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"VACATION" AT SEA: JUDICIAL REMEDIES AND EQUITABLE DISCRETION IN ADMINISTRATIVE LAW

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ABSTRACT

Scholars have rarely examined the remedial issues that federal courts may face when they find that an administrative agency has acted unlawfully. This Article presents a broad survey of that topic in the course of exploring a narrower doctrinal issue: the validity of "remand without vacation." That term denotes a practice whereby a court remands an agency action for further work but allows the action to remain in place during the remand proceedings. In recent years many appellate panels have resorted to this practice in order to

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minimize disruption of an ongoing administrative program or to protect private reliance interests.

Some argue that this very untraditional form of relief is prohibited by section 706 of the Administrative Procedure Act, which provides that a reviewing court "shall . . . set aside" an agency action that violates one of the review standards codified therein. This Article contends, however, that section 706 should not be read literally, but rather in light of a longstanding canon of statutory construction that disfavors interpretations that would displace the equitable remedial discretion of the federal courts. The Article traces the history of that discretion in the administrative law context and examines its numerous manifestations in modern case law.

The tradition of remedial discretion is not without limits, however. Several recent cases, in which the Supreme Court has evinced a preference for bright-line rules over equitable balancing, suggest that at least some Justices would have doubts about remand without vacation. Indeed, a peek at some of the Court's internal working papers confirms the existence of such doubts. Moreover, this remedial device is subject to practical objections—most notably, that it might unduly relax pressure on agencies to do their work carefully the first time around, and discourage private citizens from initiating court actions to challenge agency orders.

Nevertheless, this Article defends remand without vacation as a legitimate exercise of discretion. The practice entails relatively simple judgments, not drastically different from determinations that courts have often made in the past. Moreover, the practical worries about the device have not been borne out by experience to date. Accordingly, the Article advocates continued but cautious use of remand without vacation. Relying in part on guidelines endorsed by the American Bar Association, the Article concludes by suggesting standards to guide the courts' exercise of discretion in this area.

INTRODUCTION

A decade ago Professor Barry Friedman described the academic literature on judicial remedies in constitutional litigation as "noticeably sparse," at least in comparison with the literature on constitutional rights.[1] In an accompanying footnote he listed thirty articles as "[a]mong the most important" contributions to this supposedly meager body of work.[2] As a scholar who specializes in a closely allied field of public law, I find myself wanting to reply: "You call that sparse? In administrative law you'd have trouble finding half a dozen." Of course, the propensity of legal academe to focus on constitutional issues more often than on administrative issues is not news. But even so, this imbalance in the literature on judicial remedies in public law seems disproportionate. The present Article aspires to ameliorate the imbalance, at least to some extent.

To be sure, there is no dearth of relevant scholarship if one thinks of the entire field of judicial review of administrative action as a branch of the law of remedies. The voluminous literature on judicial review of agencies—ranging from "access" issues such as preclusion and standing through scope of review topics such as the hard look doctrine and principles of deference—can be seen as spelling out the

1. Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 736 (1992).

2. *Id.* at 736 n.4. Friedman's compilation did not even include the vast literature on 42 U.S.C. § 1983 (2000), the major implementing statute used as a framework for constitutional litigation.

"remedial" implications of such "substantive" statutes as the securities laws, the immigration laws, and the labor laws.[3] This Article, however, picks up where most of these analyses leave off. My focus is on remedial issues that arise *within* a judicial review proceeding. Assume that a challenger has invoked judicial review and has demonstrated to a court's satisfaction that an agency did act unlawfully. What remedial options does the court have at that point? The scholarship on that question is, indeed, "noticeably sparse."[4]

Now it may be supposed that the relative shortage of literature on the remedial aspects of judicial review of administrative action is attributable to the simplicity of the problem. For most of the relatively brief history of administrative law, the court's proper course when it deems an action unlawful has been considered self-evident: the court declares the action void and sends it back to the agency for further consideration. That remedy is, indeed, the courts' normal course of action.[5]

Consider, however, the Ninth Circuit's decision in *Idaho Farm Bureau Federation v. Babbitt*.[6] In that case, the Fish and Wildlife Service issued a regulation that listed the Bruneau Hot Springs Snail as an endangered species. Farm groups, whose members wanted to pump water from the stream in which the snail lived, sought judicial

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3. *See generally* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 152–96 (1965) (devoting a chapter to "The System of Judicial Remedies," meaning the system by which litigants gain *access* to the courts in administrative cases).

4. Among the limited exceptions are: JAFFE, *supra* note 3, at 713–20 (discussing remands in a tellingly brief section of his treatise); 3 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 18.4 (4th ed. 2002) [hereinafter PIERCE TREATISE] (describing types of injunctions available); Toni M. Fine, *Agency Requests for "Voluntary" Remand: A Proposal for the Development of Judicial Standards*, 28 ARIZ. ST. L.J. 1079 (1996); James O. Freedman, *The Uses and Limits of Remand in Administrative Law: Staleness of the Record*, 115 U. PA. L. REV. 145 (1966); Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 562–75 (1985) (discussed *infra* Part IV.B.1). In addition, a literature on remands without vacation has emerged. *See infra* note 13. Empirical studies of remands include William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393 (2000); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1043–54, 1059–60; Stephen F. Williams, "*Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975).

5. *See, e.g.*, Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp., 423 U.S. 326, 331 (1976) ("If the decision of the agency 'is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . . for further consideration.'" (quoting Camp v. Pitts, 411 U.S. 138, 143 (1973))); Garland, *supra* note 4, at 568.

6. 58 F.3d 1392 (9th Cir. 1995).

review. They complained, in part, that the Service had issued the rule illegally, because it had relied heavily on a report of the United States Geologic Service without making the report available for public examination and comment, as required by the Endangered Species Act. The court of appeals agreed with this contention and ordered that the regulation be returned to the agency, so that the proper procedures could be followed.[7] The court added, however, that the regulation could remain in place during this period of further consideration.[8]

Was the court right in allowing the rule to remain in effect during remand proceedings? The court's explanation was that, otherwise, the snail species might become extinct, and the sums spent on the government studies could turn out to have been wasted.[9] This makes a certain amount of practical sense, at least from the standpoint of the agency (and, of course, the snail). Yet, on a formal level, the remedy seems odd. The appeal was over, the court had condemned the rule as invalid, and the farmers had "won," yet their tangible situation was almost the same as if they had lost. They would in all probability reap no benefit from their "victory." Why should a farmer have had to face possible sanctions for drawing water from the stream where the snail lived if the court had unequivocally ruled that the agency's rule on the subject was invalid?

A court's decision, after full consideration, to pronounce an agency action illegal, but to allow the action to continue in effect anyway, is sometimes known as "remand without vacation."[10] This Article presents an extensive evaluation of the validity and uses of this device. Over the past decade, judicial resort to the device has become a familiar feature of administrative law practice, especially in the District of Columbia Circuit.[11] The phenomenon is also spreading

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7. *Id.* at 1406.

8. *Id*.

9. *Id.* at 1405–06.

10. Some writers prefer the term "vacatur" to "vacation." I prefer the latter, if only because it is conducive to a livelier title for this Article. Lexicographers accept both terms. *See* BALLENTINE'S LAW DICTIONARY 1331 (3d ed. 1969); BLACK'S LAW DICTIONARY 1546 (7th ed. 1999).

11. Remand without vacation has been described as the D.C. Circuit's "general practice" when the basis for the remand is inadequate reasoning. Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 638 n.72 (1994). Today, I believe, this assessment would be an overstatement. In recent years the court has used the device fairly selectively, probably in part because of the questions that have been raised about its propriety.

to other circuits.[12] Use of the device has stimulated scholarly attention,[13] debate within the practicing bar, and even drama and poetry![14] The circumstances that have led to its rise are explored in Part I of this Article.

Among the questions surrounding remand without vacation is whether the Administrative Procedure Act (APA) permits the courts to exercise this option. The most immediate basis for doubt on this score is that section 706 of that Act states that a reviewing court "*shall* . . . hold unlawful and set aside agency action" that is found to violate any of the review standards codified therein.[15] In *Checkosky v. SEC*,[16] the D.C. Circuit divided as to whether section 706 actually means, as its literal language appears to suggest, that a court is compelled to "set aside" an agency action whenever it finds that the action transgresses one of those review standards.[17] Since *Checkosky*, the D.C. Circuit has repeatedly acknowledged the questions raised by

12. *Idaho Farm Bureau* is one example. *See also, e.g.*, Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1380–81 (Fed. Cir. 2001) (remanding veterans benefits rule because of inconsistencies in agency's interpretations, but leaving the rule in place to prevent disruption); Cent. Me. Power Co. v. FERC, 252 F.3d 34, 48 (1st Cir. 2001) (declining to vacate an inadequately reasoned FERC rate order, because "the errors at issue can probably be mended" and "the public interest in assuring [electric] power is decisive"); Cent. & S.W. Servs., Inc. v. EPA, 220 F.3d 683, 692 (5th Cir. 2000) (discussed *infra* note 30). The practice may have originated about two decades ago in Clean Air Act cases. *See* David B. Chaffin, Note, *Remedies for Noncompliance with Section 553 of the Administrative Procedure Act: A Critical Evaluation of* United States Steel *and* Western Oil & Gas, 1982 DUKE L.J. 461, 466–69 (discussing early cases).

13. *See* 1 PIERCE TREATISE, *supra* note 4, § 7.13 (endorsing remand without vacation); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 75–78 (1995) [hereinafter Pierce, *Seven Ways*] (same); Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 SETON HALL L. REV. 108 (2001) (criticizing remand without vacation); Frank H. Wu & Denisha S. Williams, *Remand Without Reversal: An Unfortunate Habit*, 30 ENVTL. L. REP. 10193 (2000) (same); Chaffin, *supra* note 12, at 476–78 (supporting remand without vacation).

14. A 2002 bar program in Washington, D.C., featured a skit on remands without vacation, with a script that included such couplets as: "You defeat a rule and the rule should be gone; / But not quite so fast, you could be *wrong*. / The court can remand it but let it remain / While an agency tries to do it over again! / What kind of result is this you say, / I've won this long battle but not won the day?" David F. Zoll, Introductory Comments at the Prettyman-Leventhal American Inn of Court 1 (May 13, 2002) (script on file with the *Duke Law Journal*).

15. 5 U.S.C. § 706 (2000) (emphasis added).

16. 23 F.3d 452 (D.C. Cir. 1994).

17. *Compare id.* at 462–66 (Silberman, J., separate opinion) (supporting remand without vacation under certain circumstances), *with id.* at 490–93 (Randolph, J., separate opinion) (rejecting the legality of remand without vacation).

that case but has avoided confronting them head-on.[18] As recently as November 2002, another panel split on the issue.[19] Part II of this Article responds to that debate by providing, on a doctrinal level, a relatively straightforward analysis to the effect that the "plain" language of the APA does not settle the legal issue.

That conclusion, however, leads to a more complex doctrinal and policy inquiry in Parts III and IV. The discussion in Part III asserts that the legality of remand without vacation must be assessed against the background of the federal courts' tradition of remedial discretion—a tradition that stems from the heritage of the old equity courts and has been reinforced by more modern developments. I survey several doctrinal areas in which the federal courts have adhered to pragmatism and flexibility in prescribing remedies in administrative law and related public law cases. In this fashion, the topic of remand without vacation, which may seem too narrow to warrant extended scrutiny in its own right, provides an opportunity to make a broad assessment of the status of judicial remedies in modern administrative law.

This discretion does have its limits, however, as I discuss in Part IV. Indeed, in a few related contexts, the Supreme Court has quite consciously curbed the remedial discretion of courts and agencies in favor of bright-line restrictions. I will examine some significant evidence (including some internal Court documents) suggesting that the Court would find the stricter of the two views from *Checkosky* quite attractive. Nevertheless, I suggest in this Article that, in the specific context of remand without vacation, a relatively permissive reading of the tradition of remedial discretion should prevail.

Having outlined a theoretical justification for remand without vacation, the Article concludes by addressing issues of implementation in Part V. One focus of attention is a set of prudential guidelines proposed by the American Bar Association to guide the courts' discretionary choices in using this remedy. This discussion illuminates, I hope, some of the practical considerations that present themselves in this area, thereby lending further support to the pragmatic approach favored by this Article. The manner in

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18. *See* Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1135 n.4 (D.C. Cir. 1995) (finessing the *Checkosky* issue because parties had not raised it); Am. Water Works Ass'n v. EPA, 40 F.3d 1266, 1273 n.1 (D.C. Cir. 1994) (same).

19. *See* Milk Train, Inc. v. Veneman, 310 F.3d 747, 755–56 (D.C. Cir. 2002) (ordering remand without vacation); *id.* at 757–58 (Sentelle, J., dissenting) (rejecting legality of remand without vacation).

which remand without vacation is implemented is sure to evolve (assuming it is ultimately held to be lawful), but an analysis of developments to date should be helpful in clarifying the stakes in the debate.

I. THE EMERGENCE OF REMANDS WITHOUT VACATION

Until recently, reviewing courts routinely vacated agency actions that they found to have been rendered unlawfully. That practice was generally accepted and essentially taken for granted.[20] Had the courts ever paused to analyze it, they presumably would have mentioned several justifications for their adherence to that custom, at least as a general norm. Common sense notions of fairness, rooted in the rule of law, suggest that a litigant who has demonstrated that an agency action is invalid deserves some tangible relief. Moreover, widespread judicial refusal to disturb administrative actions that are poorly reasoned or procedurally defective might unduly reduce the public's incentive to challenge official mistakes. It could also lessen agencies' incentive to do their work carefully in the first instance.

Why has the conventional understanding broken down? Probably several factors are at work. The first is that, under modern conditions, inflexible adherence to the traditional practice would sometimes result in heavy social costs. The practice of routinely vacating actions that are being remanded took shape at a time when most judicial review proceedings involved regulated persons seeking relief from adjudicative orders directed specifically at them.[21] Today, in contrast, agencies make many of their most important decisions through rules,[22] and affected interests can often obtain direct review of those rules without waiting for subsequent enforcement proceedings.[23] Increasingly, therefore, courts now find themselves examining the validity of agency actions that directly implicate the rights of thousands or millions of persons. Vacation of such an action can upset a legal regime on which many citizens depend. Even a

20. *See supra* note 5 and accompanying text.

21. Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1145–47 (2001) (noting that agencies largely neglected rulemaking until the 1960s).

22. Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 375–77; Schiller, *supra* note 21, at 1147–51; *see* Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 254–56 (1986) (exploring causes of the shift from adjudication to rulemaking).

23. Scalia, *supra* note 22, at 377; Schiller, *supra* note 21, at 1152–53.

relatively minor error in the agency's reasoning, or a procedural error concerning a single issue, can lead to nullification of a rule that underpins a major regulatory program (at least where severance is infeasible).[24] Moreover, the invalidation may occur years after the agency has instituted the rule, at a time when regulated interests have already made extensive commitments in reliance on it.[25]

Courts have understandably come to believe that they should have at least some discretion to avoid inflicting consequences of this sort. In a number of decisions, therefore, they have resorted to remand without vacation in order to prevent an unduly disruptive interruption in a regulatory regime. *Idaho Farm Bureau Federation*, the "endangered snail" case mentioned earlier,[26] is one example. An even more dramatic example is *Rodway v. United States Department of Agriculture*.[27] In *Rodway*, the department issued new coupon allocation regulations for the food stamp program, but it did not comply with the requisite APA rulemaking procedure.[28] The court remanded for notice and comment proceedings, but declared that the rules could continue in effect until replaced by valid regulations.[29] In doing so, the court cited "the critical importance of the allotment regulations to the functioning of the entire food stamp system, on which over ten million American families are now dependent to supplement their food budgets."[30]

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24. *See, e.g.*, Associated Gas Distrib., Inc. v. FERC, 824 F.2d 981, 993, 1044 (D.C. Cir. 1987) (vacating a rule that "envisage[d] a complete restructuring of the natural gas industry" because of "problems in a few of [its] components").

25. *See, e.g.*, Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991) (vacating, on procedural grounds, eleven-year-old rules that had served as a cornerstone of the EPA's regulation of hazardous waste facilities). The court evidently did not consider the option of remand without vacation, and its own recommendation for avoiding disruption proved less than completely satisfactory. *See infra* note 46 and accompanying text.

26. *See supra* notes 6–9 and accompanying text.

27. 514 F.2d 809 (D.C. Cir. 1975).

28. *Id.* at 813–17.

29. *Id.* at 817.

30. *Id.*; *see also* Cent. & S.W. Servs., Inc. v. EPA, 220 F.3d 683, 692 (5th Cir. 2000) (remanding a rule on disposal of PCBs because the EPA did not adequately explain its failure to exempt electric utilities, but leaving the rule in place so that it would continue to govern entities other than utilities); Fertilizer Inst. v. EPA, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (holding that, although the EPA had provided inadequate notice of rules authorizing exemptions from CERCLA reporting requirements, the rules would not be vacated because, *inter alia*, their removal could affect the agency's ability to respond adequately to serious safety hazards); W. Oil & Gas Ass'n v. EPA, 633 F.2d 803, 813 (9th Cir. 1980) (leaving in place an EPA list of "nonattainment areas," which had been issued without notice and comment, because of "a

A second theme in the case law, which somewhat overlaps the first, is protection of reliance interests. Frequently, when a rule is held invalid after it has already gone into effect, private citizens will already have arranged their expectations around it. Companies may have entered into contracts, made capital investments, and shifted business operations in light of the rule. In this situation, courts will sometimes allow the invalidated rule to remain in place in order to smooth the transition to a new regime.[31]

Third, as Professor Richard Pierce has contended, the growing interest in remand without vacation is largely attributable to the Supreme Court's 1988 decision in *Bowen v. Georgetown University Hospital*.[32] That case held that an agency cannot adopt a legislative regulation that applies retroactively to completed transactions unless Congress has explicitly conferred such authority.[33] Before *Georgetown*, an agency whose rule had been vacated could decide on the best way to respond to the court's concerns, promulgate a new rule (or the old one with a new justification), and make this rule retroactive to the date of the court's action, thus ensuring that *some* rule would provide a governing standard for transactions that occurred during the entire affected period. *Georgetown* renders this strategy unworkable, except in those rare situations in which Congress has specified that the agency's rules may be retroactive. Officials therefore have stronger reasons to want to keep an old rule in place continuously until it is superseded by a new one. The technique of remand without vacation enables the court to accommodate this desire. I will return later to the tensions between this technique and the *Georgetown* decision,[34] but on a purely

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desire to avoid thwarting in an unnecessary way the operation of the Clean Air Act" in California).

31. *See, e.g.*, United Distrib. Cos. v. FERC, 88 F.3d 1105, 1127, 1191 (D.C. Cir. 1996) (declining to vacate, on account of a few errors, a "sweeping" rule that had been in effect for several years directing mandatory unbundling of pipeline sales and transportation services); A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1492 (D.C. Cir. 1995) (noting that "vacating the rule approving the [new animal drug application] would prove disruptive to [the drug's manufacturer], which has relied on it in good faith for over thirteen years"); City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1171–72 (D.C. Cir. 1987) (declining to require vacation of rules regarding returns on long distance telephone lines, where this step would have disrupted an ongoing settlement process and caused economic hardship to third parties).

32. 488 U.S. 204 (1988); *see* Pierce, *Seven Ways*, *supra* note 13, at 76–78 (contending that growth of remand without vacation in the D.C. Circuit in 1990s "was motivated largely by a desire to avoid the potential disruptive effects" of *Georgetown*).

33. *Georgetown*, 488 U.S. at 208.

34. *See infra* Part IV.A.1.

descriptive level Pierce is probably correct in his hypothesis that the Supreme Court's decision has contributed to the burgeoning use of remand without vacation.

Fourth, Pierce also suggests that the growing use of remand without vacation, at least in the D.C. Circuit, may reflect that court's effort to minimize the extent to which judicial review contributes to the "ossification" of rulemaking.[35] The ossification theory holds generally that the threat of court review causes agencies to spend inordinate amounts of time on their rulemaking proceedings, and also to avoid rulemaking entirely in favor of less intensely reviewed adjudicative actions. Thus, according to Pierce, courts have acted on the view that a remand will create less of a disincentive to rulemaking if it is not accompanied by vacation.

Although the ossification analysis has a substantial following among academics,[36] it is not clear that judges on the D.C. Circuit or elsewhere have been persuaded by it.[37] However, I would propose a slight variation on Pierce's argument that may come closer to explaining the growth of the remand without vacation device. Whatever judges may think on a general level about the incentives impinging on agencies, I suspect that they often feel in particular cases that a strong remedy like vacation of a rule or order under review is disproportionate to the magnitude of the violation they have found. Although judicial reversal under the "arbitrary and capricious" standard of review was once considered a disposition

35. *See* 1 PIERCE TREATISE, *supra* note 4, § 7.13, at 521 (calling the device a "significant step toward reducing policy paralysis"); *see also* Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1462, 1471 n.30 (1992) (praising the D.C. Circuit's consideration of alternatives to suspending a rule upon remand).

36. *See, e.g.*, JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 224–31 (1990) (warning about a trend toward ossification); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387–96 (1992) (same); Pierce, *Seven Ways*, *supra* note 13, at 60–62 (same). *But see* Jordan, *supra* note 4, at 440–41 (noting that, in one sample of cases, "[a]gencies generally achieved what they sought . . . with no significant interference from judicial review under the hard look doctrine"); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 489 (1997) (acknowledging the trend but warning that "many of the proposed solutions will do more harm than good"). For many more citations to the literature, see Jordan, *supra* note 4, at 393–95.

37. *See, e.g.*, Patricia M. Wald, *Judicial Review in the Time of Cholera*, 49 ADMIN. L. REV. 659, 662–63 (1997) (arguing that courts should adhere to prevailing review standards, despite possible effects on agency rulemaking, and that Congress expects them to do so).

reserved for truly outrageous administrative conduct,[38] that is no longer so. Today courts feel free to remand a rule because of weaknesses in an agency's explanatory statement that might be best described as unanswered questions.[39] They might not think of their own analyses as nitpicking, but they may nevertheless feel that their objections to the agency's position may turn out not to add up to very much, once the agency has had a renewed opportunity to justify its position. It is easy to imagine that, in this circumstance, a judge may well be reluctant to hold that the agency's program should cease during the remand proceedings. Judges probably like the option of being able to have it both ways: remanding without vacation enables them to enforce high standards of rigorous analysis without causing serious disruption to an agency's program.

To be sure, courts have other means at their disposal to deal with potential disruptions resulting from invalidation of an agency rule. The need for remand without vacation should be weighed in light of these alternatives. One such alternative is simply to vacate the rule but delay issuance of the court's mandate, so that the agency will have time to make adjustments before the court's order goes into effect.[40] This solution is probably adequate in a simple case in which the agency could be expected to repair its error immediately. Postponement of the court's mandate will not always be a satisfactory solution, however. In a relatively complex case, the court may not feel able to estimate how much time the agency would need, and it may well want to avoid the burden of having to entertain a series of requests for extension of such a stay. Thus, it will often prefer to get the review proceeding off its docket by entering a simple remand order, perhaps accompanied by an exhortation to the agency to

38. *See, e.g.*, Pac. States Box & Basket Co. v. White, 296 U.S. 176, 185–86 (1935) (equating arbitrariness review of rules with due process review of legislation for rationality, under which the law survives "if any state of facts reasonably can be conceived that would sustain it" (quoting Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 209 (1934))).

39. *See* Wald, *supra* note 37, at 665–66 (noting that "the agency's failure to give an 'adequate' explanation for its rule or decision is the most common reason for a judicial remand," and that these reversals "are most often caused by the agency's failure to communicate or explain to generalist judges what they are doing, not by the agency's failure to do enough research or garner sufficient expert opinions for the record").

40. This is a frequently used technique. *See infra* note 168 and accompanying text; Jordan, *supra* note 4, at 416–17 (citing examples).

proceed with dispatch (and a warning that if it does not, the challenger can return to court for additional relief).[41]

An agency can also take steps on its own to minimize discontinuity in its program after the court has vacated a rule. It can issue an "interim" rule to maintain (or improve on) the status quo until it has developed a new rule to meet the court's objections.[42] The agency can claim that it has "good cause" to issue the rule without notice and comment.[43] However, this too is not always an entirely satisfactory alternative to remand without vacation. Several months may elapse before the agency decides whether and how to issue an interim rule,[44] and even then the rule may not stand up in court.[45] Moreover, under *Georgetown*, the interim rule will probably have to be prospective only; as such, it will not save enforcement actions

41. *See infra* notes 421–22 and accompanying text. Postponement of the court's mandate may be particularly ineffective in connection with rules that create cumulative liability over time, such as rules that impose user fees or regulate ongoing conduct. A regulated party who knows that the rule will become void in the near future has little incentive to come into compliance with it. For example, a person who is behind on fee payments can simply choose to remain in arrears, knowing that the debt will ultimately be canceled.

42. *See* Shell Oil Co. v. EPA, 950 F.2d 741, 752 (D.C. Cir. 1991) (recommending this alternative to the EPA).

43. 5 U.S.C. § 553(b)(B) (2000) (exempting rules from notice and comment obligations if the agency finds for good cause that such procedure would be "impracticable, unnecessary, or contrary to the public interest"); Mid-Tex Elec. Coop. v. FERC, 822 F.2d 1123, 1131–34 (D.C. Cir. 1987) (upholding a post-remand interim rule).

44. Such delay can occur for many reasons. For example, the original rulemaking team may have moved on to other responsibilities, and new personnel may need to familiarize themselves with the issues. The agency may want to evaluate events that have occurred since the rule was promulgated. Regulated interests may prevail on the agency to adopt some fresh alternative. Consensus within the agency itself as to the proper response may be difficult to achieve. These complicating factors are all normal elements of the rulemaking process, and their influence on the agency's development of a long-term response to the judicial remand would not be troubling. They do, however, illustrate the potential for disruption in the immediate aftermath of a court's decision to remand *and* vacate, while the agency is deciding what interim rule, if any, to issue.

45. Although the agency's claim of "good cause" in *Mid-Tex* survived judicial review, the court remarked that the petition for review raised a "substantial and troubling question," in light of the customary judicial view that the good cause exception should be "'narrowly construed and reluctantly countenanced.'" *Mid-Tex*, 822 F.2d at 1132 (quoting Am. Fed'n of Gov't Employees v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981)). If the interim rule is similar to the original rule, the agency may also face accusations that it has not complied with the court's mandate. This was another unsuccessful basis for challenge to the interim rule in *Mid-Tex*. *Id.* at 1129–31. The court wrote narrowly, however, leaving room for uncertainty as to whether it would take an equally permissive view in other fact situations.

stemming from the period during which the now-vacated rule was supposedly in force.[46]

To round out this survey of the rise of remand without vacation, I should note that, although the device has most often been used to protect private interests from the untoward effects of temporary invalidation of a regulation, a few decisions have explored variations on this theme. In the first place, this remedy has at times been invoked in order to prevent harm to the *government's* interests. In the context of licensing programs that are financed through user fees, some courts have identified deficiencies in a fee schedule that require a remand, but have allowed the schedules to remain in effect.[47] Where the agency would otherwise be unable to recoup lost fees later, this disposition serves to preserve the financial stability of the program.

Second, although the logic of the above case law applies most clearly to controversies involving agency rules, courts have sometimes left *adjudicative* decisions standing during remand proceedings for analogous reasons. One such case is *Massachusetts v. United States Nuclear Regulatory Commission.*[48] There, environmentalists challenged an appeal board's order that granted an operating license to a nuclear power plant. The First Circuit remanded the case because of the board's unsatisfactory analysis of the results of a safety exercise at the plant. However, the court allowed the license to remain in effect. The court explained that a judicial decree voiding the license would be "immensely disruptive."[49] Moreover, the questions about the plant's safety might soon be put to rest by further explanations on

46. For example, the interim rule that the EPA issued after *Shell Oil* reinstated for the future the regulations that the D.C. Circuit had vacated in 1991, but that response did not save enforcement actions based on pre-1991 violations of the regulations. United States v. Goodner Bros. Aircraft, Inc., 966 F.2d 380, 384–85 (8th Cir. 1992) (reversing a criminal conviction for dumping hazardous wastes in 1988); William Funk, *The* Other *Chevron Doctrine: When Court Decisions Only Have Future Effect*, ADMIN. L. NEWS, Fall 1993, at 6, 15–16 (summarizing the unfortunate aftermath of *Shell Oil*). The D.C. Circuit could have avoided the *Goodner* result by not vacating the regulations in the first place.

