



# ADMINISTRATIVE LAW REVIEW



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## IN MEMORIAM

**Charles H. Koch**

Stephen Wermiel ..... i

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**IN MEMORIAM**  
**CHARLES H. KOCH**  
**1944–2012**

PROFESSOR STEPHEN WERMIEL\*

Charles H. Koch, Jr., the Dudley Woodbridge Professor of Law at the William and Mary Marshall–Wythe School of Law, was an administrative law expert of the first order and played an important role in the history of the *Administrative Law Review*. We are saddened at his passing and invite our readers to join us in reflecting on his many contributions and achievements in the study of administrative law.

The *Administrative Law Review* is unique among law reviews in that it has had several different homes. From 1989 to 1996, while the *Administrative Law Review* was housed at William and Mary and operated as a faculty-run journal, Professor Koch served as editor in chief and supervised student staff members who assisted in the production of regular volumes. In this

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\* Professor and Fellow, Law and Government Program, American University Washington College of Law.

and in all other facets of his teaching career, he was passionately devoted to the study and development of administrative law. We are grateful for his careful custodianship of the law review and salute his leadership in our field. Truly, he was a luminary.

A graduate of the University of Maryland and The George Washington University Law School, Professor Koch also earned an LL.M. from the University of Chicago Law School. He worked at the Federal Trade Commission for five years before beginning his teaching career at DePaul University College of Law in Chicago in 1975. In 1979 he joined the faculty at William and Mary and remained there until his death on February 18, 2012.

Professor Koch was a prolific author of books and articles on administrative law. His works include eight articles published in the *Administrative Law Review* and many more published in other journals. He was the author or co-author of numerous practice books and annual supplements, including portions of *Federal Practice and Procedure*, *Federal Administrative Practice*, and the third edition of *Administrative Law and Practice*. He was the lead author of the celebrated casebook, *Administrative Law: Cases and Materials* (with co-authors William Jordan and Richard Murphy), now in its sixth edition.

Beyond his scholarship, Professor Koch served our field in so many other ways. For the past seven years, he was assistant chief reporter for the American Bar Association project on Administrative Law of the European Union. He also served as the chair of the Association of American Law Schools (AALS) Administrative Law Section from 1999–2000 and chair of the planning committee for the AALS Workshop on Administrative Law in 2000. He served twice as a consultant to the Administrative Conference of the United States.

The editors and faculty board of the *Administrative Law Review* honor Professor Koch for a distinguished career dedicated to the advancement of administrative law.

# ARTICLES

## THE SUPREMACY CLAUSE, COOPERATIVE FEDERALISM, AND THE FULL FEDERAL REGULATORY PURPOSE

ADAM BABICH\*

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\* Professor of Law, Tulane University, and Director of the Tulane Environmental Law Clinic. Thanks to Professors Johanna Kalb, M. Isabel Medina, and Amy Stein, to research assistants James C. Hou, Jessica L. Kersey, and Kara K. McQueen-Borden, and to Cheri, Jo, and Walter Babich.

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## INTRODUCTION

The Supremacy Clause is a slippery thing, considering its few, straightforward words.<sup>1</sup> The U.S. Supreme Court says the Clause “is not a source of any federal rights” but merely governs the priority of rights and duties when our sovereigns’ laws conflict.<sup>2</sup> Nonetheless, the Clause gives rise to a stand-alone private cause of action for preemption of state (and local<sup>3</sup>) laws.<sup>4</sup> Preemption claims are therefore available to members of the regulated community to fend off state regulation that is inconsistent with

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1. U.S. CONST. art. VI, cl. 2 states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 107 (1989) (quoting *Chapman v. Hous. Welfare Right Org.*, 441 U.S. 600, 613 (1979)).

3. For simplicity’s sake, the balance of this Article refers to state and local law together as “state” law. *See Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 612 (1991) (“The term ‘State’ is not self-limiting since political subdivisions are merely subordinate components of the whole.”).

4. 28 U.S.C. § 1331 (2006); *Verizon Md. Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 642 (2002) (“We have no doubt that federal courts have jurisdiction under § 1331 to entertain such a suit.”); *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1065 (9th Cir. 2008) (“Under well-established law of the Supreme Court, this court, and the other circuits, a private party may bring suit under the Supremacy Clause to enjoin implementation of state legislation allegedly preempted by federal law.”). *Cf. Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (“An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable.”).

national programs for protecting public health and welfare.<sup>5</sup> More questionable, however, is the extent to which members of the public may use the Clause to challenge state action that undermines national health and welfare standards.<sup>6</sup> This is because the Supremacy Clause becomes even more slippery in the context of federal laws that employ a scheme known as cooperative federalism to allocate responsibility between sovereigns. But if the regulated community can wield preemption claims to fend off overreaching state law, why not also allow people who seek full implementation of national health and welfare standards to assert preemption?<sup>7</sup>

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5. See *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987) (“Vermont nuisance law is inapplicable to a New York point source” because the Clean Water Act “precludes . . . those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act.”); *North Carolina, ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 303 (4th Cir. 2010) (holding a North Carolina public nuisance suit to require control of power plant emissions in Alabama and Tennessee is preempted because, *inter alia*, “Congress has chosen to grant states an extensive role in the Clean Air Act’s regulatory regime through the [state implementation plan] and permitting process, [and therefore] field and conflict preemption principles caution at a minimum against according states a wholly different role and allowing state nuisance law to contradict joint federal–state rules so meticulously drafted.”); *Fireman’s Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 952 (9th Cir. 2002) (holding that parts of a City of Lodi municipal ordinance are “preempted by CERCLA [i.e., the federal Comprehensive Environmental Response Compensation and Liability Act] only to the extent that they permit Lodi to order use of procedures more stringent than the [federal National Contingency Plan].”), *cert. denied*, 538 U.S. 961 (2003); *Rollins Envtl. Servs. (FS), Inc. v. Parish of St. James*, 775 F.2d 627, 637 (5th Cir. 1985) (holding that a St. James Parish, Louisiana, ordinance was an “impermissible intrusion into territory preempted under [the Toxic Substances Control Act].”).

6. See *Wis. Dep’t of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495 (2002) (explaining that in the context of cooperative federalism, the Court has “not been reluctant to leave a range of permissible choices to the States, at least where the superintending federal agency has concluded that such latitude is consistent with the statute’s aims”); *N.Y. State Dep’t of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973) (“Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one.”); see also *Legal Envtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640, 644 (11th Cir. 1990) (affirming dismissal of an environmental group’s preemption challenge to an allegedly illegal state-issued permit). But see *Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1270 (11th Cir. 2000) (“[The Resource Conservation and Recovery Act] sets a floor for regulation of hazardous waste . . . and to allow the Florida program to restrict or limit the federal remedy would lower that floor.” (citation omitted)).

7. It is, however, not unusual for the law to favor economic interests over those favoring health protection and quality of life. See, e.g., Oliver A. Houck, *Standing on the Wrong Foot: A Case for Equal Protection*, 58 SYRACUSE L. REV. 1, 31 (2007) (arguing that, according to some judges and scholars, “courts are for private interests and not for those of the public at large”).

This Article shows that private litigants may use the preemption doctrine to police the national standards of cooperative federalist regulatory programs without undermining the state primacy that Congress intended those programs to preserve. It focuses on the environmental cooperative federalist schemes that Congress employs in many antipollution laws. These schemes provide for Environmental Protection Agency (EPA) authorization for states to administer federal regulatory programs, so long as those states conform to minimum national standards for protection of public health and welfare. State laws, regulations, or orders that authorize activities inconsistent with these minimum federal standards create a potential for preemption claims. This is because under “conflict preemption” doctrine, federal law preempts state action that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>8</sup>

On its face, conflict preemption would seem to apply to every state departure from federal mandates in a cooperative federalist regulatory scheme. But if that were the law, affected parties would be able to run to federal court with a preemption claim every time an EPA-authorized state issued an illegal permit, arguably to the detriment of the states’ ability to “function as political entities in their own right.”<sup>9</sup> It is difficult to believe that Congress intended to launch this “parade of horrors”<sup>10</sup> every time it employed a cooperative federalist system to allow states to administer health and welfare protections.<sup>11</sup> It is equally difficult to believe, however, that Congress meant to suspend operation of preemption doctrine and allow state regulatory programs to drift away from national goals to the detriment of public health and welfare. Careful analysis of conflict preemption doctrine in the context of cooperative federalist schemes

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8. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

9. *Bond*, 131 S. Ct. at 2364 (explaining that the “allocation of powers in our federal system” serves in part to preserve “the integrity, dignity, and residual sovereignty of the States.”).

10. See Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 590 (1989) (explaining that “parade of horrors” refers to a “contention that the principle embraced by the other side will produce certain specified undesirable consequences”).

11. Of course, similar arguments—based on similar parades of horrors—could be made about preemption in other contexts. See *North Dakota v. United States*, 495 U.S. 423, 459 n.6 (1990) (Brennan, J., concurring in part and dissenting in part) (“The plurality suggests that my recognition of this aspect of federal immunity doctrine will lead to a parade of horrors: Every state regulation will be potentially subject to challenge. But this particular parade has long been braved by our court system, not only under the doctrine of federal immunity but also under the much broader doctrine of pre-emption.” (citation omitted)).



eliminates this conundrum.

This Article demonstrates that state actions which conflict with federal mandates do not *always* pose a true obstacle to accomplishment of the “full purposes and objectives” of the federal regulatory program that imposes the mandates.<sup>12</sup> Instead, state–federal conflicts within cooperative federalist systems fall within one of the three categories described below. Once these conflicts are sorted into appropriate categories they can be handled under familiar Supremacy Clause principles.

“Category 1” conflicts arise from the types of isolated mistakes that occur inevitably in any regulatory system. When federal agencies make such mistakes they are simply mistakes. When state agencies make mistakes on decisions governed by national standards, those mistakes constitute state action that conflicts with federal law. By employing a cooperative federalist system to achieve its purposes, however, Congress implicitly decided to tolerate these types of conflicts, unless it specified otherwise. Therefore, Category 1 conflicts do not pose a true obstacle to accomplishment of the full federal regulatory purpose<sup>13</sup> and should not give rise to preemption.

“Category 2” conflicts are systemic conflicts rather than isolated mistakes, but they are subject to “robust corrective mechanisms” under the relevant federal regulatory scheme. Robust corrective mechanisms are mechanisms that are reasonably calculated to remove any state-law obstacle to achievement of the full federal regulatory purpose. When the cooperative federalist system has such mechanisms, conflicts are handled within the system and therefore do not pose true obstacles to the full federal regulatory purpose that would give rise to preemption.

“Category 3” conflicts arise when state actions pose systemic conflicts with federal mandates and are not subject to robust federal corrective mechanisms. Because these are not conflicts that Congress implicitly decided to tolerate or that the federal regulatory program handles in a robust way, they pose an obstacle to achievement of cooperative federalist systems’ full federal regulatory purposes. Thus, Category 3 conflicts are true conflicts, and courts should hold that the federal mandates at issue preempt the conflicting state actions in this category.

Part I of this Article reviews Supremacy Clause jurisprudence to show that all preemption questions can be treated as arising under the doctrine of conflict preemption—which is usually analyzed as one of three types of

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12. See *Hines*, 312 U.S. at 67.

13. As used in this Article, the phrase “full federal regulatory purpose” should not imply that state laws must conflict with *all* of Congress’s purposes to be preempted. Rather the phrase suggests that when federal regulatory programs are driven by multiple goals, state law conflicts must be assessed in light of the federal purposes considered as a whole.

preemption. This Part then discusses the “ultimate touchstone in every pre-emption case,” which the U.S. Supreme Court has identified as “the purpose of Congress.”<sup>14</sup> As used by the Court in this context, however, the phrase “purpose of Congress” is a term of art that refers to the full federal regulatory purpose, including the purposes behind regulations that administrative agencies promulgate. This Part also shows that state action may sometimes be inconsistent with a specific federal mandate without posing a true obstacle to accomplishment of the *full* federal regulatory purpose.

Part II of the Article discusses abstention doctrine to show that the doctrine should not be a significant impediment to the use of the Supremacy Clause to police state implementation of national mandates imposed by cooperative federalist regulatory systems.

Part III of the Article reviews the basics of cooperative federalism in antipollution law, emphasizing Congress’s three major goals for the approach, to: (1) achieve national standards to protect public health and welfare, (2) overcome bureaucratic inertia, and (3) preserve state primacy. These goals underlie the full federal regulatory purpose that serves as the ultimate touchstone for Part IV’s preemption analysis. Part III also reviews typical mechanisms in antipollution laws for keeping EPA-authorized state programs on track and discusses the enforcement discretion doctrine’s role in reducing the effectiveness of some mechanisms. These mechanisms are important to Part IV’s discussion of whether cooperative federalist regulatory systems contain robust mechanisms to correct state-law conflicts with federal mandates.

Part IV of the Article analyzes the three categories of state–federal conflicts listed above and suggests a “robust federal corrective mechanism” test. It shows that courts should allow members of the public and the regulated community to wield preemption claims to block only state actions that pose true obstacles to accomplishment and execution of the *full* federal regulatory purpose. The Article concludes that once true conflicts are distinguished from false conflicts, the preemption doctrine can serve as a useful source of private claims to police cooperative federalist systems without undermining them.

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14. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (“[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.” (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996))).

## I. PREEMPTION DOCTRINE

The Supremacy Clause establishes that the “Constitution, and the Laws of the United States” are “the supreme Law of the Land.”<sup>15</sup> Because federal law is supreme, it necessarily preempts inconsistent state law.<sup>16</sup> This Part begins an analysis of how preemption should work in the context of cooperative federalist regulatory schemes. It shows that (A) the gravamen of preemption is conflict between state laws and federal regulatory objectives; (B) in preemption analysis, judicial inquiry into federal regulatory objectives is necessarily and appropriately wide-ranging; and (C) to advance the “full” federal purpose in the context of cooperative federalism, courts must strike a balance among multiple federal goals.

