gave too little deference to the SEC's determination of what constituted serving the public interest. *Id.* at 163. Addressing next the district court's assertion that the grant of substantial relief on the basis of allegations was unfair to Citi, the panel held that it is not within a court's purview to protect "private, sophisticated, counseled" parties from settlements to which they agree. *Id.* at 165. Finally, the panel rejected the notion that a court can refuse a settlement on the grounds that the settlement does not prove or concede liability. *Id.* at 166.

220. *See* SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup IV*), 752 F.3d 285, 291 (2d Cir. 2014) ("A district court abuses its discretion if it '(1) based its ruling on an erroneous view of the law,' (2) 'made a clearly erroneous assessment of the evidence,' or (3) 'rendered a decision that cannot be located within the range of permissible decisions.'" (quoting Lynch v. City of New York, 589 F.3d 94, 99 (2d Cir. 2009))).

221. *Id.* at 291, 293.

222. *Id.* at 292.

223. *Id.*

affecting the status of injunctive relief, and such orders are said to have serious or irreparable consequences, interlocutory appeals may be allowed.[224] When the denial of a settlement is, in effect, the denial of injunctive relief, and if the denial will result in irreparable harm if left undisturbed, a party is entitled to an interlocutory appeal.[225] The Second Circuit found that this standard was satisfied.[226] First, because the consent decree included two types of injunctive relief (a pro forma "obey-the-law" injunction, and implementation of certain internal-compliance controls), the denial of the consent decree did deny the SEC the injunctive relief it sought.[227] Second, the SEC demonstrated irreparable harm because, in the eyes of the appellate court, the district court "expressed no willingness to revisit the settlement agreement with the parties, [and] instead [set] a trial date."[228] Thus, the Second Circuit concluded that it had jurisdiction to hear the appeal.[229]

2. *Did Judge Rakoff Require an Admission of Liability?* The appeals panel disposed of the second issue in a single paragraph. The SEC argued that Judge Rakoff abused his discretion by conditioning the approval of the consent decree on Citi's admission of liability.[230] As the district court's pro bono counsel submitted, however, Judge Rakoff did not condition liability on an admission.[231] The panel accepted the position of the district court's counsel, "[w]ith good reason—there is no basis in the law for the district court to require an

224. 28 U.S.C. § 1292(a)(1) (2012) (granting appellate jurisdiction over interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions"); *see* Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981) ("Unless a litigant can show that an interlocutory order of the district court might have a serious, perhaps irreparable, consequence, and that order can be effectually challenged only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal.").

225. *Citigroup IV*, 752 F.3d at 293.

226. *Id.*

227. *Id.* The SEC has not enforced a single injunction against a financial institution for over a decade. SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup I*), 827 F. Supp. 2d 328, 334 (S.D.N.Y. 2011). This leaves one to wonder why the SEC wanted *these* injunctions.

228. *Citigroup IV*, 752 F.3d at 293.

229. *Id.*

230. *Id.*

231. *Id.*; *see* Coffee, *supra* note 17, at 2 (stating that Judge Rakoff conditioned approval not on Citi's admission of liability, but upon lack of facts). This is an important point, as many critics of Judge Rakoff's opinion use this straw man. A pro bono counsel was appointed to argue in favor of Judge Rakoff's opinion because both the SEC and Citi were in favor of approval of the consent decree.

admission of liability as a condition for approving a settlement between the parties."[232]

3. *How Much Deference Should Be Afforded to the SEC?* The degree of deference owed to the SEC was a "far thornier" issue.[233] The panel first laid out two related background principles: there is a "strong federal policy" in favor of consent decrees and, at the same time, courts are not "rubber stamps" to the whims of agencies.[234] It is between these two poles that the sparring took place.[235]

The panel next set out to determine the proper standard of review. The panel clarified that when a court reviews a consent decree involving an enforcement agency, the court should consider "whether the proposed consent decree is fair and reasonable."[236] And when injunctive relief is included, the court should also ensure that "the public interest would not be disserviced."[237] A district court is required to enter a consent decree "[a]bsent a substantial basis" that one of these elements is violated.[238] Missing from the standard announced by the court is the requirement of adequacy.[239]

The Second Circuit defined the inquiry into the fairness and reasonableness of a consent decree as focused on whether the decree is procedurally proper.[240] A court should also ensure that the decree is not the product of collusion or corruption.[241] Finally, the baseline

232. *Citigroup IV*, 752 F.3d at 293.

