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Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law

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OF GIFT HORSES AND GREAT EXPECTATIONS: REMANDS WITHOUT VACATUR IN ADMINISTRATIVE LAW [*]

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I. INTRODUCTION

Administrative law has been shaped over the years by fundamentally practical considerations. In the early days of the so-called "administrative state," these considerations pointed to a cautious involvement of courts in the processes of curtailing especially egregious regulatory decisions.[1] Displacement of agency decisions by courts was rare; yet, the omnipresent threat of substantial judicial intrusion surely affected agency decisions. The adoption of the APA in 1946 reflected, as well, practical concerns.[2] Though this statute provides a comprehensive template for federal agency decisionmaking, what is striking about the APA is how much is left out and how much is left to the discretion of both agencies in implementing regulatory decisions and to the courts in superintending agency action. Moreover, many note that the nearly sixty-year-old APA is anachronistic, given the contemporary nature and scope of regulatory issues.[3] However legalistic are the contours of traditional and contemporary administrative law, there is a deep concern with practical judgment,[4] a concern rooted in our faith in this rather modern, and hard constitutionally to categorize, tradition of policymaking by administrative agencies.[5]

Given this history, it is hardly surprising that many doctrinal techniques represent the pragmatic

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[*] Prepared for "Remands" Conference, Arizona State Law Journal, Arizona State University College of Law, Tempe, AZ, February 13, 2004.

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[1] *See, e.g.*, NLRB v. Hearst Publ'ns Inc., 322 U.S. 111 (1944); Interstate Commerce Comm'n v. Union Pac. R.R. Co., 222 U.S. 541 (1912).

[2] *See generally* Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447 (1986).

[3] *See, e.g.*, Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 97 (2003) ("The statute fails to recognize the new modes of governance that characterize the administrative state, such as priority setting, resource allocation, research, planning, targeting, guidance, and strategic enforcement.").

[4] *See, e.g.*, R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245 (1992).

[5] For a wide-ranging, fascinating discussion of the fundamental tensions between traditional democratic debates about the "legitimacy" of the administrative state and more contemporary, theoretically informed understandings, see Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711 (2001).

effort of courts to shape agency decisionmaking through deliberate use of doctrine. One excellent example of this effort is the device of remand without vacatur. Remand without vacatur is a mechanism by which courts remand back to an agency a decision in circumstances in which the court believes the agency rationale is flawed, yet declines to vacate the agency decision.[6] Thus, the agency decision stands during the period in which the agency scrambles to develop a rationale for the rule that will survive judicial scrutiny. The court retains all the power it has to vacate the rule eventually; however, it holds its fire while the agency goes back to the drawing board.

Leading administrative law scholars have embraced this device as an eminently practical compromise wrought by the federal courts.[7] They argue that the remand without vacatur devices strike the right balance between aggressive review and administrative discretion. It is, in Ron Levin's words, "an expression of judicial humility."[8] Moreover, it is just what the doctor ordered for a regulatory world in which administrative rulemaking has become "ossified."[9]

My claim in this essay, however, is that this view misconstrues the complex relationship between courts and agencies. While the remand without vacatur device appears to limit the scope of judicial scrutiny, the conclusion that it results in an optimal state of the world in which judicial review is neither too hot, nor too cold, but just right, is naïve. Remand without vacatur does not exist in an administrative law vacuum. Courts carry out their role as judicial police officers in the shadow of the remedial strategies that are available to them as they conduct their activities. Where a certain remedy is unavailable, the court must adapt its judicial strategy accordingly. Judicial remedies are not exogenous, but endogenous; that is, courts can and do consider which techniques are best suited to their objectives of superintending the process of regulatory decisionmaking.[10]

In the broadest terms, administrative law reflects the rules by which courts regulate, in particular ways and for particular reasons, agency decisions. Thus, remand without vacatur does not spring up out of nowhere as an effort to curtail judicial power. Rather, courts use this strategy in order to temper the

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[6] *See, e.g.*, Milk Train, Inc. v. Veneman, 310 F.3d 747, 755-56 (D.C. Cir. 2002); Checkosky v. SEC, 23 F.3d 452, 454 (D.C. Cir. 1994). For a good general discussion, see Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 SETON HALL L. REV. 108 (2001), and sources cited in *infra* note 82.

[7] *See* Ronald M. Levin, *'Vacation' at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. (forthcoming 2004) (manuscript at 6-10, on file with author); Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 ADMIN. L. REV. 59, 75-78 (1995).

[8] Levin, *supra* note 7 (manuscript at 57).

[9] *See* Pierce, *supra* note 7, at 60; *see also* 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, 393 (2000); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385-86 (1992).

[10] *See* Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61, 61-67 (2002).

draconian impact of hard look review. In using this technique, hard look review goes down easier; aggressive judicial review is ameliorated in its effects by the remand without vacatur device. If this characterization is right, the real question we ought to be asking in considering the impact of the remand without vacatur device is not whether it is a good strategy in light of hard look review, but, instead, whether its use contributes to an equilibrium in which hard look review is made more palatable.[11]

The judicially created strategy of remand without vacatur should be disfavored precisely because it facilitates the use of more aggressive judicial scrutiny of agencies' reasoning process. The rationale offered by leading commentators for the device is that it promotes agency flexibility--this is the heart of the argument, that it reduces agency ossification. My argument, however, is that it may do quite the opposite. By adding to the flexibility of judicial review, it promotes judicial activism. It does so, more specifically, by empowering the courts to intervene, rather than hold back, in the agency decisionmaking process. While it is fair to suggest that agencies may prefer remand without vacatur to the more apocalyptic step of simple vacatur, the choice between the two is truly an illusive one. What we want to know is how this practical strategy interacts with the central issue of judicial intervention.

In this essay, I first examine some of the underpinnings of the objections to expansive judicial review of agency rulemaking. The burden of this essay, I hasten to add, is not to provide new reasons for or against the claim that rulemaking has become ossified because of aggressive judicial review. That spirited debate is the subject of a plethora of fine articles,[12] not to mention arguments within influential appellate courts.[13] Rather, the purpose of the discussion of agency rulemaking and judicial review is to frame the basic argument of this essay, that is, that judicial devices like remand without vacatur have the paradoxical effect of encouraging more interventionist judicial review.

II. ADMINISTRATIVE DISCRETION AND ADMINISTRATIVE LAW

A. Regulatory Decisionmaking and the Hard Look

Since the 1970s, federal courts have given agency decisions a "hard look" to ensure that agencies have acted reasonably, have considered all relevant issues, and have based their decisions upon evidence and facts, not merely conjecture and politics.[14] Hard look review was born of a distrust

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[11] The discussion of "endogeneity" and "equilibrium" in these two paragraphs references a large, recent body of literature involving "positive political theory" perspectives on administrative processes and the regulatory state. *See generally* Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1 (1994); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

[12] *See* sources cited *supra* note 9 and *infra* note 42.

[13] *See* sources cited *infra* notes 14, 17 & 27.

[14] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977); Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977); Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976); Greater

of agency performance and a confidence in the ability of courts to separate well-reasoned decisions from poorly-reasoned agency decisions.[15] Searching review, it was believed by the architects of the hard look strategy, protects the public against irrational and unfounded agency decisions.[16] In his concurring opinion in *Ethyl Corp. v. EPA*,[17] Judge Harold Leventhal expressed well the structure of hard look review in the ordinary administrative law case:

> Once the presumption of regularity in agency action is challenged with a factual submission, and even to determine whether such a challenge has been made, the agency's record and reasoning has to be looked at. If there is some factual support for the challenge, there must be either evidence or judicial notice available explicating the agency's result, or a remand to supply the gap.[18]

The seminal modern case on hard look review is *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.* ("State Farm").[19] In that case, the Department of Transportation rescinded a passive restraint rule for automobiles without a persuasive statement of reasons. "The first and most obvious reason for finding the rescission arbitrary and capricious," said the Court, "is that [the agency] apparently gave no consideration whatever to modifying the Standard [in order to accomplish its proffered regulatory objectives]."[20] While this objection seems, on the surface, to reflect a reasonable demand for the Court to impose, the declaration that the measure of what is or is not "arbitrary and capricious," as defined by section 706(2)(A) of the APA, is whether the agency has considered alternatives to its regulatory choice is a significant move. The requirement of a "reasoned analysis" for the rule,[21] combined with a reluctance to take the agency's stated reasons for making one

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Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970). *See generally* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990); Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507 (1985).

15 A classic early statement of the role of courts in supervising aggressively agency performance is Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

16 See generally CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990); MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION (1988).

17 541 F.2d 1 (D.C. Cir. 1976).

18 *Id*. at 22 (footnote omitted).

19 463 U.S. 29 (1983).

20 *Id*. at 46.

21 *Id*. at 57 (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841 (1970)).

choice rather than another,[22] is the *sine qua non* of modern hard look review.[23] Moreover, the proof is in the pudding, as the aftermath of *State Farm* was a significant expansion of judicial intervention in the administrative process.[24] Hard look has proved to be more than just a rhetorical twist; hard review has impacted the processes of regulatory decisionmaking.[25]

Hard look review has not come into the 21st century unqualified, however. The *Chevron* doctrine, named for *Chevron v. Natural Resources Defense Council, Inc.*,[26] in which the Supreme Court established a two-part test for determining whether an agency's statutory interpretation has earned deference by the reviewing court, has significantly impacted "scope of review" doctrine. From one perspective, contemporary doctrine is deeply schizophrenic, with hard look review existing alongside the "soft glance" of *Chevron*.[27] A more persuasive account of these precedents, however, is that *Chevron* remains limited to circumstances in which the agency is engaged in statutory interpretation;[28] in the ordinary circumstance in which an agency is exercising discretion under the charge of its enabling act, courts still give agency decisions a mighty hard look.

Another qualification to modern hard look review is the "committed to agency discretion" line of cases flowing from *Heckler v. Chaney*.[29] In an early pivotal case, the Supreme Court had interpreted the "committed to agency discretion" language of section 706(a)(2) of the APA to restrict judicial

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[22] *Id*. at 51-57.

[23] *See* Garland, *supra* note 14, at 545-46; Stephen F. Williams, *The Roots of Deference*, 100 YALE L.J. 1103, 1107-08 (1991) (book review).

[24] *See, e.g.*, Troy Corp. v. Browner, 120 F.3d 277 (D.C. Cir. 1997); Am. Fed'n of Labor and Congress of Indus. Orgs. v. OSHA, 965 F.2d 962 (11th Cir. 1992).

[25] *See generally* MASHAW & HARFST, *supra* note 14.

[26] 467 U.S. 837 (1984).

[27] *See, e.g.*, Arent v. Shalala, 70 F.3d 610, 620 (D.C. Cir. 1995) (Wald, J., concurring) ("I agree with the panel that despite these distinctions, the *Chevron* and *State Farm* frameworks often do overlap."); *see also* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1276 (1997) ("[T]he D.C. Circuit's strenuous efforts to divide up the terrain between arbitrariness review and *Chevron* step two should be abandoned; the court, as well as other courts, would do better simply to treat these two modes of analysis as equivalent.").