### A. Preemption and Conflict

Federal preemption cases are typically sorted into one of three types: express, field, or conflict preemption.<sup>17</sup> But because the fundamental purpose of the Supremacy Clause is to establish the priority of federal rights “whenever they come in conflict with state law,”<sup>18</sup> this Article invites the reader to view all federal preemption cases as subject to conflict preemption. In other words, conflict preemption essentially swallows all other preemption types.<sup>19</sup> For example, the first type of preemption,

15. U.S. CONST. art. VI, cl. 2.

16. See *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) (“Under the Supremacy Clause . . . state laws that ‘interfere with, or are contrary to the laws of congress, made in pursuance of the constitution’ are invalid.” (citation omitted) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824))); *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 383–84 (1963) (“‘[T]he law of the State, though enacted in the exercise of powers not controverted, must yield’ when incompatible with federal legislation.” (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 211)); see also JAMES T. O’REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION AND LITIGATION* 5 (2006) (“Alexander Hamilton was sadly incorrect when he predicted that ‘it will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities.’” (quoting THE FEDERALIST NO. 17)).

17. See *Mortier*, 501 U.S. at 604–05 (summarizing the three categories). Scholars have argued about whether there should be more categories. See Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 739–40 (2008) (noting that “the exact number [of preemption categories] depend[s] on who is doing the counting” and arguing for four: “express, field, conflict, and frustration”).

18. *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 107 (1989) (quoting *Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 613 (1979)).

19. Similarly, the U.S. Supreme Court has recognized that the second step of the *Chevron* test essentially swallows the first. See *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 n.4 (2009) (explaining that the Court may skip the first part of the *Chevron* test for statutory interpretation in administrative law (whether Congress has spoken directly to the

“express preemption,” occurs when Congress expressly displaces state law.<sup>20</sup> In those cases, of course, state attempts to continue to regulate in the preempted area would conflict with Congress’s purpose. Similarly, type two—“field preemption”—applies when Congress occupies an entire field with federal law (implicitly expressing its intent to bar state regulation of that field).<sup>21</sup> Again, therefore, any state regulation would pose a conflict.<sup>22</sup> This leaves the third and final type, which is already labeled “conflict preemption.” This category covers two sets of circumstances, the second of which swallows the first: (1) when “compliance with both federal and state regulations is a physical impossibility,”<sup>23</sup> and (2) when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>24</sup>

Assuming, therefore, that Congress has the power to enact the potentially preempting federal law, the bottom-line question underlying all preemption cases is: Does the state action at issue pose a conflict with

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question at issue) and move directly to the test’s second step (whether the agency interpretation under review is reasonable) because “if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable” (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984))). This is logical; nonetheless, skipping directly to the bottom-line question posed by a multipart test may affect outcomes by changing the test’s emphasis.

20. See *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989) (“Congress has the authority, in exercising its Article I powers, to pre-empt state law.”); see also *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1074–75 (2011) (holding that the National Childhood Vaccine Injury Act of 1986 “expressly eliminates liability for a vaccine’s unavoidable, adverse side effects,” including “those resulting from design defects”).

21. See *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (explaining that Congress “may create a scheme of federal regulation ‘so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.’” (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))). Federal occupation of an entire field reveals “a clear, but implicit, pre-emptive intent.” *Id.* at 31.

22. Indeed, the U.S. Supreme Court’s decision in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983)—which appears to turn on the boundaries of “the [federally] occupied field” at issue, *id.* at 216—makes more sense when viewed as a response to the question: Does the state action at issue conflict with Congress’s full purposes and objectives? See *infra* note 58 and accompanying text.

23. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

24. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see also *Barnett Bank*, 517 U.S. at 31 (“Alternatively, federal law may be in irreconcilable conflict with state law.” (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982)) (internal quotation marks omitted)). Conflict preemption only applies when the federal objective at issue is “significant.” *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1137 (2011) (“Like the regulation in [*Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000)], the [seatbelt] regulation here leaves the manufacturer with a choice. And, like the tort suit in *Geier*, the tort suit here would restrict that choice. But unlike *Geier*, we do not believe here that choice is a significant regulatory objective.”).

achievement of a federal law's "full purposes and objectives"?<sup>25</sup>

*B. Preemption Doctrine's "Ultimate Touchstone" Is the Federal Regulatory Purpose*

The U.S. Supreme Court says that the "purpose of Congress is the ultimate touchstone in every pre-emption case."<sup>26</sup> In this context, however, the phrase "purpose of Congress" is a term of art.<sup>27</sup> What the Court really means is that the ultimate touchstone is the purpose of the regulatory program launched by congressional legislation.<sup>28</sup> This is clear because lawful federal regulations have "no less pre-emptive effect than federal statutes."<sup>29</sup> So the "purpose of Congress" in this context cannot be limited to specific evidence of congressional intent; it is a changeable concept. Regulatory programs develop and evolve to respond to new conditions and

25. *Davidowitz*, 312 U.S. at 67.

26. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

27. Once a phrase has "become a term of art . . . any attempt to break down the term into its constituent words is not apt to illuminate its meaning." *Sullivan v. Stroop*, 496 U.S. 478, 483 (1990).

28. The Court explained:

Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it. Also relevant, however, is the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

*Medtronic*, 518 U.S. at 486 (citations omitted) (internal quotation marks omitted); see also *Farina v. Nokia Inc.*, 625 F.3d 97, 118 (3d Cir. 2010) (citing *Lohr*, 518 U.S. at 485–86); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 754 n.67 (2004) ("As a general matter, assuming the agency was exercising properly delegated authority, Congress would have wanted the agency's decision to be effective and to control." (citing Benjamin W. Heineman, Jr. & Carter G. Phillips, *Federal Preemption: A Comment on Regulatory Preemption After Hillsborough County*, 18 URB. LAW. 589, 592 (1986))); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2116 (2000) (arguing that "congressional intent and federal interests" are both "gleaned from the regulatory structure").

29. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (quoting *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982)). This does not mean, however, that courts blindly defer to every administrative statement that a state law is preempted. See *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 98 n.9 (2d Cir. 2006) ("[W]hatever deference would be owed to an agency's view in contexts where a presumption against federal preemption does apply, [it is arguable that] an agency cannot supply, on Congress's behalf, the clear legislative statement of intent required to overcome the presumption against preemption."), *aff'd by an equally divided court sub nom. Warner-Lambert Co. v. Kent*, 552 U.S. 440, 441 (2008); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 883 (2008) (arguing that when courts "review an agency's interpretation of a federal statute's preemptive effect . . . the presumption against preemption may conflict with the *Chevron* rule, which requires courts to defer to agency interpretations of the statute").

policies, at least some of which Congress may not have contemplated specifically. Indeed, the U.S. Supreme Court's policy in reviewing regulatory programs is to avoid "ossification" of statutory meanings.<sup>30</sup>

The full federal regulatory purpose can be difficult to discern reliably—no "rigid formula or rule . . . can be used as a universal pattern to determine the meaning and purpose of every act of Congress."<sup>31</sup> Where the regulatory program "does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact pre-empts an action based on the law of an affected State."<sup>32</sup>

At least in theory, courts begin their analyses of Congress's purpose with a rebuttable presumption "that the historic police powers of the States were not to be superseded."<sup>33</sup> This is the famous "presumption against pre-emption."<sup>34</sup> It is based on respect for the states as "independent sovereigns,"<sup>35</sup> and has particular force in fields that have traditionally been the states' province.<sup>36</sup> Nonetheless, even state laws "designed to protect vital state interests" are subject to federal preemption.<sup>37</sup>

Scholars point out that the Supreme Court has been inconsistent in its application of the "now-you-see-it, now-you-don't" presumption against preemption.<sup>38</sup> But by their nature presumptions are strange and

30. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting)).

31. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see also *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 617 (1991) (Scalia, J., concurring) (emphasizing "how unreliable [congressional] Committee Reports are—not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction [since the Court uses] them when it is convenient, and ignore[s] them when it is not").

32. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987).

33. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Lohr*, 518 U.S. at 485).

34. *Id.* at 565 n.3.

35. *Id.* (quoting *Lohr*, 518 U.S. at 485) (rejecting the argument that the presumption should not apply "because the Federal Government has regulated drug labeling for more than a century"). But see *United States v. Locke*, 529 U.S. 89, 108 (2000) ("[A]n 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence.").

36. See *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) ("[A] court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption.").

37. *De Canas v. Bica*, 424 U.S. 351, 357 (1976); see also *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994) ("[U]nder the Supremacy Clause, [the Court's] office is not to pass judgment on the reasonableness of state policy.").

38. James M. Beck, *Notes on Bruesewitz*, LEXOLOGY (Feb. 23, 2011), <http://www.lexology.com/library/detail.aspx?g=fe474bb5-61ab-4d18-8d23-5a02cf71cf5a>; see also S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 733 (1991) (describing the U.S. Supreme Court's approach to the presumption as "fickle").

unpredictable things.<sup>39</sup> Whether a presumption is even worth talking about may depend on the strength of the evidence offered to rebut it. Presumptions, after all, are the “bats of the law flitting in the twilight, but disappearing in the sunshine of actual facts.”<sup>40</sup>

Scholars also criticize the Court’s wide-ranging inquiry into the “purpose of Congress” as unpredictable.<sup>41</sup> Professor David A. Dana argues that courts are attempting to answer “a wholly hypothetical question: if Congress had spoken directly and unambiguously to the precise preemption question at hand, which it did not, what would it have said?”<sup>42</sup> Fair enough. But what Professor Dana describes is the essence of the judicial function—to weigh relevant factors despite uncertainty and reach decisions that resolve the disputes at hand and, over time, shed light on gray areas in the law.<sup>43</sup> Court decisions are unpredictable in large part because courts

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39. See Adam Babich, *Can Preemption Protect Public Participation?*, 61 CASE W. RES. L. REV. 1109, 1131 & nn.124–29 (2011) (“Sometimes [presumptions] merely assign the burden of producing evidence to the disfavored party . . . . Other[s] . . . change the burden of persuasion. Still others behave like a thumb on the scale of justice . . . add[ing] a vague persuasive force to the favored party’s evidence.” (footnotes omitted)).

40. MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE § 345, at 821 (Edward W. Clearly ed., 2d ed. 1972) (quoting *Mackowik v. Kan. City, St. J. & C.B.R. Co.*, 94 S.W. 256, 262 (Mo. 1906)).

41. See, e.g., THOMAS O. MCGARITY, *THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES* 51 (2008) (“[T]he Court has crafted an ornate, and often inconsistent, body of law to decide whether Congress has *impliedly* preempted state law.”); Dinh, *supra* note 28, at 2085 (“[T]he Supreme Court’s numerous preemption cases follow no predictable jurisprudential or analytical pattern.”); Hoke, *supra* note 38, at 716 (“[P]liant standards governing the degree of clarity with which Congress or an agency must speak for a rule to be preemptive . . . [lead to a] substitution of judicial policymaking for political decision . . . .”); Merrill, *supra* note 17, at 741 (“[T]he doctrine . . . systematically exaggerates the role of congressional intent, attributing to Congress judgments that are in fact grounded in judicial perceptions about the desirability of displacing state law in any given area.”); Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 515 (2010) (“Judicial preemption doctrine is thin and confusing.”); Susan Raeker-Jordan, *The Pre-Emption Presumption that Never Was: Pre-Emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379, 1388 (1998) (“[O]nce courts delve into the murky realm of congressional purposes to ascertain whether Congress intended to displace state law, it naturally follows that courts may overstep the federalism line . . . .”).

42. David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 510 (2008).

43. Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 STAN. L. REV. 1, 8 (2000) (“If we gain something in dispute resolution by shifting authority to resolve legal ambiguity from judges to agencies, we also lose an influence over lawmaking that was an important component of the Founders’ constitutional design.”); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2074 (1990) (the *Chevron* principle “is quite jarring to those who recall the suggestion, found in *Marbury v. Madison* and repeated time and again in American

reach those results in hard cases. The easy cases—those governed by bright lines—mostly settle out of court.<sup>44</sup> Because the parties to disputes cannot predict the results of difficult cases on their own, society carefully selects Article III judges.<sup>45</sup> Judges “are not automata,”<sup>46</sup> and—by and large—our expectation is that these judges will not rule according to rigid formula but instead apply their wisdom to traditional and evolving tools of legal and factual analysis, tempered by a humble appreciation of the Judiciary’s limited role in making policy.<sup>47</sup> Undoubtedly, judges sometimes get it wrong and—perhaps unconsciously—allow their policy preferences to affect results. But the same can be said of judgments based on almost any legal doctrine.<sup>48</sup> Like many aspects of U.S. government, the role of the Judiciary makes sense only when compared to the available alternatives.<sup>49</sup>

Should courts ignore conflicts between state and federal law unless and until Congress unambiguously specifies otherwise?<sup>50</sup> That approach would ask courts to stand by passively as states frustrate attainment of congressional objectives expressed in lawfully enacted statutes.<sup>51</sup> Granted,

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public law, that it is for judges, and no one else, to ‘say what the law is’” (footnote omitted)).

44. See Matthew K. Roskoski, *Zen and the Art of Jurisprudence*, 98 MICH. L. REV. 1529, 1532 (2000) (reviewing PAUL F. CAMPOS, JURISMANIA: THE MADNESS OF AMERICAN LAW (1998)) (“[T]he *really* easy cases settle, the *relatively* easy cases are decided at trial and not appealed, and since the Supreme Court only grants certiorari on the *extremely* difficult cases, the Supreme Court is almost invariably making it up as it goes along.”).

45. Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951) (“The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.”).