233. *Id.*

234. *See id.* ("Our court recognizes a strong federal policy favoring the approval and enforcement of consent decrees. To be sure, when the district judge is presented with a proposed consent judgment, he is not merely a rubber stamp.").

235. *Id.* at 294–98.

236. *Id.* at 294.

237. *See id.* (providing that so long as an injunction is not unfair, unreasonable, or, when injunctive relief is concerned, when that injunctive relief would not be a disservice to the public, consent decrees must be approved).

238. *Id.*

239. *See id.* (reasoning that the adequacy standard was borrowed from settlement review in the class action context). In such a context, an adequacy requirement makes sense because future claims are barred via res judicata. *Id.* However, that is generally not the case in the context of consent decrees. *Id.* Plaintiffs with private rights of action are free to bring those claims any time, and where no private rights of action exist, "the S.E.C. is the entity charged with representing the victims, and is politically liable if it fails to adequately perform its duties." *Id.*

240. *See id.* at 295 ("The primary focus of the inquiry [into fairness and reasonableness], however, should be on ensuring the consent decree is procedurally proper . . . .").

241. *Id.* at 294–95.

legality of the decree, clarity of language, and resolution of underlying claims are among the considerations.[242]

As to factual support for consent decrees, the Second Circuit held that requiring the SEC to establish the veracity of its allegations was an abuse of discretion: "Trials are primarily about the truth. Consent decrees are primarily about pragmatism."[243] The court then engaged in a discussion of the relative merits of consent decrees in mitigating risk, uncertainty, and costs associated with litigation.[244] Although the court did not establish any bright-line rule about how well supported a consent decree must be, it stated that district courts should generally be satisfied by the averments of the SEC, and that here the district court had a "sufficient" record on which to approve the consent decree.[245] Thus in just one paragraph, the Second Circuit dispatched the crux of the district court's concern.[246]

In considering the public interest, the court held that "[t]he job of determining whether the proposed S.E.C. consent decree best serves the public interest, however, rests *squarely* with the S.E.C., and its decision merits significant deference."[247] In support of this proposition, the panel offered that federal judges have no constituency, whereas executive agencies have a congressional constituency.[248] The panel then confronted Judge Rakoff's public-interest inquiry, and determined that "the district court made no findings that the injunctive relief proposed in the consent decree would disservice the public interest, in part because it defined the public interest as 'an overriding interest in knowing the truth.'"[249] To the Second Circuit, this was an improper inquiry and thus constituted legal error.[250]

242. *Id.*

243. *See id.* at 295 ("It is an abuse of discretion to require, as the district court did here, that the S.E.C. establish the 'truth' of the allegations against a settling party as a condition for approving the consent decrees.").

244. *Id.*

245. *See id.* at 295–96 (stating that "colorable claims, supported by factual averments" provide sufficient basis for approval of consent).

246. *Id.*

247. *Id.* at 296 (emphasis added).

248. *Id.* (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984)).

249. *Id.* at 297 (quoting the district court's opinion).

250. *See id.* (explaining that whereas a district court cannot find the public interest disserved based on a policy disagreement with the SEC, it could, for example, find the public interest disserved if the consent decree barred private causes of action).

The Second Circuit went on to state that the decisions about which causes of action to charge against particular defendants were entirely within the purview of the SEC.[251] And further, for a district court to withhold approval of a consent decree because it did not believe the proper charges were brought constituted an abuse of discretion.[252]

Finally, the panel pointed out that the SEC is free to carry out its enforcement efforts through administrative channels, outside the reach of Article III courts.[253] The panel cautioned hollowly that if the SEC seeks to invoke the equitable powers of courts, "then the S.E.C. must be willing to assure the court that the settlement proposed is fair and reasonable."[254] The court closed its analysis by restating the (equally hollow) rubber-stamp motif: "For the courts to simply accept a proposed S.E.C. consent decree without any review would be a dereliction of the court's duty to ensure the orders it enters are proper."[255]

III. CONFRONTING THE SECOND CIRCUIT'S DECISION

The decision of the Second Circuit in *Citigroup* is flawed in at least two respects. First, the decision patently violates the separation-of-powers doctrine by granting the SEC far too much power to determine the propriety of an injunction. Second, it ignores longstanding precedent regarding the role of courts with respect to equitable relief. This Part analyzes both of these objections.