[28] The contours of the *Chevron* doctrine remain controversial. While there have been literally hundreds of appellate court cases applying and shaping the doctrine, the Supreme Court has only recently endeavored to fashion some clearer guidelines for what circumstances create a "*Chevron* question." *See, e.g.*, United States v. Mead Corp., 533 U.S. 218 (2001); Christensen v. Harris County, 529 U.S. 576 (2000). *See generally* Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833 (2001).

[29] Heckler v. Chaney, 470 U.S. 821 (1985).

review of agency decisions to where there is "no law to apply."[30] In *Chaney*, the Court significantly expanded the "no law to apply" doctrine to cordon off all decisions in which the agency decides whether, and to what extent, to exercise its enforcement discretion as unreviewable.[31] The effect of this ruling, and later rulings fleshing out the contours of reviewability doctrine,[32] is to carve out a cul-de-sac of unreviewable, agency decisions from the range of decisions subject to judicial scrutiny under the APA. Although the boundaries of this category have remained since *Chaney* rather fluid,[33] the significance of the doctrine is clear: Hard look review is limited to those agency decisions that are reviewable in the first instance. Per *Chaney*, where there is no law to apply, review is unavailable.[34]

Despite these qualifications, hard look review is well-entrenched in modern administrative law.[35] From any vantage point, it is clear that the emergence of hard look review in the 1970s has reconfigured the regulatory playing field. Agency decisionmaking was affected in uncertain, but palpable, ways by the heavy hand of the federal courts.[36] Skeptical judges cast their gaze on the output of complex agency activities; agencies predictably responded. The result was--and has been--an equilibrium in which agencies, courts, and other interested public and private decisionmakers carry out agency functions with due regard of the actions and reactions of one another.[37]

Whether this equilibrium is a good or bad thing depends upon an informed judgment of the role

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

[31] *Chaney*, 470 U.S. at 831.

[32] *See, e.g.*, Lincoln v. Vigil, 508 U.S. 182 (1993); Webster v. Doe, 486 U.S. 592 (1988); Farmworker Justice Fund, Inc. v. Brock, 811 F.2d 613 (D.C. Cir. 1987), *vacated as moot*, 817 F.2d 890 (D.C. Cir. 1987); Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1 (D.C. Cir. 1987).

[33] *See* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 777 (1990); Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 675-76 (1985).

[34] While *Chevron* deference and unreviewability doctrine per *Chaney* represent the main counter-currents to hard look review, there are other, more technical, administrative law doctrines that function to curtail the discretion of the courts. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (standing); United States v. Gaubert, 499 U.S. 315 (1991) (sovereign immunity); Ticor Title Ins. Co. v. FTC, 814 F.2d 731 (1987) (ripeness/timing).

[35] *See e.g.*, Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243 (1999).

[36] For empirical efforts to measure this impact, *see, e.g.*, Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL. ANALYSIS & MGMT. 369 (1991); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984.

[37] *See* McCubbins et al., *supra* note 11, at 433-34; *see also* Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 6 J.L. ECON. & ORG. 263, 263-66 (1990).

and function of agencies in the modern administrative state. Certainly hard look review has added to the procedural complexity of agency performance. Insofar as some of these procedures have ensured greater participation by affected groups, this move has enhanced the democratic components of agency decisionmaking. More controversial is whether this review has yielded better "reasoned" agency decisions.[38]

With the hindsight afforded by about a quarter century of hard look doctrine in the federal courts, a number of preliminary observations can, I believe, be supported by available evidence:

(1) Agency decisionmaking has become increasingly expensive as procedural requirements and other adjustments wrought by hard look review have emerged in the modern period;[39]

(2) As a consequence of these costs and complexities, administrative law scholars have spoken sensibly of what they label the "ossification" of regulatory decisionmaking.[40] While the general issue is complex, the point is an intuitive one: agencies fear reversals and, therefore, take pains to develop strong evidentiary bases for their regulatory decisions. These "pains" can and do steer agencies away from tackling difficult social and economic issues. Thus, the paradoxical result of hard look scrutiny is fewer bold regulatory initiatives;[41]

(3) In order to survive scrutiny, agencies proliferate not only more cumbersome procedures but, in particular, more court-like procedures.[42] These procedures entail the receipt and evaluation of evidence, the prohibition of certain informal contacts by members of the public, and the substitution of "legal" for "political" judgment.[43] On the

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[38] I leave to one side what I believe to be a perfectly pertinent, but very complicated, question of how we discern what "well-reasoned" means in this context. For an interesting, far-reaching discussion of reason and rationality in the context of democratic decisionmaking, see ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? (1998).

[39] *See* sources cited *supra* notes 14, 16.

[40] *See* sources cited in *supra* note 9.

[41] This is the essential lesson of Jerry Mashaw and David Harfst's influential study of the National Highway Transportation Administration. *See generally* MASHAW & HARFST, *supra* note 14; *see also* R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983) (influential study of the EPA and the Clean Air Act).

[42] *See, e.g.*, Paul R. Verkuil, *Comment: Rulemaking Ossification--A Modest Proposal*, 47 ADMIN. L. REV. 453 (1995).

[43] *See, e.g.*, Peter L. Strauss, *Revisiting* Overton Park*: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251 (1992).

> whole, agencies have developed models of decisionmaking that are more adversarial and legalistic than one witnessed in an earlier era--or, to put the point more bluntly, one might expect out of an administrative regime in a political context.[44]

There is much more one can say about the impact of hard look review on administrative agency performance in the modern era. There is enough here, however, to make the general point that contemporary administrative law has transformed--we might say even *significantly* transformed--regulatory decisionmaking. This observation frames the discussion in the next section of the remand without vacatur device. While this device has been defended by the D.C. Circuit and other influential commentators as an antidote to aggressive judicial review,[45] the interaction between this mechanism and hard look review suggests, I argue, that the practical case for remand without vacatur may be more problematic than it might otherwise appear.

Tacit in the discussion to this point is the argument that the courts role ought to be more limited in regulatory policymaking. To make the point more explicitly, I argue that there ought to be limits on courts' use of liberal remedial devices to curtail agency behavior. Remedial discretion in administrative law is designed primarily to protect individual rights from unlawful governmental action, not to maintain what the courts believe to be balance within regulatory system. Balance-maintenance is part and parcel of what agencies do.

B. The Case for Judicial Modesty in the Face of Regulatory Realism

Aggressive judicial review is expensive, any way you slice it. Whether these costs are justified, of course, rests on one's views about the value of hard look review in improving agency performance. Save for those significant situations in which judicial review is properly deployed to redress a constitutional violation by an agency or to ensure that the agency is complying with the law as Congress has instructed, the role of judicial review is controversial. How much should courts intervene in regulatory decisionmaking to ensure that the commands of section 706 of the APA are met? This is a question about which reasonable people differ, to put it mildly. The evidence described sketchily in the previous section raises serious questions about whether and to what extent the hard look revolution has been a salutary one; yet, the empirical evidence does not settle the question. The case for more vigorous judicial scrutiny under APA section 706 must confront arguments--*normative* arguments--about the nature and scope of administrative agency decisionmaking. From my perspective, the central

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[44] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983) (Rehnquist, J., dissenting); *see also* Lisa S. Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462 (2003); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 964-66 (2001); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 984-85 (1997); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 161 (1995).

[45] *See* sources *supra* notes 6-8.

question involves how we think agencies behave and what we believe are the structure of influences and pressures they face in carrying out their regulatory functions.

Agency decisions are the result of factors both internal and external. Internal factors include, at the very least, the strength of arguments of interested parties in cases involving formal adjudication and licensing, the weight of the evidence as well as informed discretion in the case of rulemaking, and other factors that contribute to the body of knowledge that drives agencies toward conclusions. It is naïve to suppose that agencies make decisions only where the facts, law, and evidence point unequivocally in one direction. More commonly, agencies "satisfice,"[46] that is, form and implement judgments on the basis of the best available evidence, with due recognition of the constraints of knowledge, resources, and time.[47] Although reasonable persons can differ about whether and to what extent this is a failing of the administrative state, it can be said that agencies perform their task with admirable efficiency and care given the world of great uncertainty and competing influences. To be a fan of the modern administrative state is, to a great degree, to embrace uncertainty and the theory of the second-best.[48]

External factors on agency performance loom large as well. Agencies react ubiquitously to congressional pressures;[49] so too, do agencies respond to influences of executive branch officials.[50] The nature of this influence is complex. Legislators may react through the technique of what has been called "police patrols,"[51] the ongoing oversight of regulatory performance in order to maintain the smooth functioning of the administrative program in question. Alternatively lawmakers may investigate

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[46] HERBERT SIMON, MODELS OF MAN 204 (1957).

[47] *See generally* Charles E. Lindblom, *The Science of "Muddling Through*," 19 PUB. ADMIN. REV. 79 (1959).

[48] A recent body of literature, building upon insights from cognitive psychology, makes the more cynical claim that agency reasoning is plagued by cognitive difficulties. *See, e.g.*, Jeffrey J. Rachlinski & Cynthia R. Farina, *Getting Beyond Cynicism: Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549 (2002). See generally BEHAVIORAL LAW & ECONOMICS (Cass R. Sunstein ed., 2000). Despite this empirically-based concern, other scholars insist that agencies possess the skills, and ought to possess the will, to engage in rational, information intensive cost-benefit analysis. These theories presuppose, it would seem, that the cognitive difficulties are not insurmountable. *See, e.g.*, Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001).

[49] *See, e.g.*, Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95 (1997); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1 (1994).

[50] *See, e.g.*, Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003); Kagan, *supra* note 43.

[51] *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, in CONGRESS: STRUCTURE AND POLICY 426 (Mathew D. McCubbins et al. eds., 1987).

agencies episodically, focusing on so-called "fire alarm" tactics.[52] Audits, for example, enable legislators and executive branch officials to investigate agency performance where decisions become especially salient and where political officials can expect to make some specific, calibrated interventions. These strategies are seldom "either/or." Political oversight of regulatory decisionmaking is ubiquitous and agencies are properly concerned with the structure, timing, and motivation behind their overseers' strategies. While the extent and scope of these influences are the product of many circumstances, the mere fact of constant legislative and executive controls acts as a serious check on agency performance.[53]

The extent of private sector influence on agency activity is more controversial. Public choice theory insists that such influence is a regular part of the regulatory process.[54] Yet, the evidence suggests that such influence is irregular.[55] Few believe that agencies are, in the terminology of Richard Stewart, writing a quarter century ago, mere "transmission belts" for interest group influences.[56] More accurately, interest groups manifest influence over agencies through comparatively small, though durable, actions. These weapons of influence no doubt impact agency decisions.[57] Yet, within the structure of the modern administrative state, these methods of influence contribute to agency results only episodically. Few outside of the public choice fraternity believe that this influence is more important--or even equivalently important--than the impact of political influence, that is, influence by the legislative and executive branches.[58]

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[52] *See id.* at 427.