47. *See* Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1135 (D.C. Cir. 1995) (holding that the agency violated the APA by failing to allow notice and comment in promulgating a fee schedule for a program that Congress intended to be self-financing, but declining to vacate because of "obvious hardship" to agency); Allied-Signal, Inc. v. United States Nuclear Regulatory Comm'n, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (noting that a fee schedule devised pursuant to congressional mandate was inadequately explained, but declining to vacate it because the commission would then have had to refund fees and would probably not have been able to recoup them later).

48. 924 F.2d 311 (D.C. Cir. 1991).

49. *Id.* at 336.

the board's part, or by other tests that were scheduled to be performed shortly thereafter.[50]

II. REMAND WITHOUT VACATION AND THE APA

A. Checkosky v. SEC

A major objection to remand without vacation, at least potentially, is that it may not be permissible at all under the APA. This possibility first came into focus in *Checkosky v. SEC*.[51] Although the fact situation in *Checkosky* is strongly reminiscent of the accounting scandals of 2001 and 2002, it actually arose a decade earlier. The Securities and Exchange Commission (SEC) found that two accountants, Checkosky and Aldrich, had violated generally accepted accounting standards during an audit of a photocopier manufacturer. Specifically, they had condoned the manufacturer's decision to omit millions of dollars in research and development expenses from its financial statement, making the company look more successful than it was. The SEC suspended the accountants from practice before the agency, concluding that their behavior had constituted "improper professional conduct."[52]

A fractured panel of the D.C. Circuit reversed. In the lead opinion, Judge Silberman expressed strong dissatisfaction with the Commission's analysis. He found the SEC's opinion ambiguous as to whether the agency thought that the accountants had acted with any mental state more culpable than mere negligence.[53] If the agency had concluded that the respondents could be suspended merely because they had been negligent, it would have been obliged to "consider not only the administrative burden such a position would entail but also whether it would [illegitimately] constitute a *de facto* substantive

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50. *Id.*; *see also* United Mine Workers, Int'l Union v. Mine Safety & Health Admin., 928 F.2d 1200 (D.C. Cir. 1991). In the latter case, the agency had exempted a mining company from a worker safety rule on the condition that it follow an alternative safety procedure. The court found that the exemption had been inadequately explained, but did not vacate it, because the company had already reasonably relied on the exemption by implementing the alternative procedure, and the agency might be able to furnish a more adequate explanation on remand. *Id.* at 1203. *See also* Int'l Union, United Mine Workers v. Fed. Mine Safety & Health Admin., 924 F.2d 340, 346 (D.C. Cir. 1991) (similar case); Int'l Union, United Mine Workers v. Mine Safety & Health Admin., 920 F.2d 960, 967 (D.C. Cir. 1990) (similar case).

51. 23 F.3d 452 (D.C. Cir. 1994).

52. *Id.* at 454.

53. *Id.* at 458–60 (Silberman, J., separate opinion).

regulation of the [accounting] profession."[54] It had neither clearly committed itself to the negligence theory nor produced the requisite justification for one. Nor had the Commission made a plausible case for imposing the sanctions on a recklessness theory.[55] Judge Silberman concluded that the case should be remanded to the Commission for further analysis—but that, during the administrative proceedings that were to come, the suspensions could remain in effect.[56]

Another member of the panel, Judge Randolph, agreed that the case should go back to the SEC for further explanation. However, he dissented from the court's decision to allow the suspensions to stand during the remand proceedings.[57] He argued that such a disposition was incompatible with section 706 of the APA, which states that a reviewing court "*shall* . . . hold unlawful and set aside agency action" that violates the review standards codified in that section (e.g., by being "arbitrary and capricious," procedurally defective, or in excess of statutory authority).[58] Judge Silberman responded that he did not need to reach the "shall . . . set aside" language of section 706 in that case, because he had only found that the agency action *might* be arbitrary. Until the agency had explained the suspension orders more explicitly, he could not decide whether it *was* arbitrary.[59] He cited dozens of cases in which his court had similarly remanded agency decisions for a better explanation, without vacating those decisions immediately.[60]

Although my overall position in this Article is to commend Judge Silberman's support for remand without vacation, his theory for sidestepping the literal wording of section 706 was far from satisfactory. It is true, as he noted, that judges often say, in the course of remanding an action, that the court must obtain more clarification before finally deciding the arbitrariness question.[61] But, as Judge

54. *Id.* at 459.

55. *Id.* at 460.

56. *Id.* at 462.

57. *Id.* at 490–93 (Randolph, J., separate opinion). The third member of the panel, District Judge Reynolds, would have upheld the SEC's decision outright. *Id.* at 493–96 (Reynolds, J., concurring in part and dissenting in part). In effect, therefore, Judge Silberman's opinion controlled the outcome of the appeal, because Judge Randolph gave him a majority on the decision to remand, while Judge Reynolds gave him a majority on the decision not to vacate.

58. 5 U.S.C. § 706 (2000) (emphasis added).

59. *Checkosky*, 23 F.3d at 462–65 (Silberman, J., separate opinion).

60. *Id.* at 466.

61. *See id.* at 463–64. For a more recent example, see County of Los Angeles v. Shalala, 192 F.3d 1005, 1023 (D.C. Cir. 1999).

Randolph pointed out, it is also extremely common for courts to say that an action *is* arbitrary because the agency has not supported it with a rational explanation.[62] Judges use these verbal formulas more or less interchangeably, because in either situation the normal consequence is the same: a remand for reopened proceedings conforming to the court's conclusions. The question of whether the court must also vacate the action should not depend on which terminology a particular judge prefers.

Indeed, if one had to choose between these two ways of describing what happens when a court remands an administrative decision due to inadequate explanation, Judge Randolph's formulation is probably preferable. Carried to its logical conclusion, Judge Silberman's approach seems to mean that he would not characterize an action as "arbitrary and capricious" unless it were so irredeemably flawed that the agency had no reasonable prospect of saving it. In this situation, the court presumably would not remand at all. Yet, although courts occasionally do reach a conclusion to that effect, it is not a common occurrence.[63] Usually a court does not know, or professes not to know, whether the agency could salvage a poorly explained opinion. Thus a court will normally remand such a decision to the agency.[64] If that sequence of events cannot be

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62. *See Checkosky*, 23 F.3d at 491 n.33 (Randolph, J., separate opinion) (citing numerous examples).

63. For discussion of the relevant case law, see *infra* notes 348–55 and accompanying text. Ironically, one of the few cases in which a court has definitively ruled an agency's efforts to explain itself incurable and terminated the proceeding, instead of remanding, was a subsequent decision by the D.C. Circuit in the *Checkosky* litigation itself. After an unsatisfactory response from the SEC on remand, the court decided that it had had enough. Checkosky v. SEC, 139 F.3d 221, 222 (D.C. Cir. 1998). But the court added that this remedy should be "'reserved for truly extraordinary situations,'" and that it had not found any other example in its case law from the past seven years. *Id.* at 226 (quoting Tenn. Gas Pipeline Co. v. FERC, 926 F.2d 1206, 1214 (D.C. Cir. 1991) (Thomas, J., concurring)). For a more recent example, see *Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000) (issuing a mandamus to force the FCC to rescind rules that it had failed for twenty years to justify).

64. *See* Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 262 (1986):

> [C]ourts will nearly always defend their "abuse of discretion" reversals by asserting that the agency has not "explained its decision" sufficiently. Part of the explanation for the popularity of this rationale is judicial politeness. When a court feels that an agency's action is illogical or inconsistent with prior practices or simply ill-advised, it is far easier to ask the agency to "explain" the alleged flaw than to hold flatly that the flaw is fatal. Indeed, such a judicial argument is not necessarily disingenuous. The judge may really believe that the agency *might* be able to justify the apparent weakness in its opinion; at least there is no need for the court to reach that question immediately.

described as a holding that the agency action is arbitrary and capricious (or, to use a synonymous phrase, an "abuse of discretion"), the term is far narrower than most administrative lawyers understand it to be.

At best, Judge Silberman's reasoning provides an escape route from the literal construction of section 706 in an ill-defined subset of the total universe of situations in which a court might decide that an agency's action is too poorly explained to be upheld. Indeed, since *Checkosky*, the D.C. Circuit has continued to invoke the technique of remand without vacation in those circumstances.[65] But his argument does not provide a rationale for the remedy of remand without vacation in all of the situations in which the equities favoring that remedy may be present. It does not, for example, apply to situations in which a court does pronounce an agency's rationale to be arbitrary and capricious, yet wishes to minimize disruption by leaving the action in place while the agency tries to frame an acceptable rationale for it, or tries to find a different solution to the same regulatory problem.[66] Nor does his reasoning provide a satisfactory rationale for decisions that have remanded but not vacated actions because of a procedural violation, such as rules that have been issued without proper notice and comment.[67]

Still, Judge Silberman's instincts were in the right place. He apparently realized that as a matter of circuit precedent, not to mention practicality, the remedy of remand without vacation needed defending. He had to resort to a questionable defense because of his willingness to accept Judge Randolph's literal approach to statutory construction at face value. As we are about to see, a better response would have been to challenge that interpretive method head-on.

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65. *See, e.g.*, Norinsberg v. USDA, 162 F.3d 1194, 1199–1200 (D.C. Cir. 1998) (citing and following *Checkosky*); A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1492 (D.C. Cir. 1995) (same).

66. *See, e.g.*, La. Fed. Land Bank Ass'n v. Farm Credit Admin., 336 F.3d 1075, 1085 (D.C. Cir. 2003) (rules governing farm loans); Fox TV Stations, Inc. v. FCC, 280 F.3d 1027, 1040–49 (D.C. Cir. 2002) (rule on television station ownership); City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1171 (D.C. Cir. 1987) (rule setting reimbursement rates for long-distance telephone calls).

67. Judge Silberman tacitly recognized this difficulty in a later case in which, in an opinion for the panel, he remanded a rule because of noncompliance with section 553 but did not vacate it. Instead of explaining why this relief was consistent with the APA, he merely relied on circuit precedent. Sugar Cane Growers Coop. of Fla., Inc. v. Veneman, 289 F.3d 89, 98 (D.C. Cir. 2002); *see also* Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405–06 (9th Cir. 1995) (agency failure to disclose relevant information); Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1133–35 (D.C. Cir. 1995) (agency failure to provide notice and comment opportunity); Fertilizer Inst. v. EPA, 935 F.2d 1303, 1310–12 (D.C. Cir. 1991) (insufficiently informative rulemaking notice).

In any event, in cases subsequent to *Checkosky*, the D.C. Circuit has acknowledged the question raised by that case, but has declined to resolve it.[68] Remand without vacation continues to exist,[69] but its availability may depend on the composition of a particular panel.[70] Meanwhile, other circuits have yet to address the issue of whether the device is consistent with section 706.

B. Section 706 Reexamined

If Judge Randolph's literal reading of section 706 were tested in the Supreme Court, what would be the result? The attraction of that reading is its simplicity. The statute says that a court "shall" set aside an agency action found to be unlawful, and arguably it should be interpreted to mean exactly what it says. This straightforward argument would surely hold some appeal for the current Supreme Court, which, in a number of recent decisions, has adopted literal or otherwise inflexible readings of other sections of the APA, even in the face of longstanding lower court interpretations pointing in a contrary direction.[71]

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68. *See supra* note 18 and accompanying text.

69. Milk Train, Inc. v. Veneman, 310 F.3d 747, 755–56 (D.C. Cir. 2002); Sierra Club v. EPA, 167 F.3d 658, 664 (D.C. Cir. 1999); *cf.* Radio-Television News Dirs. Ass'n v. FCC, 184 F.3d 872, 888–89 (D.C. Cir. 1999) (remanding unsatisfactorily explained failure to rescind a rule, but granting no further relief).

70. Consider, for example, *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855 (D.C. Cir. 2001), in which the successful petitioner, the Sierra Club, requested remand without vacation, but the court vacated the rule anyway, explaining that the industry petitioners' claims, which the court *had not reached*, were "potentially meritorious." *Id.* at 872. It seems unlikely that the court would have resorted to this curious reasoning if Judge Randolph had not been a member of the panel. *See also, e.g.*, Util. Solid Waste Activities Group v. EPA, 236 F.3d 749, 755 (D.C. Cir. 1999) (Randolph, J.) (vacating an amended rule because the agency had failed to allow notice and comment before repairing an inadvertent word-processing error in a prior rule; no discussion of whether to vacate); Columbia Falls Aluminum Co. v. EPA, 139 F.3d 914, 923–24 (D.C. Cir. 1998) (Randolph, J.) (vacating an EPA rule on the treatment of aluminum by-products as hazardous wastes, but not addressing the possibility of remand without vacation).

71. *See* Dickinson v. Zurko, 527 U.S. 150, 165 (1999) (holding that the APA displaced prior case law on standard of review in patent cases); Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 270 (1994) (reading section 556 as codifying the burden of persuasion in formal adjudication); Darby v. Cisneros, 509 U.S. 137, 146–47 (1993) (reading the last sentence of section 704 as limiting the case law doctrine of exhaustion of administrative remedies, despite decades of contrary lower court case law); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Regulatory State*, 95 COLUM. L. REV. 749, 755–56, 755 n.30 (1995) (criticizing *Greenwich Collieries* as an unduly rigid interpretation of APA); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 486–93 (same).

The Court's readiness to accept a literal reading of the "shall . . . set aside" language of section 706 would probably depend in large part on jurisprudential judgments. The Justices would have to make a number of tradeoffs—between bright-line rules and open-ended standards, between judicial creativity and judicial restraint, and between strong regulation and safeguards against administrative overreaching. These underlying issues in the debate over remand without vacation are the subject of the next two Parts of this Article. For the present, however, it is worth noting that, from a purely doctrinal perspective, the Randolph theory is not as strong as it seems to be at first blush. Conventional statutory construction analysis alone would be sufficient to cast significant doubt on the literal interpretation. I will first examine arguments on that level, and then turn to more theoretically ambitious matters.

The literal interpretation of the "shall . . . set aside" language of section 706 is by no means inescapable. In all probability, a well briefed court would not construe the statute in isolation, but rather in light of a longstanding judicial presumption that militates against a finding that Congress has placed curbs on the courts' remedial discretion. The leading case is *Hecht Co. v. Bowles*,[72] which rejected an interpretation of price control legislation that would have compelled district courts to issue an injunction whenever they found a violation of that law. Although the language of the challenged statute seemed to make such injunctions mandatory,[73] the Court asserted that "equity practice with a background of several hundred years of history" militated in favor of a more flexible judicial role; only an "unequivocal statement of [legislative] purpose" would suffice to establish that Congress had meant to override that tradition.[74] *Hecht* has spawned a series of decisions treating this presumption as a kind of judicially enforced "clear statement rule."[75] This is not to say that

72. 321 U.S. 321 (1943).

73. *See* Emergency Price Control Act of 1942 § 205(a), 56 Stat. 23, 33 (1942) ("[U]pon a showing by the Administrator that [any] person . . . is about to engage in any [violation of the Act,] a permanent or temporary injunction, restraining order, or other order shall be granted without bond."). The Court did suggest that "other order" could include an order that merely retained the case on the district court's docket. *Hecht*, 321 U.S. at 328. The Court did not rest heavily on that line of argument, however, perhaps because such an order is not the kind of judicial action that one would think should have to be predicated on a showing of violation.

74. *Hecht*, 321 U.S. at 329–30.

75. *See* Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987); Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) ("The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances . . . .");

the Court never finds that the presumption has been overcome. As with other canons, the holdings go both ways.[76] But the *Hecht* presumption is at least a well-established factor in the equation.

One of the latest in this series of cases is *Miller v. French*,[77] in which the Supreme Court gave a literal construction to a clause in the Prison Reform Litigation Act of 1995. Under that Act, a state's motion to terminate an existing injunction regulating prison conditions would operate automatically as a stay, beginning not later than ninety days after the motion was filed.[78] The stay would continue in effect until such time as the issuing court determined that the injunction remained necessary to correct a federal right and was narrowly tailored under criteria specified in the Act.[79] Two dissenters argued that the language should be read to preserve the court's ability to suspend the stay.[80] The Court refused, finding that the Act was unambiguous.[81] Nonetheless, the Court conceded that "we should not construe a statute to displace courts' traditional equitable authority absent the 'clearest command' or an 'inescapable inference' to the contrary."[82] In short, although the presumption articulated in the line of cases extending from *Hecht* to *French* does not displace attention to the particular context of a given statute, these cases do indicate the strong tradition of caution that courts have endorsed when confronting statutes that seemingly replace equitable discretion with mandatory commands.[83]

Califano v. Yamasaki, 442 U.S. 682, 694 n.9 (1979) ("[T]he [statutory] word 'shall,' particularly with reference to an equitable decision, does not eliminate all discretion . . . ."). For further discussion of this line of authority and the academic literature that has grown up around it, see *infra* Part III.C.

76. *See* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 496 (2001) (acknowledging *Hecht* but deferring to clearly expressed congressional priorities); TVA v. Hill, 437 U.S. 153, 193–94 (1978) (same); Sierra Club v. Marsh, 872 F.2d 497, 503–04 (1st Cir. 1989) (Breyer, J.) (acknowledging the equitable balancing test but still granting an injunction). For further discussion, see *infra* Part III.C.

77. 530 U.S. 327 (2000).

78. 18 U.S.C. § 3626(e)(2) (2000).

79. *Id.* §§ 3626(b)(2), 3626(e)(2)(B).

80. *French*, 530 U.S. at 353–62 (Breyer, J., joined by Stevens, J., dissenting).

81. *Id.* at 336–41 (opinion of the Court).

82. *Id.* at 340 (citations omitted).

83. Brian Prestes has recently argued at length for the literal reading of "shall . . . set aside" in section 706. Prestes, *supra* note 13. His article is well crafted, but my disagreement with it centers on his failure to give any significant weight to the canon against repeals of equity powers. *See id.* at 141–46 (minimizing the significance of *Hecht*). That canon rests on a substantial body of precedent—not, as his argument suggests, the *Hecht* case alone.

The evidence of congressional intent to curb the courts' remedial discretion in section 706 is by no means "inescapable." The word "shall" does point in that direction, but its context—consisting of the provision as a whole, related provisions, and its enactment history—points the other way. In the first place, the last clause of section 706 states that "due account shall be taken of the rule of prejudicial error."[84] This clause, a harmless error principle, necessarily implies that the "shall . . . set aside" language found earlier in the provision must mean "shall generally," not "shall always."[85] Furthermore, the draftsmanship of section 706 as a whole suggests that Congress expected courts to flesh out its meaning over time. The provision contains open-ended phrases such as "arbitrary and capricious," "substantial evidence," and "unreasonably delayed," which plainly invite judicial creativity. One would not expect so broadly worded an enabling statute to impose severe constraints on the courts' remedial discretion.

Another conventionally accepted source of guidance in statutory construction is the language of closely related statutory provisions.[86] Here, related statutes cast further doubt on the literal reading of section 706. Congress has given appellate courts essentially open-ended discretion to fashion appropriate remedies when they review the decisions of lower courts.[87] And in the APA itself, Congress has

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84. 5 U.S.C. § 706 (2000). An early student Note on remand without vacation argued that the "rule of prejudicial error" clause itself permits a court to leave in place a rule that was issued without APA procedures, because the challenger can simply be afforded proper procedures on remand. Chaffin, *supra* note 12, at 477. That argument seems to go too far toward weakening the APA, because it could be used in every case that involves procedural error.

85. Moreover, a strictly literal reading of section 706 would mean that the court must "set aside" "findings and conclusions" that violate any of the criteria in the six numbered categories listed in that provision. By ordinary understanding, however, a court sets aside actions, not findings and conclusions. That implication in the text of section 706 furnishes another reminder that literalism, as a method of statutory construction, has its limits.

86. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.").

87. 28 U.S.C. § 2106 (2000) ("[Any] court of appellate jurisdiction may . . . vacate . . . any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances."); Lawrence v. Chater, 516 U.S. 163, 166–73 (1996) (asserting broad discretion under § 2106 to grant certiorari, vacate, and remand cases to courts of appeals). Prestes takes issue with this inference drawn from § 2106. He writes:

> [I]t stands to reason that Congress might provide courts with broad discretion to fashion remedies when reviewing the highly variable category of lower court judgments and that Congress might also provide courts with little discretion when faced with insufficiently reasoned agency action, a confined and clearly identified

authorized courts to wield similarly broad discretion in staying agency action *pending* adjudication.[88] In light of these provisions, one can certainly question the notion that Congress meant to confine the courts' remedial discretion in section 706 as severely as the words of that provision could be read to require. Also instructive is the language of a number of statutes in which Congress has provided for judicial review of agency actions in specific regulatory contexts. These laws authorize a reviewing court not only to "set aside" agency actions, but also to "modify" or "suspend" them.[89] If the APA is read to mean that every action that fails the review standards of section 706 must be "set aside," these provisions become difficult to explain.

Finally, the enactment background of the APA contains little if any indication that Congress paid attention to the precise implications of the "shall . . . set aside" language of the Act. In the published legislative history of section 706, members of Congress focused on the standards of review listed there, paying no particular attention to the

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> subset of cases. In addition, given agencies' anomalous role in the separation of powers, judicial review might be more strict or disciplined when courts are reviewing agency action than when they are reviewing the judgments of other, constitutionally equal courts.

Prestes, *supra* note 13, at 141 (footnote omitted). I disagree with the factual premise of Prestes's first argument. Administrative decisions can be remarkably varied, ranging from complex rulemaking proceedings and formal adjudications to decidedly informal agency pronouncements such as letters and press releases. District court decisions look relatively uniform by comparison. Prestes's second argument appears to be a non sequitur, because if section 706 imposes "discipline" on anyone, it must be the Article III courts, whose constitutional position is not "anomalous." Moreover, it is unclear why Congress would express an across-the-board preference for "strictness" in judicial review of agency actions that may be either regulatory or deregulatory, and that may either coerce citizens' conduct or bestow benefits on them.

88. 5 U.S.C. § 705 (2000) ("On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process . . . to preserve status or rights pending conclusion of the review proceedings."); *see also* FED. R. APP. P. 18 (authorizing stays pending appeal of agency actions, without specifying permissible grounds).

89. *E.g.*, Federal Trade Commission Act § 5(c), 15 U.S.C. § 45(c) (2000) ("[The courts of appeals] shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission . . . ."); Administrative Review Orders Act (Hobbs Act) § 2342, 28 U.S.C. § 2342 (2000) ("The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of [various agency orders]."); Occupational Safety and Health Act § 11(a), 29 U.S.C. § 660(a) (2000) ("[The courts of appeals] shall have power to . . . make . . . a decree affirming, modifying, or setting aside in whole or in part, the order of the Commission . . . ."). Similar provisions in the labor, natural gas, and disability benefits areas are discussed *infra* notes 119–20, 129–30. In turn, these provisions, which simply confer "power" or "jurisdiction" to take the listed actions, do not purport to foreclose other options such as remand without vacation.

remedial issue. The committee reports, in paraphrasing the provision, ignored the "set aside" language entirely, remarking that a court should "hold unlawful any action, findings, or conclusions found to be [within the six categories listed in the provision]."[90] One representative, for example, said that an agency decision "*can* be set aside" if any of the six categories applies;[91] evidently he did not believe that a court *must* do so. On the whole, section 706 does not seem to have been intended to accomplish anything daring or new. One respected source, the *Attorney General's Manual on the APA*, maintains, in fact, that section 706 was viewed as "restat[ing] the present law as to the scope of judicial review."[92] This comment is quite suggestive, because part of the "present law" at that time was the *Hecht* case itself, which was handed down while the APA was being drafted. Some of the authors of the Act must have been aware of it and presumably would have commented on the discrepancy if they had intended to create one.

In the context of the overall legislative record, courts could easily hold that the evidence of Congress' desire to displace the courts' traditional remedial discretion is insufficient to meet the standard set forth in the *Hecht* line of cases. Indeed, at least one modern Supreme Court case appears to assume that the equity tradition described in *Hecht* does remain viable in APA cases. In *Webster v. Doe*,[93] the Court held that a former Central Intelligence Agency employee's claim of wrongful termination was reviewable under the APA insofar as he pleaded a constitutional violation. The Court then returned the

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90. ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 213 (1946) [hereinafter APA LEGISLATIVE HISTORY] (Senate Judiciary Committee report); *id.* at 278 (House Judiciary Committee report); *id.* at 370 (floor summary by Rep. Walter, chair of the relevant subcommittee).

91. *Id.* at 377–78 (remarks of Rep. Springer) (emphasis added).

92. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL], *reprinted in* ABA SECT. OF ADMIN. L. & REG. PRAC., FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 33, 140 (William F. Funk et al. eds., 3d ed. 2000); *accord* APA LEGISLATIVE HISTORY, *supra* note 90, at 39 (Senate Judiciary Committee print). The Court has often given weight to interpretations in the *Attorney General's Manual* (and continues to do so despite the questions raised in recent years about reliance on legislative committee reports). *See, e.g.*, Darby v. Cisneros, 509 U.S. 137, 148 n.10 (1993) (unanimous opinion); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 218 (1988) (Scalia, J., concurring); Steadman v. SEC, 450 U.S. 91, 102 (1981). Professor Duffy has disputed the Attorney General's characterization insofar as it may imply that the judicial review provisions of the APA merely recognize court-created principles and have no legal force in their own right. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 119, 132 (1998). I respond to his analysis *infra* at note 133.

93. 486 U.S. 592 (1988).

case to the district court for further proceedings, pointedly reminding that court that, under *Hecht*, "traditional equitable principles requiring the balancing of public and private interests control the grant of declaratory or injunctive relief in the federal courts."[94] The Court certainly did not seem to believe—as Judge Randolph's reading of section 706 would apparently require—that the lower court would automatically be obliged to "set aside" the CIA's termination order if it were to find that the agency had acted unconstitutionally.

All of this adds up to a fairly convincing case against the thesis that the "shall . . . set aside" language of section 706 has such a "plain meaning" as to make any further consideration of the validity of remand without vacation nugatory. At the same time, however, section 706 surely contains no *affirmative* endorsement of remand without vacation. The courts' ultimate decision about whether and how far to utilize that device may well depend in large measure on how expansively they interpret the tradition of equity that underlies the *Hecht* line of cases. I turn next to that issue.

III. REMANDS AND THE REMEDIAL DISCRETION OF THE FEDERAL COURTS

How broad is federal equity power, anyway? An ample judicial and scholarly literature speaks to that question, at least on a general level.[95] The Supreme Court has most often addressed the issue in the context of constitutional litigation—especially "structural injunction" cases brought against state and local governments as remedies for school desegregation, housing discrimination, or other infringements of civil rights. When the Court upholds strong relief of this kind, it tends to recite expansive formulas, such as the frequently quoted language of *Swann v. Charlotte-Mecklenburg Board of Education*:[96] "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[97] As one might

94. *Id.* at 604–05.

95. For an extensive compilation of references to the law review literature on remedial issues in federal courts, see Thomas E. Baker, *Federal Court Practice and Procedure: A Third Branch Bibliography*, 30 TEX. TECH. L. REV. 909, 1081–90 (1999).

96. 402 U.S. 1 (1971).