A. Separation of Powers: Ceding a Central Function

In *Citigroup*, the Second Circuit's holding grants to the SEC a function central and essential to the judiciary, and thus violates the separation-of-powers principle.[256] Namely, the decision permits the SEC to be the arbiter of the public interest: "The job of determining

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251. *See id.* (defining the SEC's sphere of jurisdiction).

252. *Id.* Again, this seems to be a straw man. It is no mistake the panel appended this phrase with "to the extent." *See id.* ("*To the extent* the district court withheld approval of the consent decree on the ground that it believed the S.E.C. failed to bring the proper charges against Citigroup, that constituted an abuse of discretion." (emphasis added)).

253. *Id.*

254. *Id.*

255. *Id.* at 298.

256. *See* Chadha v. INS, 634 F.2d 408, 425 (9th Cir. 1980) ("[W]e define a constitutional violation of the separation of powers as an assumption by one branch of the powers that are central or essential to the operation of a coordinate branch . . . .").

whether the proposed S.E.C. consent decree best serves the public interest, however, rests squarely with the S.E.C., and its decision merits significant deference."[257] Given that the primary consideration in injunctive relief is consideration of the public interest, the SEC may now decide for itself when injunctive relief is warranted.

After *Citigroup*, the decision to grant or deny injunctive relief is only nominally a decision for the courts. Professor John Coffee, writing before the decision of the Second Circuit came down, reasoned that the only way the court of appeals could reverse Judge Rakoff would be to declare that the SEC has the "sole discretion" to determine when injunctive relief is warranted.[258] That is precisely what the Second Circuit held.

The decision is also disruptive to the judiciary and prevents judges from discharging their duties, meeting the standard set out in *Nixon* for finding a separation-of-powers violation.[259] Article III of the Constitution explicitly vests equity power in the courts.[260] There is no indication courts are unsatisfactory or ill-situated in this regard. On the contrary, hundreds of years of equitable precedent provide compelling reason to conclude that courts take this responsibility seriously and discharge this duty to effect just and reasonable outcomes. *Citigroup*, however, all but places the courts' equity powers with the SEC in the context of securities enforcement. Courts are thus confined in their own use of equitable powers, resulting in the loss of a key constitutionally granted function.

Equitable relief is precisely the sort of central and essential power contemplated in *Nixon* and *Chadha*. Equitable relief has been a crucial tool of the courts in a number of contexts including

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257. *See Citigroup IV*, 752 F.3d at 296.

258. *See* Coffee, *supra* note 17, at 3. Coffee states that

> [t]he only basis on which the Second Circuit could seemingly grant the requested relief . . . would be to find that the SEC, and not the district court, has the sole discretion to determine whether a proposed settlement is fair, reasonable, adequate and in the public interest. To date, even though the SEC is entitled to deference, the case law does not go anywhere near this far.

Id.

259. *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977) ("[T]he proper inquiry focuses on the extent to which [another branch's act] prevents the Executive Branch from accomplishing its constitutionally assigned functions.").

260. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial power shall extend to all cases, in law and equity . . . ."). The Constitution provides that the "judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." *Id.*

antitrust,[261] desegregation,[262] and prison reform.[263] Without such equitable powers, court-issued mandates would lack potency and credibility. Equitable powers, the "formidable" power of contempt among them, are those that give court decisions their "bite" and are thus critical to the judiciary.[264] The decision of the Second Circuit ignores this truth and pegs the court's equitable powers to the desires of the SEC.

B. Ignoring Hecht *and Its Progeny*

One of the more striking features of the Second Circuit's opinion is the fact that it contains scant treatment of precedent. This is true of controlling precedent from the Supreme Court and the Second Circuit, as well as persuasive precedent from other circuits. Despite the Second Circuit's nonchalance on this point, precedent is very informative of the dispute in *Citigroup*.