[53] *See generally* PETER STRAUSS ET AL., ADMINISTRATIVE LAW: CASES AND COMMENTS 138-237 (rev. 10th ed. 2003).

[54] *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); Pablo T. Spiller, *Politicians, Interest Groups, and Regulators: A Multiple-Principals Agency Theory of Regulation, or "Let Them Be Bribed,"* 33 J.L. & ECON. 65 (1990).

[55] *See, e.g.*, JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997); Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7 (2000); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1 (1990).

[56] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1675 (1975).

[57] *See, e.g.*, Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987).

[58] Major political science studies have offered more complex examinations of the determinants of agency performance. If there is a common thread in this disparate work, it is that there is considerably more to the picture of regulatory policymaking than either the "transmission belt" theory or the slavish obedience to political control theory indicates. *See, e.g.*, DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS AND POLICY INNOVATION IN

With regard to political influence, the regular interventions--and, indeed, the threatened interventions--of legislators and the President are an important part of the process of checking agency action.[59] To be sure, administrative law doctrine in various ways regulates the ways in which legislative and executive officials monitor agencies.[60] The answer to the perennial question "who guards the guardians" is multifaceted, yet it is clear that courts play a proper role in ensuring that agencies can carry out their statutory responsibilities to make and enforce rules with only that monitoring by political actors that is consistent with the Constitution's separation of powers and also with statutes that regulate specifically the activities of Congress and the President. That said, the range of legislative and executive powers in the administrative state is very broad. *And this breadth is essential to steer administrative agency decisionmaking in democratic directions*. The fundamental challenge for the courts is to maintain the ability of political officials in the legislative and executive branches to appropriately supervise agency policymaking, while making sure that the constitutional rules are followed.[61]

We have considered how the emergence and persistence of hard look review and modern administrative law doctrine can disrupt agency decisionmaking by upending the political, economic, and social balances struck by agencies acting in good faith yet with incomplete information. The discussion thus far has been intentionally abstract, for the aim of this section is to set the stage for an analysis in the next section of the remand without vacatur device. More extended analyses elsewhere support the claim that agency policymaking has been seriously damaged by aggressive judicial intervention.[62]

In light of these difficulties, a key test for any judicially created remedy in administrative law should be whether and to what extent the remedy fuels interventionism and, thereby, thwarts sound agency decisionmaking. At first glance, the remand without vacatur device appears to have the salutary effect of reducing judicial impositions; it is, after all, less aggressive than simple vacatur. Appearances can be deceiving, however. As we will see in the next section, this strategy may backfire.

III. THE INTUITIVELY SENSIBLE (BUT POTENTIALLY OVERSTATED) CASE FOR REMAND WITHOUT VACATUR

To understand the remand without vacatur device, we must begin by understanding the basic

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EXECUTIVE AGENCIES, 1862-1928 (2001); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS (1991).

[59] In addition to the sources cited in *supra* notes 44, 49; *see also* Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180, 1181-89 (1994); Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA:* Quis Custodiet Ipsos Custodes *(Who Shall Watch the Watchers Themselves)?*, 54 L. & CONTEMP. PROBS. 205, 210-18 (1991).

[60] *See* STRAUSS ET AL., *supra* note 53, at 666.

[61] *See, e.g.*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 574-79 (1984).

[62] *See* sources cited in *supra* notes 14-16.

structure of judicial review of agency decisions. The APA provides that final agency actions, either rules or orders, are reviewable by the proper federal court. The minimal standard of review for all agency actions is found in section 702(2)(a). This section provides that the reviewing court "shall ... hold unlawful and set aside agency action ... found to be--(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.][63] Where an agency decision occurs after a formal adjudicatory or rulemaking hearing, the reviewing court should hold unlawful agency action "unsupported by substantial evidence.'[64] In the ordinary case, therefore, the reviewing court will have before it an agency decision and some record. In addition to considering whether the agency has acted consistently with its statutory obligations, it will evaluate the agency's reasoning process to assure itself that it meets the standards of rationality demanded by the APA's scope of review section. By its very nature, the review of agency reasoning under section 706 goes beyond mere statutory interpretation.[65] Since the very beginning of American administrative law, and certainly since the adoption of the APA in 1946, section 706 review has been regarded as trans-statutory, as looking beyond the organic act and to the agency's reasoning process.[66]

The sanction ordinarily available to the reviewing court is vacatur. This remedy flows from the court's responsibility to "hold unlawful and set aside agency action.'[67] Vacatur, on its own terms, has no necessary connection to the remedy of remand. Vacatur obliterates the agency decision. Remand in administrative law represents an assignment by the court back to the agency.[68] While the APA does not expressly authorize the reviewing court to issue a remand order,[69] this order has long been

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[63] 5 U.S.C. § 706(2)(A) (2000).

[64] *Id*. § 706(2)(E).

[65] *See, e.g.*, John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429.

[66] See the discussion in Daniel B. Rodriguez, *Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory*, 72 CHI.- KENT L. REV. 1159, 1182-83 (1997).

[67] § 706(2).

[68] *See* Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 97 (D.C. Cir. 2002), discussed in *infra* text accompanying notes 101-107 ("Normally when an agency so clearly violates the APA we would vacate its action ... and simply remand for the agency to start again.").

[69] Indeed, there is nothing at all in the APA about remand orders. Rather, the APA provides expressly for interim relief. *See* § 705 ("the reviewing court ... may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings"). Despite this clear statutory charge to the courts to implement this remedy, where they think it appropriate, the Supreme Court has suggested that statutory authorization is not necessary for the courts to provide interim relief. *See* Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 9-10 (1942). The suggestion that such remedial discretion is inherent in judicial power has implications on the remand without vacatur issue, as I will discuss in more detail in Part III.

regarded as well within the remedial discretion of the federal courts.[70] Indeed, remand after vacating an agency decision has been used frequently and over many decades to implement the will of the reviewing court to strike down an agency decision while giving the agency a chance to correct its mistake. The D.C. Circuit's development of the remand without vacatur technique is entirely judge-made; it provides an intermediate device between the ordinary decision to vacate and remand an agency action and the decision to uphold the agency action.

A. Garbled Explanations and Great Expectations: Remand Without Vacatur

To better grasp the remand without vacatur technique, consider the facts of *Checkosky v. SEC*.[71] The dispute in *Checkosky* involved a decision of the Securities and Exchange Commission to penalize Savin Corporation for attempting to defer certain research and development expenditures as capitalized assets instead of declaring them as ordinary business expenses. According to the SEC, this effort violated generally accepted accounting principles and, therefore, constituted '"improper professional conduct' in violation of the Commission's Practice Rule 2(e)."[72] Messers. Checkosky and Aldrich challenged the SEC's order on the ground that the order was unsupported by substantial evidence. They also argued that this order could only apply, according to Rule 2(e) and the underlying statute, to "willful misconduct."[73]

The difficulty the reviewing court faced, it explained, was determining what sort of standard the agency applied in scrutinizing the defendants' conduct.[74] In some respects, the agency appeared to object to defendants' conduct on the grounds that they acted negligently, an objection that would carry with it, the court argued, a very heavy burden for the agency to meet in order to exercise its administrative authority.[75] Elsewhere, the agency seems to suggest that recklessness is enough and that

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[70] *See, e.g.*, ALFRED AMON, JR. & WILLIAM T. MEYTON, ADMINISTRATIVE LAW 447-49 (2d ed. 2001).

[71] 23 F.3d 452 (D.C. Cir. 1994). *Checkosky* is not the first case in which the D.C. Circuit used the remand without vacatur device; however, it contains the most extended discussion of the efficacy and legality of the technique and is, therefore, discussed at length by commentators and by other courts. *See* Levin, *supra* note 7 (manuscript at 10-14); Frank H. Wu & Denisha S. Williams, *Remands Without Reversal: An Unfortunate Habit*, 30 ENVTL. L. REP. 10193, 10193-94 (2000); Prestes, *supra* note 6, at 108-12.

[72] *Checkosky*, 23 F.3d at 454; Practice Rule 2(e), 17 C.F.R. § 201.2(e)(1)(ii) (1993). Two circuit courts before *Checkosky* had considered the underlying issue of the Commission's authority to issue Rule 2(e). *See* Davy v. SEC, 792 F.2d 1418, 1421-22 (9th Cir. 1986); Touche Ross & Co. v. SEC, 609 F.2d 570, 575 (2d Cir. 1979).

[73] 17 C.F.R. § 201.2(e)(1)(ii) (1993).

[74] *Checkosky*, 23 F.3d at 456.

[75] *Id*. at 459.

defendants should be penalized because of their reckless behavior.[76] However, the Commission "never analyzed the evidence to explain just how petitioners' conduct could be thought to pass beyond negligence to the greater degree of culpability--recklessness. Nor did the Commission specify just what meaning it was giving the term reckless."[77] Hence, the dilemma for the court was that the SEC was imprecise in explaining the rationale for holding defendants' culpable. It was *possible* that the agency decision could be upheld--that is, that the agency's conclusion that defendants engaged in "willful misconduct" was supported by substantial evidence under the standards of the APA.[78] Yet, because the SEC's explanation was ambiguous, it was possible to find that the agency applied an incorrect standard of "willful misconduct."[79]

Given the uncertainty in discerning the basis upon which the Commission reached its final decision, the *Checkosky* court was not prepared to reach the conclusion that the agency's decision was unsupported by substantial evidence.[80] "Absent such clarity," announced the court, "the proper course, one that we follow today, is to remand so as to afford the agency an opportunity to set forth its view in a manner that would permit reasoned review."[81] Thus the court applied the technique of remand without vacatur, a technique employed in numerous D.C. Circuit cases over a twenty or so year period.[82]

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[76] *Id*. at 460.

[77] *Id*.

[78] *Id*. at 458-62.

[79] The court in *Checkosky* considers this issue under the rubric of § 706 of the APA and, thus, is properly viewed as a hard look review case. Interestingly, a perspective never discussed in the case--and presumably not raised by the parties--is whether this case ought to be decided under the *Chevron* test. After all, the linchpin of the court's concern is that the agency may have misconstrued the phrase "willful misconduct." The problem with applying the *Chevron* test to this case, after all, may be that we have no adequate basis to know, for reasons explained by the court, whether and to what extent the SEC was engaging in statutory interpretation in reaching its result.

[80] There is some confusion in the court's opinion about the standard of review. Although this is a case in which the agency decision can be upheld only where supported by substantial evidence on the record, the court frequently discusses the "lighter" arbitrary/capricious standard. *See id*. at 460, 462, 464-65.

[81] *Id*. at 462.