97. *Id.* at 15; *see also* United States v. Paradise, 480 U.S. 149, 183–84 (1987) (Brennan, J., plurality opinion) (quoting the same language from *Swann*); *id*. at 190 (Stevens, J., concurring) (same); Hills v. Gautreaux, 425 U.S. 284, 297 (1976) (same); Cobell v. Norton, 240 F.3d 1081, 1108 (D.C. Cir. 2001) (same).

expect, however, this assertiveness has its limits. The Court showed a different attitude, for example, in *Missouri v. Jenkins*.[98] In that 1995 case, the Court overturned a district court decree that had required Missouri to make massive expenditures to upgrade the Kansas City school district, as a remedy for past discrimination in the schools.[99] Particularly noteworthy in *Jenkins* was Justice Thomas's concurring opinion. He argued at length that *Swann* had vastly overstated the legitimate scope of federal equity power, at least if the expectations of the framers of the Constitution were to be honored.[100] "[W]e ought to be reluctant to approve its aggressive or extravagant use," he argued, "and instead we should exercise it in a manner consistent with our history and traditions,"[101] as well as with fundamental principles of federalism and separation of powers.[102]

As I observed at the outset of this Article, the remedial issues posed by constitutional cases of this sort have stimulated a large amount of academic commentary.[103] I will occasionally draw on that literature in the following pages, but it will not play a central role in my analysis. Sweeping rhetorical pronouncements of the sort just quoted should be seen as products of their context—namely, high-profile litigation that involves fundamental constitutional rights as well as the complications of federalism. The tradeoffs that judges make among competing values in situations like that are probably not reliable guides to the manner in which they will, or should, dispose of equitable relief issues presented in the workaday world of regulatory appeals. In contrast with civil rights cases, proceedings for judicial review of federal administrative action tend to be less ideologically charged,[104] to involve much less sweeping assertions of judicial power,

98. 515 U.S. 70 (1995).

99. *Id.* at 75–80, 100.

100. *Id.* at 123–37 (Thomas, J., concurring).

101. *Id.* at 124.

102. *Id.* at 131–33.

103. In addition to the thirty sources compiled in Friedman, *supra* note 1, at 736 n.4, see, for example, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999); Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475 (1999); John Choon Yoo, *Who Measures the Chancellor's Foot?: The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1123 (1996).

104. *Cf.* Frank H. Easterbrook, *The Limits on Judicial Power in Ordering Remedies: Civil Rights and Remedies*, 14 HARV. J.L. & PUB. POL'Y 103, 103 (1991) ("When we hear an objection to the remedy, it is almost always a disguised objection to the definition of what is due, and not to the methods used to apply the balm.").

and to present no such collisions between federal courts and state or local governments.[105] On the assumption that context matters,[106] therefore, the following discussion will focus rather tightly on the role of equity in administrative law and closely related public law cases.

A. The Equitable Remedial Tradition in Administrative Law

As an initial matter, one may ask: why are equity principles relevant at all in administrative law cases? A short historical exegesis will be helpful in answering that question. It can begin with the uncontroversial premise that the federal judiciary has possessed broad equity powers since the earliest days of the republic. The Judiciary Act of 1789 gave the national courts jurisdiction over "all suits . . . in equity."[107] The Supreme Court has recently noted that this legislation conferred "'an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered'" by the English Chancery Court at that time.[108]

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105. *See* Duffy, *supra* note 92, at 128 n.72 (declaring that academic criticisms of structural injunctions "do not undermine my conclusion here that the judge-made law of equity applied against federal administrative agencies was (and is) fundamentally legitimate, because the equitable remedies imposed in this field were (and are) almost always garden-variety injunctions with little or no judicial innovation").

106. For another expression of judicial doubt about the wisdom of expanding the scope of equitable discretion, see *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333 (1999). The Court held that a federal district court may not issue a preliminary injunction to prevent a debtor from disposing of unsecured assets if the creditor seeking the injunction has not already obtained a judgment on the debt. Justice Scalia, writing for the Court, pointed out the novelty of this sort of relief, adding:

> We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief. To accord a type of relief that has never been available before . . . is to invoke a "default rule" not of flexibility but of omnipotence. When there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position than we both to perceive them and to design the appropriate remedy.

Id. at 322 (citations omitted). The Court made these comments, however, in the context of creditors' rights—a private-law field that is heavily laden with several centuries' worth of tradition. I would anticipate that the claims of tradition will usually be considered less weighty in the context of federal administrative law, the major contours of which have been shaped primarily during the modern era.

107. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (1789).

108. *Grupo Mexicano de Desarrollo*, 527 U.S. at 318 (quoting Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939)); *accord id.* at 335 (Ginsburg, J., dissenting). *See generally* Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1245–70 (2001) (reviewing in detail how early federal courts wielded equity powers and thereby determined the scope of their own subject-matter jurisdiction).

As administrative agencies began to emerge, equity actions became one route by which citizens could obtain access to court to challenge wrongful executive action. The suit for injunction served as a "catchall" to which one might resort if writs such as mandamus or certiorari proved unavailing.[109] For example, the classic 1902 case of American School of Magnetic Healing v. McAnnulty[110] held that the plaintiff could use an injunction suit to obtain judicial review of the Post Office's order suspending its mail delivery, although no statute specifically provided for such review.[111] By early in the twentieth century, according to Professor Davis, the injunction had become "the main weapon in the arsenal for attacking federal administrative action."[112]

This heritage survives today in what are commonly known as "nonstatutory" review proceedings. Standard administrative law usage differentiates between so-called "statutory" and "nonstatutory" judicial review. The distinction is embedded in section 703 of the APA.[113] According to that provision, if Congress has created a "special statutory review proceeding" in the legislation under which the agency acted, a person who wants to challenge the agency's action in court must normally resort to that proceeding. This is known as "statutory" review.[114] Section 703 goes on to say, however, that "in the absence or inadequacy" of such a proceeding, the challenger may resort to "any applicable form of legal action," including an action for declaratory judgment or injunction. Such proceedings are usually called "nonstatutory" (although this is a misnomer, inasmuch as the APA does authorize them).[115] The term "nonstatutory" is also used to refer to situations in which a litigant challenges executive authority entirely outside the framework of the APA.[116] In either of the latter

109. JAFFE, supra note 3, at 193.

110. 187 U.S. 94 (1902).

111. Id. at 110–11.

112. 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 23.04, at 308 (1958); see Duffy, supra note 92, at 121–26 (reviewing the early history of equity in administrative law).

113. 5 U.S.C. § 703 (2000).

114. ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 343 (4th ed. 1997).

115. Id. at 343, 345; ABA Sect. of Admin. L. & Reg. Prac., A Blackletter Statement of Federal Administrative Law, 54 ADMIN. L. REV. 1, 46 (2002) [hereinafter Blackletter Statement].

116. Blackletter Statement, supra note 115, at 46. An example is an action brought against the President, who is not subject to the APA. See, e.g. Dalton v. Specter, 511 U.S. 462, 474 (1994) (finding the APA to be inapplicable to a suit challenging President's decision to close

two situations, the "nonstatutory" review plaintiff will normally commence a civil action for injunctive or declaratory relief, or both, in a federal district court. Such a suit is self-evidently equitable in nature. Indeed, Davis observes, the injunction "has become a general utility remedy for use whenever no other form of review proceeding is clearly indicated."[117]

Today, however, most judicial review of agency action is "statutory" in the sense just explained. That is, the challenger obtains access to court—usually a court of appeals—pursuant to a statute that specifically provides for review of a particular administrative power or program. One might reasonably have supposed that Congress, in adopting these statutory review provisions, intended to make a clean break from the past, leaving behind the equitable heritage of ordinary civil litigation. But the courts have reached a different conclusion. For many years, even in statutory review cases, they have referred to themselves as courts of equity and have claimed the powers that accompany that status. The premise of these claims seems to be that statutory review proceedings, although "appellate" in many respects, can also be seen as exercises of original jurisdiction. In this understanding, the reviewing court possesses equitable authority like that of a federal district court in a civil case.[118]

Representative of this line of authority is *Ford Motor Co. v. NLRB*,[119] which was decided in 1939 but is still a leading case. The

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military base, but assuming arguendo that some presidential violations could be reviewed outside the APA framework).

117. 3 DAVIS, *supra* note 112, § 23.20, at 386. According to Professor Duffy, the federal-question jurisdiction statute, 28 U.S.C. § 1331 (2000), provides the current statutory authority for this exercise of equity powers. *See* Duffy, *supra* note 92, at 126–29, 146–48.

118. *See* Mobil Oil Co. v. Fed. Power Comm'n, 417 U.S. 283, 311–12, 312 n.45 (1974) (citing with approval Natural Gas Pipeline Co. v. Fed. Power Comm'n, 128 F.2d 481 (7th Cir. 1942)). In *Natural Gas Pipeline*, the Commission ordered a reduction in a pipeline company's rates. The court stayed this order but required the pipeline to post a bond for the protection of consumers. Later the Commission's rate reduction order survived judicial review, so that the pipeline became liable for refunds. Asserting that the bond created an equitable "fund" for the benefit of consumers, the court held that it had exclusive jurisdiction to oversee distribution of this fund, and that it could enjoin consumers from seeking refunds through litigation in any other forum. 128 F.2d at 483–84. The court explained:

> We think it well settled that in respect to review of orders of Federal Boards and Commissions, the jurisdiction of the Circuit Court of Appeals, when granted by Congress [in typical statutory review provisions], is original rather than appellate in character and that, being endowed with original jurisdiction, the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit.

Id. at 484.

119. 305 U.S. 364 (1939).

Board ordered Ford to reinstate certain employees and then petitioned a court of appeals for enforcement. While the enforcement action was pending, the Board became aware that its reinstatement order was vulnerable to a procedural challenge. The Board accordingly asked the court of appeals to remand the case, so that it could repair the error. The court complied with this request. In the Supreme Court, Ford protested that the court of appeals had possessed no authority to grant the Board's request, because the judicial review provision of the labor laws provided that the court could either enforce, modify, or set aside the Board's action. In Ford's view, the statute left no room for the court to remand the matter so that the agency could do the modifying.[120] A unanimous Supreme Court brushed this contention aside and affirmed the lower court, declaring: "The jurisdiction to review the orders of the [NLRB] is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action."[121]

Later the same year, the Court decided *United States v. Morgan*,[122] a case known in the literature as *Morgan III*.[123] The Secretary of Agriculture entered an order requiring stockyard companies in Kansas City to reduce their rates. The district court temporarily enjoined the Secretary's order but required the companies to pay into court the sums that the department claimed were excessive. Later, the Secretary's order was set aside on procedural grounds, and the companies sought immediate repayment of the withheld money. The Supreme Court held, however, that the district court should retain the money for the present. "[T]he district court sits as a court of equity," the Court said, "and . . . assumes the duty of making disposition of the fund in conformity to equitable

120. Brief for Petitioner at 22.

121. 305 U.S. at 373. For a thorough discussion of choices that a court may face while exercising its discretion in the specific context of an agency's request for a voluntary remand, see Fine, *supra* note 4.

122. 307 U.S. 183 (1939).

123. At least, it would be so known if commentators chose to write about it. *Morgan III* is somewhat like Zeppo Marx—an often forgotten member of a famous quartet. *See, e.g.*, Daniel J. Gifford, *The* Morgan *Cases: A Retrospective View*, 30 ADMIN. L. REV. 237 (1978) (discussing the first, second, and fourth *Morgan* cases and ignoring the third).

principles."[124] Thus, if the Secretary were to establish in subsequent administrative proceedings that the (now expired) rates had been excessive, the court should use the money to make the companies' customers whole[125]—even though the Secretary could not lawfully have ordered such a retroactive adjustment himself.[126] Professor Davis has summarized *Ford* and *Morgan III* as follows: "The Supreme Court has declared that a proceeding in the court of appeals on a petition for review is controlled by equitable principles and the court has equity powers, even though the statute does not explicitly so provide."[127] The lower courts have frequently proceeded on the same assumption.[128]

Note that, in *Ford*, the Court was disinclined to construe the relevant statutory review provision as limiting the courts' equitable authority. In this respect, too, *Ford* has set a pattern for later decisions. The Court has continued to adopt flexible interpretations of the standard legislative formula that empower a reviewing court to "affirm, modify, or set aside" a challenged order. For example, does this standard formula permit a reviewing court to uphold an order on a provisional basis, with the explicit understanding that the agency may revise its decision if it believes that subsequent events justify such action? A literalist might have answered no, but the Court's answer was yes.[129] Does a reviewing court operating under such a

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124. 307 U.S. at 191 (citations omitted).

125. *See id.* at 193–95.

126. *See id.* at 192.

127. 3 DAVIS, *supra* note 112, § 23.03, at 304.

128. *See, e.g.*, Zambrana v. Califano, 651 F.2d 842, 844 (2d Cir. 1981) (upholding a judicially imposed time limit on an agency's disposition of applications for disability benefits); Indiana & Michigan Elec. Co. v. Fed. Power Comm'n, 502 F.2d 336, 346 (D.C. Cir. 1974) (holding that although the Commission's suspension of a utility's rate increases had been untimely, equity required the utility to forego collecting retroactive rate increases and to refund any charges that the Commission might later find to have been excessive); Sindicato Puertorriqueno de Trabajadores v. Hodgson, 448 F.2d 1161, 1170 (D.C. Cir. 1971) (holding that agricultural workers in Puerto Rico were entitled to initiate further administrative consideration of their request for an upward adjustment in minimum wage rates set by the Department of Labor). *See generally* Samuel Estreicher, *Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law*, 80 COLUM. L. REV. 894, 926–29 (1980) (tracing "the importance of equitable principles in judicial review of administrative decisionmaking" in numerous opinions by the late Judge Leventhal). Judge Leventhal discerned an additional statutory foundation for the courts' authority: "While [28 U.S.C.] § 2106 applies in terms only to review of a court order, its basic principle is not inapposite to appellate review of agency orders." Greater Boston Television Corp. v. FCC, 463 F.2d 268, 277 (D.C. Cir. 1971).

129. *See* Mobil Oil Corp. v. Fed. Power Comm'n, 417 U.S. 283, 310–12 (1974) (holding that, under a statute empowering a court of appeals to "affirm, modify, or set aside [a Commission]

legislative provision have the authority to certify a nationwide class action and enter an injunction that requires the agency to improve its hearing procedures? One might have thought that the standard formula would rule out such creative judicial measures. However, at least in the Social Security disability benefits context (in which initial review powers are lodged in the district courts), the Court has held that this legislative language is no obstacle to the reviewing court's exercise of its normal authority under the class action and injunction provisions of the Federal Rules of Civil Procedure.[130] These holdings that a statutory review provision should not be read too literally, where such a reading would confine the court's equitable remedial authority, have obvious implications for this Article's overall thesis.

Indeed, this approach to construction has migrated into judicial interpretation of section 706 of the APA—the same provision that was at issue in *Checkosky*. In *NAACP v. Secretary of Housing and Urban Development*,[131] the plaintiffs brought a class action alleging that the department was breaching its statutory duty to take affirmative steps to implement the policy of the Fair Housing Act. The First Circuit held that the district court could find that a pattern of governmental neglect was an abuse of discretion and could be "set aside" pursuant to section 706. Then-Judge Breyer acknowledged that this reading of the APA might seem forced. Nevertheless, citing the language from *Ford* about the court's equity powers, he wrote that "the words 'set aside' need not be interpreted narrowly. A court, where it finds unlawful agency behavior, may tailor its remedy to the occasion."[132] This language does not quite go so far as to endorse the converse proposition—i.e., that a court may also "tailor its remedy" on certain occasions by deciding that the words "set aside" *should* be read narrowly. It does, however, clearly foreshadow such a possibility.

I do not want to claim too much for the cases that I have summarized in this Section. Some of them predated the APA, and none involved the same degree of tension between statutory text and

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order in whole or in part," the court could simultaneously uphold a Commission rate order and authorize the Commission to modify the order later if necessary).

130. *See* Califano v. Yamasaki, 442 U.S. 682, 699–700, 704–06 (1979); *see also* Avery v. Sec'y of HHS, 762 F.2d 158, 163 (1st Cir. 1985) (Breyer, J.) (holding that, in remanding certain disability claims to the agency as required by a recent statute, the district court could nevertheless retain jurisdiction over a class action in which the agency's management of those claims was at issue).

131. 817 F.2d 149 (1st Cir. 1987).

132. *Id*. at 160–61.

equitable powers as does the problem of the *Checkosky* case. To sustain the validity of remand without vacation, the canon disfavoring restriction of equity powers will have to do more work than it did in these decisions. Nevertheless, this line of cases teaches a lesson that is decidedly helpful to my theme: For more than sixty years, courts have drawn upon the traditions of equity to support a broad understanding of the remedial powers of federal courts in administrative law cases—even in the face of arguably contrary statutory directives.[133]

B. The Modern Prevalence of Remedial Discretion

This Section continues the survey of remedial discretion in administrative law that I commenced in Part III.A, but the emphasis shifts from historical antecedents to current practice. I will summarize, in a basically descriptive fashion, a variety of situations in which courts have continued to adhere to the kind of flexibility that is characteristic of traditional equitable discretion, although they do not always describe it in those terms.[134] These situations reflect a pattern into which remand without vacation can fit comfortably.

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133. Although Professor Duffy acknowledges that courts may properly rely on judge-made principles, stemming from the legacy of equitable jurisdiction, when they hear challenges to executive authority outside the APA framework, *see supra* notes 113–17 and accompanying text, he reaches a different conclusion with respect to cases to which the APA does apply. In the latter situation, he argues, courts must comply with the APA's mandatory directives—including the "set aside" language of section 706. *See* Duffy, *supra* note 92, at 130–31, 165, 175–76. To this extent, his position seems at odds with mine. The disagreement may, however, be more apparent than real. The main thrust of Duffy's article is a challenge to the tendency of many courts and commentators to enunciate case law doctrines, such as exhaustion and ripeness, as exercises of pure judicial law-making authority. In particular, he argues that these authorities wrongly regard the APA as merely declaratory and, therefore, as less binding than other legislation. *Id.* at 119, 131–32. In this Article, I accept the authority of the APA as law, but I also invite reviewing courts to adopt a limiting construction of one clause of that Act, utilizing a canon of statutory construction that predates and exists apart from the APA itself. This construction would leave the courts free to exercise the considerable equitable discretion that other statutes confer upon them.

134. The present discussion deals only with the courts' equitable *remedial* discretion, not with equitable discretion that may lead a court to decline to adjudicate the legality of an agency action in the first place, such as equitable estoppel or laches. *See* Wilkinson v. Legal Servs. Corp., 80 F.3d 535, 538 (D.C. Cir. 1996) (holding that a discharged employee was equitably estopped from challenging the legality of LSC's composition because plaintiff had been a *paid* LSC employee for years); Apache Survival Coalition v. United States, 21 F.3d 895, 905–14 (9th Cir. 1994) (dismissing on laches grounds an action by a tribe that waited too long to sue the Forest Service to halt construction of a telescope); Indep. Bankers Ass'n v. Heimann, 627 F.2d 486, 488 (D.C. Cir. 1980) (dismissing on laches grounds an action challenging a twelve-year-old interpretive ruling by the Comptroller of Currency). For similar reasons I will not discuss the D.C. Circuit's longstanding practice of invoking "equitable discretion" to support dismissals of suits brought by members of Congress to challenge governmental policies. *See, e.g.*, Riegle v.

A familiar example is the judicial power to grant or deny a stay of an administrative action while an appeal is pending.[135] In *Scripps-Howard Radio, Inc. v. FCC*,[136] the FCC granted a radio station's application for permission to increase the power of its broadcasting signal. A competing broadcaster sought judicial review of the Commission's decision, as well as a stay of that decision pending the disposition of the appeal. The question before the Court was whether the court of appeals had authority to grant the stay. The relevant provisions of the Communications Act could have been read as withholding that authority.[137] The Court said, however, that the power to grant stays in order to prevent irreparable injury had always been part of the judiciary's traditional equipment for the administration of justice,[138] and it had to be assumed that Congress would not deprive the court of appeals of this power without clearly expressing its intention to do so.[139] That presumption, of course, is quite similar to the *Hecht* canon discussed earlier in this Article.[140] The drafters of the APA were well aware of *Scripps-Howard*. In what is now section 705 of the Act, Congress codified the authority of reviewing courts to grant a stay "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury."[141] In subsequent years, the criteria that judges use to determine whether to order a stay have evolved,[142] and variations on those criteria have emerged in

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Fed. Open Mkt. Comm., 656 F.2d 873, 879–82 (D.C. Cir. 1981). *But see* Chenoweth v. Clinton, 181 F.3d 112, 114–16 (D.C. Cir. 1999) (suggesting that such discretion will henceforth be subsumed into the doctrine of legislator standing). *See generally* Rachel E. Barkow, *More Supreme Than Court?: The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 333 n.576 (2002) (collecting examples of overlaps between equitable discretion and the political question doctrine); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (surveying equitable doctrines that serve as jurisdictional barriers).

135. *See generally* JAFFE, *supra* note 3, at 689–700 (presenting a wide-ranging analysis of the courts' stay authority in administrative cases); L. Harold Levinson, *Interim Relief in Administrative Procedure: Judicial Stay, Administrative Stay, and Other Interim Administrative Measures*, 42 AM. J. COMP. L. (SUPP.) 639, 640–48 (1994) (same).

136. 316 U.S. 4 (1942).

137. *See id.* at 18–19 (Douglas, J., dissenting).

138. *Id.* at 9–11 (opinion of the Court).

139. *Id.* at 11, 15.

140. *See supra* Part II.B. For more on the *Hecht* line of cases, see *infra* Part III.C.

141. 5 U.S.C. § 705 (2000); *see* Sampson v. Murray, 415 U.S. 61, 68 n.15 (1974) (citing Senate committee report on APA for the proposition that section 705 codifies principles of *Scripps-Howard*).

142. The leading case of *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958), set forth four factors that a court should consider in deciding

specific contexts,[143] but the APA drafters' core premise that they were conferring an equitable power[144] has not been controversial.

A commitment to flexibility in judicial remedies is also visible in a number of more specific administrative law contexts. For example, most courts have maintained that they have discretion to decide on an appropriate sanction for a violation of the Federal Advisory Committee Act. Invalidation of the agency action that resulted from the proceeding in which the violation occurred is an option, but is not mandatory in every case.[145] Similarly, when an agency commits a violation of the ex parte contacts requirements of the APA, the court must weigh various policies in order to decide whether to invalidate the agency's action due to the violation.[146] In the recently enacted judicial review provision of the Regulatory Flexibility Act, Congress

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whether or not to stay an administrative action pending appeal: (1) whether the petitioner is likely to prevail on the merits, (2) whether the petitioner will be irreparably injured without a stay, (3) whether issuance of the stay would substantially harm other interested persons, and (4) the public interest. *Id.* at 925. With minor variations, this test remains authoritative. *See, e.g.*, Michael v. INS, 48 F.3d 657, 664 (2d Cir. 1995); Ohio *ex rel.* Celebrezze v. NRC, 812 F.2d 288, 290 (6th Cir. 1987); Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673–74 (D.C. Cir. 1985). Indeed, the *Virginia Petroleum* factors have become the standard touchstone for preliminary injunctions in civil litigation generally. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2948 at 131 (1995). For voluminous citations, see *id.* §§ 2948–2948.4; see also Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 111 n.4 (2001) (asserting that, although case law variations in the precise formulations of the standard have elicited scholarly complaints, the criticism is "overstated").

143. *See Murray*, 415 U.S. at 83–84 (holding that when a probationary government worker seeks a judicial stay of her employer's decision to terminate her, the court, in exercising its equitable powers, must require her to make an especially strong showing of irreparable injury, instead of applying "the traditional standards governing more orthodox 'stays.' See *Virginia Petroleum* . . . .").

144. *See* APA LEGISLATIVE HISTORY, *supra* note 90, at 213 (Senate committee report) ("The authority granted is equitable and should be used by both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy."); *id.* at 277 (House committee report) (same); ATTORNEY GENERAL'S MANUAL, *supra* note 92, at 106 ("This power to stay agency action is an equitable power, [and] reviewing courts may 'balance the equities' in determining whether to postpone the effective date of agency action.").

145. *See* Cargill, Inc. v. United States, 173 F.3d 323, 341–42 (5th Cir. 1999) (holding that the district court had discretion to fashion a remedy that would serve purposes of Act); Natural Res. Def. Council v. Peña, 147 F.3d 1012, 1025–27 (D.C. Cir. 1998) (same); Nat'l Nutritional Foods Ass'n v. Califano, 603 F.2d 327, 336 (2d Cir. 1979) (declining to invalidate regulations as a remedy for violation of Act). *But see* Alabama-Tombigbee Rivers Coalition v. Dep't of Interior, 26 F.3d 1103, 1106–07 (11th Cir. 1994) (concluding that injunctive relief is the only adequate remedy).

146. *See* Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth., 685 F.2d 547, 563 (D.C. Cir. 1982) (inferring this approach from 5 U.S.C. § 557(d)(1)(D), although that provision seemingly speaks only to agencies).

has adopted its own version of remand without vacation.[147] Also worth mentioning in this connection is the highly discretionary manner in which courts determine whether to require an agency to complete a long-pending rulemaking proceeding.[148] In one sense, these judgments are about liability, not remedy; the issue is whether, in the language of section 706 of the APA, the court should "compel agency action unlawfully withheld or unreasonably delayed."[149] However, even when the agency has missed a statutory deadline, so that its susceptibility to some judicial order is apparent, the courts will not automatically direct immediate compliance.[150] Liability and remedy seem to merge in this area.

In addition, remedial discretion is a prominent feature of cases in which the constitutionality of regulatory legislation is at issue. In these cases, which might be said to dwell on the boundary line between constitutional law and administrative law, courts have frequently invoked doctrines that bear a more than passing resemblance to remand without vacation. The focus of this discussion will be on situations in which the court reaches the merits and finds a violation of law, but might deny relief anyway, at least in significant part.[151]

Consider, for example, the de facto officer doctrine. This doctrine, which dates back to feudal times, "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's

147. Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (1996) (amending 5 U.S.C. § 611(a)(4) (2000)) (providing that relief from a Regulatory Flexibility Act violation shall include, in addition to remand, an order directing the agency to defer enforcement of the improperly issued regulation against small entities *unless* the court finds that continued enforcement is in the public interest).

148. *See In re* Int'l Chem. Workers Union, 958 F.2d 1144, 1149–50 (D.C. Cir. 1992) (listing multiple considerations that courts should consider in deciding whether delay in completing rulemaking proceeding is unreasonable); Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 79–80 (D.C. Cir. 1984) (same). *See generally* 2 PIERCE TREATISE, *supra* note 4, § 12.3 at 839–46; Neil R. Eisner, *Agency Delay in Informal Rulemaking*, 3 ADMIN. L.J. 7, 18–23 (1989).

149. 5 U.S.C. § 706(1) (2000).

150. *See, e.g.*, Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455, 475–78 (D.C. Cir. 1998) (permitting a continued breach of a statutory deadline in light of the agency's good faith efforts and the court's limited capacity to supervise those efforts); *In re* Barr Labs., Inc., 930 F.2d 72, 74–76 (D.C. Cir. 1991) (same); 2 PIERCE TREATISE, *supra* note 4, § 12.3 at 846–53.

151. This discussion excludes a host of other remedial issues that may arise in such constitutional litigation, such as the court's familiar responsibility to tailor the terms of an injunction to the nature and magnitude of a violation. On that topic, see 2 PIERCE TREATISE, *supra* note 4, § 18.4, at 1345–55.

appointment or election to office is deficient."[152] The traditional rationale for the doctrine is that it "protect[s] the public from the chaos and uncertainty that would ensue if actions taken by individuals apparently occupying government offices could later be invalidated by exposing defects in the officials' titles."[153] The Supreme Court apparently relied on this theory when it declined to invalidate statutes enacted by state legislators who were later found to have been elected from unconstitutionally apportioned districts.[154] Similarly, when the Court held in *Buckley v. Valeo*[155] that the procedure that had been used to appoint some of the members of the Federal Election Commission (FEC) had violated the Appointments Clause of the Constitution, it added that it would accord de facto validity to past actions of the Commission.[156]

The current status of the de facto officer doctrine is not very clear. In *Ryder v. United States*,[157] a member of the Coast Guard alleged that two judges on the military tribunal that had reviewed and upheld his court-martial conviction had been appointed in violation of the Appointments Clause.[158] The Supreme Court, permitting his challenge to proceed, stated that it was disinclined to extend *Buckley* and the reapportionment cases beyond their facts.[159] The Court indicated, however, that its restrictive attitude toward the de facto officer doctrine was heavily influenced by the importance of the constitutional values at stake.[160] The Court seemed to accept older

152. Ryder v. United States, 515 U.S. 177, 180 (1995). *See generally* Gary Lawson & Guy Seidman, *The Hobbesian Constitution: Governing Without Authority*, 95 NW. U. L. REV. 581, 595–96 (2001) (surveying the history of and early literature on the de facto officer doctrine).