46. *Id.*

47. See Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 14 (1983) (“*Marbury*’s justification for judicial review, grounded as it is in the ‘ordinary and humble judicial duty’ of the common law courts, seems necessarily to entail a general obligation of independent law-exposition by article III courts. This is what courts ‘do’; it is their ‘job.’”).

48. See Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 97 (2011) (“I now share the view of many scholars that courts will never announce a doctrine that cannot accommodate the powerful tendency of judges and Justices to act in ways that are consistent with their strongly held political and ideological perspectives.”).

49. Cf. Winston S. Churchill, Speech at the House of Commons (Nov. 11, 1947), in 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897–1963, at 7563, 7566 (Robert Rhodes James ed., 1974) (“[I]t has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time . . .”).

50. See Robert S. Peck, *A Separation-of-Powers Defense of the “Presumption Against Preemption,”* 84 TUL. L. REV. 1185, 1198 (2010) (explaining why “determining congressional intent [on preemption] can be challenging”).

51. But see AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (holding that even “a federal statute’s saving clause cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with



after watching enough of its programs fail, Congress *might* learn to include detailed instructions about preemption in every statute.<sup>52</sup> The onus would be on the congressional drafters and their constituents to hold together or reassemble their coalitions and to draft legislative language and amendments that anticipate and expressly preempt whatever types of state law might pose an obstacle, and then to repeat this process as necessary when unanticipated situations arise and courts—purporting to exercise restraint—allow national goals to fall by the wayside. Given the biases for stalemate and ineffectiveness that are already built into the federal legislative system,<sup>53</sup> would such a laissez-faire judicial approach to state obstruction of federal statutory purposes really serve the Constitution and the public interest better than current doctrine?

At any rate, for purposes of this Article, it is unnecessary to resolve scholarly debates about preemption doctrine’s merits. For our purposes, it is enough to note that under current doctrine, litigants and courts base their analyses of the federal regulatory purpose on a wide-ranging inquiry.

*C. The Supremacy Clause Preempts State Action That Conflicts with the “Full”  
Federal Regulatory Purpose*

Federal law preempts state action that conflicts with the “full purposes and objectives of Congress,”<sup>54</sup> i.e., the full federal regulatory purpose.<sup>55</sup> Preemption analysis, therefore, requires recognition that Congress (and the federal agencies that Congress assigns to administer its regulatory statutes)

the provisions of the act. In other words, the act cannot be held to destroy itself.” (alteration in original) (quoting *Am. Tel. & Tel. Co v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227–28 (1998)) (internal quotation marks omitted)).

52. See Peter M. Shane, *Federalism’s “Old Deal”: What’s Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 206 n.37 (2000) (arguing that by requiring a clear and manifest expression of congressional intent, the Court “in essence, is instructing Congress . . .”).

53. See Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 985 (2009) (“[T]he Constitution embodies the assumption, whether right or wrong, that presidential and legislative action is more dangerous than presidential and legislative inaction and, accordingly, that presidential and congressional action should be subject to an especially dense network of constitutional constraints.”); see also Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1130 (2011) (“The filibuster rule exponentially increases the power of small minorities to block congressional action. Positive political theorists now agree that since the 1980s the filibuster threat has meant that legislation on even remotely salient political issues requires a supermajority—one must garner sixty votes on nearly every bill.”).

54. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

55. See *supra* notes 26–30 and accompanying text (showing that the phrase “purposes of Congress” in this context really means the federal regulatory purpose).

can act with multiple purposes, some of which may themselves conflict.<sup>56</sup> Analysis of the *full* federal regulatory purpose may reveal that state action that conflicts with a particular federal mandate does not pose a true conflict when it is considered in context of the full and multiple purposes of the regulatory scheme that Congress launched. In other words, part and parcel of a federal regulatory decision to adopt multiple goals is sometimes “to tolerate whatever tension there [is] between them.”<sup>57</sup> When Congress and federal administrative agencies decide to tolerate such tension, it follows that the courts “can do no less.”<sup>58</sup>

In *Ruiz v. Commissioner of the Department of Transportation of New York*,<sup>59</sup> the Southern District of New York was faced with a city regulation that purported to limit truck weights in conflict with a federal law that Congress

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56. Cf. *Ohio v. EPA*, 997 F.2d 1520, 1532 (D.C. Cir. 1993) (upholding regulations as consistent with a law that “mandates the achievement of multiple goals” and distinguishing a situation in which a “court had before it a statute requiring a single goal to be achieved to the extent practicable”); Kevin O. Leske & Dan Schweitzer, *Frustrated with Preemption: Why Courts Should Rarely Displace State Law Under the Doctrine of Frustration Preemption*, 65 N.Y.U. ANN. SURV. AM. L. 585, 587 (2010) (“Congress often has competing objectives and crafts legislation as a product of compromise. For instance, Congress might conclude that a particular type of state tort action should proceed in order to provide remedies for injured consumers, even if it ‘frustrates’ to some degree the federal goal of uniformity.”); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 281 (2000) (“The mere fact that Congress enacts a statute to serve certain purposes, then, does not automatically imply that Congress wants to displace all state law that gets in the way of those purposes. . . . It follows that a general doctrine of ‘obstacle preemption’ will . . . imply preemption clauses that the enacting Congress might well have rejected.” (footnote omitted)).

57. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984); see also *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (“In determining whether Vermont nuisance law ‘stands as an obstacle’ to the full implementation of the [Clean Water Act (CWA)], it is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal.”).

58. *Silkwood*, 464 U.S. at 256; see also *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190 (1983) (upholding California’s *economically motivated* regulation of nuclear power despite federal legislation occupying the field of nuclear safety); Christopher H. Schroeder, *Supreme Court Preemption Doctrine*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION* 119, 133 (William W. Buzbee ed., 2009) (“*Pacific Gas and Electric* . . . is exemplary in comprehending that while Congress surely has objectives for statutes when it enacts them, it may well not want those objectives pursued ‘at all costs.’”). Cf. *Wyeth v. Levine*, 555 U.S. 555, 575 (2009) (“The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.” (alteration in original) (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67 (1989))).

59. 679 F. Supp. 341 (S.D.N.Y. 1988).

intended “to promote a uniform weight limit for trucks on federal highways.”<sup>60</sup> Congress, however, had “contemplated the existence of inconsistent local regulations” and selected a remedy: “withholding of federal highway funds” from noncompliant states.<sup>61</sup> Because the court determined that Congress’s decision was “to live with” some inconsistency, the court found that the city’s weight regulations “cannot be considered, for federal preemption purposes, to have been an obstacle to the accomplishment of congressional purpose.”<sup>62</sup>

It is far from clear that the *Ruiz* court got it right.<sup>63</sup> What federal purpose did the court serve by upholding inconsistent state regulation? To assume that Congress intends every specific remedy for a state’s violation of national policy to eliminate the possibility of preemption would be unreasonable, especially if the remedy that Congress provided is not robust enough to restore the federal mandate’s supremacy. Nonetheless, the *Ruiz* court’s basic insight is valuable: identification of a state-law conflict with a specific federal mandate is not enough to prove preemption unless that state law conflicts with the *full* purpose of the national regulatory program that imposes the mandate. And Congress’s specification of a particular mechanism for resolving the conflict at issue—while not necessarily dispositive of the preemption question—underscores the possibility that Congress’s full purpose may be more nuanced than a simple command for nationwide conformity.

There is relatively little discussion of multiple federal purposes in preemption case law. In fact, it is easy to get the impression from court opinions that once a litigant establishes that state action conflicts with a lawfully enacted federal mandate, preemption of that state action inevitably follows.<sup>64</sup> Nonetheless, considering common sense, the U.S. Supreme

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60. *Id.* at 359.

61. *Id.* at 344, 359.

62. *Id.* at 359.

63. *See infra* notes 213–34 and accompanying text (explaining a “robust federal corrective mechanism” test). Whether the highway fund cutoff qualified as robust would depend on an analysis of the full federal regulatory purpose behind 23 U.S.C. § 127 (2006).

64. *See, e.g.,* Katharine Gibbs Sch. (Inc.) v. FTC, 612 F.2d 658, 667 (2d Cir. 1979) (“Where an explicitly formulated federal statute or regulation is in conflict with state law, preemption of state law follows inevitably from the supremacy clause of the Constitution.”); *see also* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1303 (2009) (“The Court’s readiness to find field preemption and its capacious view of what constitutes an obstacle for purposes of conflict preemption have led some commentators to argue that there is a presumption in favor of preemption, despite the Court’s refrain to the contrary.”). In *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577 n.4 (2011), however, the Court referred to a prior suggestion that it “might” be possible for state and federal law to conflict directly when it is not impossible to comply with both, perhaps

Court's occasional acknowledgment of more nuanced congressional goals, and the Court's clear direction that the Supremacy Clause only brings down those state laws that conflict with the *full* federal regulatory purpose, it should be uncontroversial to acknowledge that not every state-federal conflict leads to preemption.

## II. ABSTENTION

This Part presents an analysis of abstention doctrine, which allows federal courts to decline (or defer<sup>65</sup>) jurisdiction over legally valid lawsuits in deference to state judicial or administrative processes. On its surface, the doctrine *seems* relevant to the question of how preemption operates in cooperative federalist systems because (1) both abstention and preemption doctrines serve to prioritize federal and state exercises of authority; and (2) one purpose of abstention doctrine is to limit federal court interference

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also implying that there *might* be no direct conflicts without impossibility. On the other hand, according to a plurality in *Mensing*, the Supremacy Clause “suggests that courts should not strain to find ways to reconcile federal law with seemingly conflicting state law.” *Id.* at 2580 (plurality opinion).

65. In *Pullman* and *Younger* abstention, the federal case is stayed to avoid interference with the state proceeding but can be resumed once the state proceeding is complete. See *Harris Cnty. Comm’rs Court v. Moore*, 420 U.S. 77, 88 n.14 (1975) (“Ordinarily the proper course in ordering ‘*Pullman* abstention’ is to remand with instructions to retain jurisdiction but to stay the federal suit pending determination of the state-law questions in state court.”); *Deakins v. Monaghan*, 484 U.S. 193, 202 (1988) (Under *Younger* abstention, “the District Court has no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding”). But when the applicable state-court case is before a Texas court, the federal court “dismisses the case *without prejudice* rather than retaining jurisdiction” because Texas courts “cannot grant declaratory relief if a federal court retains jurisdiction over the case.” *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm. of State Bar of Tex.*, 283 F.3d 650, 656 (5th Cir. 2002). In *Burford* abstention, the case is simply dismissed, albeit often without prejudice. See *S. Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 527 (11th Cir. 1983) (“Because *Burford* abstention results in [*inter alia*] the dismissal rather than stay of federal proceedings . . . it is perhaps the most potent device in the abstention area.” (quoting *Nasser v. City of Homewood*, 671 F.2d 432, 440 (11th Cir. 1982)) (internal quotation marks omitted)); *Brandwein v. Cal. Bd. of Osteopathic Exam’rs*, 708 F.2d 1466, 1475 (9th Cir. 1983) (“Even if the district court were correct in dismissing under the *Burford* doctrine, the dismissal should have been without prejudice.”). *Colorado River* abstention can go either way. See *Boushel v. Toro Co.*, 985 F.2d 406, 409 (8th Cir. 1993) (*Colorado River* abstention “allows federal courts to dismiss or stay cases in deference to concurrent state court proceedings . . . . In such a case, ‘a stay of the federal suit pending resolution of the state suit mean[s] that there would be no further litigation in the federal forum; the state court’s judgment on the issue would be res judicata.’” (alteration in original) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 (1983))).

“with the proceedings or orders of state administrative agencies.”<sup>66</sup> But none of the existing abstention categories neatly fit preemption challenges to state decisions that purport to implement federal law yet conflict with federal mandates. Abstention doctrine should therefore have no broad impact on private litigants’ use of the Supremacy Clause to police cooperative federalist systems, although abstention might prevent such challenges in specific situations. Readers who require no further convincing of this proposition may safely skip to Part III of this Article.

In general, “federal courts’ obligation to adjudicate claims within their jurisdiction [is] virtually unflagging.”<sup>67</sup> Abstention is “the exception, not the rule.”<sup>68</sup> This exception is rooted in the courts’ traditional discretion to grant or withhold equitable relief and therefore is more appropriately applied to claims for injunctive or declaratory relief than to claims for damages.<sup>69</sup>

As it has evolved, abstention is not a coherent doctrine or collection of doctrines.<sup>70</sup> Instead, it is more a laundry list of circumstances that the

66. *New Orleans Pub. Serv., Inc. v. Council of New Orleans (NOPSI)*, 491 U.S. 350, 361 (1989); see Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CALIF. L. REV. 613, 617 (1999) (“Objections to [federal courts] entertaining state-law challenges to [state] agency action are grounded in fears that lower federal courts will be too involved in the shaping of state law and thus create problems of nonuniformity and illegitimacy.”).

67. *NOPSI*, 491 U.S. at 359 (quoting *Deakins*, 484 U.S. at 203) (internal quotation marks omitted).

68. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976).

69. See *NOPSI*, 491 U.S. at 359 (noting that “the federal courts’ discretion in determining whether to grant certain types of relief . . . was part of the common-law background against which the statutes conferring jurisdiction were enacted”); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 718 (1996) (Although abstention doctrine is rooted “in the historic discretion exercised by federal courts sitting in equity, . . . we have recognized that the authority of a federal court to abstain from exercising its jurisdiction extends to all cases in which the court has discretion to grant or deny relief.” (internal quotation marks omitted) (citing *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959)). Further, “*Burford* might support a federal court’s decision to postpone adjudication of a damages action pending the resolution by the state courts of a disputed question of state law.” *Id.* at 730–31.