[82] *See* Milk Train, Inc. v. Veneman, 310 F.3d 747, 755-56 (D.C. Cir. 2002); United Distrib. Comm'n. v. Fed. Energy Regulatory Comm'n, 88 F.3d 1105, 1191 (D.C. Cir. 1996); A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1492 (D.C. Cir. 1995); Am. Water Works Ass'n v. EPA, 40 F.3d 1266, 1275 (D.C. Cir. 1994); Checkosky v. SEC, 23 F.3d 452, 454 (D.C. Cir. 1994); Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146 (D.C. Cir. 1993); Int'l Union United Mine Workers of Am. v. Fed. Mine Safety and Health Admin., 924 F.2d 340 (D.C. Cir. 1991); Int'l Union United Mine Workers of Am. v. Fed. Mine Safety and Health Admin., 920 F.2d 960, 967 (D.C. Cir. 1990); City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1171-72 (D.C. Cir. 1987); Rodway v. U.S. Dep't of Agric., 514 F.2d 809, 824

Remand without vacatur is designed to give the agency another bite at the "explanation" apple. Frequently what the court is concerned with in reviewing agency decisions is the *rationale* the agency uses in forming its regulatory decision, the court remands the decision back to the agency to see whether the agency can construct a rationale that would survive scrutiny.[83] Of course, virtually all outcomes in regulatory cases in which the agency decision is found wanting involve remands to the agency in the sense that an agency can try again; the key twist in *Checkosky* and similar cases is that the agency decision remains in place for a specified period of time. Sometimes the agency succeeds in constructing a bullet-proof rationale; other times they fail. The agency decision is not frozen in place forever, but merely for a time in which the agency is urged to return to the drawing board for further analysis and explanation.[84]

(D.C. Cir. 1975).

There are a few remand without vacatur cases in other circuit courts. *See, e.g.*, Cent. & S.W. Servs., Inc. v. EPA, 220 F.3d 683, 702 (5th Cir. 2000); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1406 (9th Cir. 1995); W. Oil & Gas Ass'n v. EPA, 633 F.2d 803, 814 (9th Cir. 1980).

[83] It is important to distinguish this strategy from the decision of the reviewing court to vacate an agency decision and remand to the trial court for a review of the agency's decision. The classic case here is *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), in which the Supreme Court faulted the reviewing court for failing adequately to review the agency's decision on the basis of the full administrative record available to the agency at the time of its decision (or, perhaps more accurately, for the record that *should have been available*). *Id*. at 415. In the absence of the sort of findings and evidentiary basis that could inform the reviewing court's evaluation of the agency's decision, the solution, according to the *Overton Park* Court, was a remand to the district court for "plenary review of the [agency's] decision." *Id*. at 416.

In *Camp v. Pitts*, 411 U.S. 138, 140-43 (1973), the Supreme Court clarified the scope of its *Overton Park* holding, noting that the proper next step following a remand to the trial court for a more comprehensive review was not necessarily a trial de novo, nor a close inquiry into the mental processes of the agency decisionmakers. *See also* United States v. Morgan, 313 U.S. 409, 422 (1941); Deukmejian v. Nuclear Regulatory Comm'n, 751 F.2d 1287 (D.C. Cir. 1984), *vacated in part pending rehearing en banc*, 760 F.2d 1320 (D.C. Cir. 1985), *aff'd*, 789 F.2d 26 (D.C. Cir. 1986) (en banc). Rather, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp*, 411 U.S. at 142.

Overton Park and its progeny are extremely important in establishing the obligation of the reviewing court to consider and critically examine whether and to what extent the agency based its decision, *even in an informal decisionmaking* setting, on the basis of evidence and relevant information and not speculative and "improper" factors; moreover, this line of cases reinforces the idea that courts should review the agency decision on the basis of the contemporaneous record, not on the basis of post hoc rationalizations and "litigation affidavits." *See Volpe*, 401 U.S. at 415. However, nothing in the *Overton Park* doctrine suggests whether the lower court, in carrying out its responsibilities, should refrain from remanding without vacating the agency's decision.

[84] The agency does not always prevail in the end, as the facts of *Tex Tin Corp. v. EPA*, 935 F.2d 1321 (D.C. Cir. 1991), indicate. In this case, the EPA's plea that its decision to place a hazardous waste facility on the National Priorities List should be upheld based upon "common sense" was rejected and the court remanded the decision back to the EPA for a better explanation. *Id*. at 1324. The

Checkosky provides an illustration of one important circumstance in which the reviewing court believes the device is appropriate: Where the basis of the agency decision is insufficiently clear and, therefore, where the reviewing court would profit from sending the case back to the agency for a more complete explanation. This strategy hearkens back to the Supreme Court's injunction in *SEC v. Chenery Corp.*,[85] a seminal early administrative law case in which the Court cautioned reviewing courts to avoid upholding an agency decision on a basis other than the one advanced by the agency.[86] The *Chenery* Court sensibly limited judicial review to the agency's stated rationale; reviewing courts ought not to come up with a basis for upholding the agency's decision that has not been articulated clearly by the agency itself.[87] The D.C. Circuit in *Checkosky* tied the remand without vacatur device tightly to the *Chenery* holding, noting that "'[s]ince courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review,' reviewing courts will often ... pause before exercising full judicial review and remand to the agency for a more complete explanation of a troubling aspect of the agency's decision.'"[88]

While the use of the remand without vacatur device has remained controversial, both within the scholarly literature and within the circuit itself, the court has continued to use it to temper the impact of its disapprovals in the modern hard look era. A good recent example of its use is in *Milk Train, Inc. v. Veneman*.[89] In this case, the court considered a decision by the Secretary of Agriculture to use some federal money to compensate farmers for losses incurred during 1998.[90] Trouble was that Congress had expressly appropriated funds to compensate dairy farmers "for economic losses incurred during

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agency's later explanation still fell short, according to the court, and the decision was, in the end, struck down as arbitrary and capricious. Tex Tin Corp. v. EPA, 992 F.2d 353, 356 (D.C. Cir. 1993). These cases, and other instances in which the agency failed twice, are discussed in *Checkosky*, 23 F.2d at 463.

[85] 318 U.S. 80 (1943) (Chenery I).

[86] *Id*. at 87-89.

[87] *See generally* Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199 (analyzing how courts have determined when *Chenery* requires reconsideration).

[88] *Checkosky*, 23 F.3d at 463 (internal citations omitted); *see also* U.S. Dep't of Defense v. Fed. Labor Relations Auth., 982 F.2d 577, 580 (D.C. Cir. 1993); Sullivan Indus. v. NLRB, 957 F.2d 890, 905 n.12 (D.C. Cir. 1991); Radio Station KFH Co. v. FCC, 247 F.2d 570, 572 (D.C. Cir. 1957).

[89] 310 F.3d 747 (D.C. Cir. 2002) (the FCC must make the basis of its action "reasonably clear").

[90] *Id*. at 755-56.

1999."[91] The court remanded the regulations to the Secretary without vacating them.[92] The court was clearly motivated by the fact that it would be nearly impossible to get back to the status *quo ante* since the money had already been distributed to the farmers. The majority hoped that the Secretary could, following the remand, come up with an adequate explanation for the use of these funds in this manner.[93] *Milk Train* represents one key factor in the court's use of this remedial device: the tremendous hardship that would occur if a flawed rule were immediately vacated. This, combined with the court's optimism that the agency could fix the problem by recreating its decisional rationale, fuels the court's frequent, if controversial,[94] use of this technique.

A somewhat different circumstance in which the D.C. Circuit has applied the remand without vacatur device, is where the agency's rationale is clear, but cannot, on its own terms, provide adequate support for the legality of its decision. A good example of the use of the device in this circumstance is *American Medical Ass'n v. Reno*.[95] In that case, the Drug Enforcement Agency promulgated a fee schedule under the Controlled Substances Act[96] without providing for notice and comment.[97] The court acknowledged that such notice and comment was clearly required by the APA and, therefore, the agency violated this statute.[98] However, the court declined to vacate the agency's decision, on the grounds that such a remand would create an "obvious hardship" to the agency.[99] The court remanded the decision back to the agency for correction of this mistake.[100]

This error-correction function of remand without vacatur appears prominently in several D.C. Circuit cases over the past decade.[101] Two years ago, in *Sugar Cane Growers Cooperative of*

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91 Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act 2000, Pub. L. No. 106-78, § 805, 113 Stat. 1135, 1179 (1999).

92 *Milk Train*, 310 F.3d at 756.

93 *Id*.

94 *See id*. at 760-63 (Sentelle, J., dissenting).

95 57 F.3d 1129 (D.C. Cir. 1995).

96 21 U.S.C. § 811 (2000).

97 57 F.3d at 1131-32.

98 *Id*. at 1132.

99 *Id*. at 1135.

100 *Id*. at 1135-36.

101 *See, e.g.*, Allied Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 154 (D.C. Cir. 1993); Massachusetts v. U.S. Nuclear Regulatory Comm'n, 924 F.2d 311, 337 (D.C. Cir. 1991).

Florida v. Veneman,[102] the D.C. Circuit rejected the argument by the agency that it should not have to follow the section 553 processes of developing rulemaking because the regulatory program at issue "was an 'isolated agency act' that did not propose to affect subsequent Department acts and had 'no future effect on any other party before the agency.'"[103] It, therefore, was not a rule under the APA section 551(4) definition.[104] The court rejected this argument, but declined to vacate the agency's rule.[105] Recollecting the contemporary strand of remand without vacatur cases, the court said:

> Appellants insist that we have no discretion in the matter; if the Department violated the APA--which it did--its actions must be vacated. But that is simply not the law. Instead, "[t]he decision whether to vacate depends 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 ....'" We have previously remanded without vacating when the agency failed to follow notice-and-comment procedures.[106]

Although the device of remand without vacatur is used exactly the same here as elsewhere, the rationale behind the remedy in *Sugar Cane Growers* is different than its use in *Checkosky* and *Milk Train*. In contrast to these two cases, the court in *Sugar Cane Growers* uses the remand without vacatur device to give the agency another chance to correct an error. Though holding that the agency has acted unlawfully, the court utilizes its remedial discretion to soften the blow to the agency. The agency must correct its mistake by using the APA-prescribed rulemaking process as a condition for continuing to enforce its enacted rule.[107]

B. The Purposes Served and Disserved by Remand Without Vacatur

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[102] 289 F.3d 89 (2002).

[103] *Id*. at 95-96 (quoting Daingerfield Island Protective Soc'y v. Babbitt, 823 F. Supp. 950, 957 (D. D.C. 1993) *aff'd in relevant part*, 15 F.3d 1159 (D.C. Cir. 1993)).

[104] Section 551(4) defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4) (2000).

[105] 289 F.3d at 97-98.

[106] *Id*. at 99 (internal citations omitted).

[107] In this sense, the rule in place after the court's decision and before the agency returns to court is akin to an interim rule, a device not squarely described in the APA, but one nonetheless utilized by agencies, for example, the Internal Revenue Service, to implement its policy while the rulemaking process is underway. *See* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 704 (1999).