153. EEOC v. Sears, Roebuck and Co., 650 F.2d 14, 17 (2d Cir. 1981).

154. Connor v. Williams, 404 U.S. 549, 550–51 (1972).

155. 424 U.S. 1 (1976).

156. *Id*. at 142.

157. 515 U.S. 177 (1995).

158. *Id.* at 179.

159. *Id.* at 183–84. The Court passingly recognized, but did not attempt to resolve, a tension between the de facto officer doctrine and its recent decisions holding that newly adopted constitutional principles must be given broad retroactive effect. *Id*. at 184–85. These decisions are discussed *infra* in Part IV.A.2.

160. *Ryder*, 515 U.S. at 180–83. Other recent cases involving Appointments Clause challenges have also rejected the de facto officer defense. *See* United States v. Gantt, 194 F.3d 987, 998 (9th Cir. 1999) (holding, however, that the relevant officer's appointment had not actually been unconstitutional); Silver v. USPS, 951 F.2d 1033, 1036 n.2 (9th Cir. 1991) (same); FEC v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88, 89 (1994) (deeming the doctrine inapplicable where the constitutional issue is raised by the defendant in an enforcement action).

precedents that had applied the doctrine to validate actions in which the defect in an official's appointment was at most statutory and was more fairly viewed as merely technical.[161] The doctrine probably retains some vitality in the latter sort of case,[162] at least where the defect in an officer's title is not raised until well after the government has taken the action being challenged.[163]

The Supreme Court also used a second remedial device in *Buckley v. Valeo* to soften the impact of its decision to declare the FEC unlawfully constituted: The Court stayed the issuance of its own mandate for thirty days, to give Congress time to reorganize the Commission on a lawful basis.[164] The same technique surfaced again in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[165] where the Court found a constitutional defect in the structure of the bankruptcy court system. The Court delayed issuing its mandate for a period of three months[166] (later extended for an additional three months),[167] so that Congress could restructure the system.[168] The

161. *Ryder*, 515 U.S. at 181–83; *see also* Nguyen v. United States, 123 S.Ct. 2130, 2136 (2003) (indicating that the de facto officer doctrine should apply to defects that are "merely technical," but not to defects that offend a "strong policy") (quoting Glidden Co. v. Zdanok, 370 U.S. 530, 535–36 (1962)); Roell v. Withrow, 123 S. Ct. 1696, 1707–08 (2003) (Thomas, J., dissenting) (same).

162. *See, e.g.*, Levine v. United States, 221 F.3d 941, 944 n.7 (7th Cir. 2000) (rejecting a collateral attack on a criminal conviction, even though the Assistant U.S. Attorney did not meet a local residency requirement, which was a mere "matter of government administration"); Horwitz v. State Bd. of Med. Examiners, 822 F.2d 1508, 1516 (10th Cir. 1987) (holding that members of a licensing board who had failed to take an oath of office were de facto officers).

163. *Compare* Andrade v. Lauer, 729 F.2d 1475, 1496–1500 (D.C. Cir. 1984) (holding that the de facto officer doctrine does not bar a judicial challenge if the plaintiff sues at or around the time when the challenged action is taken and the agency had reasonable actual notice of the objection to the claimed defect), *with* Office of Thrift Supervision v. Paul, 985 F. Supp. 1465, 1475 (S.D. Fla. 1997) (applying the de facto officer doctrine because the plaintiff's challenge was belated). Timely notice to the government about a claimed defect in an officer's title is important, because a properly appointed officer's subsequent ratification of the challenged action can often cure the defect. *See* Doolin Sec. Sav. Bank v. Office of Thrift Supervision, 139 F.3d 203, 212–14 (D.C. Cir. 1998) (holding that a possibly invalid notice from an Acting Director of OTS was immune from challenge because a properly appointed Director had effectively ratified the notice in his final decision in the petitioner's case); FEC v. Legi-Tech, Inc., 75 F.3d 704, 709 (D.C. Cir. 1996) (holding that ratification by a properly constituted FEC cured the Appointments Clause problem that had been found in *NRA Political Victory Fund*).

164. Buckley v. Valeo, 424 U.S. 1, 142–43 (1976).

165. 458 U.S. 50 (1982).

166. *Id.* at 88.

167. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 459 U.S. 813 (1982).

168. Lower courts often use this same technique. *See, e.g.*, Bd. of Trade v. SEC, 883 F.2d 525, 536–37 (7th Cir. 1989) (remanding an order registering a company as a clearing agency, but deferring the court's judgment for 120 days in order to avoid harming investors); Nat'l Coalition

results of such an exercise of remedial discretion, especially when it is employed in tandem with the de facto officer doctrine, are somewhat similar to the results of remand without vacation. In either instance, the judiciary heads off the potentially disruptive interruption of a government program, by allowing the status quo to remain in effect for a limited time while the government is fixing the problem the courts have identified. Indeed, one practical question that a court should address in deciding whether to resort to remand without vacation in a given case is whether it could reach an equally satisfactory outcome by simply postponing the issuance of its own mandate.[169]

The doctrine of severability, an issue that can arise in both constitutional law and administrative law, illustrates remedial flexibility in a different way. In the constitutional context, the usual severability question is whether, when a court holds a statutory provision unconstitutional, it should strike down the entire statute, or, instead, should "sever" the offending provision and leave the remaining provisions in place. According to the traditional doctrine, "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted."[170] In other words, the theoretical touchstone is legislative intent.[171] The problem is that the legislature's intentions regarding severability are typically highly speculative—especially inasmuch as the issue relates, by its nature, to a state of affairs that the lawmakers assumed (or at the very least hoped) would not exist.[172] Even if the challenged act contains a severability clause, the judicial response is not foreordained, because courts tend to treat such clauses as raising

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Against Misuse of Pesticides v. Thomas, 809 F.2d 875, 884–85 (D.C. Cir. 1987) (remanding a pesticide regulation with directions to the agency to address the issue within thirty days, but deferring the effective date of the mandate during that period); Simmons v. ICC, 757 F.2d 296, 300 (D.C. Cir. 1985) (Scalia, J.) (holding that a rule that relaxed carriers' reporting obligations had been adopted without requisite procedures, but could remain in effect for ninety days); EEOC v. CBS, Inc., 743 F.2d 969, 975–76 (2d Cir. 1984) (concluding that certain powers had been invalidly transferred to the EEOC subject to an unconstitutional "legislative veto," but staying issuance of mandate for four months to allow Congress to enact the transfer properly, as it did).

169. *See supra* note 40 and accompanying text (comparing the two approaches).

170. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987).

171. *See* John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 210, 213 (1993) (documenting the longstanding predominance of legislative intent criterion).

172. *Id.* at 230–31.

only a weak presumption about legislative intent.[173] As a practical matter, therefore, the court has wide leeway in making determinations about severability,[174] but the discretionary element of the court's decision remains somewhat masked, due to the formal terms in which the doctrine is couched.

The corresponding issue in administrative law is whether a court should sever part of a regulation that it has found to be invalid for one reason or another. In theory, the decision supposedly again turns on the intentions of the promulgating authority (here, the agency).[175] And, once again, that test can lead to disparate results, depending on the court's fictionalized reconstruction of the agency's intent.[176] In this context, however, courts seem more willing to acknowledge openly that discretionary considerations, including equitable factors, play a role in their decisions about whether to sever.[177] A particularly relevant illustration is the D.C. Circuit's opinion in *Davis County Solid Waste District v. EPA*.[178] There, the court held that EPA emission standards for municipal waste "combustor units" violated the Clean Air Act. However, the court vacated the standards only insofar as they regulated small combustor units; it left in place portions of the rules pertaining to larger units.[179] What is of special relevance here is that the court, in reaching this conclusion, relied

173. *Id.* at 222–25. The presumption is weak in that courts typically apply roughly the same test in determining whether to sever, regardless of whether the legislation contains a severability clause. *Id.* at 235–36.

174. Professor Nagle argues that courts should give severability clauses their plain meaning, and, when no such clause is available, should determine whether to sever on the basis of traditional statutory construction and, if necessary, a general presumption in favor of severance. *Id*. at 232–57. What is noteworthy for present purposes is that the courts, despite their growing attraction to formalism in other statutory interpretation areas, *see supra* note 71 and accompanying text, have shown no movement toward adopting such an approach.

175. *See* North Carolina v. FERC, 730 F.2d 790, 795–96 (D.C. Cir. 1984).

176. *Compare* Bell Atl. Tel. Cos. v. FCC, 24 F.3d 1441, 1447 (D.C. Cir. 1994) (denying severance because of "substantial doubt" that the agency would have preferred it), *and* North Carolina v. FERC, 730 F.2d at 795–96 (denying severance because the Commission's order was "unitary"), *with* K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 294 (1988) (allowing severance where there was "no indication that the regulation would not have been passed but for [the] inclusion" of the invalid provisions); *see also* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) (invalidating one section of an FCC rule and upholding others, without discussing severability).

177. *See* MD/DC/DE Broadcasters Ass'n v. FCC, 253 F.3d 732, 735 (D.C. Cir. 2001) (refusing to accede to the FCC's *explicit* preference for severance, because "to do so would [not] leave a sensible regulation in place").

178. 108 F.3d 1454 (D.C. Cir. 1997).

179. *Id.* at 1460.

squarely on its precedents concerning remand without vacation. Under that body of case law, as I will discuss later, the seriousness of the rule's deficiencies and the disruptive effect of short-run invalidation are factors that the circuit routinely considers in deciding whether to vacate.[180] Applying those principles, the court in *Davis County* explained that its interpretation of the Act was unlikely to affect the provisions regulating the large units; moreover, vacation of the entire rule would result in a significant increase in pollution emissions from those units while the rule was being revised.[181] In a strikingly direct fashion, therefore, *Davis County* demonstrates the compatibility between remand without vacation and the existing remedial landscape, of which the severability doctrine is one element.[182]

Closely related to severability is the narrow but interesting problem of selecting a remedy for a statute that violates the Constitution because it is underinclusive. In Justice Harlan's famous formulation, a court facing such a situation has "two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion."[183] In one representative case, *Califano v. Westcott*,[184] a section of the Social Security Act provided certain welfare benefits to families of unemployed fathers, but not to families of unemployed mothers. The Court ruled unanimously that

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180. *See infra* notes 389–90 and accompanying text.

181. Davis County Solid Waste Mgmt. v. EPA, 108 F.3d 1454, 1458–59 (D.C. Cir. 1997).

182. Indeed, one member of the panel that decided *Davis County* was Judge Randolph, the dissenter in *Checkosky*. Presumably he assumed that this problem, unlike the *Checkosky* issue, lent itself to equitable balancing because the text of the APA did not settle the matter. A textual analysis was, however, potentially available, as demonstrated in *Catholic Social Service v. Shalala*, 12 F.3d 1123 (D.C. Cir. 1994). One reason the court gave in that case for finding a regulation severable was that only a "part" of the rule was invalid, not the "whole" of it. This distinction was said to follow from 5 U.S.C. § 551(13) (2000), which defines "agency action" to include "the whole or a part of an agency rule." *Id.* at 1127–28. The *Catholic Social Service* analysis has not been followed subsequently, perhaps because it leaves little room for equitable balancing.

183. Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in the result). Congress had exempted conscientious objectors from military service, but only if their opposition to war was "by virtue of religious training and belief." Justice Harlan concluded that this limitation violated the Establishment Clause and that the only acceptable remedy was to extend the exemption to nonreligious conscientious objectors, rather than to eliminate the exemption entirely. *Id.* at 361–67.

184. 443 U.S. 76 (1979).

this arrangement violated equal protection principles, but it divided on the question of remedy. The majority, in an opinion by Justice Blackmun, decided to extend the benefit to unemployed mothers' families.[185] Justice Blackmun defended this expansion of the statute on the ground that the alternative—a suspension of the program—would impose hardship on needy children whom Congress had plainly intended to assist.[186] In addition, he said, the Act contained a strong severability clause, which he thought was evidence of the legislature's desire to protect these beneficiaries in the event of a constitutional challenge.[187] Four dissenters would have eliminated the benefit entirely, leaving any reconfiguration of the program to Congress.[188]

The case law on this issue is noteworthy for its candid recognition that the problem calls for judicial creativity. Even the *Westcott* dissenters agreed with that premise.[189] Some opinions do reach for a legislative baseline, by suggesting that a court should strive to act as Congress would have wanted,[190] or at least should not "'circumvent the intent of the legislature.'"[191] Yet even those formulas leave a good deal of responsibility in the courts' hands.[192] Thus the task quickly comes down to judicial weighing of competing policies: the court should "'measure the intensity of commitment to the residual [legislative] policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as

185. *Id.* at 90–93.

186. *Id.* at 90.

187. *Id*.

188. *Id.* at 96 (Powell, J., concurring in part and dissenting in part).

189. The dissenters did not suggest that an extension would be categorically beyond the province of the judiciary. On the contrary, their major premise was that, "[i]n choosing between these alternatives [extension or nullification], a court should attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole." *Id.* at 94. Their dissent was based on the relatively narrow ground that Congress would not have favored this particular extension. *See id.* at 94–96 (noting, *inter alia*, that Congress had adopted the classification at issue in *Westcott* precisely in order to avoid the broad coverage that the majority was now prescribing).

190. *See* Miller v. Albright, 523 U.S. 420, 489 (1998) (Breyer, J., dissenting) ("[W]e can excise the two provisions only if Congress likely would prefer their excision . . . .").

191. Heckler v. Mathews, 465 U.S. 728, 739 n.5 (1984) (quoting *Westcott*, 443 U.S. at 94 (Powell, J., concurring in part and dissenting in part)).

192. In *Westcott*, Justice Blackmun did not claim that the severability clause was dispositive of his case. Nor could he easily have done so, for the Court's decision did not actually "sever" any provision of the Social Security Act. In any event, the courts' wariness about severability clauses is longstanding. *See supra* note 173 and accompanying text.

opposed to abrogation.'"[193] It is a situation-specific determination,[194] and the cases have by no means always favored extension over nullification, as *Westcott* did.[195] Overall, the courts seem to share the view expressed in this context by Professor (now Justice) Ruth Bader Ginsburg: "The courts act legitimately, I am convinced, when they employ common sense and sound judgment to preserve a law by moderate extension where tearing it down would be far more destructive of the legislature's will."[196] This consensus further attests to the recognized capacity of the judiciary to use discretion to resolve remedial questions that the legislature is unlikely to have considered.

In short, as the examples summarized in this Section show, remedial discretion is a recurring theme in administrative law and closely related public law cases—as the equity heritage recounted in the preceding Section might lead one to expect. This is not to say that judges consistently mention equitable antecedents to justify their preference for keeping their options open. Frequently they do not. At times they seem to take remedial discretion for granted, or to use a passing reference to "equitable discretion" as little more than a makeweight slogan.[197] This casualness about tradition should not be surprising, now that the era predating the merger of law and equity courts has become a distant memory in the federal judicial system.[198]

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193. *Mathews*, 465 U.S. at 739 n.5 (quoting Welsh v. United States, 398 U.S. 333, 365 (1970) (Harlan, J., concurring in the result)).

194. *See* Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEVE. ST. L. REV. 301, 318–24 (1979) (exploring the merits of this choice in various fact situations).

195. *See, e.g.*, *Mathews*, 465 U.S. at 739 n.5 (deferring to an express congressional preference for nullification over extension); Quiban v. Veterans Admin., 928 F.2d 1154, 1163 (D.C. Cir. 1991) (R. Ginsburg, J.) (opining that, even assuming a constitutional problem with Congress's decision to provide veterans' benefits to 12,000 Filipinos who had served in the U.S. army during World War II, but not to over 200,000 Filipinos who had served the Allied cause in the Philippine army, Congress might well prefer to withdraw the benefit from the former group rather than to extend it to the latter); Olsen v. DEA, 878 F.2d 1458, 1464 (D.C. Cir. 1989) (R. Ginsburg, J.) (noting that, even assuming that Congress could not permit one religious sect to use marijuana for sacramental purposes without permitting other sects to do likewise, the court would not lightly predict that the legislature would prefer extension over abandonment of this exemption from drug laws).

196. Ginsburg, *supra* note 194, at 324. She added that, although extension of a statute can be seen as judicial legislation, "[t]he function the courts perform in [this regard] seems to me entirely harmonious with a view that sees our institutions of government not as rigidly compartmentalized but as interdependent." *Id*.

197. *See, e.g.*, Zambrana v. Califano, 651 F.2d 842, 844 (2d Cir. 1981); Sindicato Puertorriqueno De Trabajadores v. Hodgson, 448 F.2d 1161, 1170 (D.C. Cir. 1971).

198. Carrying this point to its logical conclusion, Professor Laycock argues that "we should consider it wholly irrelevant whether a remedy, procedure, or doctrine originated at law or in

The courts' continued attraction to open-ended approaches probably derives in large measure from more practical considerations, such as their desire to do justice in particular cases, and their prudential intuition that the factors that *should* influence remedial decisions are too complex to be reduced to simple rules or one-size-fits-all solutions. Another part of the explanation may be that judges simply have a good deal of confidence in their own ability to work out fair solutions on an ad hoc basis. Part IV of this Article examines some of the grounds on which that self-confidence may be called into question. For the present, however, it can at least be said that the prevalence of remedial discretion strongly suggests that, over time, the continued integration of remand without vacation into public law adjudication would not prove to be too difficult.

C. Equitable Discretion to Withhold Injunctive Relief

I now address in greater detail what is probably the closest analog to remand without vacation in the remedies case law. In Part II.B above, I discussed a canon of statutory construction stemming from *Hecht Co. v. Bowles*[199] and its progeny. The *Hecht* canon disfavors statutory interpretations that tend to foreclose the courts from exercising equitable remedial discretion. This Section discusses a related topic—the *substance* of the equitable authority that the canon seeks to leave undisturbed.[200] I examine cases that have arisen in the context of civil litigation, in which the plaintiff (either a private party or an agency acting in an enforcement capacity) has sought an injunction that would prohibit the defendant from violating a regulatory statute. The teaching of the cases, broadly speaking, is that equity does not always require the court to issue such an injunction, even if the court has found the defendant to be in breach of the

equity," because "the discretion once associated with equity now pervades the legal system." Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 54 (Summer 1993). He continues: "We can argue about the right balance between discretion and formalism, but it makes no sense to argue about the right balance between law and equity." *Id.* at 75. (He acknowledges, of course, an exception for doctrines such as the constitutional right to jury trial, where a distinction between law and equity is textually compelled. *Id.* at 53–54.) Although Laycock's view has considerable appeal, courts considering the validity of remand without vacation, or similar devices, do not need to go so far, because, as the preceding Section showed, the equity tradition in administrative law has a substantial pedigree in any event.

199. 321 U.S. 321 (1944).

200. Only for expository convenience does this Article discuss these two aspects of the cases separately. The Justices surely would not take such pains to preserve the *Hecht* canon if they did not value the uses to which it is commonly put.

statute. In this respect, the cases contain parallels to the kind of discretion that courts exercise in administrative cases when they consider remand without vacation. At the same time, the cases contain refinements and qualifications that also deserve attention.

The courts' application of this discretion-favoring doctrine has been the target of academic criticism, especially in the environmental context. Commentators have questioned whether judges have any business using equitable balancing tests to weaken the implementation of public-regarding remedial legislation.[201] The *Hecht* decision itself causes relatively little concern in this regard. It is commonly explained away as a situation in which the defendant (a department store accused of price control violations) had decisively abandoned its unlawful conduct, making an injunction against future misconduct simply unnecessary.[202] The focus of controversy has been the case law of the past two decades, in which courts have drawn upon equity traditions to justify their refusal to enjoin *continuing* violations.

Particularly troubling to commentators is *Weinberger v. Romero-Barcelo*.[203] There, Puerto Rico residents sought an injunction to prevent the Navy from conducting weapons training exercises off the coast of the island without having obtained a permit from the EPA, as the Federal Water Pollution Control Act (FWPCA) required. The district court directed the Navy to apply for a permit, but refused to instruct it to cease further training exercises while the permit application was pending. The court noted that the Navy's violations were not causing "'appreciable harm' to the environment," and that the injunctive relief sought by the plaintiffs would harm the public interest "'because of the importance of the island as a training center.'"[204] The Supreme Court, in an opinion by Justice White, upheld the district court's disposition, relying on the "traditional function of equity," pursuant to which a court "'balances the

201. *See, e.g.*, CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 220–21 (1990); Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 398–400 (1983); Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524 (1982). Professor Plater maintains that "a court has no discretion or authority to exercise equitable powers so as to allow violations of statutes to continue." *Id.* at 525–26. For a critique of Plater's reading of the precedents, see David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 638–47 (1988).

202. *See, e.g.*, Plater, *supra* note 201, at 549–52.

203. 456 U.S. 305 (1982).

204. *Id*. at 310 (quoting Romero-Barcelo v. Brown, 478 F. Supp. 646, 706 (D.P.R. 1979)).

conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction.'"[205] *Romero-Barcelo* can be read to indicate that a court may allow a statutory violation to continue, perhaps indefinitely, by evaluating the "equities" of a case on the basis of the court's own sense of fairness. This open-ended notion strikes some scholars as unacceptably rootless and incompatible with the primacy of Congress in determining how the FWPCA should be enforced.[206]

The commentators' premise that a court may not use equitable balancing to override what a statute requires is surely sound.[207] However, their critique of *Romero-Barcelo* tends to exaggerate the extent of the Court's departure from that premise.[208] Particularly instructive is the manner in which *Romero-Barcelo* took account of the Court's famous earlier decision in *Tennessee Valley Authority v. Hill*.[209] In *Hill*, the Court upheld an injunction that prohibited the Tennessee Valley Authority from completing construction of a dam that endangered the habitat of the snail darter (a species of perch). The Court held that the relevant provisions of the Endangered Species Act made an injunction mandatory, leaving no room for any argument that the economic benefits of the dam outweighed the possible danger to an obscure species of fish.[210] Congress itself had struck the balance between these two policies in the Endangered Species Act. The Court said that it could not supersede that policy judgment under the guise of exercising equity jurisdiction.[211]

In *Romero-Barcelo*, the Court distinguished *Hill* instead of repudiating it.[212] The Court explained that issuance of an injunction

205. *Id.* at 312 (quoting Yakus v. United States, 321 U.S. 414, 440 (1944)).

206. *See, e.g.*, Shreve, *supra* note 201, at 397 n.96 (lamenting *Romero-Barcelo*'s "refus[al] to issue an injunction through a kind of vague balancing of the equities").

207. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) ("When Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes."); *In re* Grand Jury Proceedings Empanelled May 1988, 894 F.2d 881, 887 (7th Cir. 1989) ("[I]n cases where the plaintiff has an established entitlement to an equitable remedy the judge cannot refuse the remedy because it offends his personal sense of justice.").

208. The following account draws heavily on a persuasive analysis in Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513, 522–27 (1984).

209. 437 U.S. 153 (1978).

210. *Id.* at 187–88.

211. *Id.* at 193–95.

212. Weinberger v. Romero-Barcelo, 456 U.S. 305, 314 (1982).

was the only means available in *Hill* to vindicate Congress's choice. The Puerto Rico situation was different, because an injunction "is not the only means of ensuring compliance" with the FWPCA.[213] The district court had discretion to allow the Navy to come into compliance by applying for a permit. Even though this approach would allow the Navy's statutory violation to continue in the short run, it would fulfill the purpose of the Act. In a sense, it would circumvent the permit process, but "[t]he integrity of the Nation's waters, . . . not the permit process, is the purpose of the FWPCA."[214] Indeed, other provisions of the Act authorized the EPA to adopt measures that allowed polluters to come into compliance in an orderly and measured way, rather than immediately, and the district court's approach to the Navy was similar.[215] Thus, "[t]he exercise of equitable discretion, which must include the ability to deny as well as grant injunctive relief, can fully protect the range of public interests at issue at this stage in the proceedings."[216] In short, *Romero-Barcelo* construed the FWPCA as preserving the courts' discretion to determine the *manner* in which a polluter should come into compliance, not as giving them discretion to negate the statutory policy itself.[217]

Justice Stevens dissented in *Romero-Barcelo*, challenging the majority's reasoning as too facile. Congress had itself made a judgment that the permit process was necessary, he argued, and the federal courts had no business second-guessing that decision.[218] Thus, while the judiciary did retain some discretion in enforcing the FWPCA, "a general rule of immediate cessation must be applied in all but a narrow category of cases."[219] The Court's failure to adhere to the "strong presumption in favor of enforcing the law as Congress has written it" was, he asserted, particularly regrettable in an environmental case.[220]

Despite that protest, the Court adhered closely to its *Romero-Barcelo* reasoning in another case five years later. *Amoco Production*

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213. *Id*.

214. *Id*.

215. *Id.* at 316–18.

216. *Id.* at 320.

217. *See* 1 DAN B. DOBBS, LAW OF REMEDIES 247–48 (2d ed. 1993) (interpreting *Hill* and *Romero-Barcelo* as giving courts "[d]iscretion to deny remedies, not discretion to deny rights").

218. *Romero-Barcelo*, 456 U.S. at 333 (Stevens, J., dissenting).

219. *Id.* at 322.

220. *Id.* at 326.

Co. v. Village of Gambell[221] involved a challenge to a sale by the Secretary of the Interior of oil and gas leases off the coast of Alaska. Residents of two Alaskan native villages sought a preliminary injunction to prevent oil companies from conducting exploratory activities in the leased areas. One of the plaintiffs' claims was that the Secretary had not complied with the Alaska National Interest Lands Conservation Act (ANILCA), which required him to hold a hearing and make certain findings before taking action that would impair natural resources used for subsistence purposes in Alaska. The district court agreed that the Secretary had not complied with ANILCA, but refused to enter the injunction. The Ninth Circuit reversed and directed the entry of a preliminary injunction, contending that "injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances."[222]

Again speaking through Justice White, the Supreme Court disagreed with the court of appeals, finding in ANILCA no "clear indication" that Congress meant to "deny federal district courts their traditional equitable discretion."[223] The Court explained that "the Ninth Circuit erroneously focused on the statutory procedure rather than on the underlying substantive policy the process was designed to effect—preservation of subsistence resources."[224] Justice White acknowledged that if environmental injury is sufficiently likely, equitable balancing will usually favor the issuance of an injunction, because such an injury is often irreparable and can seldom be adequately remedied by money damages.[225] In this instance, however, the district court had expressly found that the oil companies' exploration activities were unlikely to impair subsistence resources.[226] Moreover, the companies would need to obtain additional permission from the Secretary before taking further steps, such as development and production.[227] On the other hand, the Court said, issuance of the injunction would cost the oil companies $70 million in nonrecoverable

221. 480 U.S. 531 (1987).

222. People of the Village of Gambell v. Hodel, 774 F.2d 1414, 1423 (9th Cir. 1985).

223. *Gambell*, 480 U.S. at 544.

224. *Id*.

225. *Id.* at 545.

226. *Id*.

227. *Id.* at 538 n.6, 544.

expenses and would hinder the public interest in development of energy resources.[228]

If the holdings of *Romero-Barcelo* and *Gambell* created an impression that the Supreme Court, despite its protestations to the contrary, was prepared to give lower courts unlimited freedom to modify regulatory legislation through equitable balancing, that impression presumably has now been dispelled by the Court's recent decision in *United States v. Oakland Cannabis Buyers' Cooperative*.[229] The United States sought an injunction under the federal Controlled Substances Act to prevent the Cooperative from distributing and manufacturing marijuana for medical purposes. The district court granted the injunction. On appeal, the Ninth Circuit directed the district court to modify its injunction, in the exercise of equitable authority, to permit patients to use the drug if they could show a "medical necessity." The Supreme Court was not prepared to tolerate this. It held that the Act contained no exemption for "medical necessity," and that courts could not rely on the traditions of equity as a backdoor means of creating one.[230] Writing for the Court, Justice Thomas returned to the rationale of *TVA v. Hill*:

> Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute. Their choice (unless there is statutory language to the contrary) is simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all.[231]

It is tempting to look to ideology to explain the Court's renewed emphasis on congressional policies as a trump to equitable discretion. Was the Court simply inclined to be more zealous about the war on drugs than about environmental protection? Perhaps. Yet the Court also went out of its way to declare that it was not abandoning the teachings of *Romero-Barcelo*. Justice Thomas devoted an entire subsection of his opinion to emphasizing that the issuance of an

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228. *Id.* at 545–46. Justice Stevens, joined by Justice Scalia, declined to join this section of the Court's opinion. He noted that the Court's disposition of other issues made it unnecessary to reach the question of the proper standard for granting an injunction. *Id.* at 555–56 (Stevens, J., concurring in part and concurring in judgment); *see infra* note 235 (explaining the Court's additional holding).