70. See Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1154 (1974) (“The scope of administrative abstention . . . is ambiguous largely because the reasoning that supports the abstention is not clear.”); Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 535 n.20 (1989) (“[T]he division of the abstention cases into discrete doctrines may be more imaginary than real. The abstention doctrines defy strict categorization, so it is not surprising that courts and commentators define the categories in different terms, and that the categories change over time.”); James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1114 (1994) (arguing that the doctrine is not a “theoretically satisfactory tool for mediating the friction that inheres in our federalist

Supreme Court has decided may “justify a federal court’s refusal to decide a case in deference to the States.”<sup>71</sup> Courts typically group these circumstances into categories, even if the total number of categories and some of the boundaries between them are open to debate.<sup>72</sup> The most popular four categories are: (1) *Younger* abstention, which applies when there is either a parallel state criminal proceeding or a parallel civil proceeding that is related or sufficiently analogous to a criminal proceeding;<sup>73</sup> (2) *Pullman* abstention, which applies when a state court ruling on an ambiguous issue under state law could allow a federal court to avoid, or to narrow, a difficult issue under the U.S. Constitution;<sup>74</sup> (3) *Burford* abstention, which applies when a federal ruling on state law would risk disruption to a complex state administrative process for achieving coherent state policy;<sup>75</sup> and (4) *Colorado River* abstention, which applies under “exceptional circumstances”<sup>76</sup> when “wise administration of justice”

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judicial system”).

71. *NOPSI*, 491 U.S. at 368; see also *Quackenbush*, 517 U.S. at 716–17 (summarizing the list).

72. See *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11 n.9 (1987) (“The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes.”); see also Charles R. Wise & Robert K. Christensen, *Sorting Out Federal and State Judicial Roles in State Institutional Reform: Abstention’s Potential Role*, 29 FORDHAM URB. L.J. 387, 394 (2001) (noting that “abstention remains shrouded in confusion”); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1535 (1990) (“[T]he Court has proliferated a confusing assortment of various abstention doctrines, and dramatically expanded the scope of many of the individual categories of abstention.”).

73. See *Health Net, Inc. v. Wooley*, 534 F.3d 487, 494 (5th Cir. 2008) (“Although *Younger* abstention originally applied only to criminal prosecutions, it also applies ‘when certain civil proceedings are pending, if the State’s interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government.’” (citations omitted) (quoting *Pennzoil Co.*, 481 U.S. at 11)).

74. See *Moore v. State Farm Fire & Cas. Co.*, 556 F.3d 264, 273 (5th Cir. 2009) (“*Pullman* abstention applies when an interpretation of an unclear state law will preclude the need to decide a federal constitutional issue.” (citing *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 499–500 (1941))); see also *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75–76 (1997) (“Certification today covers territory once dominated by [*Pullman* abstention] . . . . *Pullman* abstention proved protracted and expensive in practice . . . .”); Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1686 (2003) (“[T]he dominance of *Pullman* abstention ended with the rise of certification in the 1960s.”).

75. *Moore*, 556 F.3d at 272 (“*Burford* abstention applies when a case involves a complex issue of unsettled state law that is better resolved through a state’s regulatory scheme.” (citing *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943))).

76. *Stewart v. W. Heritage Ins. Co.*, 438 F.3d 488, 491 (5th Cir. 2006) (“Under *Colorado*

requires deference to a parallel state proceeding that raises substantially identical claims and issues.<sup>77</sup>

It is not completely clear how abstention and preemption doctrines should interact, given the fact that both doctrines serve to prioritize federal and state exercises of authority. A preemption challenge asks whether Congress intended to displace the state's authority,<sup>78</sup> while abstention doctrine asks whether "the [s]tate's interests are paramount."<sup>79</sup> It seems logical to expect courts to answer the preemption question first, which would generally moot application of judge-made prudential abstention rules. On the other hand, federal abstention would not block preemption challenges. Instead, it would send litigants to state court, at least for their first crack at a resolution.<sup>80</sup> This area of the law is not entirely settled, but courts have recognized a "preemption exception" to at least some abstention categories when "the naked question, uncomplicated by [ambiguous language], is whether the state law on its face is preempted."<sup>81</sup>

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*River*, a district court may abstain from a case only under 'exceptional circumstances.'" (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)). The *Western Heritage* court further held that "[i]f the suits are not parallel, the federal court must exercise jurisdiction." *Id.* at 491 n.3 (citing *RepublicBank Dall., N.A. v. McIntosh*, 828 F.2d 1120, 1121 (5th Cir. 1987)). The court explained:

In deciding whether 'exceptional circumstances' exist, the Supreme Court identified six relevant factors: 1) assumption by either court of jurisdiction over a res, 2) relative inconvenience of the forums, 3) avoidance of piecemeal litigation, 4) the order in which jurisdiction was obtained by the concurrent forums, 5) to what extent federal law provides the rules of decision on the merits, and 6) the adequacy of the state proceedings in protecting the rights of the party invoking federal jurisdiction.

*Id.* at 491 (quoting *Kelly Inv., Inc. v. Cont'l Common Corp.*, 315 F.3d 494, 497 (5th Cir. 2002)).

77. See *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 307–08 (3d Cir. 2009).

78. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996))).

79. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996) (ultimately, abstention is based on a "federal court's decision, based on a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the 'independence of state action' that the State's interests are paramount and that a dispute would best be adjudicated in a state forum" (quoting *Burford*, 319 U.S. at 334)).

80. See *Local Union No. 12004, United Steelworkers of Am. v. Massachusetts*, 377 F.3d 64, 77 (1st Cir. 2004) ("[T]he *Younger* analysis is in the end a question of who should decide whether there is some form of preemption by the federal labor laws: the state courts on review of any [Massachusetts Commission Against Discrimination] order, subject to review by certiorari in the Supreme Judicial Court, or the federal courts, which also have jurisdiction over the matter.").

81. *Norfolk & W. Ry. Co. v. Pub. Utils. Comm'n*, 926 F.2d 567, 573 (6th Cir. 1991) (alterations in original) (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 236–37 (1984)).

Regardless of whether a preemption exception applies, the U.S. Supreme Court's 1989 opinion in *New Orleans Public Service, Inc. v. Council of New Orleans (NOPSI)*<sup>82</sup> should limit the abstention doctrine's impact on litigants' use of preemption claims to police cooperative federalist regulatory systems. The *NOPSI* case was a preemption challenge to a New Orleans City Council regulatory decision. The council prohibited an electric utility from passing some costs of nuclear power on to the ratepayers, when the Federal Energy Regulatory Commission had already determined that those costs were appropriate. The utility brought preemption challenges in federal district court, which abstained.<sup>83</sup>

In *NOPSI*, the Court rejected application of *Burford* abstention, in part because the *NOPSI* case involved neither "a state-law claim" nor a need to "untangle[ ]" a federal claim from "a skein of state law."<sup>84</sup> And "there is . . . no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy."<sup>85</sup> A similar conclusion would be appropriate in most situations in which a state regulation, order, or permit that purports to implement a cooperative federalist regulatory scheme allegedly conflicts with federal law.<sup>86</sup> Such a

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(internal quotation marks omitted)); see also *Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1266 & n.12 (11th Cir. 2000) (holding that "[a]bstention under *Burford* and under the primary jurisdiction doctrine is rarely, if ever, appropriate when federal law preempts state law" and noting that "[o]ther circuits agree that abstention is generally inappropriate in a preemption case"); *Fresh Int'l Corp. v. Agric. Labor Relations Bd.*, 805 F.2d 1353, 1362 (9th Cir. 1986) (requiring abstention where "preemption is not 'readily apparent' . . . [and the court could not] say that California's interest is superseded by preemptive federal law"). In *NOPSI*, the U.S. Supreme Court declined to resolve the issue. 491 U.S. 350, 367 (1989) ("NOPSI argues, even if a *substantial* claim of federal pre-emption is not sufficient to render abstention inappropriate, at least a *facially conclusive* claim is. Perhaps so. But we do not have to decide the matter here . . .").

82. 491 U.S. 350, 361 (1989).

83. *Id.* at 353–58.

84. *Id.* at 361 (quoting *McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist.* 187, 373 U.S. 668, 674 (1963)).

85. *Id.* at 363 (alteration in original) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 380 n.5 (1978)).

86. In general, abstention arguments have fared poorly in disputes under federal antipollution laws. See *Chico Serv. Station, Inc. v. Sol P.R. Ltd.*, 633 F.3d 20, 31–32 (1st Cir. 2011) ("While we are not prepared to rule out categorically the possibility of abstention in a [Resource Conservation and Recovery Act (RCRA)] citizen suit, we believe that the circumstances justifying abstention will be exceedingly rare."); *Sierra Club, Inc. v. Sandy Creek Energy Assocs., L.P.* 627 F.3d 134, 144 (5th Cir. 2010) (affirming a district court's decision not to abstain under *Burford* "since no state cause of action is involved in a federal [Clean Air Act (CAA)] citizen suit"); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 619 (7th Cir. 1998) (finding that *Burford* abstention in a RCRA citizen suit "would be an end run around RCRA"); *Boyes*, 199 F.3d at 1270 ("The Boyes are entitled to bring their RCRA



state decision may have involved balancing of interesting and complex factors, but—in general—those factors would not be relevant to the question of whether there was a conflict with federal law. In other words, a preemption challenge in this context would usually be a facial challenge.<sup>87</sup> Thus, in *NOPSI*, “no inquiry beyond the four corners of the Council’s [order was] needed to determine whether it is facially pre-empted.”<sup>88</sup>

The *NOPSI* Court also rejected application of *Younger* abstention because—in contrast to *Younger*’s roots in avoiding interference with state courts’ criminal and civil enforcement authorities—“it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action.”<sup>89</sup> Further, *Younger* cannot apply to state administrative regulations, orders, or permits, because courts “have never extended it to proceedings that are not ‘judicial in nature.’”<sup>90</sup> After *NOPSI*, it would be an unreasonable stretch to apply *Younger* abstention to most decisions of state administrative agencies.

*NOPSI* does not eliminate the possibility of abstention with respect to every conceivable claim that a federal mandate preempts state administrative action.<sup>91</sup> But the precedent—together with the “preemption

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claims for remediation in federal court. The *Burford* and primary jurisdiction abstention doctrines are inapplicable.”); *see also* *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 505 (7th Cir. 2011) (“The majority of district courts addressing *Burford* abstention in this context have also refused to abstain.”). *But see* *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 481 (6th Cir. 2004) (“[Claims] that the Kentucky agency [violated Kentucky law and] the Clean Air Act by issuing Gallatin’s [prevention of significant deterioration (PSD)] permit exclusive of Harsco’s operations and by determining that a PSD permit was unnecessary with respect to Harsco . . . offer a classic explanation for applying *Burford* abstention.”); *Coal. for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1194–95 (6th Cir. 1995) (distinguishing *NOPSI* because “Kentucky has enacted and is operating its own authorized program under RCRA and is attempting to establish a coherent policy under its law concerning the operation and licensing of hazardous waste disposal facilities”).

87. A facial challenge is either (1) “a challenge to an entire legislative enactment or provision,” showing illegality “in every conceivable application,” *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011), or (2) a challenge that alleges overbreadth, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008).

88. 491 U.S. at 363. The Court explained that “[u]nlike a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors, federal adjudication of this sort of pre-emption claim would not disrupt the State’s attempt to ensure uniformity in the treatment of an ‘essentially local problem.’” *Id.* at 362 (quoting *Ala. Pub. Serv. Comm’n v. S. Ry. Co.*, 341 U.S. 341, 347 (1951)).

89. *Id.* at 368.

90. *Id.* at 370.

91. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 727 (1996) (the Supreme Court’s cases “do not provide a formulaic test for determining when dismissal under *Burford* is appropriate”).

exception”<sup>92</sup>—should apply to enough such claims to ensure that preemption challenges remain a viable tool for policing state implementation of cooperative federalist regulatory schemes.<sup>93</sup>

### III. ENVIRONMENTAL COOPERATIVE FEDERALISM

This Part begins an analysis of the full federal regulatory purpose behind environmental cooperative federalist regulatory schemes. Subpart A puts the relevant terminology in perspective. Next, subpart B describes the characteristics of typical environmental cooperative federalist systems. Subpart C shows that Congress enacted environmental cooperative federalist regulatory schemes to (1) attain national standards, (2) overcome bureaucratic inertia, and (3) preserve state primacy. Finally, subpart D summarizes the process by which states obtain EPA approval to implement federal environmental laws and examines legislative and regulatory mechanisms for keeping states on track to achieve regulatory purposes.

#### A. Terminology and Scope

Since at least the 1930s, lawyers have used the phrase “cooperative federalism” to refer to a variety of approaches to power sharing among our sovereigns.<sup>94</sup> These approaches have one thing in common: they are not “dual federalism,” that is, they do not relegate federal and state sovereigns to mostly separate spheres.<sup>95</sup> Instead, theories of cooperative federalism

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92. See *supra* note 81 and accompanying text (citing, *inter alia*, the *Norfolk & Western Railway Co.* case).

93. But see *supra* note 86 (citing, *inter alia*, the *Gallatin Steel Co.* case). Cases that apply *Burford* abstention to alleged violations of federal environmental mandates ignore an important limitation on the *Burford* doctrine: it applies only to claims arising under state law. See *Sierra Club, Inc. v. Sandy Creek Energy Assocs., L.P.*, 627 F.3d 134, 144 (5th Cir. 2010) (noting that *Burford* abstention is inappropriate where the case “does not involve a state-law claim” (quoting *NOPSI*, 491 U.S. at 361)).

94. See Joseph F. Zimmerman, *Preemption in the U.S. Federal System*, *PUBLIUS*, Fall 1993, at 1, 10 (noting that “cooperative federalism” fittingly describes a variety of approaches and characteristics but fails to describe others).