Remand without vacatur aims to accomplish three aims simultaneously: (1) to give the agency opportunity to improve its reasoning process;[108] (2) to maintain stability of regulatory system while the dispute continues;[109] and (3) to protect the "reliance interests" of individuals and firms.[110] Each of these issues deserve to be taken very seriously; after all, each of them--good reasoning, stability, and reliance interests--are of critical importance in the successful functioning of the administrative state. We consider each in turn.

Facilitating sound agency reasoning is the *sine qua non* of modern hard look review. The APA requires agency decisions to pass, at the very least, the threshold of arbitrary and capricious review.[111] It is only by evaluating the reasons and rationales proffered by the agency that the reviewing court can satisfy itself that the administrative decision is neither arbitrary nor capricious (or, depending upon the proper standard of review, is supported by substantial evidence).[112] It would seem, therefore, that anything that enables the reviewing court to make better sense of the agency's reasoning process would be a valuable practical device.

While this is a sensible argument in favor of the remand without vacatur device, there are two considerations that militate against its use for this purpose. First, there are limits to how far reviewing courts should go to fine-tune agency reasoning. The basic standard of review in administrative law--arbitrary/capricious review--requires that the agency pass a "plausibility" threshold, not that it articulate a full blown empirical and theoretical basis for choosing one outcome rather than another. To illustrate this point, consider the lodestar modern hard look case, *State Farm*.[113] Suppose that the Secretary of Transportation had rescinded the extant passive restraints requirement on the grounds that it was putting its resources behind strategies to reduce the ill-effects of second-order collisions in ways other than by requiring the installation of airbags in automobiles and that, therefore, the benefits of the passive restraint rule was outweighed by the costs. The reviewing court--and perhaps the public, for that matter--may prefer a better rationale than that; they may deplore the agency's cost/benefit tradeoff and may also expect a more elaborate justification for the agency choice.[114] However, so long as the agency can persuade the reviewing court that this decision is within the boundaries of its statutory charge, this

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[108] *See* Checkosky v. SEC, 23 F.3d 452, 462 (1994).

[109] *See* Levin, *supra* note 7 (manuscript at 6) ("Vacation of an action can upset a legal regime on which many citizens depend.").

[110] See *id*. ("A second theme in the case law ... is protection of reliance interests.").

[111] 5 U.S.C. § 706(1)(A) (2000).

[112] § 706(1)(E). One of the defining features of hard look review is the merging of more interventionist substantial evidence review with arbitrary and capricious review. *See, e.g.*, Peter Strauss, *Comment, The Rulemaking Continuum*, 41 DUKE L.J. 1463 (1992).

[113] 463 U.S. 29 (1983).

[114] Or, to be fair, the public may welcome the use of cost/benefit analysis by responsible agencies in implementing their charge to create optimal regulatory policy. *See generally* CASS R. SUNSTEIN, THE COST-BENEFIT STATE (2002).

decision would likely be upheld even under a hard look review standard.

I draw the hard look doctrine back to the point I raised in the previous section in connection with "internal factors" influencing agency outcomes.[115] Agencies satisfice; they do not necessarily arrive at the best regulatory outcome. Correspondingly, the role of the reviewing court is to ensure that they have acted within the wide band of what is reasonable; it is not to figure out ways to get the agency's reasoning closer toward the ideal of perfection.[116] Therefore, the argument that the remand without vacatur device improves agencies' reasoning process assumes its own conclusion; the objective attached to the device ought not to be an objective at all.

Second, there are many instances in which the remand without vacatur device is used despite the fact that the agency has in fact articulated well the basis of its decision. The problem from the court's perspective in cases such as *AMA* and *Sugar Cane Growers* is not that the reasoning is generally poor; it is that the agency decision is fundamentally flawed. Thus, the decision to remand without vacatur does not enhance the agency's reasoning, so much as it gives the agency the opportunity to correct a mistake. In these circumstances, a reviewing court can accomplish its objective of improving agency reasoning just as easily, if not more so, by vacating the agency rule or order and remanding it back to the agency for reconsideration than by leaving the rule/order intact during the interim. Frequently, a reviewing court upends the agency decision, yet telegraphs rather clearly to the agency what it must do to survive judicial rule next time. If the intention is to get the agency to correct its mistake, vacatur is much stronger medicine than remand without vacatur. To be sure, this stronger medicine comes at the cost of inflicting hardship on the agency and perhaps also on the parties relying on the rule. Yet, my point here is only that the error-correcting function of remand without vacatur does not really explain why the "*without vacatur*" is useful other than for the reason that hardship is thereby avoided. We are left with little reason, then, to believe that this ameliorative device helps improve agency reasoning or is a more efficacious technique for correcting serious agency errors.

Moreover, there are good reasons to suppose that an agency will be motivated both *ex ante* and *ex post* to adopt rules in a manner that will pass muster if they know that they face the prospect of vacatur if they fail. As discussed in Part I of this article, these incentive effects are not necessarily salutary;[117] I question the degree to which courts micro-manage agency decisionmaking by threatening judicial intervention. The stories told by social scientists and legal scholars who have closely studied regulatory decisionmaking and the impact of the federal courts in particular policy contexts suggest that

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115 *See* text accompanying *supra* notes 15-21.

116 *But see* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992). Professor Seidenfeld offers an elegant counter-theory, describing the ways in which agency decisionmaking can, when properly constructed and supervised, realize much more aspirational, grandiose aims. He notes: "[T]he paradigmatic process for agency formulation of policy--informal rulemaking--is specifically geared to advance the requirements of civic republican theory .... With proper constraints on bureaucratic decisionmaking ... the administrative state holds the best promise for achieving the civic republican ideal of inclusive and deliberative lawmaking." *Id*. at 1560-76.

117 *See* text accompanying *supra* notes 39-44.

the agency motivations wrought by activist judicial review has been problematic.[118] However, if we take on face value the opposite view propounded by advocates of hard look review, that is, that agencies should be incentivized to reconfigure agency decisionmaking and to engage in more, rather than less, elaborate administrative processes prior to the development and implementation of a regulation or order, then it is not at all clear that the middle-ground device of remand without vacatur has more desirable incentive effects than the heavier stick of simple vacatur. True, the remand without vacatur device can be viewed as an optimizing strategy, one that strikes a balance between the disincentives for agencies to adopt rules in the face of aggressive, costly judicial review and the incentive for the agency to "get it right." But, the problem with this viewpoint is that it is in tension with the underlying theory behind hard look review, a theory that is designed to force agencies to engage in more elaborate and "synoptic" agency decisionmaking.[119]

A significant second consideration that is advanced in favor of the remand without vacatur device is that it promotes stability in the administrative process. It is a practical device by which courts can finetune the administrative process by careful, calculated intervention. It is a scalpel, not a blunderbuss. And it seems to respect better than the blunt tool of simple remand the interests of the agency in carrying out its regulatory functions with a minimal amount of judicial intrusion.

Both Ronald Levin and Richard Pierce express great sympathy to the remand without vacatur technique on this ground. Says Levin:

> In a number of decisions, [courts] have resorted to remand without vacation in order to prevent an unduly disruptive interruption in a regulatory regime ... [T]he device of remand without vacation enables the government to ... 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" seems to have particular force.[120]

Professor Richard Pierce ties the device to the effort to combat the "ossification" of regulatory decisionmaking. By providing the agencies with greater flexibility, they will feel more free, so the argument goes, to expend the effort to enact rules; moreover, the superior partnership nurtured between courts and agencies will reduce the defensiveness, avoidance, and other noxious behaviors characteristic of agencies in an environment in which hard look review overlays all agency rulemaking and, therefore, in which the game may not be worth the candle. Both of these arguments are variations

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118 *See* sources cited in *supra* notes 14-16.

119 *See* Colin Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 393-434 (1981); *see also* SHAPIRO, *supra* note 16, at 14- 35.

120 Levin, *supra* note 7 (manuscript at 6, 65). The Frankfurter reference is to *United States v. Morgan*, 313 U.S. 409, 422 (1941) (Morgan IV).

on essentially the same theme: Remand without vacatur is pro-agency.[121]

The "stability" rationale is appealing. Reducing the effects of judicial review in the hard look review appears to streamline the administrative process. This streamlining is just what the doctor ordered for those concerned with regulatory ossification.[122] Yet, there is a way in which this device may have the opposite effect. I note here in passing an argument I will develop in more detail below: that the device contributes to courts' interventionist strategies and thus, paradoxically, expands rather than contracts judicial review. But there is a second reason for skepticism about the "stability/anti-ossification" result. Recall that remand without vacatur preserves the status quo while the agency returns to the drawing board. There is no clear incentive, save for a timetable that the court establishes--and my reading of the cases suggest that such timetables are quite rare--for the agency to diligently redesign its decision and rationale and to return to the court for its approval. Hence, the regulatory process bears costs while the process slowly unfolds. To be sure, these costs are not primarily litigation costs, but so long as the agency's decision is preserved while it takes its time to re-examine its regulatory rationale, there are costs to the system nonetheless. Recalling the *Checkosky* case, note that Messers. Checkosky and Aldrich remain subject to the penalties imposed by the SEC while the agency proceeds post-remand. While there may be a stay available to them pending further proceedings, this stay is discretionary; in addition, they still run the risk of having this penalty upheld after the subsequent judicial proceeding--whenever that happens.

In the end, remand without vacatur may trade one solution to the ossification problem for another problem. Even if we agree that agencies like remand without vacatur, this does not mean that the costs associated with ossification, and hence with the regulatory process more generally, dissipate. Remand without vacatur is still a remand; agencies do not escape searching review by greater use of this device in the federal courts. Moreover, the incentives on the part of agencies to delay while they reconstruct their rationales seem rather strong. In a world in which delay and uncertainty represent costs to the regulatory system--and, therefore, ossify the administrative process--the remand without vacatur device does not clearly promote stability and may, in fact, even exacerbate it.

The third rationale for the device is that it protects the reliance interests of parties involved in the regulatory dispute. On the surface, this rationale seems quite odd. If the agency's decision is flawed, so flawed that the reviewing court remands it back to the agency for further consideration, then we might doubt that the reliance interests of (1) the agency, and (2) the individual or firm's interests represented by the agency, ought to be respected at all. After all, these individuals have relied on an administrative decision of dubious validity. But the reality of the situation is more complicated than that. Agencies promulgate rules after a good deal of pre-implementation process. Although regulated industries and individuals bear the risk that these rules may ultimately be overturned, while challenges wind their way through courts, they surely conduct themselves in accordance with the established rules adopted by the agencies. As Ron Levin notes: "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

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[121] Levin notes that the "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." Levin, *supra* note 7 (manuscript at 65).

[122] *See supra* note 9.

entered into contracts, made capital investments, and shifted business operations in light of the rule."[123] It would seem only prudent for us to give some deference to these settled expectations in designing remedies in administrative law.