229. 532 U.S. 483 (2001).

230. *Id.* at 494, 497.

231. *Id.* at 497–98 (citation omitted).

injunction is discretionary unless a statute clearly provides otherwise.[232] The Controlled Substances Act, he continued, contained no such clear statement.[233] The Court noted that, in contexts like that of this Act, "criminal enforcement is an alternative, and indeed the customary, means of ensuring compliance with the statute. Congress' resolution of the policy issues can be (and usually is) upheld without an injunction."[234]

In summary, despite some superficially contrasting results, the cases reviewed in this Section appear to fall into a reasonably consistent pattern. Their collective message is that a court may not rely on equity to repudiate a statutory objective outright, but it has some leeway to decide whether or not to grant an injunction as a *means* of achieving compliance with the statutory scheme. *Romero-Barcelo* and *Gambell* suggest, more specifically, that a court may decline to order immediate cessation of a continuing violation if the breach in question is expected to be temporary,[235] the requirement being violated is merely a means to an ultimate statutory purpose, the defendant's impairment of that underlying purpose is minimal or nonexistent, and the costs to the defendant of complying with the injunction would be high. To be sure, in a given context there can be room for debate as to whether the requirement that the defendant is violating is merely a "means" or implicates a more fundamental statutory purpose. Such a disagreement provided the impetus for Justice Stevens' dissent in *Romero-Barcelo*. Thus, the task of applying the principles requires a court to make delicate judgments about

232. *Id.* at 496–97.

233. *Id.* at 496.

234. *Id.* at 497. A separate opinion in *Oakland Cannabis* suggested that cultivation and possession—as distinguished from distribution and manufacturing—of marijuana should be tolerated under the Controlled Substances Act for seriously ill patients. *Id.* at 501–02 (Stevens, J., concurring in the judgment). By expressing a preference for criminal enforcement, the Court may have intended to leave room for executive officials to achieve such a possibility, at least as a practical matter, through the exercise of prosecutorial discretion.

235. In *Gambell*, the Court did not refer to the defendants' breach as temporary. This omission, however, is readily explained by an unusual feature of the case. In a separate section of its opinion, the Court upheld the district court's ruling that ANILCA did not apply to the contested leases at all. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546–55 (1987). Thus, in these two courts' view, the Secretary had not committed a statutory violation in the first place. As Justice White pointed out, had the district court not reached this conclusion, it could easily have ordered the Secretary to hold the hearing and make the findings prescribed in ANILCA. *Id.* at 543 n.8. Such a mandate would have supplied the alternative remedy envisioned by *Romero-Barcelo.*

legislative objectives.[236] The overall framework for analysis, however, is fairly well defined.

Hecht, *Romero-Barcelo*, and *Oakland Cannabis* grew out of civil litigation, in which the courts had original jurisdiction. With minor adaptations, however, one can easily extrapolate the teachings of those cases to fit the context of judicial review of agency action, where the court acts in a basically appellate capacity. (Indeed, it would seem that in *Gambell* the Court has already made that extrapolation, although it did so *sub silentio* and perhaps with no attention to its possible significance.) The "set aside" remedy of section 706 of the APA is functionally similar to an injunction and, as I have shown above, is rooted in the traditions of equity.

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236. *See, e.g.*, United States v. Mass. Water Res. Auth., 256 F.3d 36, 58 (1st Cir. 2001) (refusing to require the defendant to install a filtration system, as prescribed in an EPA rule, because the court regarded that step as unnecessary to secure the Safe Drinking Water Act's goal of water purity). Cases involving a defendant agency's failure to prepare an impact statement, such as the one prescribed by the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370 (2000), exemplify the difficulty of applying the Court's teachings. The holdings vary widely. *See* Sarah W. Rubenstein, *Injunctions Under NEPA After* Weinberger v. Romero–Barcelo *and* Amoco Production Co. v. Village of Gambell, 5 WIS. ENVTL. L.J. 1, 13–17 (1998) (compiling cases). One prominent analysis is that of then-Judge Breyer in *Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989). He argued that the case for enjoining a federal project if the initiating agency has not prepared a required environmental impact statement is somewhat stronger than in *Gambell*, because NEPA contains no judicially enforceable substantive provisions that could support an ultimate judicial reversal "on the merits," as ANILCA did. Thus, he said, an injunction is the court's only available tool with which to cure a NEPA violation. *Id.* at 502–04. *See* Rubenstein, *supra*, at 21 (endorsing this analysis); Leslye A. Herrmann, Comment, *Injunctions for NEPA Violations: Balancing the Equities*, 59 U. CHI. L. REV. 1263, 1290 (1992) (same). *But see, e.g.*, Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 201–02, 206–07 (D.C. Cir. 1991) (Thomas, J.) (remanding to allow the FAA to supplement an environmental impact statement with a required conflict-of-interest form, but declining under *Romero-Barcelo* to treat this breach as a reason to invalidate the FAA's approval of airport expansion plan).

The *Sierra Club* reasoning seems at best incomplete, because the substantive purposes embedded in other congressional legislation, including the agency's enabling statute, can also deserve consideration on the equity balance scale. *See Gambell*, 480 U.S. at 546 (mentioning, as one factor militating against injunctive relief in that case, the public's interest in oil production, as recognized in the Outer Continental Shelf Lands Act). However, even if one accepts the argument of *Sierra Club*, there is a sense in which the "irreparable harm" element in most NEPA cases will tend to be more severe (and thus more deserving of an injunction) than in the fact situations that potentially lend themselves to remand without vacation. In the latter situations, the adverse effects of an agency's APA violation will generally be felt only during an interim period, while the agency is considering how to cure that violation. In contrast, a court's willingness to allow a federal agency to proceed with a project without analyzing its possible environmental consequences would create a risk of a *permanent* negation of NEPA's purposes in relation to that project.

Consequently, the *Hecht* doctrine carries strong implications concerning the proper dimensions of remand without vacation.

Specifically, the logic of *Hill* and *Oakland Cannabis* suggests that where an administrative agency has injured a citizen by acting in a manner that the substantive statute flatly forbids, or by withholding a benefit to which the citizen is flatly entitled, a court has no room to use "equitable balancing" to override the statute. Indeed, as we shall see, courts have not resorted to remand without vacation in these situations.[237] Many administrative law cases, however, involve no such categorical statutory breach, but instead an exercise of discretion.[238] It may appear to the court that the agency might be able to justify its action, or something very similar to it, by following better procedure or giving better reasons for its decision. Here, *Romero-Barcelo* and *Gambell* imply that the judiciary should retain a residuum of flexibility. In some circumstances, they suggest, a reviewing court might allow temporary continuation of an agency action that does not comply with the APA, especially where the balance of practical hardships favors such a disposition.

There remains, however, the commentators' fundamental normative question about the *Hecht* doctrine: Should not a court hesitate to use equitable doctrines to supplement, and in a sense to supersede, the remedial framework that Congress has created? The most carefully developed argument for judicial self-restraint is that of Professor Daniel Farber. In essence, his analysis is an elaboration of the Stevens position in *Romero-Barcelo*. He starts from the premise

237. *See infra* notes 394–95 and accompanying text.

238. The importance of agency discretion in administrative law reveals the limited utility, in this context, of a proposal offered by Professor David Schoenbrod. He would replace the equitable balancing of *Romero-Barcelo* with a guideline that he views as less incoherent. He proposes that, in bestowing or withholding injunctive relief, a court should never aim to give the plaintiff more than his or her rightful position; however, it may grant less than the rightful position if the alternative relief is consistent with the goals of the statute and is warranted by circumstances that were not reflected in the formulation of the underlying rule. Schoenbrod, *supra* note 201, at 647. "[R]ightful position" means "the position that the plaintiff would have had but for the wrong." *Id.* at 628. Schoenbrod's rule of thumb may be workable where the plaintiff has been deprived of a categorical statutory right. In a typical administrative law case, however, in which the violation involves incorrect procedure or inadequate reasoning, a court would have considerable difficulty using the plaintiff's "rightful position" as a reference point. This would be true not simply because of possible vagueness in the underlying law, but also, and more fundamentally, because only the agency would have authority to decide what "position" the plaintiff should occupy. *See infra* Part IV.B. It would hardly be appropriate for the court to define the plaintiff's "rightful position" as reinstatement of the state of affairs that existed prior to the agency's action. Such a restoration of the status quo ante might well retard, rather than promote, the objectives of the underlying regulatory scheme.

that the scope of equitable discretion depends on congressional intent, but he also recognizes that legislative intent on this point is often unclear.[239] He then sets forth three reasons why, in the particular context of modern environmental legislation, courts should resolve these close cases by applying a presumption *against* the exercise of equitable discretion. First, according to Farber, equitable discretion is "superfluous" in most such contexts, because "modern environmental statutes . . . contain elaborate mechanisms for taking cost and hardship into account while providing considerable discretion to administrative agencies."[240] Second, "many environmental cases . . . involve value judgments that are inherently political in nature and that should be made by a politically accountable entity."[241] Third, Congress has often proved willing to provide its own remedies for overly stringent statutory requirements in environmental regulation. Thus, "[t]he availability of legislative relief reduces the need for judicial assistance."[242]

None of Farber's three policy arguments supports a similar presumption against equitable discretion when the statutory scheme that the courts are implementing is the APA. First, the judicial review provisions of the APA[243] are written in broad terms, not detailed ones. They provide a framework for consideration of matters such as reviewability, standing, finality, and the scope of judicial review, but most of the conceptual foundations of each of these topics have been defined through judicial case law. Second, remand without vacation actually enhances the leeway available to political actors. It leaves the defendant agency—a politically accountable entity—free to determine for itself how to react in the short run to the court's refusal to uphold the original administrative action on the merits. Third, and derivatively from the second point, remand without vacation may actually augment congressional influence. In a typical APA case, the likelihood that the legislature will reinstate a given rule or adjudicative order that a court has vacated is usually remote.[244] To

239. Farber, *supra* note 208, at 542; *see also* Schoenbrod, *supra* note 201, at 632–33 (arguing that courts need "trans-substantive" principles in this area, because legislative intent is usually inconclusive).

240. Farber, *supra* note 208, at 542.

241. *Id.* at 542–43.

242. *Id.* at 543.

243. 5 U.S.C §§ 701–706 (2000).

244. This argument may seem directly contrary to Farber's analysis. Recall, however, that he offered his observation in the specific context of environmental programs, in which

override a court order, Congress needs to pass a statute, a task that for familiar Madisonian reasons is not easy to accomplish. If, however, a court has utilized remand without vacation and thereby given the agency the freedom to decide on its next move, interested members of Congress can readily resort to their usual methods of informal persuasion (and pressure) to influence the agency's choice.

An additional, and compelling, justification for circumspection in the APA context is that a court's use of the section 706 "set aside" remedy—in effect, if not in form, an "injunction" rectifying the APA violation—will often work against the thrust of the substantive statute. A judicial decree that vacates an inadequately reasoned antipollution regulation, for example, vindicates the APA policy against arbitrary decisionmaking, but may also weaken the government's environmental program. In these circumstances, then, congressionally endorsed values typically press in more than one direction.[245] A system that retains some play in the joints has the virtue of allowing the reviewing court to take account of the objectives of each statute involved. To that extent, at least, a principle of flexibility looks more attractive than a bright-line principle that requires all violations to be "set aside" forthwith.

Ultimately, I have no quarrel with the admonition by Farber and others that courts should remain cognizant of whatever limitations the underlying legislation, fairly interpreted, may place on their exercise of equitable discretion. The discussion in this Section highlights the prominent role that equitable discretion has played over the years in the case law on remedies for violations of regulatory statutes. I also have explained why certain objections to that discretion, as voiced in other contexts, have limited force in the context of the APA. Nevertheless, commentators who fear that this doctrine opens the door to excessive judicial discretion raise a legitimate issue. I will discuss those concerns more fully in the next Part.

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congressional oversight tends to be exceptionally intense. *See* Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA:* Quis Custodiet Ipsos Custodes *(Who Shall Watch the Watchers Themselves)?*, 54 LAW & CONTEMP. PROBS. 205, 206 (Autumn 1991). One should hesitate to extrapolate from experience in that subject area to other contexts.

245. The Court took account of a similar tension in *Gambell*. *See supra* note 236.

IV. POTENTIAL OBJECTIONS TO REMAND WITHOUT VACATION

My argument to this point has been that remand without vacation, though arguably foreclosed by the language of section 706 of the APA, can be validated if that section is interpreted in light of the *Hecht v. Bowles* canon of statutory construction. As Part III showed, a prominent tradition of equitable remedial discretion supports the application of the canon in this situation.

However, the strength of the canon argument may also be its weakness. Just as I have relied heavily on background principles of our legal system to support my preferred reading of the APA, other analysts can readily appeal to other background principles as a reason *not* to apply the canon. Thus, I must come to grips with a variety of doctrinal and policy factors that may make some judges reluctant to adhere to the canon under these circumstances. Specifically, their reluctance might stem from (a) general reservations about equitable balancing; (b) a desire to prevent the courts from intruding upon the legitimate prerogatives of the executive branch; or (c) concern for maintaining the rule of law and providing sufficient redress to litigants, namely citizens who have won their appeal on the merits but might be denied effective relief. This Part addresses these potential reservations about remand without vacation. In doing so, I will again need to take a wide-ranging look at the courts' remedial discretion, this time with greater attention to its limits.

A. The Formalist Challenge

Part III showed that pragmatism and flexibility have been recurrent and durable themes in the jurisprudence of administrative law remedies. Viewed in isolation, the doctrines surveyed in that Part would lead one to assume that remand without vacation, with all its practical advantages, would elicit significant support from the Supreme Court. The overall jurisprudential picture is, however, more mixed. For it is also true that the Court has recently adopted distinctly inflexible doctrinal stances in a few other contexts that seem, on their facts, closely related to remand without vacation. I will highlight two such lines of decisions in this Section. Both, as it happens, have emerged in the context of retroactivity.[246] At first

246. For broader treatments of retroactivity, see DANIEL E. TROY, RETROACTIVE LEGISLATION (1998); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1056 (1997); Nelson Lund, *Retroactivity, Institutional Incentives, and the*

glance, to be sure, neither seems to be rooted primarily in the law of remedies. As the Justices have been well aware, however, the principles stemming from both lines of cases operate, in effect, as limitations on the exercise of remedial discretion.

Particularly evident in these cases has been a movement away from the kind of case-by-case balancing that has historically been associated with equitable relief. These developments suggest that the Court, or at least some Justices, might have similar doubts about the highly discretionary device of remand without vacation. In fact, a peek at the Court's private papers reveals the actual existence of such doubts.[247]

Seen in this light, the question of the lawfulness of remand without vacation exemplifies what academics have often described as the tension between "rules" and "standards"[248]—or, to use the terminology I prefer, between formalism and pragmatism.[249] The contrast between these two styles of decisionmaking provides a helpful way of thinking about much of the Supreme Court's recent jurisprudence, as even commentators writing in the mainstream press have remarked.[250] Justice Scalia is often identified as a leading exponent of the "formalist" side of the debate,[251] and Justices

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Politics of Civil Rights, 1995 PUB. INT. L. REV. 87; Russell L. Weaver, *Retroactive Regulatory Interpretations: An Analysis of Judicial Responses*, 61 NOTRE DAME L. REV. 167 (1986).

247. *See infra* notes 271–76 and accompanying text.

248. A leading article by Dean Sullivan has popularized this terminology. *See* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

249. I do not favor the "rules"-"standards" terminology in the present context, because it tends to beg the question of whether courts should at the very least be expected to apply a well-defined analytical framework—a "standard"—as they make decisions about remand without vacation. Indeed, Dean Sullivan and others recognize that the terms "rules" and "standards" actually represent only two points on a continuum of possible approaches that embody varying degrees of open-endedness. *See* Sullivan, *supra* note 248, at 58 n.231; Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 959–68 (1995). In fact, however, the D.C. Circuit seems to be well on the way to developing a coherent standard that it can successfully apply to most of these situations. *See infra* Part V.

250. *See* Walter Dellinger, *The Breakfast Table*, SLATE, June 24, 2002, *at* http://slate.msn.com/id/2067003/entry/2067324/ (describing Apprendi v. New Jersey, 530 U.S. 466 (2000), as reflecting a split between the Court's "Legalists" of the left and right, on the one hand, and its "Pragmatists," on the other) (on file with the *Duke Law Journal*); Linda Greenhouse, *The Competing Visions of the Role of the Court*, N.Y. TIMES, July 7, 2002, § 4, at 3 (explaining the Court's internal "debate over text versus context," and comparing it with Sullivan's typology).

251. Sullivan, *supra* note 248, at 65; *see* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989) (urging that appellate judges apply "the law of *rules*" whenever possible); Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 GEO. WASH. L. REV. 991, 999–1020 (1994) (reviewing Justice Scalia's formalist writings and opinions in detail).

Stevens[252] and Breyer[253] as defenders of pragmatism and flexibility. All of these theoretical constructs could undoubtedly be framed with a great deal more precision than I have displayed here.[254] For some purposes, for example, a rule-based approach could and should be distinguished from a "formalist" approach. The relatively simple categories of analysis that I have just set forth should, however, prove sufficient for the limited purposes to which I will put them in the following discussion.

At a high level of generality, much can be said on both sides of the rules-standards debate. One camp can argue, for example, that rules tend to offer consistency and predictability of application, ease of administration, and protection against arbitrary or subjective decisionmaking by unelected judges.[255] The opposing camp can respond by saying, among other things, that flexible standards allow decisionmakers to avoid the over- or underinclusiveness of rigid rules,[256] as well as to adapt to changing circumstances over time.[257] Of course, one can favor rules to govern some legal problems and standards to govern others.[258] I do not prefer the latter over the former in all situations.[259] I will maintain, however, that in the particular case of remand without vacation, the courts should opt for

252. *See, e.g.*, Sullivan, *supra* note 248, at 88–90.

253. *See* Greenhouse, *supra* note 250 (reporting Dean Sullivan's view that Justice Breyer is now the "quintessential justice of standards"); *see also* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 249, 269–71 (2002) (asserting that his own approach to constitutional decisionmaking, which emphasizes "the real-world consequences of a particular interpretive decision," is no more subjective than the "more literal approach" favored by other judges).

254. *See generally* Symposium, *Formalism Revisited*, 66 U. CHI. L. REV. 527 (1999).

255. *See* Sullivan, *supra* note 248, at 62–66; Sunstein, *supra* note 249, at 969–77.

256. Sunstein, *supra* note 249, at 992–93.

257. *See* Sullivan, *supra* note 248, at 66; Sunstein, *supra* note 249, at 993–94.

258. Laycock, *supra* note 198, at 73–74; Sunstein, *supra* note 249, at 1012–16.

259. For example, I agree with Professor Merrill's contention that predictable, easy-to-apply principles should govern the courts' decision, in a given case, as to the proper scope of review of a statutory interpretation rendered by an administrative agency. Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 819–26 (2002). Indeed, I would simplify the choice even further than Merrill would, because I believe (as does Justice Scalia) that the distinctions the Court has recently set forth in this area, with Merrill's support, should in most circumstances not be drawn at all. *See* Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771 (2002). *See also* Devlin v. Scardelleti, 536 U.S. 1 (2002). In *Devlin*, the Court abandoned the bright-line rule that a class member may not appeal from a settlement without first intervening in the class action. *Id*. at 14. To me, Justice Scalia's protest against the majority's vague alternative approach is quite persuasive. *See id.* at 18–23 (Scalia, J., dissenting) (denouncing the Court's "exponential increase in indeterminacy").

flexibility. Accordingly, this Part concludes with a discussion of why, in this context, the allure of recent thrusts toward formalism—like the allure of a literal reading of section 706—should be resisted.

1. *The Decline of Retroactive Rulemaking.* When a court uses remand without vacation to permit an invalid agency rule to affect legal rights before its errors have been cured, its choice is comparable in some respects to permitting a rule to affect legal rights retroactively. The Supreme Court strongly discouraged the latter practice in *Bowen v. Georgetown University Hospital*.[260] In *Georgetown*, the Department of Health and Human Services (HHS) adopted a rule in 1981 that revised the formula for calculating its reimbursements to hospitals for the services they rendered to Medicare beneficiaries. A group of District of Columbia hospitals, including Georgetown, challenged the rule in a district court, which invalidated the rule in 1983 because it had been adopted without notice and comment procedure. HHS then readopted the rule in 1984, using proper procedures. The 1984 rule was retroactive, in that it purported to allow HHS to recoup from the hospitals the amounts that the agency would have saved in 1981 and 1982 if the initial rule had been validly in force during that period. As Justice Kennedy later noted in his opinion for the Court, "the net result was as if the original rule had never been set aside."[261]

Under the 1984 rule, the Washington hospitals stood to lose more than $2 million in reimbursements for services they had rendered in 1981 and 1982. They again brought suit. The Supreme Court held that the retroactive aspect of the 1984 rule was invalid. Justice Kennedy wrote: "Retroactivity is not favored in the law. Thus, . . . a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."[262] The Medicare Act, however, did not authorize retroactive rulemaking.

Why did the Court adopt this canon disfavoring retroactivity? Its opinion provided no enlightenment. One could assume that one of its

260. 488 U.S. 204 (1988).

261. *Id*. at 207.

262. *Id.* at 208. In a concurring opinion, Justice Scalia read the APA to require a similar result, i.e., that a rule could not be retroactive unless Congress had specifically authorized such an effect. *Id.* at 216–25 (Scalia, J., concurring).

reasons was the basic unfairness of imposing a detriment on a regulated person for conduct that has already been completed. These concerns about inadequate notice and unfair surprise, which have strong due process overtones, presumably also contributed to Justice Kennedy's further declaration that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[263] The Court reaffirmed this latter canon in a detailed opinion six years later in *Landgraf v. USI Film Products*.[264] However, the due process theme does not seem to have been the only factor at work in *Georgetown*. The Court also appears to have been motivated by a more abstract concern about orderly process and the rule of law.

This component of the Court's thinking is discernible in its reaction to the Secretary's argument that the Court should tolerate the regulation in the case at bar because it was a "curative" rule, designed to repair the defects in an earlier rule that had been invalidated. Such a rule, the government argued, would often promote "congressional intent and important substantive goals," and in any event would not defeat substantial reliance interests, because the original, invalidated rule would have provided at least some notice to regulated persons.[265] But the Court rejected this plea, declaring that the Medicare statute denied the Secretary the authority he sought.[266] Justice Scalia, in concurrence, was even more caustic on this point:

> [E]ven if I felt free to construct my own model of desirable administrative procedure, I would assuredly not sanction "curative" retroactivity. I fully agree with the District of Columbia Circuit [in the decision below] that acceptance of the Secretary's position would "make a mockery . . . of the APA," since "agencies would be free to violate the rulemaking requirements of the APA with impunity if, upon invalidation of a rule, they were free to 're-issue' that rule on a retroactive basis."[267]

As one measure of how far the Court in *Georgetown* seems to have drifted away, at least temporarily, from the flexible doctrines of

263. *Id.* at 208 (opinion of the Court).

264. 511 U.S. 244 (1994).

265. *Georgetown*, 488 U.S. at 215.

266. *Id*.

267. *Id.* at 225 (Scalia, J., concurring) (quoting Georgetown Univ. Hosp. v. Bowen, 821 F.2d 750, 758 (D.C. Cir. 1987)).

remedial discretion that it has embraced in many other corners of the law, consider the contrast between the Court's decision in *Georgetown* and the district court's decision in the same case. The district court had invalidated the retroactive Medicare reimbursement regulation using an equitable balancing test—the same test that the D.C. Circuit uses to evaluate the retroactivity of administrative agencies' adjudicative precedents.[268] The Court obviously was aware of that potential basis for resolving the case, but its rationale was conspicuously different.[269]

Now suppose the district court had held in the 1983 appeal that the original rule had to be sent back to HHS for notice and comment proceedings, but that the 1981 rule could remain in effect during those proceedings. The pointed language in the Court's statement of facts would again be true: "the net result [would be] as if the original rule had never been set aside." Indeed, that would be precisely the effect, with no "as if" about it. Applying the logic of Justice Scalia's concurrence, one might argue that if "curative" rulemaking makes a "mockery" of the APA, remand without vacation does the same—for an agency should not be able to do *directly* what *Georgetown* says it may not do *indirectly*. An agency would surely not need to make a *subsequent* (curative) rule retroactive if it could simply continue to regulate under the old one during the remand proceedings. In other words, if "retroactivity is not favored in the law," one can argue with at least some force that an agency should not normally be able to

268. *See id.* at 207–08 (opinion of the Court) (noting the district court's reliance on *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972)). Justice Scalia indicated that courts should employ a similar test to determine whether a rule that has "secondary retroactivity" (i.e., that applies only to future transactions but does so in a way that alters the practical consequences of past private choices) is arbitrary and capricious. *Id.* at 219–20 (Scalia, J., concurring). For post-*Retail Union* developments concerning the balancing test applied to retroactive agency adjudication, see, e.g., *Consolidated Edison Co. v. FERC*, 315 F.3d 316, 323–24 (D.C. Cir. 2003); *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081–86 (D.C. Cir. 1988) (en banc).

269. *See also* Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994). *Rivers*, a companion case to *Landgraf*, rejected the idea that the presumption against retroactivity lawmaking is suspended if the enactment "restores" what was generally believed to be the law when the parties acted. *Id.* at 310–11. (The statute in *Rivers* was "restorative" in the sense that it reinstated a rule of law that the Court had recently and unexpectedly abandoned. *Id.*) Like the Court's resistance to "curative" rulemaking in *Georgetown*, *Rivers* seems to confirm that the Court's reservations about retroactivity do not revolve entirely around the objective of avoiding unfair surprise to individuals.

impose monetary or other liability with respect to a time period during which it had no *valid* rule on the books.[270]

As a matter of fact, there is direct evidence that at least some of the Justices were well aware that their ruling could affect the use of remand without vacation, and they wanted to avoid encouraging it. That evidence comes from the Supreme Court's internal working papers on *Georgetown*, some of which are now in the public domain.[271] In a first draft of the majority opinion, Justice Kennedy proposed dicta that would have *endorsed*, in principle, the government's argument in support of curative rulemaking—although the draft went on to conclude that such a remedy was unwarranted in the particular circumstances of that case.[272] His draft said that "[w]here the exigencies of the case or the importance of the policies served by a judicially invalidated regulation create a compelling need for retroactive correction, courts may exercise their equitable discretion to remand to the agency or to stay invalidation of the challenged regulation pending curative rulemaking."[273] Justice Scalia responded with a memo asking him to omit that language. He wrote:

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270. Whether *Georgetown* leads directly to a conclusion against remand without vacation was an incidental issue in *ICORE, Inc. v. FCC*, 985 F.2d 1075 (D.C. Cir. 1993). The FCC approved a schedule of rates in 1986 that reduced the amounts that local telephone companies could charge their customers for routing their calls to long-distance carriers. On review, the court of appeals remanded the rate decision, deeming it poorly reasoned, but did not vacate it. City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1171–72 (D.C. Cir. 1987). The rates thus remained in effect during the next several years, while the Commission revised its reasoning to meet the court's criticisms. Eventually, in 1991, the Commission readopted the same rates for long-term use. In a second appeal, the telephone companies argued that the implementation of the original rates during the 1986–91 period constituted retroactive rulemaking within the meaning of *Georgetown*. The court disagreed. It maintained that, although *Georgetown* would have prevented the agency from filling a regulatory "gap" retroactively, if the court had vacated the initial rates, the Supreme Court's opinion did not mean that the court had been obligated to create such a gap in the first place. *ICORE*, 985 F.2d at 1082.