Like *Hecht*, the analysis begins with the relevant statutory language.[265] The SEC brought its case against Citi under the 1933 Act.[266] Section 20(b) of that Act provides for statutory injunctions:

> Whenever . . . any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, the Commission may, in its discretion, bring an action in any district court of the United States . . . to enjoin such acts or practices, and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.[267]

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261. *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 101–05 (D.C. Cir. 2001) (discussing injunctions in the antitrust context).

262. *See, e.g.*, Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955) ("In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." (footnotes omitted)).

263. *See, e.g.*, Brown v. Plata, 131 S. Ct. 1910, 1947 (2011) (using injunctive relief to impose prison-population limits to ensure prisoners' Eighth Amendment rights were protected).

264. *See* SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup I*), 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011) ("But when a public agency asks a court to become its partner in enforcement by imposing wide-ranging injunctive remedies on a defendant, enforced by the formidable judicial power of contempt, the court, and the public, need some knowledge of what the underlying facts are . . . .").

265. Hecht Co. v. Bowles, 321 U.S. 321, 321–22 (1944).

266. SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup IV*), 752 F.3d 285, 289 (2d Cir. 2014).

267. Securities Act of 1933 § 20(d), 15 U.S.C. § 77t(b) (2012).

A long line of Supreme Court cases holds that, unless the governing statute contains express language circumscribing the discretion of district courts, the background principles of equity remain in force.[268] The above language is far from the "inescapable inference" required by *Warner Holding Co.* to conclude that the discretion of the district court is in some way curtailed.[269] In fact, in *Mills v. Electric Auto-Lite Co*.[270] the Supreme Court held that the statutory language of the 1934 Act, substantially similar to that of the 1933 Act, did not restrict courts' discretion: "[W]e cannot fairly infer from the Securities Exchange Act of 1934 a purpose to circumscribe the courts' power to grant appropriate remedies."[271]

At the risk of trivializing this plain yet important point, the Supreme Court in *Hecht* held that, even when a statute uses *more* restrictive language, it is still entirely within a court's purview to determine the propriety of injunctive relief.[272] In addition, the *Hecht* Court specifically cited the 1933 and 1934 Acts as containing language that requires judicial discretion.[273] Having thus established that the operative statutory language does not circumscribe the discretion of courts, it follows that "[t]he decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court."[274] The panel in *Citigroup* all but rejected this rule by vesting the primary consideration in equitable relief—the public interest—with the SEC.[275] A reviewing court under *Citigroup* is thus confined to reviewing the "procedural propriety" of the consent decree, and absent any irregularities must generally issue the injunction as sought.[276]

Courts have a duty to independently assess the merits of a proposed consent decree.[277] The court's ultimate decision is to be

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268. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391–92 (2006); Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946); *Hecht Co.*, 321 U.S. at 330.

269. *Warner Holding Co.*, 328 U.S. at 398.

270. Mills v. Elec. Auto-Lite Co., 396 U.S. 375 (1970).

271. *Id.* at 391.

272. *Hecht Co.*, 321 U.S. at 591.

273. *Id.* at 331 n.7.

274. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

275. *See* SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup IV*), 752 F.3d 285, 296 (2d Cir. 2014) ("The job of determining whether the proposed SEC consent decree best serves the public interest, however, rests squarely with the SEC . . . .").

276. *Id.* at 295–96.

277. *Id.* at 293; *see* Arizona v. City of Tucson, 761 F.3d 1005, 1012 (9th Cir. 2014) (discussing independent review in the context of CERCLA consent decrees); City of Detroit v. Grinnell

based on the entirety of the attendant circumstances[278] and "all those considerations of fairness that have been the traditional concern of equity courts."[279] Further, courts have a "duty to inquire into the technical terms and factual disputes underlying the proposed settlement"[280] and are compelled to "take genuine account of 'the equities.'"[281] It is thus plain that the Second Circuit's preoccupation with procedural correctness, as opposed to substantive or factual propriety, is largely misplaced and incorrect as a matter of law. The topical considerations authorized by the court fall far short of the searching review that should, and traditionally has, characterized equitable practice.