This deference has been made considerably more difficult by the Supreme Court's 1988 decision in *Bowen v. Georgetown University Hospital*.[124] In this case, the Court restricted severely the circumstances in which an agency can apply its rule retroactively. The Department of Health and Human Services had promulgated regulations which provided that it "shall ... (ii) provide for the making of suitable retroactive corrective adjustments."[125] "It is axiomatic," declared Justice Kennedy for the Court, "that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."[126] Axiomatic? Well, maybe. However, the Court had never squarely held that agency rules could not be applied retroactively in the manner suggested by the Medicare Act.[127] Indeed, retroactivity had functioned for years as a useful means by which courts tempered the impact of agency reversals.[128] Even where the rule was vacated, individuals and firms who may have relied upon the rule in place could expect some attention to be paid to their plight when the agency adopted a "corrected" rule subsequently. Both Pierce and Levin point out that the rise in the remand without vacatur technique can be attributed to the demise of retroactive rulemaking after *Georgetown Hospital*.[129] Although the D.C. Circuit has not made this connection with *Georgetown Hospital* explicitly, the interaction between these two doctrines seems rather obvious. As Peter Strauss, Todd Rakoff, and Cynthia Farina put it in their notes following the *Georgetown Hospital* decision: "By casting doubt on agencies' legal authority to cure defective rulemakings retrospectively, Bowen raises the stakes for a court trying to craft an appropriate remedy (and perhaps also for any agency deliberately choosing between adjudicatory and rulemaking approaches)."[130]

The "reliance interests" argument for remand without vacatur is a strong one. Protecting the legitimate expectations of those subject to administrative rules and, therefore, those most vulnerable to the perturbations of judicial processes, is a sound justification for designing pragmatic administrative law techniques. As I indicated in the opening paragraph of this essay, administrative law rules are essentially

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123 Levin, *supra* note 7 (manuscript at 6).

124 488 U.S. 204 (1988).

125 42 U.S.C. § 1395x(v)(1)(A) (1984).

126 *Bowen*, 488 U.S. at 208.

127 *See* William V. Luneberg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 107-08.

128 *See* Levin, *supra* note 7 (manuscript at 46-58) (discussing retroactivity in administrative decisionmaking, and its connection to remand without vacatur).

129 *See* Pierce, *supra* note 7, at 75-76 (remand without vacation in D.C. Circuit "was motivated largely by a desire to avoid the potential disruptive effects" of *Georgetown Hospital*).

130 *See* Strauss, *supra* note 61, at 583.

practical devices for regulating agencies and also the courts that review such agencies. Given the legitimate interest in protecting these reliance interests, is the remand without vacatur device a good one? It is, I argue, an inadequate solution to a problem wrought by *Georgetown Hospital* and, perhaps more fundamentally, the Court's incoherent doctrines concerning administrative law remedies. The *Georgetown Hospital* doctrine restricts a very practical mechanism employed by agencies to temper the impact of judicial decisions. The inability of the agency to correct decisions retroactively not only disrupts settled expectations of parties, it also creates ex ante incentive effects on the part of agencies, leaving agencies in a bind in deciding how to regulate in the first instance. While it is not surprising to see the courts struggle with salvaging some degree of protection of reliance interests and doing so through the creative device of remand without vacatur, we ought not to lose sight of what is the essential problem: A crabbed reading of the APA that restricts the agency's ability to act retroactively cuts off one key means of regulatory flexibility. And remand without vacatur is an inadequate substitute. The question remains to be seen whether it is a substitute whose benefits outweigh, or are outweighed by, its costs.

C. Remand Without Vacatur Revisited: Gift Horse or Trojan Horse?

The discussion to now has focused on the practical questions of whether and to what extent the remand without vacatur device accomplishes its aims of facilitating agency reasoning, stability in regulatory administration, and protection of reliance interests. Despite my arguments in the previous section that the benefits attributed to the remand without vacatur device are overstated, I expect that the reader up until now may be left with the conclusion that many scholars and a majority on the D.C. Circuit have found attractive, namely, that remand without vacatur is on balance sensible as a strategy for improving the administrative process somewhat. While no panacea, it improves regulatory outcomes while maintaining stability and the reliance interests of affected parties. It is, in short, quintessentially what remedial discretion is all about: Crafting judicial strategies within the boundaries of law to facilitate sound regulatory decisionmaking. What is not to like?

One answer to that question has been proffered by dissenting voices in the D.C. Circuit, particularly Judges Raymond Randolph and David Sentelle, both of whom have objected to the remand without vacatur device on the grounds that it violates the Administrative Procedure Act.[131] While I agree with the D.C. Circuit majority and with Professors Pierce and Levin that this argument is ultimately unpersuasive, it is worth considering seriously at least as a window into how and why judges disagree about the nature and scope of remedial discretion. Moreover, the debate within the D.C. Circuit encapsulates familiar disagreements about formalism and functionalism in administrative law, disagreements that should shape our understandings about administrative law remedies generally.

1. When Does Shall Mean Shall? The Legal Arguments over Remand Without Vacatur

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[131] *See* Milk Train, Inc. v. Veneman, 310 F.3d 747, 758 (2002) (Sentelle, J., dissenting); Checkosky v. SEC, 23 F.3d 466, 466 (D.C. Cir. 2002) (Randolph, J., concurring); *see also* Util. Solid Waste Activities Group v. EPA, 236 F.3d 749 (D.C. Cir. 2001) (Randolph, J.). Because of this disagreement within the circuit, Ron Levin notes that "remand without vacation continues to exist, but its availability may depend on the composition of a particular panel." Levin, *supra* note 7 (manuscript at 14).

In particular, Judges Randolph and Sentelle have articulated the view that the remand without vacatur device violates APA section 706.[132] This section provides that a court "shall ... hold unlawful and set aside agency action, findings, and conclusions found to be--(A) arbitrary, capricious, and abuse, or otherwise not in accordance with law."[133] Randolph and Sentelle read this language as prohibiting the court from remanding an agency decision without setting it aside. As a matter of strict statutory construction, this view has substantial merit. Certainly this interpretation makes the most sense of the strong term "shall." Moreover, there is support for this construction in statements by Justices Kennedy and Scalia. Negotiating the terms of the *Georgetown Hospital* in an early draft of the majority opinion, Kennedy proposed that courts could "stay invalidation of the challenged regulation pending curative rulemaking."[134] Justice Scalia reacted strongly to this suggestion, declaring that "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."[135]

Caselaw on the interpretation of the word "shall" is, alas, unilluminating. What the Court frequently says in connection with regulatory policymaking and the role of the courts is that the courts retain a great deal of remedial discretion. This remedial discretion is not unlimited, of course; for example, in *Hecht Co. v. Bowles*,[136] the Court conceded that an "unequivocal statement of [legislative] purpose," could restrict the courts' use of equitable principles to overcome rather clear statutory direction.[137] This hornbook rule of law confuses as much as clarifies, however, since the key question remains what represents such an "unequivocal statement?" Suffice it to say for our purposes that no federal court has defined the word "shall" to limit altogether the discretion of the court to provide interim relief, equitable relief of another sort or, more specifically, to implement the remand without vacatur strategy. Moreover, the tenor of the Supreme Court decisions permitting the federal courts to exercise broad remedial powers suggests that the "shall" injunction of section 706(1) does not clearly restrict the courts' remand without vacatur strategy.

In his thorough article on the remand without vacatur question, Professor Levin recounts in detail the statutory and legislative history arguments for the proposition that section 706(1) does not

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132 *See Milk Train*, 310 F.3d at 758; *Checkosky*, 23 F.3d at 466.

133 5 U.S.C. § 706(2)(A) (2000).

134 This information is gleaned from Professor Levin's examination of the Justices' private papers made available recently thanks to Justice Thurgood Marshall. *See* Levin, *supra* note 7 (manuscript at 49) (quoting from first draft of the opinion of the Court (circulated Nov. 22, 1988), at 11-12). I have not examined these papers myself in order to confirm Professor Levin's review.

135 *See* Levin, *supra* note 7 (manuscript at 50) (citing "Letter from Justice Scalia to Justice Kennedy, at 1-2 (Nov. 28, 1998)). Professor Levin also points out that Justices Stevens and Blackmun expressed agreement with Justice Scalia's concerns. *Id*. at 50 & n.243.

136 321 U.S. 321 (1944).

137 *Id*. at 329. *See* the discussion in Levin, *supra* note 7 (manuscript at 15).

restrict remand without vacatur.[138] I will not recount in similar detail his arguments here, since the thrust of my argument is concerned with a different, more practical, set of considerations. I will simply describe the reasoning underlying his conclusion, a conclusion that I find persuasive as an accounting of the APA and this remedial device:

- Section 706's "shall" language should be construed not "in isolation," but "in light of a longstanding judicial presumption that militates against a finding that Congress has placed curbs on the courts' remedial discretion."[139] Many cases involving a range of judicial remedies support the presumption that the courts' traditional remedial discretion and equity powers are to be preserved.[140]

- Closely related statutory provisions support the notion that the APA preserves broad remedial discretion.[141] Not only do the core statutes on federal judicial powers grant to courts wide-ranging remedial powers, including the power of remand and the power to "require such further proceedings to be had as may be just under the circumstances,"[142] but so too does the APA in the section immediately proceeding section 706. In section 705, the courts are given the power to "issue all necessary and appropriate process ... to preserve status or rights pending conclusion of the review proceedings."[143]

- While the legislative history is inconclusive, the context of the section, "consisting of the provision as a whole, related provisions, and its enactment history" points to a conclusion that "shall" need not be construed in a strict,

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138 Levin, *supra* note 7 (manuscript at 14-19).

139 *Id*. at 15.

140 *Id*. at 15-16; *see, e.g.*, Miller v. French, 530 U.S. 327 (2000). Professor Levin also describes *Webster v. Doe*, 486 U.S. 592 (1988), as a case reinforcing the courts' broad equity powers. *See* Levin, *supra* note 7 (manuscript at 18-19). I would not read *Webster* as would Levin. Yes, the Court notes in dicta that "traditional equitable principles requiring the balancing of public and private interests control the grant of declaratory or injunctive relief in the federal courts"; however, this is fairly read as a mere restatement of the general equity powers of the trial courts in connection with these conventional forms of relief. *See Webster*, 486 U.S. at 604-05. The statement does not really bear on the question at hand, namely, whether the reviewing courts in federal administrative law cases could or should use their equity powers to superintend certain regulatory processes. In any event, Professor Levin's general point about the broad remedial powers of the federal courts in administrative law cases is valid.

141 Levin, *supra* note 7 (manuscript at 17-18).

142 *See* 28 U.S.C. § 2106 (2000). *But see* Prestes, *supra* note 6, at 141.

143 5 U.S.C. § 705 (2000).