95. See *Younger v. Harris*, 401 U.S. 37, 44 (1971) (“[T]he National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”); Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950) (dual Federalism comprised postulates that, *inter alia*: “Within their respective spheres the two centers of government are ‘sovereign’ and hence ‘equal’”); Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619, 635–36 (1978) (arguing that dual federalism’s diffusion of power created a “record of liberty [that] was stained by the legitimacy given slavery”); see also Nestor M. Davidson, *Cooperative Localism: Federal–Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 964–65 (2007) (“This [dual federalism] conception of constitutional structure, often

recognize that federal and state powers and responsibilities overlap and interact.

In the early 1970s, Congress passed the Clean Air and Clean Water Acts, beginning the modern era of cooperative federalist antipollution regulation.<sup>96</sup> These enactments followed a dramatic expansion of federal power under the Commerce Clause, first in response to the Great Depression<sup>97</sup> and then to battle racial segregation.<sup>98</sup> By the late 1960s and early 1970s, the commerce power seemed broad enough to completely displace state environmental regulation.<sup>99</sup> But just because Congress *could*, in theory, displace state power,<sup>100</sup> did not mean it wanted to do so. Instead,

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described as a layer cake, posits the federal government and state governments operating in separate, clearly demarcated spheres.”); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 284 (2005) (“The term [*cooperative federalism*] arose out of the recognition that the separation of state and national authority assumed in dual federalism did not accurately describe the actual interaction of state and national governments.”).

96. See Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law’s First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 77–78 (2001) (discussing the “first generation” of U.S. environmental protection laws, including “the Clean Air Act of 1970 [and] the Federal Water Pollution Control Act Amendments of 1972 (now, as further amended, referred to as the Clean Water Act)” (footnote omitted)).

97. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942) (upholding Commerce Clause regulation of consumption of wheat “on the farm where grown”). Bruce Ackerman argues that it was only after the new deal that “the federal government would operate as a truly national government, speaking for the People on all matters that sufficiently attracted the interest of lawmakers in Washington, D.C.” BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 105 (1991).

98. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (holding that Congress “had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce”).

99. See J. William Futrell, *The History of Environmental Law*, in *SUSTAINABLE ENVIRONMENTAL LAW* 3, 38 (Celia Campbell-Mohn et al. eds., 1993) (“The Supreme Court’s vindication of the 1964 Civil Rights Act opened the door for sweeping environmental health and safety regulation.”). More recently, limits to that power have emerged. See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 204 (2004) (arguing that “the U.S. Supreme Court’s emerging framework for defining the limits of congressional authority under the Commerce Clause is potentially . . . threatening to environmental law”). At least for now, however, most antipollution regulations remain squarely within the modern conception of the commerce power’s reach. See, e.g., *United States v. Olin Corp.*, 107 F.3d 1506, 1511 (11th Cir. 1997) (“[T]he regulation of intrastate, on-site waste disposal constitutes an appropriate element of Congress’s broader scheme to protect interstate commerce and industries thereof from pollution.”).

100. See *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (in general, the commerce power extends to: (1) “the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce”; and (3) “activities having a substantial relation to interstate commerce”); *Olin Corp.*, 107 F.3d at 1510 (concluding that the Superfund Act “regulates a class of activities [disposal of hazardous waste at the site of

to allocate responsibility between sovereigns to implement modern antipollution laws, Congress created environmental cooperative federalism.<sup>101</sup>

Perhaps because the word *cooperative* sounds so friendly, some have used other labels—for example, “coercive” federalism—to describe Congress’s relatively heavy-handed approaches to federal–state interaction.<sup>102</sup> This Article follows the U.S. Supreme Court, however, in using the phrase “cooperative federalism” to include a relatively bare-knuckled form of cooperation.<sup>103</sup> In *New York v. United States*,<sup>104</sup> the Court defined “a program of ‘cooperative federalism’” as an arrangement in which federal law “offer[s] States the choice of regulating . . . according to federal standards or having state law pre-empted by federal regulation.”<sup>105</sup> More colorfully, the Court has also described this arrangement as Congress “taking a stick to the States.”<sup>106</sup>

One problem with trying to nail *cooperative federalism* to any one definition is that federal laws ignore definitional boundaries. This suggests that

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production] that substantially affects interstate commerce”).

101. See Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1532 (1995) (“Cooperative federalism holds the promise of allowing the states continued primacy and flexibility in their traditional realms of protecting public health and welfare, while ensuring that protections for all citizens meet minimum federal standards.”).

102. See Joseph F. Zimmerman, *National–State Relations: Cooperative Federalism in the Twentieth Century*, PUBLIUS, Spring 2001, at 15, 27 (offering a “theory of coercive federalism”); see also Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 640 (2007) (noting that “[s]ome critics of cooperative federalism thus argue that it would be more accurately characterized as ‘coercive federalism’”).

103. Tenth Amendment doctrine prohibits Congress from “commandee[ring] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.” *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)); see also *Env’tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 847 (9th Cir. 2003) (“[W]hile the federal government may not *compel* them to do so, it may *encourage* States and municipalities to implement federal regulatory programs. . . . [But] the State or municipality must retain ‘the ultimate decision’ as to whether [it] will comply with the federal regulatory program.”).

104. 505 U.S. 144 (1992).

105. *Id.* at 145; Mark Squillace, *Cooperative Federalism Under the Surface Mining Control and Reclamation Act: Is This Any Way to Run a Government?*, [1985] 15 Env’tl. L. Rep. (Env’tl. Law Inst.) at 10,039, 10,039 (“One of the hallmarks of the environmental legislation passed by Congress in the 1970s was its increased reliance on a regulatory framework that has come to be known as cooperative federalism. . . . To varying degrees, virtually all of the major regulatory laws in the environmental field employ this scheme.”).

106. *Train v. Natural Res. Def. Council*, 421 U.S. 60, 64 (1975) (describing Congress’s first use of environmental cooperative federalism, which was in the Clean Air Act Amendments of 1970, as Congress “taking a stick to the States” as a reaction to the states’ disappointing response to “increasing congressional concern with air pollution”).

Congress did not purposefully implement theories about types of federalism but focused instead on navigating the practical and political problems posed by each enactment.<sup>107</sup> Almost any generalization about cooperative federalist systems, therefore, is subject to important exceptions. For example, neither the Superfund Act's mechanisms for involving states in cleanup of hazardous substances<sup>108</sup> nor the Clean Air Act's program for regulating automobile emissions<sup>109</sup> are very forthcoming in "offer[ing] States the choice"<sup>110</sup> of regulating according to minimum federal standards. Nonetheless both programs employ variations of the cooperative federalist model to involve both sovereigns in the regulatory process. Also, both programs function within a larger cooperative federalist framework created by the cumulative impact of the Nation's antipollution laws.<sup>111</sup>

For purposes of this Article it is sufficient to focus on meat-and-potatoes environmental cooperative federalist schemes. These schemes center on EPA-authorized programs, in which states (once they receive EPA approval) take the lead in implementing minimum federal standards subject to federal oversight. Despite many exceptions and variations, this arrangement is the environmental cooperative federalist system's foundation. And although it may sound straightforward, any system that relies on state sovereigns to consistently follow federal policy in the midst of a constantly changing political, economic, scientific, and regulatory framework is inherently complex.

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107. See John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1192–93 (1995) (When creating environmental cooperative federalism in the 1970 Clean Air Act Amendments, "[f]ew members of Congress . . . expressed any sentiments for the abstract values of state autonomy . . . . On the contrary, federal legislators viewed state autonomy with suspicion because the states had failed to impose adequate air pollution controls.").

108. See Babich, *supra* note 101, at 1537 (arguing that the Superfund Act's "scheme has pitted [the Environmental Protection Agency (EPA)] against the states in a continuing battle to control the stringency of Superfund cleanups").

109. See *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 256 (2004) (interpreting Clean Air Act § 209(a), 42 U.S.C. § 7543(a) (2006), to preempt state auto emission regulations imposed "through purchase restrictions").

110. *New York v. United States*, 505 U.S. 144, 145 (1992).

111. Rena I. Steinzor, *Devolution and the Public Health*, 24 HARV. ENVTL. L. REV. 351, 357 (2000) ("All of the major federal environmental laws divide the authority to implement programs between the federal and state governments."); Squillace, *supra* note 105, at 10,039 ("To varying degrees, virtually all of the major regulatory laws in the environmental field employ this scheme [of cooperative federalism].").

### B. Environmental Cooperative Federalist Systems

Although they vary significantly in their details,<sup>112</sup> the basic outline of modern cooperative federalist systems is that:

- (1) EPA promulgates minimum federal standards that preempt less stringent state standards;<sup>113</sup>
- (2) States that wish to run their own antipollution programs (that is, essentially all states) develop those programs through their own legislative and administrative processes and then submit them to EPA;<sup>114</sup>
- (3) EPA reviews and approves (or disapproves) the state programs. Once a state's program is approved, the state's regulations apply instead of most EPA regulations associated with the approved program and the state becomes the primary issuer and enforcer of permits;<sup>115</sup>

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112. The major antipollution laws' approaches to cooperative federalism vary not only from statute to statute, but also from program to program within statutes. While some of this variation results from historical accident and vagaries of the legislative process, there are policy reasons behind other differences. For example, the Clean Air Act affords the states less discretion to regulate "mobile sources," such as cars and trucks, than "stationary sources," such as factories or refineries. Compare *supra* note 109 and accompanying text, with *infra* note 114 and accompanying text. This avoids some of the practical problems that would be involved in tailoring mass-produced mobile sources to meet standards that varied among the fifty states.

113. See A. Dan Tarlock, *Environmental Law: Then and Now*, 32 WASH. U. J.L. & POL'Y 1, 23 (2010) ("Cooperative federalism rested on two ideas: first, the federal government would set floors, which the states could raise but not lower; second, the states would be responsible for administering the major regulatory programs, primarily the Clean Air and Water Acts, 'incentivized' by federal grants and fiscal sanctions for non-enforcement.").

114. See, e.g., Clean Air Act § 4(a), 42 U.S.C. § 7410(a) (2006) ("[E]ach State shall . . . adopt and submit to the Administrator . . . a plan which provides for implementation, maintenance, and enforcement of such primary standard . . ."); Clean Water Act § 402, 33 U.S.C. § 1342(b) (2006) ("[T]he Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law . . ."); Resource Conservation and Recovery Act § 3006, 42 U.S.C. § 6926(b) ("Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and . . . submit to the Administrator an application . . . for authorization of such program.").

115. See, e.g., *Gen. Motors Corp. v. United States*, 496 U.S. 530, 537 (1990) ("The Administrator is to approve the proposed revision if he determines that 'it'—that is, the revision—meets the substantive requirements imposed on a [state implementation plan] by [Clean Air Act] § 110(a)(2)."); Resource Conservation and Recovery Act § 3006, 42 U.S.C. § 6926(b) (an approved state "is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste . . ."). In addition to its authority to

- (4) EPA provides oversight of state implementation;<sup>116</sup> and,
- (5) Sweetening the deal, EPA provides significant funding to the states to assist in running EPA-approved programs.<sup>117</sup>

One policy justification for this system is that it allows for state experimentation and variety within federal mandates' ambit.<sup>118</sup> Indeed, even when mandatory federal standards apparently govern most permit standards, states retain enormous discretion.<sup>119</sup> For example, determining whether a pollution source exceeds a regulatory threshold includes myriad decisions about which emission streams to consider and how to estimate them.<sup>120</sup> Even when the underlying methodology is relatively rigid, regulators can have varying impacts depending on the extent to which they defer to—or rework—applicants' assumptions and calculations.<sup>121</sup>

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approve state plans under Clean Air Act § 110(a), the EPA asserts authority under 40 C.F.R. § 52.21(u) (2010), to delegate federal regulatory power to states that are without approved plans. EPA enters into delegation agreements with some states to authorize state implementation of "prevention of significant deterioration" regulations. *See, e.g.*, Prevention of Significant Deterioration; Delegation of Authority to State Agencies, 46 Fed. Reg. 9580, 9580 (Jan. 29, 1981) (codified at 40 C.F.R. pt. 52).

116. *See, e.g.*, Reed D. Benson, *Pollution Without Solution: Flow Impairment Problems Under Clean Water Act Section 303*, 24 STAN. ENVTL. L.J. 199, 204 (2005) ("[T]he CWA requires protection of U.S. waters through 'cooperative federalism,' with major roles for the states subject to EPA oversight . . .").

117. *See, e.g.*, 42 U.S.C. § 7405 (2006) (describing grants for air pollution and control programs). EPA's proposed 2011 budget "[p]rovides grants for States and Tribes to administer delegated environmental programs at \$1.3 billion." OFFICE OF MGMT. & BUDGET, TERMINATIONS, REDUCTIONS, AND SAVINGS: BUDGET FOR THE U.S. GOVERNMENT FISCAL 2011, at 125, <http://www.gpoaccess.gov/usbudget/fy11/pdf/budget/environmental.pdf>. Federal funding subjects state environmental agencies to EPA's Title VI (i.e., environmental justice) regulations. 40 C.F.R. § 7.50; *see, e.g., id.* § 7.35(b) ("A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex . . .").

118. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); *see also* Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 184 (2006) (noting that federal preemption can leave "the responsibility of generating policy ideas to the federal government alone").

119. *See* Dwyer, *supra* note 107, at 1223 ("Despite the imposition of federal priorities and requirements over the last twenty-five years, many state legislatures and agencies have become significant players in environmental policy-making.").

120. *See, e.g.*, Atl. States Legal Found., Inc. v. Eastman Kodak Co., 12 F.3d 353, 359 (2d Cir. 1993) (holding that a discharger is not liable under the Clean Water Act for discharging chemicals that the state declined to limit in a water discharge permit).