As a trial judge, Judge Rakoff was in the best possible position to view and assess the factual record. Presiding over the proceedings, Judge Rakoff was able to witness the candor and forthrightness of the parties. To borrow language from the Second Circuit, he was "on the firing line and [able to] evaluate the action accordingly."[282] Conversely, the appeals panel had only a second-order view of the record that, from its lofty vantage point, it found it sufficient.[283] The Second Circuit went so far as to say that short of collusion, district courts should be satisfied by the averments of the SEC alone.[284] Averments are, by definition, unproven.[285] It is difficult to reconcile the long-standing requirement that courts satisfy *themselves* of the factual underpinnings of equitable relief and the position of the Second Circuit, which essentially asks courts to take the SEC at its word.

Corp., 495 F.2d 448, 462 (2d Cir. 1974) (stating that courts are to "eschew any rubber stamp approval in favor of an independent evaluation").

278. *See* SEC v. Culpepper, 270 F.2d 241, 250 (2d Cir. 1959) ("The chancellor's decision is based on all the circumstances . . . .").

279. SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1102 (2d Cir. 1972).

280. United States v. Hooker Chems. & Plastics Corp., 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982).

281. FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1082 (D.C. Cir. 1981).

282. *See Grinnell Corp.*, 495 F.2d at 454 ("Great weight is accorded his [the trial judge's] views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly." (alteration in original) (quoting Ace Heating & Plumbing Co., Inc. v. Crane Co., 453 F.2d 30, 43 (3d Cir. 1971))).

283. SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup IV*), 752 F.3d 285, 296 (2d Cir. 2014).

284. *Id.*

285. *Averments*, BLACK'S LAW DICTIONARY (9th ed. 2014) (defining averments as "positive declaration or affirmation of fact; *esp., an assertion or allegation in a pleading*" (emphasis added)).

As discussed in connection with *Bonastia*, a failure "to apply well-settled legal precepts to a conceded set of facts" is an abuse of discretion.[286] The Second Circuit would lead one to believe this was the case in *Citigroup*. But as far as Judge Rakoff was concerned, there was no set of conceded facts. Judge Rakoff was thus doing little more than conducting his own independent factual analysis as called for by *Hooker*, and a much more limited inquiry at that.[287] Had his factual questions been answered, he likely would have approved the settlement—this is precisely what occurred in *SEC v. Bank of America*.[288] There, Judge Rakoff initially refused to enter a consent decree for want of facts, but, after receiving additional information from the parties, approved the settlement. Importantly, the admissions of the bank stopped short of admitting liability, thus foreclosing on collateral exposure and providing a model of what a factually robust settlement with Citi could have looked like.[289]

By far the most shocking aspect of the Second Circuit's opinion was the degree of deference afforded to the SEC in determining what satisfied the public interest.[290] The court held unequivocally that "[t]he job of determining whether the proposed SEC consent decree best serves the public interest, however, rests *squarely* with the SEC, and its decisions merit significant deference."[291] This level of deference is akin to *Chevron* deference,[292] and although *Chevron* deference might often be a safe harbor for agencies when engaged in rulemaking, it seems that the Second Circuit ceded too much judicial

286. SEC v. Bonastia, 614 F.2d 908, 913 (3d Cir. 1980).

287. *See* United States v. Hooker Chems. & Plastics Corp., 540 F. Supp. 1067, 1071–72 (W.D.N.Y. 1982).

288. *See* SEC v. Bank of Am. Corp., Nos. 09 Civ. 6829 (JSR), 10 Civ. 0215 (JSR), 2010 WL 624581, at *2 (S.D.N.Y. Feb. 22, 2010).

289. *Id.*; *see* Coffee, *supra* note 17, at 1 (discussing parallels between *Citigroup* and *Bank of America*).

290. SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup IV*), 752 F.3d 285, 297 (2d Cir. 2014).

291. *Id.* at 296.