> formalistic way.[144] For example, the last clause of the section states that "due account shall be taken of the rule of prejudicial error."[145] This, and other open-ended provisions in this section, indicates that Congress designed this provision to maintain a suitable amount of judicial discretion.

The remand without vacatur device can be utilized by the courts consistently with APA section 706. The device is consistent with the courts' use of its broad remedial powers. Despite my confidence that this is the right statutory result, the utilization of this tactic remains mired in controversy within the D.C. Circuit, undecided by the Supreme Court and, at least thus far, not especially tempting to other circuit cases. In the main, the controversy reflects a battle among formalist judges. Judge Silberman, the author of *Sugar Cane Growers* and *Checkosky* and, therefore, the main voice on the circuit for the remand without vacatur device develops the case for this device mostly on the basis of a formalistic rationale. He describes the court's approach in *Checkosky* as "with[holding] full judicial review and therefore not yet determin[ing] whether the agency action is arbitrary and capricious."[146] By proceeding cautiously and requiring a fuller rationale "before deciding whether the agency's action violated administrative law,"[147] the court, says Silberman, avoids Judge Randolph's syllogism that goes as follows:

> Major premise: An agency that fails to explain adequately its actions violates the APA
>
> Minor premise: All actions that violate the APA must be set aside
>
> Conclusion: Since here the agency has failed to explain adequately its actions must have its decision set aside.[148]

The flaw in Randolph's reasoning, insists Silberman, is in the first premise; on the contrary, the court cannot yet discern *whether* the agency has explained adequately its actions.[149] Until it is able to resolve this question, the agency's decision remains frozen in time; remanding the matter back to the agency assists the court in making this decision at some point in the future.

This formalistic debate misses out on a different type of analysis, an analysis that is revealed in a tiny number of the remand without vacatur cases and the small, but vigorous, scholarly debate on the

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144 Levin, *supra* note 7 (manuscript at 16).

145 5 U.S.C. § 706 (2000).

146 Checkosky v. SEC, 23 F.3d 452, 464 (D.C. Cir. 1994).

147 *Id*. (citing Dunlop v. Bachowski, 421 U.S. 560, 574-75 (1975)).

148 The reference to "syllogism" is Judge Silberman's, though it seems to me to be a fair characterization of Judge Randolph's mode of reasoning in his dissenting opinion.

149 *Checkosky*, 23 F.3d at 154.

remand without vacatur device. This analysis is more avowedly functionalist, looking at the question whether this remedial device is appropriate for courts to use in judicial review cases under section 706 and, moreover, what sort of rules/limits should be imposed in courts in employing this device. This functionalist mode of reasoning is, to me, more appropriate in light of the central issues of remedial discretion, judicial strategy, and agency performance implicated by the remand without vacatur device and, for that matter, judicial remands in administrative law more generally. It is to the conspicuously functional considerations implicated by remand without vacatur that I now turn.

2. Promoting Judicial Activism through Judicial Restraint: The Paradox of the Middle-Ground

At first glance, remand without vacatur seems ideally suited to a regime in which courts are concerned with scrutinizing carefully agency performance but are also interested in preserving a decent amount of administrative discretion. The device represents a plausible middle ground between two extremes, one entailing complete agency discretion and the abdication of the judiciary's responsibilities under section 706, the other a rigorous, powerful mode of review in which the agency risks invalidation for an insufficiently precise rationale or ultimately correctable mistake. Criticizing this device on practical grounds seems like looking the proverbial judicial gift horse in the mouth.

Yet there is a practical deficiency in this device. The essential deficiency is this: The availability of the remand without vacatur device liberates the court to engage in searching review where such review may, by its very nature, be unduly interventionist. While I would concede that once the review is underway, remand without vacatur may, in many circumstances, be preferable to simple vacatur. But I resist the notion that the middle-ground device exists to preserve agency flexibility in a world in which searching *judicial review of agency reasoning* is inevitable.

To illustrate this deficiency, we should look carefully at the strategic considerations that animate courts in considering how best to implement their review strategy in the first instance. To this point in our discussion, we have been focusing nearly exclusively on the reviewing courts' responsibilities under section 706 of the APA. Viewed in a vacuum, the court is always reviewing agency decisions. The only questions are how to evaluate the agency's decision under the fairly broad standards of sections 706 (1)(A) and (E). The remedy, whether vacatur or remand without vacatur, follows the reviewing courts' examination of the agency's decision and its reasoning.

This description of regulatory review is misleading, however. The structure of analysis described above begins in the middle of the story, rather than at the beginning. Section 706 review obtains where (1) an agency decision is final, and (2) where is an agency is reviewable under the standards of sections 701-704 of the APA. Neither of these requirements is *pro forma*; rather, they are each important legal prerequisites to the availability of judicial review. Therefore, the answer to the question "is this agency decision reviewable?" is prior to the question of how the agency's decision is to be evaluated under the rubric of section 706.

Notwithstanding the clear textual separation between the availability of review and the scope of review questions, administrative law doctrine has frequently conflated the two inquiries. With respect to the issue of "finality," federal courts have grappled over the years with the issue of "ripeness," considering when judicial review of agency actions should occur. The issue is seldom an easy one. The courts have made it pretty clear that where there are alleged constitutional violations, violations which

would constitute an "irreparable injury," agency actions will ordinarily be held ripe for review and, moreover, individuals will not be required to exhaust all administrative remedies before seeking judicial redress.[150] However, where the allegations do not concern constitutional violations but, rather, the reasonableness of the agency decisions per APA section 706, would-be plaintiffs must exhaust their administrative remedies and the agency action must be final and, therefore, ripe for judicial review.[151]

What this has to do with remand without vacatur is this: The conclusion reached by courts in cases like *Checkosky* is that the agency's decision *may be* supported by substantial evidence but, then again, it may not be. The question is an open one and thus the agency must continue with its process to forge a rationale that the court can in fact review. Insofar as the agency rationale is part of the agency decision--which it must be, if 706 reasonableness review is to make any sense--the conclusion that the agency has not yet done enough to justify the court engaging in the process of judicial review is not different in kind from the conclusion that the agency decision is not yet final and, therefore, the case is not yet ripe. Ripeness doctrine, fairly applied, would seem to be at odds with the D.C. Circuit's stated rationale for remanding without vacatur.

If the preceding discussion strikes the reader as a caricature of a technical administrative law doctrine, this is a fair reading; I intend it as such. It is implausible that ripeness doctrine would stand in the way of reviewing an agency order as in *Checkosky*. The agency order is final at the point at which the SEC applies Rule 2(e) to petitioners Aldrich and Checkosky. In the course of review, the court sends the case back to the agency because the agency has not finished, but this does not mean that the order examined by the court was not final for the purposes of the court's initial review.[152] The point of this discussion is to dismantle the formalistic, and strained, justification offered by Judge Silberman in the Checkosky opinion. He argues that the court is not really engaging in searching review of the agency decision; remand without vacatur, by this light, embraces agency discretion. However, to get to this

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[150] *See* Abbott Labs. v. Gardner, 387 U.S. 136 (1967). For a general statement of the law regarding review of nonfinal agency action, see Judge Leventhal's concurring opinion in *Ass'n of National Advertisers, Inc. v. FTC*: "[A] federal court ... [is to] take jurisdiction before agency action ... only ... in a case of 'clear right' such as outright violation of a clear statutory provision ... or violation of basic rights established by a *structural* flaw, and not requiring *in any way* a consideration of interrelated aspects of the merits ...." 627 F.2d 1151, 1180 (D.C. Cir. 1979) (internal citations omitted).

[151] *See, e.g.*, Ticor Title Ins. Co. v. FTC, 814 F.2d 731 (D.C. Cir. 1987).

[152] This does not mean, however, that the ripeness argument would be frivolous. In *Appalachian Power v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), the court noted that:

> Of course, an agency's action is not necessarily final merely because it is binding .... In the administrative setting, "two conditions must be satisfied for agency to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process ... And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"

Id. at 1022 (internal citations omitted) (quoting Bennett v. Spear, 520 U.S. 154, 178 (1997)). Given what the *Checkosky* court ultimately said about the ambiguity in the agency's decision, the agency may have plausibly (though I do not think, in the end, persuasively) believed that the case was not yet ripe for review.

point the court had to (1) take jurisdiction over this case, (2) require the agency to defend its actions in the federal appellate court, and (3) examine not only the briefs of the party, but also the record in the case. This constitutes active judicial review, though acknowledging that this activism is tempered by the decision of the court to send the case back to the agency for further process. Ripeness doctrine would not permit the court to withhold judicial review, not so long as the agency regulation remains in place. Thus, the court's searching review was rendered inevitable once it had made the decision to review this case under section 702 of the APA.

Truly, the only way out of the "inevitable" judicial scrutiny, a scrutiny which leaves to agencies the heavy responsibility to defend its actions thoroughly in court and, also, to calculate the risk and costs of intrusive litigation in determining whether and how to fashion its regulatory strategies, is to hold the agency action unreviewable. This choice is not made in a vacuum; the APA provides twin categories of situations in which an agency decision is unreviewable. The first category, per section 701(a)(1) of the APA, is where "statutes preclude judicial review."[153] The criteria for determining whether and to what extent review is precluded by statute have been shaped by decades worth of administrative law cases, each involving specific instances of statutory interpretation. The landscape has been shaped significantly, if still ambiguously, by the creation in *Abbott Laboratories v. Gardner* of the presumption of reviewability.[154] Given this presumption, and the "clear and convincing evidence" requirement for overcoming this presumption, it is rare to find review precluded by statute.

It is rare as well for review to be unavailable as a result of the second category in section 701. This section holds unreviewable agency decisions that are "committed to agency discretion by law."[155] The definition of what constitutes "discretionary" agency decisions is, to put it mildly, inexact. We noted in passing in Part I of this article *Heckler v. Chaney*, the case in which the Supreme Court held that the agencies' choices about how best to exercise its enforcement discretion where there are no statutory standards pertaining to this discretion are unreviewable decisions.[156] But what of other agency decisions not involving enforcement discretion? The standard criterion for determining whether the action is or is not reviewable is whether there is "law to apply."[157]

The principal difficulty in the courts' approach to interpreting section 701(a)(2) is that courts neglect to view the issue of whether an agency decision is "committed to agency discretion" as a *spectrum* rather than a category. Administrative situations in which there is truly no law to apply are rare. There are only two clear instances since the articulation of this standard in *Overton Park* in which the Supreme Court has agreed with the agency that there was no law to apply and hence the agency

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153 5 U.S.C. § 701(a)(1) (2000).

154 387 U.S. 136 (1967); *see also* Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 746-47 (1992).

155 5 U.S.C. § 701(a)(1) (2000).

156 *See supra* note 65.