121. *See* EPA Order Denying Petition for Objection to Permits, No. VI-04-02, at 13

Moreover, even if a state were to consistently issue permits as stringent as those EPA issues, members of the regulated community would likely still prefer to deal with state bureaucracies. State administrators can ease the pain of regulation by making decisions relatively promptly and by providing access to decisionmakers willing to explain difficult decisions. In contrast, a huge federal bureaucracy such as EPA can be frustratingly slow and difficult to work with even when, at the end of the day, the regulatory decisions are reasonable.<sup>122</sup> When business transactions are contingent on regulatory approvals, a prompt decision may be preferable to one that is less stringent, but slow. If only because states have smaller bureaucracies and more direct incentives to avoid blocking activities that might add vitality to state economies, states are almost always better situated than EPA to provide decisionmaking that is prompt and—within the bounds of federal mandates—industry friendly.<sup>123</sup>

When two cooperate, of course, it tends to be “the stronger member of the combination who calls the tunes.”<sup>124</sup> States have nonetheless shown an ability to wield power in the cooperative federalist structure.<sup>125</sup> That power is based on (1) politics, i.e., “the built-in restraints that our system provides through state participation in federal governmental action”;<sup>126</sup> (2) practicalities, since making good on federal threats to preempt state regulatory authority would require the federal government to come up with the budget and personnel to take over;<sup>127</sup> and (3) the Judiciary, which

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(Dec. 22, 2004), *available at* [http://www.epa.gov/region7/air/title5/petitiondb/petitions/dow\\_decision2002.pdf](http://www.epa.gov/region7/air/title5/petitiondb/petitions/dow_decision2002.pdf) (rejecting a petition to veto a Clean Air Act permit when a state “apparently accepted” the permittees’ rationale for use of an alternative baseline for calculating emission increases, and cautioning that “[i]n the future,” the state “should ensure that the record clearly demonstrates the rationale for accepting an alternative baseline”).

122. See *United States v. Ottati & Goss, Inc.*, 900 F.2d 429, 444 (1st Cir. 1990) (“Has the government, in fact, spent enormous administrative (and judicial) resources in an effort to force improvement from ‘quite clean’ . . . to ‘extremely clean,’ at three to four times the ‘quite clean’ costs?”).

123. See William W. Buzbee, *Clean Air Act Dynamism and Disappointments: Lessons for Climate Legislation to Prompt Innovation and Discourage Inertia*, 32 WASH. U. J.L. & POL’Y 33, 41 (2010) (“State and local governments are more dependent on local employment and tax revenues than federal actors, resulting in a frequent bias in favor of industry and against regulatory rigor.”).

124. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 21 (1950).

125. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 6 (1988) (“In both courts and Congress, therefore, states can provide a particularly organized and effective opposition to federal policies.”).

126. *Garcia v. San Antonio Metro. Transit Auth.* 469 U.S. 528, 556 (1985) (“The political process ensures that laws that unduly burden the States will not be promulgated.”).

127. A former EPA official explains: “The stick can shift to another hand. States always have the option of returning their delegated programs back to the EPA, a frightening



introduces an element of uncertainty into the outcome of those federal-state disputes that go all the way to the mat.<sup>128</sup> This uncertainty helps encourage sovereigns to work things out cooperatively.<sup>129</sup>

### C. Three Congressional Goals

Environmental cooperative federalism arose from Congress's attempt to balance multiple and conflicting concerns: frustration with the states' protracted failure to effectively regulate pollution,<sup>130</sup> profound distrust of regulatory bureaucracies, and reluctance to abrogate the states' historical role as the primary protectors of public health and safety.<sup>131</sup> These concerns translate into three goals: to (1) provide all U.S. citizens<sup>132</sup> with a

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prospect for budget managers at the agency." G. Tracy Mehan, III, *A Symphonic Approach to Water Management: The Quest for New Models of Watershed Governance*, 26 J. LAND USE & ENVTL. L. 1, 20 (2010).

128. *New York v. United States*, 505 U.S. 144, 160 (1992) (court decisions defining the extent of federal power have "traveled an unsteady path").

129. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461 (2004) (upholding EPA's authority to block a project with a state Clean Air Act permit because of a conflict with federal "prevention of significant deterioration" regulations), was a 4-to-5 opinion, and three members of the majority are no longer on the Court.

130. See *Train v. Natural Res. Def. Council*, 421 U.S. 60, 64 (1975) (describing Congress's first use of environmental cooperative federalism (in the Clean Air Act Amendments of 1970) as Congress "taking a stick to the States" as a reaction to the states' disappointing response to "increasing congressional concern with air pollution").

131. See Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens* (pt. 2: *Statutory Preclusions on EPA Enforcement*), 29 HARV. ENVTL. L. REV. 1, 10 (2005) ("Beginning with the CAA, Congress modeled complicated 'cooperative federalism' constructs as the bedrock of its environmental programs. It envisioned that state laws, approved by EPA and meeting federal requirements, would be the cores of the statutes.").

132. Use of the term *citizen* in this context is arguably problematic. See M. Isabel Medina, *Exploring the Use of the Word "Citizen" in Writings on the Fourth Amendment*, 83 IND. L.J. 1557, 1567 (2008) ("Substitution of the word 'citizen' for the word 'person' or 'individual' erects a barrier between classes of persons which negates the basic humanity that is common to all."). A safe and healthful environment benefits not only citizens, but anyone who happens to reside in, or visit, the United States, as well as corporate, governmental, and other interests. Antipollution laws' famous "citizen suit" provisions, therefore, are not limited to citizens but generally authorize suits by any "person" with legal standing. See 33 U.S.C. § 1365(g) (2006) (defining "citizen" under the Clean Water Act as "a person or persons having an interest which is or may be adversely affected"). On the other hand, the word *citizen* packs a rhetorical power that the phrase "person having an interest" seems to lack. So legislators are apt to say that "all citizens" or "all Americans" are entitled to a safe and healthful environment, even if they intend to protect all entities at risk of injury from poor air quality within U.S. borders. Compare 116 CONG. REC. 32,900, 32,901 (1970) (statement of Sen. Edward Muskie) ("This bill states that all Americans in all parts of the Nation should have clean air to breathe . . ."), with Clean Air Act § 302(e), 42 U.S.C.

minimum level of environmental protection,<sup>133</sup> (2) overcome bureaucratic inertia,<sup>134</sup> and (3) preserve state primacy.<sup>135</sup> An analysis of preemption

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§ 7602(c) (2006) (defining “person” to include “an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States”).

133. Clean Water Act § 101(a)(3), 33 U.S.C. § 1251(a)(3) (“[I]t is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited . . . .”); Resource Conservation and Recovery Act § 1002, 42 U.S.C. § 6901(a)(4) (2006) (finding, *inter alia*, that “the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes”); 116 CONG. REC. at 32,901 (statement of Sen. Edward Muskie) (“It is also clear that ambient air quality standards which will protect the health of persons must be set as minimum standards for all parts of the Nation, and that they must be met in all areas within national deadlines.”).

134. ENVTL. POLICY DIV., COMM. ON PUB. WORKS, 93D CONG., SERIAL NO. 93-18, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 351 (Comm. Print 1974) (remarks of Sen. Edward Muskie) (“The concept of compelling bureaucratic agencies to carry out their duties is integral to democratic society. . . . The concept in the bill is that administrative failure should not frustrate public policy and that citizens should have the right to seek enforcement where administrative agencies fail.”); 116 CONG. REC. at 32,901 (statement of Sen. Edward Muskie) (“On all levels, the air pollution control program has been underfunded and undermanned. . . . [N]o level of government has implemented the existing law to its full potential. We have learned . . . that States and localities need greater incentives and assistance to protect the health and welfare of all people.”); *see also* James J. Florio, *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980’s*, 3 YALE J. ON REG. 351, 351–52 (1986) (Congress has taken on role of regulator due to EPA’s refusal to carry out congressional intent); Walter E. Mugdan & Bruce R. Adler, *The 1984 RCRA Amendments: Congress as a Regulatory Agency*, 10 COLUM. J. ENVTL. L. 215, 217 (1985) (amendments to RCRA indicate congressional distrust of EPA’s implementation of regulations); E. Donald Elliott, *U.S. Environmental Law in Global Perspective: Five Do’s and Five Don’ts from Our Experience*, 5 NAT’L TAIWAN U. L. REV. 143, 153 (2010) (“We sometimes find . . . that agencies might be reluctant to implement or enforce the law even though they have the power to do because of the fear of political backlash. In response, the Congress eventually developed something that my colleague Bruce Ackerman at Yale named the ‘Agency Forcing Statute.’” (citing BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* (1981))); Daniel P. Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 IND. L.J. 65, 68 (1996) (noting the importance of environmental laws’ “empowerment of citizens to force a recalcitrant EPA to act”).

135. Clean Air Act § 101, 42 U.S.C. § 7401(a)(3) (finding that “pollution control at its source is the primary responsibility of States and local governments”); Clean Water Act § 101, 33 U.S.C. § 1251(b) (announcing Congress’s policy to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under [the Act].”); Resource Conservation and Recovery Act § 1002, 42 U.S.C. § 6901(a)(4) (finding, *inter alia*, that “the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies”). When introducing the Clean Air Act Amendments of 1970, Senator Muskie explained:

doctrine's role within environmental cooperative federalist systems should account for all three of these goals.<sup>136</sup>

Cooperative federalism serves other valuable functions. These, however, do not appear to qualify as goals of the system but fit better into a category of happy accidents. For example, because cooperative federalist systems spread regulatory expertise among federal and state agencies,<sup>137</sup> there is always an experienced "minor league" to draw from when political considerations require replacement of federal regulatory agencies' leaders.<sup>138</sup> Further, cooperative federalism allows our sovereigns to attempt to regulate one another, helping to provide some oversight of our nation's most persistent polluters,<sup>139</sup> despite the difficulty of convincing powerful sovereigns to comply with their own laws.<sup>140</sup>

#### D. Keeping States on Track

Environmental laws provide various mechanisms—some more robust than others—for keeping states on track to fully implement national standards. These include mechanisms for approval and withdrawal of state

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In 1963, Congress recognized that the Federal Government could not handle the enforcement task alone, and that the primary burden would rest on States and local governments. However, State and local governments have not responded adequately to this challenge. It is clear that enforcement must be toughened if we are to meet the national deadlines. More tools are needed, and the Federal presence and backup authority must be increased.

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... The committee remains convinced that the most effective enforcement of standards will take place on the State and local levels. It is here that the public can participate most actively and bring the most effective pressure to bear for clean air. Public participation is therefore important in the development of each State's implementation plan. These plans... involve public policy choices that citizens should make on the State and local level. They should be consistent with a rational nationwide policy and would be subject to the approval of the Secretary.

116 CONG. REC. at 32,901–03 (statement of Sen. Muskie).

136. See *supra* note 58 (discussing *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983), and related authority).

137. See Dwyer, *supra* note 107, at 1224 ("[F]ederal funding and federal environmental legislation have promoted the development and growth of state environmental bureaucracies and expertise.").

138. See Merritt, *supra* note 125, at 7 ("[S]tate governments help maintain the multiparty system and prevent the growth of a monolithic political power on the federal level.").

139. See Adam Babich, *Circumventing Environmental Laws: Does the Sovereign Have a License to Pollute?*, NAT. RESOURCES & ENV'T, Summer 1991, at 28; Howard Kohn, *America's Worst Polluter*, ROLLING STONE, May 3, 1990, at 47, 48.

140. See Babich, *supra* note 101, at 1551 (arguing that "one of the 'happy incidents of the federal system' is that it can cause its various governments to begin to regulate each other" (footnote omitted)).

programs, for dealing with illegal permits or approvals, for direct federal enforcement, and residual authority to prevent potential imminent hazards.

### 1. *Program Approval*

Most environmental cooperative federalist programs require EPA to approve each state program before that program can operate in lieu of the federal regulatory program. EPA approval is “final agency action,” taken after notice and an opportunity for public comment, and is thus subject to judicial review.<sup>141</sup> Environmental statutes and regulations specify standards for approval to ensure that approved state programs are “consistent with” and “no less stringent than” applicable federal programs.

When federal regulatory programs change, states must change their programs, too, if they are to continue to fully implement national standards.<sup>142</sup> It would be unrealistic, however, to expect sovereigns to instantaneously enact or promulgate needed legislative or regulatory changes to keep pace with federal programs. After all, states do not have a clear target for needed changes until revisions to the federal programs are final. And state legislative and administrative processes—like federal processes—take time. The necessary state regulations require notice and an opportunity for public comment, and may be subject to judicial review in state court.<sup>143</sup> For this reason, most environmental cooperative federalist schemes provide a grace period—usually about one year—to allow state programs to catch up without running afoul of federal requirements of consistency with the changed federal program.<sup>144</sup> After that grace period is over, however, there is no automatic sanction for states that miss the deadline.<sup>145</sup> Instead, the offending state risks becoming subject to the

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141. See, e.g., 42 U.S.C. § 7607(b) (2006).

142. See, e.g., 40 C.F.R. § 271.21(e)(1) (2011) (“As the Federal program changes, authorized State programs must be revised to remain in compliance with this subpart.”).

143. See *Akiak Native Cmty. v. EPA*, 625 F.3d 1162, 1166 (9th Cir. 2010) (noting EPA’s requirement that approved states “provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process” (quoting 40 C.F.R. § 123.30 (2010))).

144. See, e.g., 40 C.F.R. § 271.21(e)(2)(i) (“For Federal program changes occurring before July 1, 1984, the State program must be modified within one year of the date of the Federal program change.”); *id.* § 271(e)(2)(ii) (with exceptions, for changes “after July 1, 1984, the State program must be modified by July 1 of each year to reflect all changes to the Federal program occurring during the 12 months preceding the previous July 1”).