292. *Chevron* deference is a two-step test applied to agency actions to determine whether the action is lawful. A court first asks whether Congress has spoken directly to the relevant question. If so, the court and the agency must adhere to the will of Congress. If Congress has not spoken directly to the issue however, the agency action will be upheld so long as it is based on a permissible reading of the statute. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

authority to the SEC by extending *Chevron*-level deference to considerations of equity—the domain of courts.[293]

The panel did itself a further disservice by relying on *Chaney* for the proposition that the SEC's enforcement action was committed to the Commission's discretion by law, and thus was unreviewable.[294] There the agency decision being challenged was the decision *not* to take enforcement action. As Chief Justice Rehnquist reasoned, decisions not to act do not involve "coercive power" on the part of an agency. The situation in *Citigroup* was precisely the opposite: the SEC *was* acting affirmatively, and its request for injunctive relief *does* implicate coercive power over those areas traditionally protected by courts. The Second Circuit's reliance on *Chaney* is not only mistaken, but also undermines its conclusion.[295]

Many circuits have held that the most important factor in determining the degree of deference afforded to a party seeking approval of a consent decree is "the persuasive power of the agency's proposal and rationale."[296] Apparently, the Second Circuit was so impressed by the strength of the SEC's case that it felt it necessary to cede the bench's most essential function to the SEC in this and all future cases.[297] This is a remarkable result considering the lack of stipulations of fact.[298] How can a trial judge be convinced of the relative strengths of the parties' positions when there are no factual

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293. *See* Chris Rice, *Injunctive Relief and Judicial Deference*, COLUM. BUS. L. REV. ONLINE (Apr. 8, 2012, 5:21 PM), http://cblr.columbia.edu/archives/12065 [http://perma.cc/3QQL-EHGN] (describing the misplaced reliance on *Chevron*).

294. SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup IV*), 752 F.3d 285, 297 (2d Cir. 2014).

295. *See* Rice, *supra* note 293. ("*Heckler* concerned a decision by an administrative agency not to pursue injunctive relief; while a request for injunctive relief involves the court's conception of the public interest, the absence of such a request does not involve the court in the same way.").

296. FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 407 (1st Cir. 1987); *see* EEOC v. Hiram Walker & Sons, Inc., 768 F.2d 884, 889 (7th Cir. 1985) (stating that a district court should compare "the strengths of the plaintiffs' case versus the amount of the settlement offer"); Walsh v. Great Atl. & Pac. Tea Co., Inc., 726 F.2d 956, 966 (3d Cir. 1983) (stating that the most important consideration in reviewing a settlement in the class-action context is whether the underlying claims could be proven); Flinn v. FMC Corp., 528 F.2d 1169, 1173 (4th Cir. 1975) (stating that a court may approve a settlement when "the record before it is adequate to reach 'an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated'" (citation omitted)).

297. *Citigroup IV*, 752 F.3d at 296.

298. *See* SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup I*), 827 F. Supp. 2d 328, 330 (S.D.N.Y. 2011) (S.D.N.Y. 2011) (noting that the court cannot approve settlement due to lack of "proven or admitted facts").

stipulations and the defendant neither admits nor denies the allegations?

On this analysis, the Second Circuit relinquished a critical role of the judiciary to the SEC. The court rationalized that the SEC has a constituency, whereas courts do not.[299] This reasoning is flawed for two reasons. First, the SEC's Congressional "constituency" gave its mandate to the SEC through the operative language of the Act, which preserves the traditional role of the courts as the ultimate deciders of whether an equitable remedy is appropriate. Second, even if the Act is not read as explicitly preserving the courts' role in this regard, the Framers nonetheless intended that courts act as a check on the whims of the executive and legislative branches. Excesses of Congress or the executive branch cannot be justified on the basis of their constituencies; the SEC has always had a Congressional constituency to which it must answer, there is nothing new or different in this case that justifies allowing the Commission to overstep its bounds. Not only is the ruling flawed and grounded in untenable justifications, but the decision has important, underanalyzed consequences moving forward.

C. Implications of the Flawed Ruling

A question that arises naturally from the Second Circuit's decision is the degree of discretion that remains for courts in granting their judicial imprimatur after *Citigroup*. Another related question is whether there were any other courses of action Judge Rakoff could have taken to avoid issuing an injunction.

As to the first question, the opinion in *Citigroup* makes clear that a reviewing court's analysis should be limited to the procedural propriety of the consent decree.[300] Other circuits have not winnowed the role of reviewing courts to such a degree, however, and leave a substantial basis for the conclusion that the role of courts is much broader.