On its own terms, the decision in *ICORE* seems clearly correct, because the court in the later case was simply following out the implications of the relief ordered in the earlier case. The petitioners were in effect asking the court to act as though the rate schedule *had* been vacated. At best, therefore, their challenge came too late. The larger issue, however, is whether the relief granted in the earlier appeal had been appropriate in the first place. The court did not really come to grips with the tensions between the remand without vacation case law and the potential underlying implications of the Supreme Court's decision.

271. These internal working papers on the *Georgetown* decision are available in the Justice Thurgood Marshall documents collection at the Library of Congress.

272. Justice Anthony Kennedy, Draft Op., Bowen v. Georgetown Univ. Hospital 11–12 (Nov. 22, 1988) (on file with the *Duke Law Journal*).

273. *Id.* at 11.

> The judicial review provision of the APA provides that "the reviewing court *shall* . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. §706(2)(A). *I think we would be buying grief to suggest that a court may exercise its equitable discretion to disregard this provision by leaving a regulation "not in accordance with law" in effect*, or by allowing a revised rule to be formulated and then applied as though it had been issued earlier. . . . [I]t is not wise for us to invite agencies to seek exercise of "equitable discretion" to let invalid rules stand.
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> . . . .
>
> I am confident that the dicta in [the draft majority opinion] will be seized upon by the government to urge "a compelling need for retroactive correction" in many cases where a regulation is invalidated. Perhaps some courts of appeals have in effect exercised such a power in the past, but we should not approve it—at least not without argument and careful consideration.[274]

Justices Stevens and Blackmun then also wrote brief memos to Kennedy, stating that they shared Scalia's concerns.[275] At that point, Kennedy deleted the disputed language, replacing it with a simple statement that the government's arguments need not be addressed because "[t]he case before us is resolved by the particular statutory scheme in question."[276]

Obviously, no one should equate the views that jurists express in private correspondence with the views that they express in published opinions. The former may be tentative and incompletely thought out; the latter are positions that they have formally agreed to live with. In this particular instance, Justice Scalia himself suggested in his memo that "argument and careful consideration" might change his mind. I am prepared to take his disclaimer at face value. Nevertheless, this correspondence provides extraordinarily clear confirmation of the intuition that members of the Court would be likely to entertain some

274. Letter from Justice Antonin Scalia to Justice Anthony Kennedy 1–2 (Nov. 28, 1988) (second emphasis added) (on file with the *Duke Law Journal*).

275. Letter from Justice Harry Blackmun to Justice Anthony Kennedy 1 (Nov. 30, 1988) (on file with the *Duke Law Journal*); letter from Justice John Paul Stevens to Justice Anthony Kennedy 1 (Nov. 29, 1988) (on file with the *Duke Law Journal*).

276. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 215 (1988).

doubts about remand without vacation. Proponents of the device would have to overcome those doubts.

2. *The Rise of Retroactivity in Judicial Decisions.* Another arena in which we can see a clash between formalist and pragmatic approaches in public law, with the former winning out over the latter, is a series of cases from the early 1990s in which the Supreme Court considered the circumstances in which it would give retroactive effect to a newly announced principle of constitutional law. In a way, these cases are even more revealing than *Georgetown*, even though they do not deal specifically with administrative law. In *Georgetown*, although the Court announced an important constraint on courts' and agencies' remedial flexibility, its terse opinion did not really spell out reasons for it. In contrast, the cases on retroactivity of judicial decisions contain extensive—indeed verbose—discussion of the comparative merits of formalist and pragmatic approaches to the problem at hand. Thus, the cases deserve close attention here. The cases are complex, however, so a somewhat extended explanation will be necessary.

At common law, courts normally gave full retroactive effect to new case law principles. That is, a court would apply a newly declared rule of law in all subsequent cases in which the rule was relevant, even if the events underlying those cases had predated the announcement of the new rule.[277] During a period of about two decades, however, roughly the 1970s and 1980s, the Court favored a different approach.[278] The leading case of *Chevron Oil Co. v. Huson*[279] prescribed a multifactor balancing test by which a court was to determine whether to apply a new precedent retroactively. That determination was to be made on the basis of whether the court had established a new principle of law, whether retrospective operation would further or retard the purposes of the rule, and whether retroactive application would produce substantial injustice.[280]

The circumstances of *Chevron Oil* itself illustrate the operation of the test. The substantive holding of the case was that personal

277. *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 94 (1993) (noting the traditional rule); Linkletter v. Walker, 381 U.S. 618, 622 (1965) ("At common law there was no authority for the proposition that judicial decisions made law only for the future.").

278. The preeminent contemporaneous article supporting this development was Roger J. Traynor, Quo Vadis, *Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533 (1977).

279. 404 U.S. 97 (1971).

280. *Id.* at 106–07.

injury suits filed by injured workers under the Outer Continental Shelf Lands Act were governed by state statutes of limitations—not by a federal doctrine of laches, as had previously been thought. The Court decided, however, that this holding should apply only prospectively. Thus, although an application of Louisiana's one-year statute of limitations would have rendered Mr. Huson's suit untimely, the Court allowed him to proceed, because the new rule had been unforeseeable, would defeat the remedial purpose of the Act (i.e., to aid injured workers by allowing them to use familiar state-law remedies), and would be inequitable by depriving him of a day in court to redress a serious injury.[281] In short, the *Chevron Oil* test roughly resembled a traditional balancing-of-equities approach.

Chevron Oil fell into disfavor in the 1990s in a series of cases involving state taxes that were held to violate the dormant Commerce Clause. The first modification of the balancing test occurred in *James B. Beam Distilling Co. v. Georgia*.[282] That case involved a challenge to Georgia's practice of taxing liquor imported from out of state at a higher rate than liquor produced in Georgia. For many years, disparities of this kind were considered permissible because of the states' reserved powers under the Twenty-First Amendment.[283] In 1984, however, the Court held in a case from Hawaii, *Bacchus Imports, Ltd. v. Dias*,[284] that a tax like Georgia's discriminated against interstate commerce and was invalid. In *Beam*, the question was whether this new constitutional ruling should apply to taxes Georgia had collected prior to *Bacchus*. Writing for three Justices, Justice O'Connor argued that it should not. She relied squarely on *Chevron Oil* reasoning: Georgia authorities had relied in good faith on pre-*Bacchus* case law, and the state would suffer hardship if it were forced

281. *Id.* at 107–08.

282. 501 U.S. 529 (1991). In the interest of simplifying this account, I will forego discussion *of American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990), a slightly earlier case in which the Justices engaged in lengthy debate over the same issues as in *Beam*, but reached no definitive result. *See* Charles Rothfeld, *The Cost of Turning Back the Clock*, THE RECORDER, Oct. 2, 1992, at 8, *available at* LEXIS, News Library, Recrdr File (offering an incisive and pungent discussion of *American Trucking* and *Beam*). Also in the interest of simplification, I will omit discussion of a series of criminal cases in which the Court followed a path similar to its treatment of civil cases. *Compare* Linkletter v. Walker, 381 U.S. at 629 (applying a test resembling that of *Chevron Oil*), *with* Griffith v. Kentucky, 479 U.S. 314, 322–23 (1987) (rejecting the *Linkletter* approach).

283. *See Beam*, 501 U.S. at 554–56 (O'Connor, J., dissenting) (summarizing the case law).

284. 468 U.S. 263 (1984).

to refund all of the incorrectly collected money.[285] A decision requiring states to comply with *Bacchus* in the future would suffice.[286]

But that was a dissenting opinion, and a majority of Justices in *Beam* saw the matter differently. For Justice Souter, joined by Justice Stevens, the dispositive consideration was that the state was advocating "selective prospectivity."[287] The Court had already applied the new Commerce Clause rule to one litigant, namely the taxpayer in *Bacchus*. Thus, failure to apply the same rule to Beam would breach "the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally."[288] In short, Souter's position was that "it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so."[289] He went on to emphasize the difference between his approach and a balancing-of-equities approach. His position was based on "the nature of precedent, as a necessary component of any system that aspires to fairness and equality," regardless of whether the parties had "actually relied on the old rule and how they would suffer from retroactive application of the new."[290]

The Souter position was technically reconcilable with *Chevron Oil*, because, in Justice Souter's jargon, the earlier case had involved "pure" rather than "selective" prospectivity.[291] That is, the Court adopted a prospective-only holding without having yet applied the new rule to anyone, including Mr. Huson. However, three concurring Justices in *Beam*—Blackmun, Marshall, and Scalia—declared that they would have preferred to abandon *Chevron Oil* entirely.[292] Regardless of whether the Court in an earlier case had given the successful challenger the benefit of the new rule, they argued, "the integrity of judicial review . . . does not justify applying principles determined to be wrong to litigants who are in or may still come to court."[293]

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285. *Beam*, 501 U.S. at 557–59 (O'Connor, J., dissenting).
286. *Id.* at 550–51.
287. *See id.* at 537–41 (plurality opinion) (Souter, J.).
288. *See id.* at 537.
289. *Id.* at 540.
290. *Id.* at 543.
291. *See id.* at 536–37 (explaining this terminology).
292. *See id.* at 547–48 (Blackmun, J., concurring).
293. *Id*.

The next step in the story came two years later in *Harper v. Virginia Department of Taxation*,[294] in which a majority of the Court, speaking through Justice Thomas, adopted the prohibition on selective prospectivity that Justice Souter had espoused.[295] At the same time, the Court's opinion avoided disavowing the broader position advocated by the *Beam* concurrences. If anything, the opinion suggested that the Court might well endorse that position in a case that squarely presented that issue.[296]

So far, these cases had not dealt directly with remedial discretion. Indeed, *Beam* and *Harper* had specifically reserved the possibility that states might be able to use remedial principles to ameliorate the strict teachings of those cases.[297] Soon afterwards, however, in *Reynoldsville Casket Co. v. Hyde*,[298] the Court threw cold water on this possibility. As in *Chevron Oil*, the question in *Hyde* was whether a personal injury action was time-barred. The Supreme Court had recently held that the tolling provision in Ohio's limitations statute was unconstitutional under the Commerce Clause, and relief had been granted on that basis. Nevertheless, the state supreme court decided to give the plaintiff the benefit of the tolling provision. In the Supreme Court, the plaintiff defended this ruling as a valid exercise of the state court's discretion to take her reliance interests into account in fashioning an equitable remedy for the state's constitutional violation. Writing for the Supreme Court, Justice Breyer responded that "this type of justification—often present when prior law is overruled—is the very sort that this Court, in *Harper*, found insufficient to deny retroactive application of a new legal rule."[299] Thus, "[i]f *Harper* has anything more than symbolic significance,"

294. 509 U.S. 86 (1993).

295. *See id.* at 97.

296. *See id.* at 115 (O'Connor, J., dissenting) (discerning this implication in the majority opinion). A minority of Justices in *Harper* continued to support *Chevron Oil*, although they divided as to how to apply it to the facts of the case at bar. *Compare id.* at 113–31 (O'Connor, J., joined by Rehnquist, C.J., dissenting) (arguing that *Chevron Oil* required nonretroactivity), *with id.* at 110–12 (Kennedy, J., joined by White, J., concurring in part and concurring in the judgment) (arguing that *Chevron Oil* permitted retroactive imposition of Virginia's tax, because the unconstitutionality of the tax had been predictable).

297. *See Beam*, 501 U.S. at 544 (Souter, J.) (plurality opinion) *and Harper*, 509 U.S. at 100–02. *See also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1764–66 (1991) (arguing that problems resulting from changes in legal doctrine are best addressed through the law of remedies).

298. 514 U.S. 749 (1995).

299. *Id.* at 753.

plaintiff could not avoid retroactive application of the Commerce Clause holding merely by characterizing the case as being about "remedy" rather than "nonretroactivity."[300] As Justice Breyer went on to explain, a court must apply constitutional holdings retroactively, pursuant to *Harper*, except in a few limited circumstances, such as where a court finds an "alternative way of curing the constitutional violation," or where further litigation is foreclosed by a final court judgment.[301]

Now, what does the Court's new jurisprudence on retroactivity of judicial holdings have to say about the permissibility of remand without vacation? At first glance, not much. Indeed, on a mundane level, the two doctrines can coexist readily enough. Even assuming that *Beam*, *Harper*, and *Hyde* apply to judicial review of agency action,[302] they have nothing to say, at least directly, about whether a court must, in the first instance, vacate an administrative decision that it finds to be inadequately supported. They merely prescribe equal treatment among litigants. For example, if a court *remands* an administrative decision at the behest of one litigant, it must do the same for any other similarly situated litigant; and if the court *vacates* the action as to one petitioner, it must be prepared to do the same when another petitioner brings an indistinguishable case to the court. These principles of equal treatment are already being honored in

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300. *Id.* at 754.

301. *Id.* at 754–59.

302. The D.C. Circuit has held that the retroactivity principles of *Beam* and its progeny will generally control the scope of judicial decisions invalidating agency action. Nat'l Fuel Gas Supply Corp. v. FERC, 59 F.3d 1281, 1288–89 (D.C. Cir. 1995). The court noted that insofar as the Supreme Court cases articulate the necessary consequences of an Article III court's judgment, both agencies and courts must accept those consequences. *Id*.

In dictum, however, the court pointed out a potentially important loophole in this rule. In *Hyde*, the Supreme Court had mentioned that a constitutional decision need not be applied retroactively if the state can find "an alternative way of curing" the problem with the law being challenged. 514 U.S. at 759. For example, if a state tax discriminates against out-of-state residents, the state can avoid having to make retroactive refunds to out-of-staters if it levies a commensurately higher tax on local residents. *Id.* at 755–56. By extension, the D.C. Circuit said, "an administrative agency may be able to cure the problem that a court has found in its order—such as inadequate support in the record—and repromulgate the order with retroactive effect." *Nat'l Fuel*, 59 F.3d at 1290; *cf.* FEC v. Legi-Tech, Inc., 75 F.3d 704, 707–09 (D.C. Cir. 1996) (allowing the FEC to proceed with a case that it had brought while unconstitutionally composed, because the Commission had since been reorganized in a constitutional manner and had ratified its earlier complaint). The *National Fuel* reasoning suggests that *Beam* should prove no threat to the common situation in which a reviewing court remands an order to an agency, and the agency then adheres to its previous action, using improved reasoning that responds to the court's concerns.

regulatory contexts[303] (although their applicability to the retroactivity of *agency* decisions is less clear).[304]

Even if the Supreme Court were to extend its "retroactivity of judicial holdings" case law to its logical terminus by overruling *Chevron Oil* completely, appellate practice in regulatory contexts might not be affected very profoundly, because prospective-only

303. *See* Jones Stevedoring Co. v. Dir., Office of Workers Comp. Programs, 133 F.3d 683, 688–90 (9th Cir. 1997) (ruling that Supreme Court's interpretation of notice requirement applied retroactively to worker compensation claim, although in this instance the lack of notice was excused as nonprejudicial); *Nat'l Fuel*, 59 F.3d at 1289–90 (stating that court's invalidation of "contract demand reduction" program in one case had the effect of retroactively preventing Commission from granting reduction requests in parallel case); Raines v. Shalala, 44 F.3d 1355, 1363–64 (7th Cir. 1995) (applying Supreme Court precedent retroactively so as to disallow award of attorney fees to disability benefits claimant).

304. The D.C. Circuit has several times declined to decide whether the *Beam* doctrine circumscribes an agency's freedom to make one of its *own* adjudicative decisions prospective only. *See, e.g.*, Power Co. of Am. v. FERC, 245 F.3d 839, 847 (D.C. Cir. 2001); District Lodge 64, Int'l Ass'n of Machinists v. NLRB, 949 F.2d 441, 447 (D.C. Cir. 1991). It has noted in dicta that Justice Souter's contention that like-situated litigants should be treated equally has force in both judicial and administrative contexts. *See id.*; *Nat'l Fuel*, 59 F.3d at 1289.

On the other hand, some of the theoretical arguments invoked by judicial opponents of *Chevron Oil* seem inapplicable to agency adjudications. In *Beam*, Justice Scalia contended that prospective overruling is incompatible with the *Marbury* principle that federal judicial power is "the power 'to say what the law is.'" James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (quoting Marbury v. Madison, 5 U.S. (I Cranch) 137, 177 (1803)). Although he conceded that in a real sense judges do "make" law, he noted that "they make it *as judges make it*, which is to say *as though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to,* or what it will *tomorrow* be." *Id.* This sort of analysis has been searchingly criticized in its own context. *See* Fallon & Meltzer, *supra* note 297, at 1758–63 ("[I]n the vast run of cases the Court . . . recognizes no sharp line between lawmaking and law-applying."); Fisch, *supra* note 246, at 1078–82 (calling Scalia's analysis circular and out of step with modern legal developments). That debate aside, however, Justice Scalia's position seems a misfit in the context of agency adjudication. Unlike an Article III court, a typical administrative agency exercises quasi-legislative power and may overrule its past precedents without even purporting to rest on the premise that it is "finding" the law that had existed all along. *See District Lodge 64*, 949 F.2d at 447 (questioning the relevance of the concurring Justices' Article III argument to administrative adjudications); Laborers' Int'l Union v. Foster Wheeler Corp., 26 F.3d 375, 385–89 (3d Cir. 1994) (developing this distinction between courts and agencies at voluminous length).

In any event, the Supreme Court has indicated that agencies have at least some discretion to decide whether or not to apply their precedents retroactively. *See* NLRB v. Food Store Employees Union, Local 347, 417 U.S. 1, 10 n.10 (1974) (stating that courts should allow the Board "to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act"). Indeed, it would be odd if agencies were broadly *prohibited* from taking account of the reliance interests of citizens who have reasonably relied on agency precedents that were later overruled. A well-developed body of precedent establishes that agencies' *failure* to accommodate such interests can be an abuse of discretion. *See supra* note 268 (citing to case law).

judicial decisions have not been very common in administrative cases anyway.[305]

On a more abstract level, however, the *Beam* line of cases carries cautionary implications that supporters of remand without vacation should not overlook. Their significance for present purposes lies in the willingness of so many Justices to jettison *Chevron Oil* and the wide-open interest balancing it exemplifies. Abstractions and formal reasoning won out over pragmatic problem solving.[306] These Justices would not permit a court to exercise discretion to soften the blow of a new constitutional doctrine, at least in most circumstances, because such discretion would impinge upon the asserted imperatives of an orderly legal system, or the "integrity of judicial review."

It is hardly difficult to imagine these same Justices repudiating remand without vacation. They might argue that the practice of vacating unlawful administrative actions is part of the traditional and normal mode of judicial review and cannot be overcome by an appeal to the practical benefits of a contrary course. To state the point differently, they might well conclude that if a court is abdicating its judicial function when it declines, on equitable grounds, to require *retroactive* compliance with its view of the law, then a refusal on equitable grounds to require *any* compliance with their view of the law for some ill-defined period of time is an even graver abdication.

Perhaps the most striking line of reasoning contributing to the attack on *Chevron Oil* was the argument of some Justices that the flexibility afforded by that case is a dangerous temptation that should be resisted. For example, Justice Blackmun wrote approvingly in *Beam* that, "[b]ecause it forces us to consider the disruption that our new decisional rules cause, retroactivity combines with *stare decisis* to prevent us from altering the law each time the opportunity presents

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305. *But see* Funk, *supra* note 46, at 15–16 (lamenting the ability of regulated entities to escape sanctions for violating a rule that is later held to have been promulgated improperly: under *Harper* the rule cannot be invalidated only for the future, at least if the first challenger receives any relief, and under *Georgetown* the rule cannot later be reinstated retroactively).

306. One might at first suppose that *Hyde*, with its careful delineation of exceptions to the basic rule of *Beam* and *Harper*, was a counter-current, a welcome breath of pragmatism into this area of the law. That is by no means clear. *Hyde* took the earlier cases for granted and derived its "exceptions" by simply probing the limits of the logic underlying those cases' formal reasoning. *See* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 752–55 (1995). Moreover, at its core, *Hyde* relied squarely on the objective of not allowing *Harper* to become merely "symbolic." *See id.* at 754. To decide whether an emasculation of *Harper* would be good or bad, however, one would need an account of what policies it serves, and the *Hyde* opinion did not supply one.

itself."[307] In a similar vein, Justice Scalia acknowledged that retroactivity poses practical difficulties, but he called them "one of the understood checks upon judicial lawmaking; to eliminate them is to render courts substantially more free to 'make new law,' and thus to alter in a fundamental way the assigned balance of responsibility and power among the three branches."[308] These passages may represent the ultimate measure of the distance that some Justices have traveled from the judicial self-confidence manifested in *Chevron Oil*. In short, although the Court remains divided, the views of one bloc are a clear illustration of how the Court will sometimes override pragmatism in favor of a "principle" about the judicial system. The attitude manifested in their opinions presents a challenge that proponents of remand without vacation would have to overcome.

3. *Implications for Remand Without Vacation.* The retroactivity decisions discussed in the two preceding Sections are noteworthy because, in each instance, the Supreme Court eschewed unstructured interest-balancing in favor of a simple, conventional principle of adjudication. As such, the two lines of decisions appear to reflect a mood of skepticism among at least some of the Justices about the value of judicial discretion in general, and remedial discretion in particular. That mood, in turn, suggests the possibility that the Court would also look unfavorably on a highly discretionary device such as remand without vacation.

One has to acknowledge that the skeptics have something of a point. Ours is hardly an era of boundless confidence in the wisdom of federal judges. Caution, if not outright mistrust, is more the order of the day. Indeed, it may seem odd for this Article to put so much stock in judicial discretion at a time when memories of *Bush v. Gore*[309] are still fresh in many minds. After all, more than a few observers have argued that the Court's choice as to the remedy in that case—specifically, its unwillingness to allow remand proceedings in the

307. *Beam*, 501 U.S. at 548 (Blackmun, J., concurring in the judgment).

308. *Id.* at 549 (Scalia, J., concurring). In *Harper* he elaborated on this theme at length, tracing several decades' worth of commentary in which "[p]rospective decisionmaking [has been] known to foe and friend alike as a practical tool of judicial activism, born out of disregard for *stare decisis*." Harper v. Va. Dep't of Taxation, 509 U.S. 86, 105–09 (1993) (Scalia, J., concurring).

309. 531 U.S. 98 (2000).

Florida courts—was among the most troubling aspects of that supremely controversial decision.[310]

As I said at the beginning of this Part,[311] I do not prefer "standards" to "rules" in all contexts. The argument here is limited to the field of judicial remedies in administrative law. It is primarily inductive in nature. I have reviewed in Part III the substantial equity tradition in administrative law, explaining how, in analogous situations, the legal system has long accepted the risks of discretionary standards as an acceptable price to pay for flexibility. This track record, when combined with the practical advantages of remand without vacation,[312] suggests that this remedial option should also be welcomed despite the somewhat open-ended decisionmaking that it necessarily entails.[313]

In any event, revulsion against putatively excessive judicial discretion stands on relatively weak ground when, as with remand without vacation, the exercise of that discretion would, if anything, serve to *limit* judicial relief. One would expect the stereotypical "judicial activist" to be eager to set aside an administrative action that he or she has just found to be unlawful. In contrast, remand without vacation is at bottom a means of mitigating relief that, in the court's view, might otherwise be overbroad. In that sense, it is an expression of judicial humility. Thus, rhetoric about judicial self-restraint, which typically is deployed as a basis for resisting an expansion of the arsenal of equitable devices,[314] cuts the opposite way in this instance.

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310. Particularly noteworthy in this regard are the views of Professor McConnell, whom President Bush later appointed to be a judge on the Tenth Circuit. *See* Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, 68 U. CHI. L. REV. 657, 674–77 (2001) ("[T]he Court's 7-2 decision to reverse the Florida Supreme Court's decision was well founded. But the same cannot be said of the decision not to allow the lower court to attempt a recount under constitutionally appropriate standards."); *see also* Ward Farnsworth, *"To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness*, 86 MINN. L. REV. 227 (2001) (discussing the remedial issue); Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of* Bush v. Gore, 11 WM. & MARY BILL RTS. J. 343 (2002) (same).

311. *See supra* notes 255–59 and accompanying text.

312. *See supra* Part I.

313. *Cf.* Fallon & Meltzer, *supra* note 297, at 1789–90 n.316 (noting the "well-known hazards" of interest balancing in the context of constitutional remedies, including tendencies toward indeterminacy and undervaluation of constitutional rights, but finding these risks tolerable); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 589–609 (1983) (making a qualified case for flexibility in constitutional remedies context). For elaboration, see *infra* notes 368–74 and accompanying text.

314. *See supra* notes 98–102 and accompanying text (discussing Justice Thomas's reactions to institutional reform litigation under the Constitution).

To be sure, proponents of remand without vacation must still come to terms with the argument made by some of the Justices in *Beam* and *Harper*—that the consequences of judicial intervention *should* be painful, so that courts will do less intervening.[315] I frankly question whether many judges would find that argument persuasive, even in the context in which it was rendered.[316] Assuming that they would, however, the argument also seems to draw heavily on the premise that courts are too prone to rely on the Constitution in order to interfere with the choices made by the political branches.[317] I would be surprised to see a corresponding argument travel very far in the context of administrative law. Such an extension would presuppose a greater degree of dissatisfaction with the current regime of "hard look" judicial review than I believe can be found in the federal judiciary at the present time.[318] For example, Justice Scalia, the Court's most forceful proponent of adjudicative retroactivity as a brake on constitutional adventurism, is certainly no foe of vigorous judicial review of agency action.[319] In short, the argument that remand without vacation should be shunned in order to foster greater judicial deference to agencies seems unlikely to command wide support—and

315. *See supra* note 308 and accompanying text.

316. *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 546 (1991) (White, J., concurring) ("JUSTICE SCALIA, fearful of our ability and that of other judges to resist the temptation to overrule prior cases, would maximize the injury to the public interest when overruling occurs . . . ."); *cf.* Rothfeld, *supra* note 282, at 18 ("[I]t may be the clearest testimony to the peculiarity of Scalia's views here that he welcomes this sort of disruption."); *see also* Fallon & Meltzer, *supra* note 297, at 1802–04 (rebutting the claim that nonretroactivity of constitutional decisions violates Article III by "mak[ing] it too easy to cut free from precedent and change the law").

317. *See, e.g.*, Harper v. Va. Dep't of Taxation, 509 U.S. 86, 105 (1993) (Scalia, J., concurring) (calling prospective decisionmaking "the handmaid of judicial activism").

318. *See supra* note 36 and accompanying text.

319. For example, in a well-known lecture on the *Chevron* doctrine, Justice Scalia acknowledged that he is more prone than other Justices to find that a statute has a "clear" meaning, which an agency would be required to follow. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520–21. He also has authored much of the Court's recent case law overturning agency decisions. *See, e.g.*, NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 714–21 (2001) (rejecting the Board's position that nurses who proposed to form a bargaining unit were outside the exemption for "supervisors"); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 481–86 (2001) (invalidating the EPA's ozone implementation strategy); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 387–92 (1999) (invalidating an FCC rule that gave telecommunications carriers "blanket access" to incumbents' facilities); Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 372–80 (1998) (invalidating a bargaining order because the Board's finding that employer lacked a good faith reasonable doubt about union's majority status did not rest on substantial evidence and reasoned decisionmaking).

especially not from the private bar, which has heretofore been the source of much, or probably most, of the criticism of that remedial device.[320]

It seems, then, that remand without vacation should survive the charge that it entails broad judicial discretion. Other objections, however, have more to do with the *manner* in which courts will be able to use their discretion if the device remains available. Those objections will be examined in the next Sections of this Part.

B. Avoidance of "Administrative" Judgments

Another potential objection to remand without vacation would be that it arguably involves the courts in an exercise of administrative judgment and thereby exceeds the institutional competence of the judiciary. This possible objection, which could be loosely described as a separation of powers argument, brings into view some important principles that must be incorporated into this Article's overall portrait of judicial remedies in administrative law. In the end, however, those principles do not undermine the case for remand without vacation.