145. See, e.g., *id.* § 271.21(g)(1) (“States that are unable to modify their programs by the deadlines in paragraph (e) *may* be placed on a schedule of compliance to adopt the program revision(s) . . .” (emphasis added)); *id.* § 271.21(g)(2) (“If a State fails to comply with the schedule of compliance, the Administrator *may* initiate program withdrawal

approved-program withdrawal procedure discussed below.

There is an important exception to the “grace period” approach to changed federal rules discussed above. When amending the Resource Conservation and Recovery Act in 1984, Congress decided that all of the changes it was authorizing to the federal hazardous waste regulatory program were so important that no grace period would do. Instead, Congress provided that hazardous waste requirements “imposed . . . pursuant to the [1984] amendments” would take effect on the same date in all states.<sup>146</sup> EPA carries out those requirements “directly in each such State” unless and until EPA authorizes that state’s program to implement the new requirement.<sup>147</sup>

None of this works as reliably in the real world as it does in theory, and there is no shortage of litigation about program approvals or EPA-approved programs that fail to meet national goals.<sup>148</sup> At least in theory, however, on the date of approval, a state program should not pose significant conflicts with national standards.<sup>149</sup> And of course, once EPA’s approval of a program survives judicial review, if any, or once the period for seeking judicial review expires (usually sixty days after publication), the courts should have little patience with arguments that the approved state program violates federal law.<sup>150</sup>

But what happens if the state changes its program after obtaining EPA approval? Or if the state fails to keep up with EPA’s revisions to the federal program?

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procedures . . . .” (emphasis added)).

146. 42 U.S.C. § 6926(g)(1).

147. *Id.* This creates a complicated regulatory regime, with different sovereigns responsible for different aspects of the same hazardous waste permit. See Adam Babich, *Is RCRA Enforceable by Citizen Suit in States with Authorized Hazardous Waste Programs?*, [1993] 23 *Envtl. L. Rep. (Envtl. Law Inst.)* at 10,536, 10,538 (explaining that “unwary regulated entities that meet the requirements of only one sovereign may miss important deadlines enforced by the other”).

148. See, e.g., *BCCA Appeal Grp. v. EPA*, 355 F.3d 817 (5th Cir. 2003).

149. But see *Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 456 (5th Cir. 2003) (upholding an EPA decision to move from interim to full approval of a state Clean Air Act program despite an EPA determination that the state’s program “did not meet all of [the Act’s] requirements”).

150. See, e.g., 42 U.S.C. § 7607(b)(1) (“Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register [with exceptions] . . .”).

## 2. *Program Withdrawal*

EPA regulations generally allow the agency to withdraw approval of state programs that stop meeting federal criteria.<sup>151</sup> EPA rarely exercises this authority, since such withdrawals are politically complex and require the agency to come up with the personnel and budget to administer the withdrawn program itself. But because EPA accomplishes withdrawals through rulemaking, Administrative Procedure Act (APA) § 553(e)—which allows “an interested person” to petition federal agencies for rulemaking—empowers citizens to petition EPA to withdraw inadequate state programs.<sup>152</sup> Further, EPA’s mere *consideration* of a petition to withdraw launches a powerful process, which motivates state agencies to take EPA suggestions for program improvement seriously. Typically, such a proceeding concludes with an EPA denial of the applicable petition *after* the state has made enough improvements to its program to eliminate the petitioner’s best arguments for withdrawal.<sup>153</sup>

Under some environmental laws (for example, the Clean Water Act and the Resource Conservation and Recovery Act), EPA must “respond in writing to any petition to commence withdrawal proceedings.”<sup>154</sup> Although other regulatory programs (for example, the Clean Air Act) fail to specifically require an EPA response, the APA supplies a duty to respond.<sup>155</sup>

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151. See, e.g., 33 U.S.C. § 1342(c)(3) (2006) (Clean Water Act); 40 C.F.R. § 123.63(a)(2)(iii) (2011) (Clean Water Act regulations); 42 U.S.C. § 6926(e) (Resource Conservation and Recovery Act); 40 C.F.R. § 271.22(a)(2)(iii) (Resource Conservation and Recovery Act regulations); 42 U.S.C. §§ 7410(a)(2)(H), 7410(c)(1), 7410(k)(5), 7509, 7661a(i) (Clean Air Act); 40 C.F.R. § 52.31 (Clean Air Act regulations).

152. 5 U.S.C. § 553(e) (2006).

153. See, e.g., State Program Requirements: Approval of Revisions to the National Pollutant Discharge Elimination System (NPDES) Program; Louisiana, 70 Fed. Reg. 810, 816 (Jan. 5, 2005) (reviewing EPA and Louisiana’s response to a 2001 petition for EPA withdrawal of Louisiana’s authority to administer a Clean Water Act discharge permitting program).

154. 40 C.F.R. § 123.64(b)(1) (Clean Water Act regulations); *id.* § 271.23(b)(1) (Resource Conservation and Recovery Act regulations); see also *Weatherby Lake Improvement Co. v. Browner*, No. 96-1155-CV-W-8, 1997 WL 687656, at \*1 (W.D. Mo. Apr. 17, 1997) (“Plaintiff may petition EPA to commence proceedings to withdraw an approved NPDES program as set forth in 40 C.F.R. § 123.64(b)(1) . . . .”); *Nat’l Wildlife Fed’n v. Adamkus*, 936 F. Supp. 435, 442–43 (W.D. Mich. 1996) (holding that EPA has “a nondiscretionary duty” to reply to plaintiffs’ petition, but that “[w]hether EPA has delayed unreasonably in responding . . . is a claim properly reviewed under the [Administrative Procedure Act (APA)]”).

155. 5 U.S.C. § 553(e) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”); see also *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (“Under the APA a federal agency is obligated

EPA responses to petitions for withdrawal are “agency action” that should be subject to judicial review under the APA, providing a quality-control check on the integrity of the cooperative federalist system.<sup>156</sup> The question is whether the underlying statutes and regulations provide “standards by which [the courts] can review the EPA’s decision not to commence withdrawal proceedings.”<sup>157</sup> For example, could EPA lawfully respond to a valid petition by stating that it had more important things to do than restore the supremacy of the federal mandates at issue?<sup>158</sup>

In a 2007 Clean Air Act opinion, the U.S. Supreme Court reviewed an EPA response to a petition for rulemaking against the Act’s standards for the regulatory decision that was the petition’s subject, noting that although the Act “condition[s] the exercise of EPA’s authority on its formation of a ‘judgment,’” this does not create “a roving license to ignore the statutory text.”<sup>159</sup> Thus, the Court rejected a dissenting argument that the Act

to ‘conclude a matter’ presented to it ‘within a reasonable time,’ 5 U.S.C. § 555(b), and a reviewing court may ‘compel agency action unlawfully withheld or unreasonably delayed.’ *Id.* § 706(1).”.

156. 5 U.S.C. § 702.

157. *Tex. Disposal Sys. Landfill Inc. v. EPA*, 377 F. App’x 406, 408 (5th Cir. 2010) (“Neither the [RCRA] statute nor the regulations present standards by which we can review the EPA’s decision not to commence withdrawal proceedings.”), *cert. denied*, 131 S. Ct. 665 (2010); *see Nat’l Wildlife Fed’n v. EPA*, 980 F.2d 765, 774 (D.C. Cir. 1992) (holding that the Safe Drinking Water Act’s “language indicates that a state is not entitled to primacy after the EPA ‘determines’ that it no longer meets the primacy requirements”); *Sierra Club v. EPA*, 377 F. Supp. 2d 1205, 1208 (N.D. Fla. 2005) (holding that “[a] citizens’ suit to enforce such discretionary duties is not available”); *Adamkus*, 936 F. Supp. at 440 (“The plain language of the regulation says that it is within the Administrator’s discretion to order the commencement of withdrawal proceedings in response to a petition from the interested person, regardless of the content of the petition.”).

158. Courts generally review “an agency’s refusal to institute rulemaking proceedings . . . at the high end of the range [of levels of deference].” *Am. Horse Prot. Ass’n v. Lyng*, 812 F.2d 1, 4–5 (D.C. Cir. 1987). Deference may be particularly appropriate when an agency’s decision not to regulate is based lawfully on “factors not inherently susceptible to judicial resolution” such as “internal management considerations as to budget and personnel; evaluations of its own competence; weighing of competing policies within a broad statutory framework.” *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1046 (D.C. Cir. 1979).

159. *Massachusetts v. EPA*, 549 U.S. 497, 532–33 (2007) (quoting 42 U.S.C. § 7521(a)(1) (2006)); *id.* at 533 (the word judgment is “but a direction to exercise discretion within defined statutory limits”); *see also Alliance to Save the Mattaponi v. U.S. Army Corps of Eng’rs*, 606 F. Supp. 2d 121, 140 (D.D.C. 2009) (holding that an EPA decision not to veto a U.S. Army Corps of Engineers permit was arbitrary and capricious when EPA based its decision, not on a “determination that the permit would not likely have unacceptable adverse effects, but on a whole range of other reasons completely divorced from the statutory text”); *O’Keeffe’s, Inc. v. U.S. Consumer Prod. Safety Comm’n*, 92 F.3d 940, 944 (9th Cir. 1996) (rejecting an argument that an agency “looked only at the cost of amending the regulations” because the

imposes no constraints on the agency's discretion to deny such petitions by declining to form a "judgment" on the substantive issue one way or the other.<sup>160</sup> Similarly, the Court of Appeals for the District of Columbia Circuit has noted that its "right to review denial of the petition for revision [of a regulation] is no different than our right to review the standard on the basis of new information under [Clean Air Act] Section 307."<sup>161</sup> This type of analysis would give petitions to withdraw program authorizations the teeth to overcome bureaucratic inertia.

Based on the doctrine of enforcement discretion, several appellate court opinions suggest that judicial review cannot be used to compel EPA to correct systemic deficiencies in state program implementation.<sup>162</sup> These opinions ignore the fact that EPA approves and withdraws approval of state programs (and also imposes "sanctions" on recalcitrant states) through notice-and-comment rulemaking—not enforcement actions.<sup>163</sup> Further, under the U.S. Constitution, EPA can have *no* enforcement authority over the states in their capacity as regulators (and sovereigns).<sup>164</sup> Instead, EPA's authority to supervise state regulation is limited to implementation of *incentives*—which, of course, is the essence of cooperative federalist systems.<sup>165</sup>

Under the enforcement-discretion doctrine—embodied in the famous case of *Heckler v. Chaney*<sup>166</sup>—courts presume that administrative decisions

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record showed that the agency had "addressed the relevant statutory factors in determining that an amendment to the regulations was not appropriate or necessary").

160. See *Massachusetts v. EPA* at 549–50 (Scalia, J., dissenting) ("Does anything *require* the Administrator to make a 'judgment' whenever a petition for rulemaking is filed? Without citation of the statute or any other authority, the Court says yes. Why is that so? When Congress wishes to make private action force an agency's hand, it knows how to do so."); see also Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 741–42 (2009) (discussing whether "requiring agency action to be based on statutory factors is likely to be more consistent with Congress's intent than the Agency's view").

161. *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 667 (D.C. Cir. 1975). But see *supra* note 158.

162. See *N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 330–31 (2d Cir. 2003) (declining to review EPA's failure to act when "it is made aware of deficiencies in a state permitting program"); *Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 464 (5th Cir. 2003) ("Under the APA, an agency's decision not to invoke an enforcement mechanism provided by statute is not typically subject to judicial review."); *Ohio Pub. Interest Research Grp., Inc. v. Whitman*, 386 F.3d 792, 798 (6th Cir. 2004) (the Clean Air Act "does not mandate that where there are confirmed areas of needed improvement a NOD [that is, an EPA Notice of Deficiency] must issue"); see also *Sierra Club v. Jackson*, 724 F. Supp. 2d 33 (D.D.C. 2010).

163. See *supra* note 151.

164. See *supra* note 103.

165. *Id.*

166. 470 U.S. 821 (1985).



not to bring enforcement actions are “committed to agency discretion by law” and therefore unreviewable under the APA.<sup>167</sup> Noting that “[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing,” the *Heckler* Court explained that so many factors go into enforcement decisions that judicial review would amount to little more than second-guessing.<sup>168</sup> In addition, the Court suggested that it has less interest in correcting errors leading to a failure to enforce, than it does in curbing government overreaching, noting that “when an agency refuses to act it generally does not exercise its *coercive* power over an individual’s liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect.”<sup>169</sup> The *Heckler* Court specified that its holding did not “involve the question of agency discretion not to invoke rulemaking proceedings.”<sup>170</sup>

Expansion of the enforcement–discretion doctrine to encompass EPA’s use of rulemaking to supervise state regulatory programs reinforces bureaucratic inertia. In many garden-variety enforcement cases, of course, defendants are relatively powerless—and the enforcer is unlikely to face significant pressure when deciding whether to pursue a violation. But the situation is different when potential defendants include major corporations, capable of pulling political strings and otherwise pushing back. This problem of relative power looms even larger when the “enforcement” target is a sovereign state that is giving myriad powerful companies a break by refusing to regulate up to minimum federal standards. Not only does the state have a significant ability to push back, but all affected members of the regulated industry have an incentive to supplement that power.<sup>171</sup>

When a government bureaucracy is subject to such pressures and yet possesses unreviewable authority to ignore deviations, it is unrealistic to expect that bureaucracy to consistently and effectively restore the supremacy of federal mandates.<sup>172</sup> Indeed, such a combination of

167. *Id.* at 837–38 (interpreting 5 U.S.C. § 701(a)(2) (1982)).

168. *Id.* at 831 (noting that the agency must assess “whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all”).

169. *Id.* at 832; see also William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 42 (2003) (“Solicitude for targets of regulation and general lack of concern about agency inaction pervade administrative law jurisprudence.”).

170. 470 U.S. at 825 n.2.