For example, the *Hooker* court recognized a duty to inquire into the factual underpinnings of a consent decree.[301] Along those lines, the First Circuit in *Standard Financial*, the Fourth Circuit in *Flinn v.*

299. *Citigroup IV*, 752 F.3d at 296.

300. *Id.* at 295.

301. *See* United States v. Hooker Chems. & Plastics Corp., 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982) ("[T]he reviewing court has a limited duty to inquire into the technical terms and the factual disputes underlying the proposed settlement.").

FMC Corp.,[302] and the Seventh Circuit in *Hiram Walker & Sons, Inc.*, all state that an important factor for a reviewing judge to consider is the strength of the plaintiff's case.[303] Indeed, the Seventh Circuit regards it as the most important factor.[304] Elsewhere, judges consider the substantive terms of consent decrees.[305] Some courts go so far as to require that the consent decree "represents a reasonable factual and legal determination based on the facts of record, whether established by evidence, affidavit, or stipulation."[306]

A recent student case comment proposes a district-court standard of review restricted to "the adequacy of the individual settlement package."[307] At the same time, the author characterizes efforts to discern factual underpinnings as "overreaching."[308] This seems to be a logical inconsistency; how can a judge possibly assess the adequacy, or any aspect of a proposed consent decree, without facts by which to measure it? In order to accord with the rich history of equitable practice, and to allow judges the flexibility needed to effect just results, reviewing judges should be given wide latitude to inquire into the facts supporting a settlement. This is not to say they will or should do so in every case, only that they should be permitted to do so when they wish. For instance, courts might inquire into evidence against the defendant, the negotiation process and how settlement figures were calculated, how the SEC determined which charges to levy, and how the SEC plans to monitor and enforce any

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302. Flinn v. FMC Corp., 528 F.2d 1169 (4th Cir. 1975).

303. *See id.* at 1172 ("The most important factor to be considered in determining whether there has been such a clear abuse of discretion is whether the trial court gave proper consideration to the strength of the plaintiffs' claims on the merits . . . ."); FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 408 (1st Cir. 1987) ("[T]he true measure of the deference due depends on the persuasive power of the agency's proposal and rationale, given whatever practical considerations may impinge and the full panoply of the attendant circumstances."); EEOC v. Hiram Walker & Sons, Inc., 768 F.2d 884 (7th Cir. 1985) (listing "a comparison of the strengths of plaintiffs' case versus the amount of the settlement offer" as one of "the factors that a district court should consider" in determining the "fairness" of a consent decree).

304. *Hiram Walker & Sons, Inc.*, 768 F.2d at 889.

305. *In re* Tutu Water Wells CERCLA Litig., 326 F.3d 201, 207 (3d Cir. 2003).

306. United States v. City of Miami, 664 F.2d 435, 441 (5th Cir. 1981).

307. *See* Case Comment, *Securities Regulation – Consent Decrees – Second Circuit Clarifies that a Court's Review of an SEC Settlement Should Focus on Procedural Propriety. –* SEC v. Citigroup Global Markets, Inc., *752 F.3d 285 (2d Cir. 2014)*, 128 HARV. L. REV. 1288, 1294 (2015). This is an especially interesting suggestion given that the Second Circuit removed adequacy from the considerations of a district court in its decision. SEC v. Citigroup Glob. Mkts., Inc. (*Citigroup IV*), 752 F.3d 285, at 294 (2d Cir. 2014).

308. *See Case Comment*, *supra* note 307, at 1291 ("Judge Rakoff overreached in his demand that the SEC establish the 'truth' of the allegations against Citi.").

penalties extracted. To equate attempts to determine the factual circumstances with admissions of liability mischaracterizes the inquiry.