One version of the institutional competence critique is the argument of Judge Sentelle, dissenting in the recent D.C. Circuit case of *Milk Train, Inc. v. Veneman*.[321] Congress had appropriated funds to compensate dairy farmers "for economic losses incurred during 1999."[322] The Secretary's explanation for her implementing regulations suggested to the court that the agency had used some of the money to compensate farmers for 1998 losses, a goal that the statute did not permit. A divided court remanded the regulations but did not vacate them. The panel majority discerned a serious possibility that the Secretary could explain her use of the funds in a valid manner, or could choose an allocation method that would correct the problem. Moreover, as the majority noted, the money had already been spent, and it would be difficult if not impossible for the

320. *See supra* note 14 and accompanying text. This is not to say that proponents of greater deference will necessarily reach a different conclusion. For example, Professor Pierce, who finds much to criticize in the aggressiveness of contemporary judicial review, *see* Pierce, *Seven Ways*, *supra* note 13, at 68–69, is also an enthusiastic supporter of remand without vacation. *Id.* at 75–79. Apparently assuming (I think correctly) that judicial decisions invalidating agency rules will remain a frequent occurrence in any event, *see id.* at 94–95, Pierce urges courts to use remand without vacation to limit the damage that would otherwise result from those decisions. *Id.* at 78, 95.

321. 310 F.3d 747, 756–58 (D.C. Cir. 2002) (Sentelle, J., dissenting).

322. *Id.* at 749 (majority opinion).

Secretary to "unscramble the egg" and restore the status quo ante.[323] Judge Sentelle, however, argued in dissent that the court should have vacated the rules.[324] He relied in part on a literal reading of the words "set aside" in section 706 of the APA—echoing Judge Randolph's *Checkosky* argument.[325] He then added that, even if remand without vacation is lawful, it is "often, if not ordinarily, unwise," because it displaces what should be an administrative judgment:

> Any time that the agency has not adequately justified its decision, we do not know what the agency's decision would have been had it subjected the questions before it to the lawful administrative process. Therefore, when we hold that the conclusion heretofore improperly reached should remain in effect, we are substituting our decision of an appropriate resolution for that of the agency to whom the proposition was legislatively entrusted.[326]

Judge Sentelle's contention rested on a doctrinal foundation that, at its core, is not particularly controversial. It is undoubtedly true that some remedial options that might otherwise seem to fall within the courts' equitable discretion are off limits because they would usurp the prerogatives of the executive branch.[327] This proposition, and its implications for the validity of remand without vacation, are the subject of this Part.

1. *The Case Law.* I will begin with a description of some representative cases. For want of a better name, the operative principle might be called the *Pottsville* doctrine, after the leading case of *FCC v. Pottsville Broadcasting Co.*[328] There the court of appeals held that the Commission had erroneously denied Pottsville's application to construct a radio station. On remand, the Commission scheduled a hearing to compare the qualifications of Pottsville and two other broadcasters that had recently filed competing applications. The court of appeals issued a writ of mandamus to require the Commission to decide Pottsville's rights on the basis of the original

323. *Id.* at 755–56.

324. *Id.* at 757–58 (Sentelle, J., dissenting).

325. *See supra* Part II.A.

326. *Milk Train*, 310 F.3d at 758 (Sentelle, J., dissenting).

327. *See* Ford Motor Co. v. NLRB, 305 U.S. 364, 373 (1939) ("[W]hile the [reviewing] court must act within the bounds of the statute *and without intruding upon the administrative province*, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.") (emphasis added).

328. 309 U.S. 134 (1940).

record. At this point, the Supreme Court intervened and reversed. Writing for the Court, Justice Frankfurter explained that the court of appeals did have power to require the Commission to act upon a correct view of the law, as determined on the initial appeal, but it lacked power to give Pottsville priority in the licensing competition. Congress had given licensing authority to the Commission alone, and the initial judicial reversal did "not impliedly foreclose the administrative agency, after its error ha[d] been corrected, from enforcing the legislative policy committed to its charge."[329]

Subsequent cases have extended *Pottsville* in a manner that highlights its implications for the courts' limited remedial role in review of agency action. In *Federal Power Commission v. Idaho Power Co.*,[330] the court of appeals held that the Commission had included an improper condition in a power company's license. The court directed the Commission to modify the license by striking out the condition. The Supreme Court found that relief impermissible, declaring that the court of appeals should instead have allowed the Commission to decide on remand whether to drop the condition or to issue no license at all.[331] The Supreme Court explained that the court of appeals' statutory power "'to affirm, modify, or set aside' the order of the Commission 'in whole or in part'. . . . is not power to exercise an essentially administrative function."[332] Similarly, in *NLRB v. Food Store Employees Union, Local 347*,[333] the Court held that the court of appeals could not modify the Board order under review by awarding

329. *Id*. at 145. *But see* JAFFE, *supra* note 3, at 714, 718–19 (suggesting that the Court should have given reviewing courts greater leeway to protect private litigants by holding agencies to traditional "law of the case" notions). As Professor Jaffe notes, *id.* at 714 n.30, Congress later sought to counteract the narrow holding of *Pottsville* by directing the FCC to decide a remanded case on the basis of the original record. *See* 47 U.S.C. § 402(h) (2000). Subsequent decisions have not, however, applied § 402(h) very expansively. *See* Lamprecht v. FCC, 958 F.2d 382, 398–99 (D.C. Cir. 1992) (following *Pottsville* and ignoring § 402(h)); E. Carolinas Broad. Co. v. FCC, 762 F.2d 95, 98–104 (D.C. Cir. 1985) (concluding that the FCC had discretion to reopen the record despite § 402(h), although its failure to do so in the case at bar was not an abuse of discretion). For comprehensive analysis of circumstances in which a court may recall its mandate, so as to permit an agency to reopen its record after the court's judgment has become final, see *Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (D.C. Cir. 1971).

330. 344 U.S. 17 (1952).

331. *Id*. at 20.

332. *Id.* at 21 (quoting Federal Power Act § 313(b), as amended at 16 U.S.C. § 825*l*(b) (2000)). *See* Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14 (1942) (remarking that no court can "stay" the Commission's denial of a license and thereby authorize a broadcaster to go on the air).

333. 417 U.S. 1 (1974).

the union reimbursement of litigation expenses, as a recent Board precedent arguably indicated would be appropriate. Instead, the court had to give the Board an initial opportunity to decide whether to apply or distinguish the precedent.[334]

The constraints exemplified by *Pottsville* and its progeny seem to derive primarily from inferences that courts have drawn from the very existence of delegated authority. When Congress empowers an agency to implement a program, it presumably intends to reap the benefits of some institutional advantage that it thinks the agency in question possesses, such as administrators' capacity to develop specialized experience or expertise, or to stay in touch with the political process. This premise leads easily to the general proposition that courts should refrain from ordering "equitable relief" that would amount to an exercise of authority that Congress entrusted to the agency instead.[335]

The *Pottsville* opinion also hinted at a constitutional basis for its division of responsibilities between the judicial and executive branches.[336] Perhaps, therefore, one should see the case as an offshoot of the principle of separation of powers. That line of reasoning, however, has not flourished. To be sure, the Constitution probably does set outer limits on the kinds of "administrative" functions that Article III courts can be authorized to perform.[337] In the modern era, however, those limits have never been very prominent or confining.[338]

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334. *Id.* at 8–10.

335. One could also support this general proposition by citing cases in which the relief ordered by the administrative agency is a critical issue in the judicial review proceeding. *See, e.g.*, Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 898–906 (1984) (holding that the court of appeals improperly modified a Board remedy by requiring a minimum amount of back pay for each affected employee). I will not discuss cases of that kind here, because they would not normally be regarded as turning primarily on the law of *judicial* remedies. Everyday principles of review of administrative action for abuse of discretion—which of course mandate substantial deference to the agency—would provide the more relevant frame of reference.

336. FCC v. Pottsville Broad. Co., 309 U.S. 134, 141 (noting without elaboration that the issues in that case implicated "the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of 'judicial power' conferred by Congress under the Constitution").

337. *See* Morrison v. Olson, 487 U.S. 654, 677–85 (1988) (narrowly construing provisions that set forth supervisory functions to be exercised by a special judicial panel under the independent counsel statute, but also holding that the provisions, as construed, did not violate Article III); Ronald M. Levin, *Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith*, 1986 DUKE L.J. 258, 274 n.81 (discussing the rise and decline of early constitutional limits on supposedly excessive judicial review).

338. *Cf.* Sullivan v. Hudson, 490 U.S. 877 (1989). In *Sullivan*, the Court noted that the judicial review provisions of the Social Security disability benefits program "suggest a degree of

Thus, although constitutional considerations may well lurk in the background of the *Pottsville* doctrine, the principle can be better explained as a product of common law—or, if one prefers to trace it to positive law, as an elaboration of the abuse-of-discretion standard of the APA,[339] or perhaps of the agencies' respective enabling statutes.

Another way to understand *Pottsville* is to analyze it as a close relative of the well-known *Chenery* doctrine. According to the latter principle, a court normally may not uphold a discretionary agency action except on grounds that the agency itself has endorsed.[340] As the Court said in the *Chenery* case, "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment."[341] *Chenery* serves to ensure that statutory discretion will be exercised by senior administrative officials, rather than by agency staff or by courts; it also serves to prevent circumvention of process constraints that promote responsible decisionmaking at the agency level—such as requirements that policymaking be rigorous and open to public participation.[342] Although one usually thinks of the doctrine as a limitation on the circumstances in which an agency action can be *upheld*, one of its corollaries is that, as a general rule, a court also may not *reject* an agency action by making its own determinations on an

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direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the Administrative Procedure Act." *Id.* The courts' remand power in that context "'places the courts . . . virtually as coparticipants in the process, exercising ground-level discretion of the same order as that exercised by ALJs and the Appeals Council.'" *Id*. (quoting JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS 133 (1978)). Although the constitutionality of this statutory scheme was not at issue in *Hudson*, the Court's failure to evince any disapproval of the scheme seems significant.

339. *See* ATTORNEY GENERAL'S MANUAL, *supra* note 92, at 108 ("Obviously, the clause does not purport to empower a court to substitute its discretion for that of an administrative agency and thus exercise administrative duties. In fact, with respect to constitutional courts, it could not do so.").

340. *See Blackletter Statement*, *supra* note 115, at 43 ("[Courts] normally will allow an agency to defend its action only on the basis of reasons articulated prior to judicial review and will not supply their own rationale for discretionary agency conduct . . . .").

341. SEC v. Chenery Corp., 318 U.S. 80, 88 (1943).

342. Harold J. Krent, *Ancillary Issues Concerning Agency Explanations*, *in* ABA SECT. OF ADMIN. L. & REG. PRAC., A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES (John F. Duffy & Michael Herz eds., forthcoming 2004) (manuscript at 2–3), *available at* http://www.abanet.org/adminlaw/apa/judical.html (on file with the *Duke Law Journal*).

issue that lies within the agency's discretionary authority.[343] Rather, the court should remand the action to the agency, allow the agency to address the disputed issue first, and then consider the rationality of the agency's view in the event of a subsequent appeal.[344]

Actually, one could probably use a *Chenery* analysis to explain the results of any of the cases in the *Pottsville* line of authority. For present purposes, however, I will treat the two doctrines as separate, because in the *Pottsville* cases the Court has tended to focus on the lower court's *actions*, not its *reasons.* It has said that the court's actions, such as excluding an applicant from a licensing competition, or modifying the terms of an existing license, were choices that the judiciary was not qualified to make in the first place. The notion that the court made those choices for reasons that it was also not qualified to adopt did not enter into the discussion (although it could have). As the reader will see momentarily, this distinction between prohibited actions and prohibited reasons will prove helpful to my analysis. Nevertheless, the logical relationship between the two doctrines is apparent.[345]

I do not mean to give the impression that the case law permits no flexibility in the principles represented by *Pottsville* and *Chenery*. For example, some exceptions to the general rule of *Pottsville* were explored in a useful article by Judge Merrick Garland[346] (written prior to his elevation to the D.C. Circuit). In his article, Judge Garland compiled numerous examples of situations in which courts have imposed affirmative remedies instead of adhering to their traditional

343. *See Chenery*, 318 U.S. at 88 ("For purposes of affirming *no less than reversing* its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.") (emphasis added).

344. An agency has broad, though not unlimited, discretion to decide how to rehabilitate its case during remand proceedings (for example, whether to reopen the record for additional comments). *Compare* Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp., 423 U.S. 326, 332–34 (1976) (articulating a general rule of deference), *with* Action on Smoking and Health v. Civil Aeronautics Bd., 713 F.2d 793, 801 (D.C. Cir. 1983) (requiring the agency to solicit new public comments because of the staleness of the existing rulemaking record). Regarding the "stale record" problem, see generally Freedman, *supra* note 4.

345. Illustrative of the overlap are cases in which a reviewing court, after rejecting an agency's position on the merits, rules against the government on an additional discretionary issue that the agency had not reached. *Compare* S. Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs, 425 U.S. 800, 805–06 (1976) (relying on the *Pottsville* line of cases as a basis for criticizing this sort of judicial overreaching), *with* INS v. Orlando Ventura, 523 U.S. 12, 16–17 (2002) (reaching essentially the same conclusion by invoking the *Chenery* doctrine).

346. Garland, s*upra* note 4.

practice of vacating and remanding.[347] Those situations have typically involved circumstances in which the judicially prescribed remedy was, at least in the perception of the court in question, the only lawful and reasonable action the agency could take.[348] Similar exceptions have evolved as qualifications on the *Chenery* doctrine. Courts typically affirm an agency decision, instead of remanding pursuant to *Chenery*, where there is no serious doubt about what the agency would do in the event of a remand,[349] or where the agency could rationally reach only one conclusion under the law anyway.[350] As Judge Friendly wrote in a famous article on the limits of *Chenery*, "the purists and the realists lock horns" in the debate over how far to extend exceptions like these.[351] Judge Friendly counted himself among the "realists," being inclined in a close case to avoid a remand that would probably prove unnecessary.[352]

While these exceptions to *Pottsville* and *Chenery* are sensible, it should be apparent that, by their nature, they can come into play only in fairly narrow circumstances. This kind of strong medicine, as Judge

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347. *Id.* at 562–75.

348. For example, he reports, lower court cases have ordered affirmative relief predicated on a violation of "nondiscretionary duties," *id.* at 566, 573, or on a "determination that the agency had repeatedly rejected the only rational course available for protecting statutory beneficiaries," *id.* at 572. Similarly, if "there is only one reasonable modification or alternative [to a regulation adopted by the agency], arguably the court should impose it." *Id.* at 570. *See also id.* at 565 ("Nor does a court violate the separation of powers when it directs an agency to take a specific action that the agency has no discretion to refuse to take—either because it has a statutory duty to take such action, or because refusal would exceed (or abuse) the discretion the agency does possess.") (footnote omitted). Perhaps distinguishable are cases in which a court refrains from remanding because the agency is simply making no progress toward reaching an acceptable solution to the problem at hand. *See supra* note 63 (discussing *Checkosky II*).

349. *See, e.g.*, *Blackletter Statement*, *supra* note 115, at 43 ("A court may deem an error in reasoning immaterial if the agency clearly would have reached the same result even if it had not made the error."); Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 211, 220.

350. Friendly, *supra* note 349, at 210, 224. Note that in *Orlando Ventura* the court of appeals had resolved without a remand the issue of improved conditions in Guatemala (which was critical to the applicant's asylum claim) on the basis that "'we would be compelled to reverse the BIA's [Board of Immigration Appeals] decision if the BIA decided the matter against the applicant.'" 523 U.S. at 15 (quoting Orlando Ventura v. INS, 264 F.3d 1150, 1157 (9th Cir. 2001)). The Supreme Court's subsequent reversal, *id.* at 18, stands as a cautionary lesson against overly hasty judicial invocation of this rationale for failure to remand. Nevertheless, the Court provided a careful analysis as to why the issue of improved conditions had been less clear-cut than the Ninth Circuit assumed. *See id.* at 17–18. That treatment seems to acknowledge, if only tacitly, that truly one-sided cases need not be remanded.

351. Friendly, *supra* note 349, at 223.

352. *Id.* at 223–24. More recently, Judge Wald has expressed a similar inclination. *See* Wald, *supra* note 37, at 666 (proposing that courts "ease up" on ban on post hoc rationalizations).

Garland noted, is best suited to situations in which the agency's result seems *substantively* unlawful or unreasonable.[353] Where, on the other hand, the court thinks that the agency's error may at most consist of a failure to consider or explain an action adequately, remand should be expected as a matter of course.[354] Thus, in the ordinary situation in which the proper course of action for the agency is open to reasonable disagreement, a court will decline to dictate specific results. Judge Garland noted in this connection the institutional competence considerations that help to account for this judicial self-restraint: Courts are not in a good position to "take evidence, weigh competing alternatives, and construct a satisfactory rule from whole cloth."[355]

2. *Implications for Remand Without Vacation.* The discussion to this point has summarized a familiar body of doctrine that circumscribes the kinds of relief that courts may prescribe in administrative cases. More specifically, this case law demonstrates that, in most circumstances, a court may not impose a remedy of its own design *instead of* remanding a case for further consideration by the agency. Against this background, I will now explore whether this line of cases should also be understood to circumscribe the kinds of relief that a court may prescribe to *accompany* a remand.

The *Pottsville* line of cases should pose no threat to the survival of remand without vacation, for a straightforward reason: agencies do not object to the use of that device. In fact, it is usually agencies themselves that seek this type of relief, because it serves their interests. The courts' failure to vacate the challenged action might be best viewed as allowing the *agency* to decide the best way to accommodate competing regulatory interests during the transition period that the remand will necessarily entail.[356] The agency will presumably have the option of suspending the rule on its own (in

353. Garland, *supra* note 4, at 570–71.

354. *Id.* at 570.

355. *Id.* at 565.

356. *See* City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1171–72 (D.C. Cir. 1987) ("[W]e leave to the Commission's judgment in the first instance how best to accommodate these various interests [in avoiding hardship to third parties and disruption of the settlement process] in light of the proceedings on remand.").

effect, "vacating" it)[357] and replacing it with an interim rule that will apply until the agency has devised a long-term solution to the problem that occasioned the judicial remand.[358] The agency also will have the option of leaving the remanded rule in place during the transitional period. In either case, however, the device of remand without vacation enables the government to avoid disruption, protect reliance interests, and maintain stability in a regulatory regime while the agency is working on its response to the court's concerns. It is, in short, an accommodation of the agency's interests, not an invasion of its turf. This is one context in which Justice Frankfurter's characterization of courts and agencies as "collaborative instrumentalities of justice"[359] seems to have particular force.

This reasoning does not entirely dispose of separation of powers concerns about remand without vacation, however, because under *Chenery* the agency's support for the bottom-line result is not necessarily enough. A court may not even *uphold* an agency's action if its decision rests on judicially supplied reasoning that the agency alone has the authority to adopt.[360] This seems to have been Judge Sentelle's point in *Milk Train*.[361] To a small extent, remand without vacation does entail a kind of managerial judgment that overlaps the agency's normal sphere of policy determination.

For two reasons, however, that minor overlap seems entirely compatible with the legitimate remedial powers of the federal courts. First, as a formal matter, a court's preservation of the status quo, through remand without vacation, is consistent with *Chenery* because

357. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 n.21 (1983) ("[T]he agency had sufficient justification to suspend . . . [its passive restraints rule] pending the further consideration required by the Court of Appeals, and now, by us.").

358. To be sure, the agency could likewise respond to the remand with an interim rule if the court does vacate the original rule. *See supra* notes 42–46 and accompanying text. That does not mean, however, that the agency is likely to be indifferent as to whether the court vacates the original rule or not. If the court vacates the rule, the agency may well have to put other pressing business aside and scramble to issue the interim rule immediately if it wants to avoid disruption. Moreover, an interim rule that replaces a vacated rule may be particularly vulnerable to court challenges. *See supra* note 45 and accompanying text.

359. United States v. Morgan, 313 U.S. 409, 422 (1941) (*Morgan IV*); *see* Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 15 (1942) (Frankfurter, J.) ("Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest."); *cf.* Friedman, *supra* note 1, at 772 (suggesting that the interdependence of courts and the political branches in controversies over remedies for constitutional violations calls for a "cooperation of powers").

360. *See supra* notes 340–41 and accompanying text.

361. *See supra* note 326 and accompanying text.

it does not require the court to make the *same* administrative determinations that the agency would have to make in order to rehabilitate or replace the challenged rule or order. Indeed, giving the agency the opportunity to make such determinations is the very purpose of the remand. When it performs that task, the agency is obliged to act with full deliberation, public participation, and the involvement of senior agency officials, as the orthodox *Chenery* doctrine contemplates.[362] The determination that underlies a court's use of remand without vacation is different. What the court decides, in the exercise of its remedial authority, is that the agency action that is currently in force should for equitable reasons remain in place in the short run, even though the agency may not be able (or inclined) to adhere to it on a permanent basis. In this respect, the court's judgment is comparable to the kind of judgment a court exercises in granting a stay pending judicial review. One would not ordinarily think of a stay as raising a *Chenery* problem, because the issues before the court are qualitatively different from those the agency will have to resolve pursuant to the remand.[363]

Second, on a more practical level, the decision for the court about whether or not to vacate, in addition to a remand, should not be particularly daunting. It is a relatively simple, bilateral choice that scarcely implicates the multifarious challenges of administering a regulatory program. Again, it is comparable in this regard to a judicial stay, a type of relief that certainly does not exceed judicial competence, as *Scripps-Howard* confirmed.[364] This judicial function is also somewhat like the role a court plays when it finds that an agency has unlawfully *rescinded* a rule. In that situation, as Judge Garland has written, the judicial task is relatively uncomplicated. The court "need not order the agency to *do* anything because vacating the rescission order alone returns the matter to the status quo ante: the unrescinded rule remains in effect."[365] The court's remedial role in this situation poses no problem of institutional competence, he explains, because the relief "does no more than reimpose a regulation crafted—and previously approved—by the agency itself. No judicial

362. *See supra* note 342 and accompanying text.

363. The court's capacity to enter a stay order is well accepted even though the agency itself could have made the same decision on its own. *See* 5 U.S.C. § 705 (2000) (empowering an agency to stay the effective date of its own action where "justice so requires"); Levinson, *supra* note 135, at 648–54 (discussing administrative stays).

364. *See supra* notes 135–44 and accompanying text.

365. Garland, *supra* note 4, at 574.

invention is required."[366] Much the same can be said about a court's decision *not* to vacate a rule that it has found to be invalid: the court's remedial decision is essentially passive and does not involve the court in writing a rule on its own. If anything, remand without vacation may be even more readily manageable, because it would by definition comport with the agency's preferred policy (in contrast to revival of an unlawfully rescinded rule, which would occur in the face of the agency's failed attempt to get rid of it). From a functional standpoint, therefore, the arguably "administrative" aspect of remand without vacation remains well within boundaries that our judicial system has long accepted as legitimate.

In short, a reviewing court should always be prepared to temper its relief to take account of its limited capacity to micromanage the agency's program. But remand without vacation, which at bottom is an act of judicial restraint, does not appear to pose a significant danger of embroiling the courts in such an offense.

C. Underenforcement of Administrative Law Values

A final objection to remand without vacation is that its use will, or may, undermine effective enforcement of the APA and the administrative law values that are embodied in that Act. I have heard many lawyers in the private bar advance one or another version of this theory. Surely, they argue, a finding that an agency's behavior has been unlawful should have serious consequences. There is something dubious, they maintain, about a doctrine that allows an acknowledged violation to remain in place, perhaps for months or years, after the court has finished with the review proceeding.[367] In my view, these observers have a valid point, but the solution is for courts to limit their resort to remand without vacation, rather than to ban it entirely.

In the kindred context of constitutional remedies, Professors Richard Fallon and Daniel Meltzer have provided a helpful theoretical analysis of what is at stake. They contend that a system of remedies for constitutional violations must be sufficient to serve two

366. *Id.* at 573.

367. *See, e.g.*, Zoll, *supra* note 14, at 5 ("[W]hy should the taxpayers pay *more* money so that [so-called agency experts] can spend *more* time *finally* doing their job? *Throw the rule out*, and the next time they will know they have to do it right the *first* time."). Although these lines were written for a caricatured character in a skit, they are not much of an exaggeration of the views of many practitioners with whom I have spoken.

functions.[368] The first is the individual interest in redress for a constitutional violation. "Few principles of the American constitutional tradition resonate more strongly," they write, "than one stated in *Marbury v. Madison*: for every violation of a right, there must be a remedy."[369] The second function is to maintain the rule of law by furnishing a vigorous judicial check on arbitrariness by the political branches.[370]

Fallon and Meltzer do not contend, however, that every judicial failure to take tangible action in response to a constitutional violation is, by definition, inadequate enforcement. On the contrary, they demonstrate that, throughout our history, the *Marbury* ideal has been qualified by doctrines such as common law privilege, sovereign immunity, and official immunity.[371] Thus, they say, "the existence of constitutional rights without individually effective remedies is a fact of our legal tradition, with which any theory having descriptive pretensions must come to terms."[372] Echoing Professor Paul Gewirtz, they acknowledge that, even in constitutional cases, "the law of remedies is inherently a 'jurisprudence of deficiency, of what is lost between declaring a right and implementing a remedy.'"[373]

The solution that these constitutional scholars recommend is a regime in which "the aspiration to effective individual remediation for every constitutional violation represents an important remedial principle, but not an unqualified command."[374] Some such principle seems appropriate in the context of remand without vacation, although the precise standard need not be the same in the administrative sphere as in the constitutional one. However one frames the relevant standard, it should at least be made clear that vacation is the default principle. A court should need to justify each

368. Fallon & Meltzer, *supra* note 297, at 1787–91.

369. *Id.* at 1778 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

370. *Id.* at 1787–88.

371. *Id.* at 1779–87.

372. *Id.* at 1786.

373. *Id.* at 1765 (quoting Gewirtz, *supra* note 313, at 587). Gewirtz distinguishes between Rights Maximizers, who evaluate remedies from the standpoint of the victim alone, and Interest Balancers, who take account of other social interests as well. Gewirtz, *supra* note 313, at 588–89, 591. Concluding that the Interest Balancers have the better of the debate, he catalogs some of the circumstances in which constitutional rights may appropriately be trumped at the remedy stage. *Id.* at 598–609.

374. Fallon & Meltzer, *supra* note 297, at 1789; *see* Gewirtz, *supra* note 313, at 602 ("Interest Balancing must be used with great caution to assure that the [constitutional] right receives sufficient weight in the balance.").

departure from that norm. Remand without vacation should, in other words, be deemed acceptable only on the basis of a careful weighing of competing considerations, not allowed as a matter of course. Such a requirement would harmonize with this Article's reliance on equitable discretion as the basis for the proposed limiting construction of the language of the APA, because the exercise of equitable discretion traditionally entails a considered balancing of interests. Moreover, it would demonstrate society's seriousness about the aspirations of individual redress and the rule of law that underlie the APA. The impulse favoring flexibility should not mean complete abandonment of the traditions of judicial review.

One component of the underenforcement objection is a kind of crude cost-benefit analysis. The claim is that, although remand without vacation may have some benefits to society, as explained in Part I, these benefits are outweighed by the risk that continued use of remand without vacation will encourage lawlessness or sloppiness on the part of agencies and discourage challenges by private parties.[375] This line of reasoning, while not implausible, rests on debatable assumptions. The critique seems attractive if one starts from the premises that agencies are already too assertive, and that litigants should be encouraged to file appeals that, if brought, would force improvements in the quality of agencies' work products.[376] It is less persuasive, however, if one thinks that under current conditions agencies are already too hesitant to act,[377] and that litigants already have too many incentives to file appeals that may technically have merit but that needlessly impede agencies from fulfilling their substantive mandates from Congress.[378]

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375. *See, e.g.*, Prestes, *supra* note 13, at 124–25.

376. Consider, in this connection, the D.C. Circuit's and Justice Scalia's warning in *Georgetown* that to sanction "curative rulemaking" would make a "mockery" of the APA by allowing agencies to violate rulemaking procedures with impunity. *See supra* note 267 and accompanying text.

377. *See supra* notes 35–37 and accompanying text (discussing Professor Pierce's advocacy of remand without vacation as a cure for rulemaking "ossification"); c*f.* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 546–48 (1978) (adopting a broad prohibition against judicially created rulemaking procedures, in part because the Court thought that agencies would otherwise have no choice but to err on the side of caution by providing elaborate procedures in every case).