157 Overton Park v. Volpe, 401 U.S. 402, 410 (1971).

decision is unreviewable;[158] and it is fair to say that both these decisions involved rather unusual factual circumstances.[159] A more useful approach to evaluating reviewability is to consider, through a more functional lens, whether the agency is well-suited to make a regulatory decision without intervention by the reviewing court under section 706(1)(A) or (E) of the APA. Remember that the agency's decision will always be subject to review for a constitutional violation. More controversial is whether the court may always review an agency decision to ensure compliance with the APA or with its underlying statute. We need not settle these difficult questions here, however. The point is that the courts ought to consider the question of reviewability in light of the spectrum of agency decisions, ranging from those that involve policy choices and tradeoffs of the sort that agencies are likely to be better suited at making than a court to those that involve the type of straightforward statutory construction that courts may credibly argue are at least as much within the expertise of courts as they are within the expertise of agencies. Under contemporary administrative law doctrine, these questions are usually settled by courts employing traditional hard look review strategies under the rubric of section 706. This approach exacerbates regulatory ossification and distorts regulatory policy; moreover, it reinforces the flawed notion that the measure of good agency reasoning is how skilled government lawyers are in persuading a reviewing court removed from the agency decisionmaking process that this reasoning is sound and that the relevant factors have been considered, the proper tradeoffs have been made, etc. Without denying that there are many circumstances in which such searching judicial review will be not only desirable, but obligatory, the development of a sensible, practically focused approach to determining which types of agency decisions are discretionary and, therefore, unreviewable, would represent an improvement in judicial review of agency decisionmaking.

We turn now to the question of what features of modern judicial decisionmaking impede the development of this refined approach to functional distribution of court/agency responsibilities. To say that the APA stands in the way is circular. The APA provides for a structure of judicial review, to be sure; it grants a right to review and also provides the criteria, in section 706, for the implementation of that review. However, it also sets out threshold prerequisites for the court to meet in order to proceed to the review function. The central question is how the APA ought properly to be interpreted and applied. So, the main issue is not the supposed impediment of the APA, but the incentives, motivations, and behavior of the appellate courts. After all, it is these courts that are carrying out the twin tasks of defining the rules governing the review of agency decisions and, further, doing the actual review.

The availability and utility of appropriate judicial remedies is, without doubt, a factor in the courts' pursuance of particular strategies of judicial review. For instance, the restrictions on standing in the APA (constitutionally based, the Supreme Court has indicated) limits significantly the ability of courts to use the vehicle of any case that manages its way up to the appellate case to implement broad

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158 Webster v. Doe, 486 U.S. 592, 603 (1988); Heckler v. Chaney, 470 U.S. 821, 837 (1985).

159 *Chaney* involves the peculiar claim made by death penalty advocates the FDA's failure to subject lethal injunction drugs to ordinary FDA review to make sure that these drugs were "safe and ineffective" was a legal violation. *Chaney*, 470 U.S. at 823-24. *Webster* involved the politically charged issue of whether the CIA acted illegally for firing an agent for being homosexual. *Webster*, 486 U.S. at 585. It is more likely that the run-of-the-mill reviewability cases in the appellate courts raise less provocative issues.

policy;[160] on the other hand, the willingness of the courts to permit broad organizational standing,[161] not to mention the availability of citizen suits in key regulatory statutes,[162] tempers the impact of standing limitations and empowers the court to intervene in major policy disputes. Despite what has been characterized as strict standing doctrine, there is seldom a policy area in which the court is unable to intervene because of the lack of a suitable case for review. Similarly, the availability of pre-enforcement review of agency regulations,[163] though controversial,[164] affects judicial strategies by giving the court the opportunity to view an agency's policy choice "from the mountain top" rather than from the vantage point of a particular application of a regulation to a real person. The choice between telescopic and microscopic review is no doubt a significant one. The fact that the APA provides for pre-enforcement review, and thus gives the courts this choice, is significant in shaping the role of the courts and therefore in shaping modern regulatory policymaking.

These rules reflect deliberate choices made by Congress in creating the regime of regulatory review by courts. An even more interesting cluster of rules are those designed by the courts themselves. Consistent with the tradition of broad remedial discretion, courts have crafted over the years various equitable devices to implement their goals and objectives. This is true, as well, in administrative law. Modern administrative law doctrine is filled with cases considering the scope and reach of judge-made devices to aid them in carrying out their review functions. It is only a surmise, and one based on impression rather than on empirical evidence, but I believe that most of these remedial devices have been designed and deployed in order to expand the role of courts in superintending administrative agencies. There are counter-examples to be sure. Mootness, ripeness, exhaustion, and sovereign immunity are four major doctrines, for the most part developed by courts that have the purpose and effect of narrowing the availability and scope of judicial review. Most other remedial devices in administrative law, though, cut the other way.[165]

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160 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); *see also* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1462 (1988).

161 *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972).

162 *See, e.g.*, Clean Air Act, 42 U.S.C. § 7604(a) (2000); Clean Water Act, 33 U.S.C. § 1365(a) (2000).

163 Though the APA is ambiguous on the question of pre-enforcement review, the Supreme Court made clear that pre-enforcement review is available. Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967); *see also* Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158, 160 (1967); Gardner v. Toilet Goods Ass'n, Inc., 387 U.S. 167, 168 (1967).

164 *See, e.g.*, JERRY L. MASHAW, *Legal Control of Administrative Policymaking: The 'Judicial Review Game'*, in FOUNDATIONS OF ADMINISTRATIVE LAW 239 (P. Schuck 2d ed. 2003); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 89-91 (1995).

165 For a seminal treatment of administrative law remedies, a treatment that I believe confirms this conclusion, see LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 152-96 (1965).

Remand without vacatur cuts both ways. From the existing baseline of hard look review, it is a tempering device; as explained by the D.C. Circuit and by influential commentators, it preserves more agency discretion and flexibility than the blunt tool of simple vacatur.[166] However, it is precisely the baseline that is in question. If the federal appellate courts were more concerned with limiting the availability of judicial review overall and, by implication then, the impact of hard look review on agency performance, then the remand without vacatur device would hardly be necessary. After all, the small number of cases that would emerge in the appellate courts would be those in which the reviewing court would be expected to review very closely. If we take seriously the idea of path dependence, basically the notion that this smaller population of cases would be more likely to reflect agency decisions about which there is controversy and also agency decisions that are properly subject to searching judicial scrutiny because courts have substantial expertise in evaluating the agency choice, then we would expect to see more agency failures. Moreover, these failures would be harder to correct; if that is right, vacatur would seem to be a more appropriate remedy.

This is a prospective state of the world. What about the real world? Under the current system, the availability of the remand without vacatur device gives the reviewing courts another reason to engage in searching judicial review. Since this review is tempered by a less-intrusive remedy, the courts feel more liberated to engage in some sort of review at all. The result of this review is, for the reasons already explained here and elsewhere, to burden administrative agencies.[167] In the long run, these burdens shape in damaging ways regulatory policymaking; they contribute to the "ossification" of the regulatory process.

The fundamental flaw in the remand without vacatur device is that it creates a remedy that *presupposes* an activist level of judicial review. It exists against a particular baseline of judicial review. Even more problematically, it *reinforces* this baseline by encouraging the courts to review agency decisions and offer a remedial middle-ground where the agency may be better off with a ground not in the middle, but closer to their preferred place, a place where the agency decision is discretionary and, therefore, not reviewable at all.

III. CONCLUSION

Remand without vacatur is a good example of the appellate courts' strategic use of a device in order to temper the impact of a negative review of agency performance. It provides the agency with a second bite at the apple. The underlying assumption on the part of the court is that the agency will succeed at fixing the problem at issue and will therefore succeed when its rule comes before the court later. There are some reasons to believe that this optimism is warranted; after all, the reviewing court has typically given the agency a roadmap to follow in reconfiguring its regulatory rationale.

This device is appealing precisely because it acknowledges the difficult role agencies face in making rules and issuing orders. Carefully exercised, in accordance with guiding principles and attention

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166 *See* sources cited in text accompanying *supra* notes 7, 71.

167 *See* sources cited in *supra* notes 39-41.

to statutory requirements,[168] remand without vacatur gives the reviewing court a useful option that it would otherwise lack. It is a tempting middle ground between two extremes.

The problem with the device is that it encourages more judicial activism. It is hardly a gift horse at all, but, instead, more of a Trojan horse. Courts may be too quick on the trigger in pursuing judicial review in cases where agency expertise should win out, given their belief that remand without vacatur, along with other tempering devices, will ease the pain of judicial scrutiny. Expanding the scope of judicial review raises a number of problems.[169] Remand without vacatur, I hasten to add, is not the precipitating cause of hard look review; rather, the relentless impact of hard look review steers the courts toward developing methods and mechanisms to ameliorate some of the dramatic effects of interventionist strategies.

The discussion of this one device raises the larger question of how we ought to view the relationship between the courts' remedial discretion in administrative law cases and the doctrines concerning scope of review. In much of the case law, as well as the scholarly commentary, these issues are considered mostly separately. Broad remedial discretion is accepted by and large as an ordinary, ubiquitous part of the administrative state. And it ought to be so regarded. Administrative law as a body of law, after all, grows out of what are essentially equitable principles.[170] Indeed, before there was an APA, courts maintained substantial powers to review the conduct and activities of regulatory agencies. However, in a world in which courts construe their review powers broadly and in which the incentives to restrain themselves in order to protect the prerogatives of administrative agencies are slim,[171] careful attention must be paid by courts and commentators to the ways courts articulate and apply their remedial powers.

As with other areas of law, we can tell a lot about the configuration of legal rules and legal policy in the administrative state by looking carefully at the structure of judicial remedies. When we look at the remedies developed over the years in which hard look review has been in operation, we see that the courts are struggling to balance interventionism with deference. Just as there is a certain ambivalence in their willingness to scrutinize aggressively agency performance, there is ambivalence, as well, in how they design their remedies. However tempting it may be to embrace this ambivalence and take on face value the willingness of courts to split the difference, with hard look review maintained alongside deferential remedy rules, it is more sensible to look at the contours of judicial strategies and the effects

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168 *See* the discussion in Levin, *supra* note 7 (manuscript at 72-73) (describing ABA's recommended guidelines for the use of the device).

169 *See* the discussion of hard look review in Part II *supra.*

170 The first American administrative case was *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), a case that involved, among other issues, the standards for the issuance of a writ of mandamus. *See generally* Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902); Louis L. Jaffe & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 LAW Q. REV. 345 (1956).

171 *See, e.g.*, Richard Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997) (discussing the relationship between judicial decisions in environmental cases and the ideological makeup of the reviewing panels).

of judicial review from a broader perspective. From this perspective, we can view remand without vacatur as a risky endeavor. True, it can be deployed to protect agencies from the sword of Damocles; but it can also fuel the courts' aggressiveness and thereby give effect to some of the worst tendencies in the super hard look review strategy manifest in contemporary administrative law. We would do well to consider the bigger picture in evaluating this particular device and, more generally, in assessing the shape of modern administrative law remedies.