In response to the second question—alternative routes Judge Rakoff could have taken—Judge Rakoff could have approved the terms of the settlement less the injunctive elements.[309] This conclusion is bolstered by *United States v. City of Miami*,[310] in which the Fifth Circuit discussed hybrid consent judgments, those "based in part on the parties' settlement agreement and in part on the court's own judgment."[311] More generally, the Supreme Court's announcement in *Yakus* that courts sitting in equity "go much further both to give and withhold relief" when the public interest is implicated than they do when only private interests are concerned also lends support to this idea.[312] Admittedly, this result would have been a windfall for Citi, as its punishment would have been *less* severe without the injunctive elements, but it would have sent a powerful message to the SEC—"if a party seeks the legitimacy of the courts, it should be prepared to play by the courts' rules." In addition to rebuking the SEC, such a settlement would have deprived the SEC of nothing of practical value as the SEC seldom enforces its injunctions.[313]

Of course, the SEC also had alternatives, the most obvious being a settlement with Citi outside of the courts. That the SEC did not choose this path means that it thinks that a court-approved settlement adds value to their enforcement, perhaps through the ostensible legitimacy conferred by a court. Without an independent judiciary, however, it is hard to see what substantive value a court might add. It

309. *See* Coffee, *supra* note 17, at 3 (arguing that if the SEC itself pursued a settlement without injunctions, it likely could extract higher monetary penalties).

310. United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981).

311. *See id.* at 440 ("Complete accord on all issues, however, is not indispensable to the entry of any order. Even in a two-party litigation the parties may agree on as much as they can . . . and call upon the court to decide the issues they cannot resolve. Thus, there may be a decree 'partially consensual and partially litigated.'" (citations omitted) (quoting High v. Braniff Airways, Inc., 592 F.2d 1330, 1335 (5th Cir. 1979))).

312. Yakus v. United States, 321 U.S. 414, 441 (1944).

313. *See* Brief of Amici Curiae Securities Law Scholars for Affirmance in Support of the District Court's Order and Against Appellant and Appellee, SEC v. Citigroup Global Mkts. Inc., 752 F.3d 285 (2d Cir. 2014) (No. 11-5227-cv), 2012 WL 7009633, at *15 ("[T]he SEC rarely seeks to hold a defendant in contempt for breach of an injunction . . . ."); Coffee, *supra* note 17, at 3 ("Nor is it credible that injunctive relief is that important to the SEC . . . because the SEC never seeks to enforce its injunctions through contempt.").

is plain that the SEC sought the legitimacy and imprimatur of the courts, yet did not wish to pay for it.

CONCLUSION

A court's injunctive power should not be wielded casually.[314] When the SEC seeks to invoke the equitable power of courts, it ought to be prepared to justify its need with factual support.[315] Contrary to what commentators and the SEC itself argued, this does not require an admission of liability and resulting collateral exposure.[316]

In *SEC v. Citigroup Global Markets*, the Second Circuit's flawed decision restricted the role of judges reviewing consent decrees to ensuring that the proposed settlement is procedurally proper. Further, the Second Circuit gave excessive deference to the SEC and its determination of what constitutes the public interest. Because the public interest is the primary consideration in the decision to grant or deny equitable relief, the Second Circuit relegated courts to the role of mere seconders to the whims of agencies. In so holding, the Second Circuit rejected precedent and violated separation-of-powers principles.

Such a decision not only weakens the power of the judiciary to effectively police ineffective enforcement by agencies, but also serves to undermine the enforcement of the securities laws. Instead of deferring to the SEC, courts should be granted discretion to inquire into the factual underpinnings of government settlements when those settlements make use of judicial imprimatur. The goal of efficient capital aggregation and allocation is only furthered by effective and meaningful enforcement of the securities laws. The trivialization of courts in this goal serves only to trivialize the goal itself.

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314. *See* SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 99 (2d Cir. 1978) (explaining that "collateral consequences of an injunction can be very grave" and describing judicial reticence to issue injunctions); *see also* United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 44 F.3d 1091, 1095 (2d Cir. 1995) (describing contempt as "among the most formidable weapons in the court's arsenal").

315. *See* Coffee, *supra* note 17, at 4 (stating that "courts should seek a full explanation of the enforcement agency's reasoning and should have some factual understanding of the strength of the case before imposing injunctive relief"). Professor Coffee helpfully illustrates a "semantic bridge," between the goals of airing adequate factual support and avoiding the effects of collateral estoppel. *Id.* at 1. He points to the Bank of America and Goldman Sachs settlements as evidence of such a viable middle ground. *Id.* at 2.

316. *Id.* at 4.