378. *Cf.* Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 175–77, 183 (1967) (Fortas, J., concurring in part and dissenting in part) (deploring the Court's relaxation of ripeness barriers to judicial review as "a license for mischief because it authorizes aggression which is richly rewarded by delay in the subjection of private interests to programs which Congress believes to be required in the public interest").

For the sake of argument, however, suppose that the former set of premises provides the more appropriate frame of reference. Even on that assumption, one can be skeptical about the extent to which continued use of remand without vacation would, in fact, alter the relevant incentives for the worse. One can reasonably assume that, amid all the factors that agencies weigh in deciding whether and how to regulate a given subject, the threat of judicial reversal is a constraining factor. The risk of a loss in court exerts generalized pressure to analyze issues rigorously, to respond to comments, and so forth. In a given case, however, the probability of reversal for failure to engage in reasoned decisionmaking,[379] or failure to adhere to the APA,[380] can be notoriously unpredictable. It does not seem realistic to expect an agency to make a further calibration of its efforts (or of its sense of self-restraint) by taking into account not only the likelihood of reversal, but also the kind of relief a court is likely to grant if it does reverse.[381] Similarly speculative is whether litigants have been deterred from challenging agency actions because of the courts' use of remands without vacation (or would be deterred if such use were to increase). With or without that device, after all, the hope of obtaining from the agency a better rule after the completion of remand proceedings provides something of an incentive to sue.[382]

Whatever the likelihood of these problems, they should be ameliorated if, as I have just recommended, the courts' use of remand without vacation remains discretionary in a significant sense. *Automatic* refusal to vacate upon a showing of a violation might be

379. *See, e.g.*, Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1064–68 (1995) ("[T]he [courts'] definition of 'arbitrary and capricious' remains relatively indeterminate.").

380. For example, a final rule must be a "logical outgrowth" of the tentative rule the agency proposed as the basis for soliciting comments, but "[o]ur cases offer no precise definition of what counts as a 'logical outgrowth.'" Nat'l Mining Ass'n v. Mine Safety & Health Admin., 116 F.3d 520, 531 (D.C. Cir. 1997).

381. According to the prevailing case law test, the availability of remand without vacation depends heavily on the court's perception of the likelihood that the agency can cure its erroneous reasoning. *See infra* notes 389–90, 392–95 and accompanying text. An agency that does not even know what error the court will find is unlikely to be in a good position to predict the court's perception of such an eventuality.

382. *Cf.* Fallon & Meltzer, *supra* note 297, at 1804 (maintaining that state taxpayers usually have an incentive to challenge unconstitutional taxes, even where retroactive refunds are unavailable, because they can thereby avoid or reduce future exactions).

enough to affect agency behavior, but discretionary use of the device would seem less likely to weigh heavily in the agency's calculus.[383]

The ultimate question is whether the benefits of firm enforcement of the APA outweigh the countervailing public interest in avoiding disruption of an ongoing government program, or other social costs, which remand without vacation is intended to address. So far, the case for that proposition is wholly abstract. No one has yet attempted to show that the manner in which courts have administered remand without vacation in the generality of cases, or in particular cases, has actually turned out badly. The subject seems ripe for pragmatic experimentation and for learning from the lessons of experience. I do think that courts should proceed cautiously in this area, but a total ban on remand without vacation, on the basis of its putative impact on agency or litigant behavior, seems premature at best.

V. IMPLEMENTING REMAND WITHOUT VACATION

In preceding Parts of this Article, I have argued that remand without vacation may legitimately be applied, consistently with the APA, in a broadly discretionary fashion. At the same time, my survey of the case law pertaining to judicial remedies in administrative law suggests some guideposts for the exercise of that discretion: Any set of criteria for remand without vacation (a) should prevent it from being used routinely or without careful consideration,[384] (b) should make clear that a court should vacate an agency action that infringes substantive statutory rights,[385] and (c) should not involve the courts in an exercise of administrative judgment.[386] These propositions, however, provide only limited guidance for courts that may wish to make use of the device.

I will use this Part to discuss in more specific terms the grounds on which courts have implemented remand without vacation in particular situations. So far, I will suggest, the case law is developing

383. Moreover, although the court's failure to vacate a rule may reduce pressure on an agency to pursue remand proceedings diligently, the court has available various means of monitoring the agency's progress and inducing compliance with the judicial mandate. *See infra* notes 421–22 and accompanying text.

384. *See supra* Part IV.C.

385. *See supra* Part III.C.

386. *See supra* Part IV.B. In this paragraph, I have not relied on the retroactivity cases discussed in Part IV.A., because an extension of those cases' logic to the present context would apparently lead to a total ban on remand without vacation.

in a fairly satisfactory fashion. I also will make some recommendations for possible new directions, drawing in part upon guidelines that the American Bar Association adopted in a 1997 resolution on this topic.[387] The guidelines are reprinted in an Appendix to this Article.

Because the question for the court concerns the fate of a rule or order during a transitional period (up until the date when the agency will have responded to the deficiencies the court has found), the court will need to address issues similar to those it faces when considering whether to grant a preliminary injunction—probability of success on the merits, a comparison of hardships among the parties, and the overall public interest.[388] In the specific context of remand without vacation, the D.C. Circuit has said, in the leading case of *Allied-Signal, Inc. v. United States Nuclear Regulatory Commission*,[389] that its decision about whether to vacate, in addition to remanding, will depend on "'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'"[390] These criteria provide a good starting point for analysis.

The former of the two *Allied-Signal* factors is analogous to the "probability of success" factor considered in the preliminary injunction context, but not quite the same. By the time the court reaches the issue of remand without vacation, it necessarily will already have decided that the agency deserves to lose on the merits of the appeal. Thus, one could not meaningfully speak in this context about a "probability of success" in a litigation sense.[391] Instead, the proper focus is on the probability that the agency can rehabilitate its

387. *See* ABA Guidelines, *infra* Appendix. I participated in the formulation of these guidelines. Like most ABA resolutions, however, they contain a synthesis of many individuals' views.

388. *See* Int'l Union, United Mine Workers v. Fed. Mine Safety & Health Admin., 920 F.2d 960, 967 (D.C. Cir. 1990) (noting that the preliminary injunction test is similar); *see also supra* note 142 and accompanying text (explicating preliminary injunction test).

389. 988 F.2d 146 (D.C. Cir. 1993).

390. *Id.* at 150–51. Actually, the court in *Allied-Signal* borrowed this language from *Int'l Union, UMW v. FMSHA*, 920 F.2d at 967, but most cases cite to *Allied-Signal* for the test, and this Article will do the same.

391. *Cf.* Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1083–84 (D.C. Cir. 2001) (explaining that nonstatutory review of agency action under the APA differs from a preliminary injunction proceeding, because the district court, having the entire record in hand, can directly address the merits of the dispute, not merely the "probability" of plaintiff's success on the merits).

prior action. As the ABA guidelines put it, the question is whether "the court finds a substantial likelihood that the agency, after further consideration, will be able to remedy its error and reach a similar overall result on a valid basis."[392]

Thus, if the basis for remand is a gap in the agency's reasoning that the court finds troubling but thinks the agency may well be able to cure, or to ameliorate with minor changes in the rule or order, that perception tends to militate towards leaving the action in place while the agency addresses the deficiency.[393] If the remand rests on a more fundamental defect in the agency's reasoning, the case for vacation of the action is much stronger[394]—at least unless the agency can demonstrate a more severe risk of interim disruption than would otherwise be required. This reasoning applies even more compellingly if the court were to find an error that the agency could not possibly cure, such as a violation of a flat statutory ban on regulation of a particular subject area. As I discussed earlier, cases such as *TVA v.*

392. ABA Guidelines, *infra* Appendix, ¶ 2(b). Note that the court should not be expected to be able to predict what the agency *will* do after it reconsiders its earlier action. The agency might or might not decide on a new course of action in response to the court's critique or further public comments (or, for that matter, changing circumstances or a revised political agenda). At the time when the court announces its decision, even the agency itself may not be able to assess the likelihood of such a development. The court should, accordingly, focus on a more manageable question: the extent to which the action seems *potentially* salvageable. The central point is that if the court were to deem the action so inherently flawed that the agency would ultimately have to abandon it in any event, the equitable argument for maintaining short-run continuity in the regulatory regime would necessarily lose much or all of its force.

393. *See* La. Fed. Land Bank Ass'n v. Farm Credit Admin., 336 F.3d 1075, 1085 (D.C. Cir. 2003) (finding rehabilitation to be "not unlikely . . . inasmuch as [the agency's] only error was its failure to explain what seems to be a policy difference with the plaintiffs"); Milk Train, Inc. v. Veneman, 310 F.3d 747 (D.C. Cir. 2002) (anticipating a "serious possibility" of valid justification for the rule); Engine Mfrs. Ass'n v. EPA, 20 F.3d 1177, 1184 (D.C. Cir. 1994) (expressing a "willing[ness] to assume for now that the [agency] . . . will be able to provide the information necessary to explain its . . . decisions").

394. *See* Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 171–72 (D.C. Cir. 2002) (Sentelle, J., dissenting) (arguing, on an issue not directly addressed by the majority, that an FCC rule should have been vacated, because the Commission had apparently made its best case for the rationality of the rule but was unconvincing); *American Bioscience*, 269 F.3d at 1086 (vacating a rule because the FDA, having had two chances to justify it, now seemed unlikely to succeed); Ill. Pub. Telecomms. Ass'n v. FCC, 123 F.3d 693, 693 (D.C. Cir. 1997) (vacating a rule because there was "little or no prospect of the rule's being readopted upon the basis of a more adequate explanation"); Indep. U.S. Tanker Owners Comm. v. Dole, 809 F.2d 847, 855 (D.C. Cir. 1987) (declining to remand without vacation because "the Secretary's omissions are quite serious and raise considerable doubt about which of the proposed alternatives would best serve the [statutory] objectives").

Hill militate strongly against remand without vacation under those circumstances.[395]

In Part I of this Article, I discussed some of the factors on the other side of the *Allied-Signal* equation, such as avoidance of disruption and protection of reliance interests, that may militate in favor of remand without vacation.[396] I will not repeat that discussion here. I will add, however, that the case law does not disclose a consistent pattern regarding the way in which the two prongs of the *Allied-Signal* formula fit together. Sometimes the court allows remand without vacation where it perceives a strong likelihood that the agency can cure its previous error, even if the court thinks that vacating would cause little disruption.[397] Conversely, the court sometimes uses the device to head off the disruptive impact of vacation, even if it discerns no particular indication that the rule can probably be cured.[398] As yet, however, there is no indication that this ad hoc balancing process has led the court seriously astray.

The ABA resolution adds some additional, generally sound perspectives.[399] I will mention only some highlights here. First, at the

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395. *See supra* notes 236–37 and accompanying text. In such a case, the court may not even need to remand. *See supra* note 350 and accompanying text; *see also* Mead Corp. v. Browner, 100 F.3d 152 (D.C. Cir. 1996) (vacating the listing of petitioner's former property as hazardous waste site, because the EPA had no statutory authority to list it).

396. *See supra* notes 22–31 and accompanying text.

397. *See* Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1047–49 (D.C. Cir. 2002).

398. *See* Allied-Signal, Inc. v. United States Nuclear Regulatory Comm'n, 988 F.2d 146, 152 (D.C. Cir. 1993) (concluding that, although the agency's chances of rehabilitating its fee schedule were poor, vacation of rates would unnecessarily give licensees a windfall).

399. One problematic statement in the guidelines is the claim that remand without vacation is more likely to be warranted where "the agency's error did not preclude fair public consideration of a central issue in a rulemaking or a fair hearing on the necessary findings in an adjudication or other agency proceeding." *See* ABA Guidelines, *infra* Appendix, ¶ 2(a). This criterion seems more relevant to the question of whether the agency's procedures rendered its action invalid in the first place (more specifically, whether any procedural deficiency was harmless). If the court has decided to remand because of a procedural error, it will by hypothesis have concluded that the agency did *not* provide the requisite public consideration or fair hearing. One setting in which this guideline would appear particularly misleading is a situation in which an agency has erred in invoking the "good cause" exemption to avoid rulemaking obligations. *See* 5 U.S.C. § 553(b)(B) (2000) (allowing exemption where agency for good cause finds that notice and comment would be "impracticable, unnecessary, or contrary to the public interest"). In such a case, the agency will usually have allowed *no* public proceedings before adopting the rule, yet it may well be able to show that vacation of the rule would be unduly disruptive. *See* Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113, 166–68 (1984) (discussing sympathetically cases in which courts have declined to vacate rules that were mistakenly issued under the good cause exemption).

most general level, it offers a cautionary note: "a reviewing court should normally strike the balance in favor of vacating the agency's action, unless special circumstances exist."[400] This sentiment is consistent with this Article's suggestion that the courts should not treat remand without vacation as a routine remedy; they should prescribe it only after a conscious weighing of competing considerations.[401] Indeed, the ABA criterion seems to call on the courts to display a greater degree of restraint than the language of the prevailing *Allied-Signal* formula would lead one to expect. The extent of actual divergence is debatable, however. As the discussion here indicates, the D.C. Circuit and other courts have in fact been selective about the occasions on which they resort to remand without vacation—at least since questions about its propriety began to emerge almost a decade ago.[402]

Second, the ABA resolution draws attention to a variable that is not explicitly an element of the *Allied-Signal* test, but surely ought to be taken into account: the interests of the petitioner or other persons who would benefit from vacation of the contested action.[403] Consideration of such interests falls squarely within the generally understood meaning of "balancing the equities" (as reflected in, for example, the standard preliminary injunction formula). Applying this factor, a court should be readiest to vacate an agency action that turns out to be unlawful if leaving it in place would inflict a particularly severe or irreparable injury on the party who challenged it.[404] For example, the facts of *Checkosky v. SEC*,[405] the case I discussed at length in Part II.A, would seem to have presented a rather weak case for remand without vacation. Recall that the court remanded, without

400. *See* ABA Guidelines, *infra* Appendix, ¶ 2.

401. *See supra* notes 374–75 and accompanying text.

402. The selectivity is most easily demonstrated by opinions in which the court remands multiple rules (or sections of a rule), vacating in one or more instances and not in one or more others. *See, e.g.*, *Fox Television Stations*, 280 F.3d at 1047–49, 1052–53 (remanding a rule on ownership of television stations, but vacating a rule on ownership of cable stations, because defects in the latter rule appeared less curable); United States Telecomm. Ass'n v. FBI, 276 F.3d 620, 622 (D.C. Cir. 2001) (invalidating several rules under which the FBI would notify telephone carriers about its needs for assistance with wiretaps, but vacating only one rule that looked especially indefensible).

403. *See* ABA Guidelines, *infra* Appendix, ¶ 2(c).

404. *Cf.* Ryder v. United States, 515 U.S. 177, 180–88 (1995) (declining to use the equitable "de facto officer" doctrine to validate a court-martial sentence, including three years' imprisonment, imposed by military judges who had been appointed unconstitutionally).

405. 23 F.3d 452 (D.C. Cir. 1994).

vacating, an SEC order suspending two accountants from practicing before the Commission. In Judge Randolph's words, the court's remedy "force[d] petitioners to serve out their suspensions while the Commission ponder[ed] its unlawful order."[406] In most situations, one would think that a punitive sanction in an adjudicative case should be vacated if a court finds that it was not validly imposed.[407] On the other hand, where the benefit of vacation to the challenging party is less evident, a court should feel freer to allow the action to stand during remand proceedings.[408] A particularly strong case for remand without vacation will normally be presented where the challenger *favors* the steps the agency has already taken, but obtained the remand in order to force the agency to consider going even further.[409]

Third, the ABA resolution seeks to refine the element of disruption (which remand without vacation is intended to ameliorate) by focusing on the interests of "persons other than the Government."[410] At first blush, the resolution's implication that government interests should not be considered seems sensible, because the "government is not a rights-bearer in the same sense as an individual."[411] Ultimately, however, the limitation may not prove to be very meaningful, because a judicial order that impairs the interests of an agency in the short run can impair its ability to fulfill its

406. *Id.* at 467 (Randolph, J., separate opinion).

407. The disposition in *Checkosky* may be explainable on narrow grounds, however. As Judge Silberman noted, the petitioners did not ask either the SEC or the court for a stay of their suspensions when they had the chance. *Id.* at 465 (Silberman, J., separate opinion). Indeed, by the time the court issued its opinion, they had served all but three months of their two-year suspensions. *In re* Checkosky, 52 S.E.C. 1177, 1178 (1997), *rev'd*, 139 F.3d 221 (D.C. Cir. 1998). The accountants may have felt that their interest lay in getting the suspensions out of the way as quickly as possible.

408. *See* A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1492 (D.C. Cir. 1995) ("[N]othing in the record suggests that significant harm would result from allowing the approval to remain in effect pending the agency's further explanation."); *cf.* Md. People's Counsel v. FERC, 768 F.2d 450, 455 (D.C. Cir. 1985) (declining to vacate marketing orders that were due to expire within three months, because short-term invalidation of program might "do more harm than good").

409. *See* Sierra Club v. EPA, 167 F.3d 658, 664 (D.C. Cir. 1999) (remanding a rule without vacation, as expressly requested by petitioners); Fertilizer Inst. v. EPA, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (leaving exemptions in place, where successful petitioners' "only complaint about the exemptions is that they are not broad enough"); Chem. Mfrs. Ass'n v. EPA, 870 F.2d 177, 236 (5th Cir. 1989) (remanding water pollution rules, as requested by environmentalists, but not vacating the rules, "which, if anything, may be too lenient"). *But see* Cement Kiln Recycling Coalition v. EPA, 255 F.3d 855 (D.C. Cir. 2001) (discussed *supra* note 70).

410. *See* ABA Guidelines, *infra* Appendix, ¶ 2(c).

411. Fallon & Meltzer, *supra* note 297, at 1792 (noting that the government has less room to plead reliance or moral blamelessness than private citizens have, and that it can spread losses broadly among taxpayers).

legislative mandate, so that the public interest suffers in the longer run. Consider, for example, a line of cases in which the D.C. Circuit has remanded fee schedules that agencies use to finance their operations.[412] In this situation, the court has noted that if it were to vacate the rule, *Georgetown* would prevent the government from recovering the sums later.[413] On one level, the disruption that these cases seek to prevent may seem unworthy of protection. Yet Congress had determined that the agencies should use fees to finance their operations, and a court could not very well be expected to dismiss as unimportant the shortfalls—and thus the impairment of services—that vacation of the fee schedules would have brought about.[414] The loss of revenues to the government might well be *outweighed* by the challenger's interest in being freed from exactions under an illegally adopted fee schedule,[415] but the government's interest should at least be a factor that the court does weigh.

The reference in the ABA resolution to "persons other than the Government" is salutary, however, insofar as it brings to mind the "public interest" factor in the traditional preliminary injunction test. That factor requires the court to take account of the interests of members of the public who may not be represented in the judicial review proceeding itself.[416] For example, the beneficiaries of a

412. *See* Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1135 (D.C. Cir. 1995) (finding that the agency violated the APA by failing to allow notice and comment in promulgating a fee schedule for a program that Congress intended to be self-financing, but not vacating because of "obvious hardship" to agency); Engine Mfrs. Ass'n v. EPA, 20 F.3d 1177, 1184 (D.C. Cir. 1994) (remanding to the agency for a clear explanation of the cost basis for the fee schedule it adopted); Allied-Signal, Inc. v. United States Nuclear Regulatory Comm'n, 988 F.2d 146, 152–53 (D.C. Cir. 1993) (holding that a fee schedule devised pursuant to congressional mandate was inadequately explained, but declining to vacate it, because the commission would then have had to refund fees and probably would not have been able to recoup later).

413. *Allied-Signal*, 988 F.2d at 152.

414. Here the court would have to be mindful of the cases emphasizing that equitable balancing must be consistent with legislatively determined values. *See supra* Part III.C.

415. The court noted in some of these cases that the agency could, and should, make refunds later to fee payers if it were to fail in subsequent proceedings to identify a sufficient justification for the rates in question. *See Am. Med. Ass'n*, 57 F.3d at 1135 (noting the agency's "ability to make up through future adjustment any improper overcollection" of user fees during the interim period); *Allied-Signal*, 988 F.2d at 153 (directing that "firms whose burden is lower under a new, non-arbitrary, rule should be entitled to refunds" of excessive fees collected during interim period); *cf.* MCI Telecomm. Corp. v. FCC, 143 F.3d 606, 609 (D.C. Cir. 1998) (applying similar reasoning to an FCC rule setting charges that long-distance telephone companies would pay to payphone providers). Such a directive to make refunds, as needed, can be an effective means of ameliorating the detriment that remand without vacation can impose on challengers.

416. In the words of the foundational case expounding that test, "[t]he interests of private litigants must give way to the realization of public purposes," especially in "litigation involving

regulation might have a strong stake in the continued effectiveness of the regulation during remand proceedings. The court would have particularly strong reasons to give controlling weight to their interests if it felt that the agency's error was merely technical and the challenger's interest in securing redress for it was, accordingly, relatively weak.[417] In this situation, the court might use remand without vacation to avoid giving private actors an incentive to resort to judicial review to derail basically valid regulatory measures on minor grounds.

Fourth, the ABA resolution is particularly instructive in drawing attention to procedural issues that a court should consider in administering the technique of remand without vacation. It indicates that, before resorting to this technique, a court should attempt to ensure that it is adequately informed about the implications of various remedial options and that potentially affected persons have had an adequate opportunity to address the merits of those options.[418] Petitions for rehearing submitted by the parties,[419] petitions to intervene submitted by nonparties, and supplemental briefs solicited by the court[420] are among the devices that may assist the court in this regard.

Fifth, the ABA resolution recognizes that the remedy of remand without vacation reduces an agency's incentive to cure its error expeditiously during the ensuing proceedings. Accordingly, it provides that the court may wish to specify a time frame within which it expects the agency to comply with the terms of the remand order.[421]

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the administration of regulatory statutes designed to promote the public interest." Va. Petroleum Jobbers' Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958).

417. *See supra* text following note 39 (suggesting that the growth of remand without vacation may derive in part from judges' feeling that vacation is sometimes out of proportion to the magnitude of the errors that have triggered a remand).

418. *See* ABA Guidelines, *infra* Appendix, ¶ 5.

419. *See* Air Transp. Ass'n v. FAA, 276 F.3d 599, 599 (D.C. Cir. 2001) (per curiam) (amending a prior opinion to provide that a fee schedule would be remanded but no longer vacated); Endangered Species Comm. v. Babbitt, 852 F. Supp. 32, 43 (D.D.C. 1994) (amending the judgment to allow a previously vacated listing of an endangered species to remain in effect).

420. *See* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1057 (D.C. Cir. 1999) (requesting supplemental briefing in order to decide whether the rule should be vacated), *rev'd on other grounds*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001); UAW v. Dole, 938 F.2d 1310, 1325 (D.C. Cir. 1991) (same); United Mine Workers of Am., Int'l Union v. Dole, 870 F.2d 662, 674 (D.C. Cir. 1989) (same).

421. ABA Guidelines, *infra* Appendix, ¶ 3. Courts, in fact, have imposed such deadlines. *See, e.g.*, Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1381 (Fed. Cir. 2001) (directing the agency to complete an expedited rulemaking within 120

That safeguard is not appropriate for every case, however. In some cases, the error found by the court may have been too minimal to warrant tight judicial control; or the complexity of the agency's task on remand may militate against a time limit. The courts have other techniques available with which they can protect the parties from unduly dilatory bureaucratic behavior in such cases.[422]

CONCLUSION

This Article has proceeded on two planes at once. On the more general level, it has provided an extensive, though largely descriptive, survey of judicial remedies in administrative law. The pervasive role of judicial discretion has been a prominent theme. At the same time, the retroactivity cases hint at the Supreme Court's developing disquiet about unfettered interest balancing.[423] Moreover, several well-developed doctrines remind us that judicial remedial discretion must yield to categorical statutory obligations,[424] as well as to an agency's prerogative under a given statutory delegation to exercise its own discretion in a reasonable fashion.[425] It is curious that administrative law scholarship has so little learning, let alone ambitious theory, in this area. This Article's exposition may provide a starting point for future explorations.

The Article's second level of analysis has treated remand without vacation as a case study. The practical advantages of the device have won it broad approval. It has enabled courts to temper their relief in administrative cases so as to avoid disruptions, effect smooth transitions, and maintain the continuity of regulatory measures that

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days, unless extended by the court, and to stay all adjudications under the rule until its validity was established); MCI Telecomm. Corp. v. FCC, 143 F.3d 606, 609 (D.C. Cir. 1998) (warning the agency to act within six months or face further judicial action); A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1492 (D.C. Cir. 1995) (directing the agency to provide an adequate explanation within ninety days); Rodway v. USDA, 514 F.2d 809, 817–18 (D.C. Cir. 1975) (directing the agency to complete rulemaking proceedings within 120 days).

422. *See, e.g.*, Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1136 n.4 (D.C. Cir. 1995) (exhorting agency to act with due haste); United Mine Workers, Int'l Union v. Mine and Safety Health Admin., 928 F.2d 1200, 1203–04 (D.C. Cir. 1991) (warning that the court would reconsider its refusal to vacate upon a showing that the agency was not proceeding with dispatch); *cf.* Ford Motor Co. v. NLRB, 305 U.S. 364, 372 (1939) (stating that if the Board were to fail to hold a new hearing within a reasonable time, pursuant to the remand the agency itself had requested, the reviewing court could vacate its own remand order and proceed to the merits).

423. *See supra* Part IV.A.

424. *See supra* Part III.C.

425. *See supra* Part IV.B.

protect the public. Yet discretion has its hazards as well. Its exercise calls for coherent standards, not just the unguided conscience of the particular reviewing court.

At present, remand without vacation appears to stand at the threshold of respectability. Its virtues are certainly not evident to everyone. If reviewing courts choose to resort to it too casually, Supreme Court intervention that would purge it from the scene seems a real possibility. If, however, courts use it with restraint and carefully explained reasoning, the chances for its survival should improve. That is the challenge that now faces the lower courts. This Article hopefully will facilitate that delicate task.

APPENDIX

Recommendation No. 107B

Adopted by the ABA House of Delegates, August 1997

BE IT RESOLVED, That the American Bar Association recommends that:

1. When a reviewing court holds that a rule or order issued by a federal administrative agency must be remanded to the agency for further consideration, the court may exercise discretion in determining whether or not to refrain from vacating the agency's action pending the remand proceedings. The Administrative Procedure Act should be construed, or if necessary amended, to permit the exercise of such discretion.

2. In exercising this discretion, a reviewing court should normally strike the balance in favor of vacating the agency's action, unless special circumstances exist. Such special circumstances may be most often found to exist where, in the context of the proceeding as a whole:

(a) the agency's error did not preclude fair public consideration of a central issue in a rulemaking or a fair hearing on the necessary findings in an adjudication or other agency proceeding;

(b) the court finds a substantial likelihood that the agency, after further consideration, will be able to remedy its error and reach a similar overall result on a valid basis; and

(c) the challenging party's interest in obtaining relief from the agency's decision is clearly outweighed by the substantial and adverse impact that vacation of the agency's action would have on

(i) persons other than the Government who over time have reasonably relied on the agency action being remanded, or

(ii) persons other than the Government, during the interim period before agency action on remand to cure the error has become final,

and such impact cannot be remedied after such interim period.

3. Where the court orders the remedy of remand without vacation, it should give serious consideration to specifying a time frame within which the agency is to comply with the terms of the remand order. The importance of setting a time frame is heightened if the burden of a remand on the challenging party noticeably increases with its duration.

4. Where the court orders the remedy of remand without vacation, it should also consider directing that, until agency action to cure the previous error has become final,

(a) any statutory or administrative deadline for compliance with the remanded action should be extended; and

(b) any proceedings brought to enforce compliance with the remanded action should be stayed, or pursued only with permission of the court.

5. In order to promote informed application of the above standards, courts should encourage parties to address remedial issues, such as the possibility of remand without vacation, in their briefs and at oral argument. In a given case, if further explanation is needed and undue delay will not result, the court should also consider inviting supplemental briefs directed to this issue.