171. David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims’ Rights Act of 2004*, 28 PACE L. REV. 623, 674 (2008) (“Decisions involving prosecutorial discretion . . . are susceptible to political and public influence . . .”).

172. William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789–1972* (pt. 1) 22 STAN. ENVTL. L.J. 145, 194–95 (2003) (before

temptation and lack of accountability invites poor decisions. Use of the enforcement–discretion doctrine to insulate federal agencies from judicial review when they fail to use rulemaking powers to correct breakdowns in the cooperative federalist system is, in essence, a decision to tolerate state failures to provide their residents with the health and welfare protections that Congress mandated for everyone in the nation. If EPA exercises discretion to look the other way when a state as large as, say, Texas fails to implement federal mandates,<sup>173</sup> a sizable percentage of the nation’s population will lose the protection of national standards.

### 3. *Other Sanctions*

The U.S. Supreme Court has recognized Congress’s access to “permissible method[s] of encouraging a State to conform to federal policy choices.”<sup>174</sup> For example, “under Congress’ spending power, ‘Congress may attach conditions on the receipt of federal funds’”<sup>175</sup> so long as those conditions “bear some relationship to the purpose of the federal spending.” Those conditions, of course, “may influence a State’s legislative choices.”<sup>176</sup> Thus, for example, an EPA finding that a state has failed to follow federal mandates under the Clean Air Act begins an eighteen-month “sanctions clock,” that includes a provision for a cutoff of federal highway funds.<sup>177</sup>

### 4. *Objections to State Permits*

Environmental laws generally give EPA authority to block illegal state permits.<sup>178</sup> Usually, this authority is discretionary,<sup>179</sup> but the Clean Air Act

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enactment of federal mandates in the 1970s, “having to deal with politically powerful cities and industries with major economic clout made moderation a virtue in the eyes of the pragmatic engineers who ran the [state environmental] agencies” (footnote omitted)).

173. See *Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 464 (5th Cir. 2003) (allowing EPA to ignore deviations in Texas’s Clean Air Act program).

174. *New York v. United States*, 505 U.S. 144, 168 (1992).

175. *Id.* at 167 (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)).

176. *Id.*

177. See 42 U.S.C. § 7509(a) (2006); 40 C.F.R. § 52.31(d) (2011).

178. See Clean Water Act § 402(d), 33 U.S.C. § 1342(d)(2) (2006) (providing EPA authority to block illegal permits); Clean Air Act § 505(b), 42 U.S.C. § 7661d(b) (2006) (same); Clean Air Act § 167, 42 U.S.C. § 7477 (authorizing EPA to block construction of sources of air pollution that fail to meet federal requirements to prevent significant deterioration of air quality that currently meets federal ambient standards); see also *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 495 (2004) (confirming “EPA’s authority, pursuant to §§ 113(a)(5) and 167” to block construction of facilities with state permits that fail to meet the Clean Air Act’s provisions for preventing significant deterioration of air that currently meets minimum federal standards).

179. See *District of Columbia v. Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980) (EPA’s

provides for a robust federal petition process that allows citizens to challenge state-issued permits in petitions submitted to EPA, requires EPA to respond by a date certain, and requires EPA to veto permits that petitioners show to be illegal.<sup>180</sup> EPA's failure to grant a petition for such an objection is subject to judicial review.<sup>181</sup>

Thus the Clean Air Act is unusual in offering citizens a process for (nondiscretionary) federal review of state permits that overlaps state administrative and judicial review processes. In most other situations, however, federal administrative responses to citizen petitions for objection are discretionary, and even an APA "unreasonable delay" lawsuit is of questionable utility.<sup>182</sup>

#### 5. *Amendments to and Termination of State Permits*

In its regulations, EPA often asserts authority to (effectively) modify state permits without actually vetoing them. Under the Resource Conservation and Recovery Act's hazardous waste regulatory program, for example, EPA has the option of "indicat[ing] in a comment, that issuance of the permit would be inconsistent with the approved State program."<sup>183</sup> EPA includes in such a comment specification of the permit condition(s) "necessary to implement approved State program requirements."<sup>184</sup> EPA withdraws the comment if "satisfied that the State has met or refuted [the agency's] concerns."<sup>185</sup> Otherwise, EPA may directly enforce its comment—even if the state does not adopt it. In the regulation's words, EPA "may take action . . . against a holder of a State-issued permit at any time on the ground that the permittee is not complying with a condition

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"decision not to review or to veto a state's action on an NPDES permit application is 'committed to agency discretion by law'" (quoting 5 U.S.C. § 701(a)(2) (1976)); *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1295 (5th Cir. 1977) ("EPA's decision not to veto a particular [Clean Water Act] permit takes on a breadth that in our judgment renders the bottom line of that decision unreviewable in the federal courts.").

180. Clean Air Act § 505(b), 42 U.S.C. § 7661d(b).

181. *Id.* See generally *N.Y. Pub. Interest Research Grp., Inc. v. Johnson*, 427 F.3d 172, 176 (2d Cir. 2005) (summarizing the Clean Air Act § 505(b) mechanism). Region VII publishes CAA § 505 petitions and EPA responses on its web page. *Title V Petition Database*, ENVTL. PROT. AGENCY, <http://www.epa.gov/region7/air/title5/petitiondb/petitiondb.htm> (last visited Jan. 23, 2012).

182. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (a claim under 5 U.S.C. § 706(1) for judicial review of agency action withheld or unreasonably delayed "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*").

183. 40 C.F.R. § 271.19(b) (2011).

184. *Id.* § 271.19(e)(3).

185. *Id.* § 271.19(d).

that [EPA] in commenting . . . stated was necessary to implement approved State program requirements, whether or not that condition was included in the final permit.”<sup>186</sup> Similarly, EPA has authority to “terminate a State-issued permit.”<sup>187</sup>

#### 6. *Direct Federal Enforcement*

EPA generally retains authority to bring enforcement actions in states that it has approved to administer cooperative federalist programs.<sup>188</sup> EPA enforcement can be civil or criminal in nature. Such enforcement sometimes serves as the only governmental response to a particular violation. More controversially, however, EPA enforcement might consist of “overfiling,” i.e., adding a layer of federal enforcement on top of an ongoing or concluded state enforcement action.<sup>189</sup>

In addition, most antipollution statutes contain a fail-safe provision to allow EPA to abate dangerous industrial activities regardless of whether those activities are permitted or are otherwise consistent with regulations.<sup>190</sup> These provisions allow EPA to seek injunctive relief or to issue administrative orders to abate situations that “may present an imminent and substantial endangerment to the public or the environment.”<sup>191</sup> This language sounds like “emergency” authority. The courts, however, have interpreted it to apply to significant risks of eventual harm, without proof of an emergency. This reading flows from statutory language under which an “endangerment” (i.e., a risk) triggers EPA’s authority—suggesting that the

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186. *Id.* § 271.19(e)(2).

187. *Id.* § 271.19(e).

188. *Id.* (“Under section 3008(a)(3) of RCRA, EPA may terminate a State-issued permit or bring an enforcement action . . . in the case of a violation of a State program requirement.”).

189. Compare *United States v. Power Eng’g Co.*, 303 F.3d 1232, 1240 (10th Cir. 2002) (deferring to EPA’s interpretation that “EPA overfiling is permissible”), with *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 901–02 (8th Cir. 1999) (“EPA may not . . . fill the perceived gaps it sees in a state’s enforcement action by initiating a second enforcement action without allowing the state an opportunity to correct the deficiency and then withdrawing the state’s authorization.”).

190. See, e.g., 42 U.S.C. § 6973 (2006); see also OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, ENVTL. PROT. AGENCY, EC-G-1998-378, GUIDANCE ON THE USE OF SECTION 7003 OF RCRA 13 (1997), <http://www.epa.gov/compliance/resources/policies/civil/rcra/rcrasect7003-rpt.mem.pdf>.

191. 42 U.S.C. § 6973(a) (Resource Conservation and Recovery Act); see *id.* §7603 (Clean Air Act); *id.* §300i (Safe Drinking Water Act); 33 U.S.C. §1364 (2006) (Clean Water Act). See generally Clean Air Act; Enforcement Authority Guidance, 56 Fed. Reg. 24,393, 24,396 (May 30, 1991) [hereinafter EPA Enforcement Guidance] (discussing EPA imminent hazard authority).

agency need not wait for actual harm to occur. And it is the endangerment—not the harm—that must be “imminent and substantial.” Moreover, the whole phrase is usually preceded by a “may”—meaning that even the risk may be potential instead of existing.<sup>192</sup> Based on this analysis, courts have ruled that the “imminent hazard” provisions of antipollution laws contain authority for EPA to abate essentially “any risks” within the statute’s scope.<sup>193</sup> In the real world, however, few federal courts are likely to issue equitable relief about “any risk,” without a showing that the risk merits such relief.<sup>194</sup> One antipollution law—the Resource Conservation and Recovery Act—allows citizen enforcers to wield similar “imminent hazard” claims.<sup>195</sup>

Imminent hazard claims provide a means of protecting the public and environment when states drop the ball in implementing cooperative federalist law. These claims, however, are not specific to state failures to meet national standards, but are mechanisms for providing a (discretionary) safety net for all types of regulatory failures.

#### IV. PREEMPTION ANALYSIS APPLIED: SORTING FALSE FROM TRUE CONFLICTS WITH THE FULL FEDERAL REGULATORY PURPOSE

This Part presents the Article’s suggested approach to preemption analysis in the context of cooperative federalism. Subpart A describes the three categories of state–federal conflicts that arise in the context of a cooperative federalist regulatory system. Subpart B shows how courts can use four questions to sort those claims into the appropriate categories. Subpart C explains the “robust federal corrective mechanism” test that two of those questions implement. Subpart D presents an illustrative table to show how various federal mechanisms for keeping states on track affect the preemption analysis. Finally, Subpart E shows that revisions to the applicable federal regulatory program can change how particular types of conflicts are sorted.

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192. *Lincoln Props., Ltd. v. Higgins*, No. S-91-760DFL/GGH, 1993 WL 217429, at \*13 (E.D. Cal. Jan. 21, 1993).

193. *United States v. Price*, 688 F.2d 204, 214 (3d Cir. 1982).

194. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) (an injunction “is not a remedy which issues as of course, or to restrain an act the injurious consequences of which are merely trifling” (citations omitted) (internal quotation marks omitted)).

195. 42 U.S.C. § 6972(a)(1)(B); see Adam Babich, *RCRA Imminent Hazard Authority: A Powerful Tool for Businesses, Governments, and Citizen Enforcers*, [1994] 24 *Envtl. L. Rep. (Envtl. Law Inst.)* at 10,122.

### A. *Categories of State–Federal Conflicts*

Usually, courts seem to treat a conflict between state action and federal law as all-but-conclusive evidence that Congress intended to preempt that state action.<sup>196</sup> But when Congress has elected to employ a system of cooperative federalism, analyses of congressional intent (i.e., the full federal regulatory purpose) must be more nuanced. In this context, conflicts between state and federal law can be usefully sorted into three categories: (1) isolated mistakes; (2) systemic conflicts subject to robust federal corrective mechanisms; and (3) conflicts with the full federal regulatory purpose (i.e., conflicts other than isolated mistakes that are not subject to robust federal corrective mechanisms).

#### 1. *Isolated Mistakes*

State agencies—like their federal counterparts—sometimes make mistakes. When Congress employs a cooperative federalist system to assign states the day-to-day responsibility for issuing permits, therefore, it must know that even states fully committed to meeting minimum national standards will occasionally make decisions that conflict with one or another federal mandate. Further, it is inevitable that some of these defective decisions will survive review by the state’s court system—just as some would slip by the federal judiciary. These types of errors, however, have nothing to do with the “priority” of federal rights over state law.<sup>197</sup> Instead they are the inevitable by-product of *any* administrative system, whether state or federal.<sup>198</sup>

U.S. legal systems minimize such errors by providing for judicial review, which serves a quality control function capable of keeping agency action more or less in line with the rule of law.<sup>199</sup> When Congress elects to employ cooperative federalist systems, Congress signals its intent—at least in most

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196. See *supra* note 64.

197. See *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 107 (1989) (the Supremacy Clause “secure[s] federal rights by according them priority whenever they come in conflict with state law” (alteration in original) (quoting *Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 613 (1979))).

198. Cf. *Paul v. Davis*, 424 U.S. 693, 699–701 (1976) (rejecting a line of reasoning that would logically “result in every legally cognizable injury . . . inflicted by a state official acting under ‘color of law’ establishing a [due process] violation”—a reading that would make “the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States”).

199. Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1452 (1992) (noting that “judicial review can steer agencies back on the track when they stray from their congressionally assigned roles” and “perform a necessary ‘quality control’ function”).

cases—to let state court systems perform the quality control function for state-issued permits. In other words, the decision to provide for state implementation involves an implicit decision to tolerate isolated conflicts that arise from imperfections in state administrative and judicial systems—subject to important exceptions.<sup>200</sup> But given that Congress is inconsistent at best in the degree of respect it affords state administrative processes,<sup>201</sup> why assume that Congress intended to tolerate these Category 1 conflicts? In other words, why not allow the preemption doctrine to provide a federal layer of review for every potentially illegal state permit? In the final analysis, the “presumption against preemption” should tip the scale toward the assumption that when Congress provides that states will serve as the primary implementers of federal policy, it must—absent evidence to the contrary<sup>202</sup>—also expect the states’ administrative law systems to provide the primary quality control mechanism. Moreover, if the federal regulatory system did not take the states’ administrative processes seriously, it would make little sense for EPA regulations to specify minimum procedural rights that members of the public must enjoy in state administration of EPA-authorized programs.<sup>203</sup>

Can illegal permits ever become Category 2 or 3 conflicts? Yes: Category 1 errors do not include mistakes—no matter how well-meaning—that qualify as systemic deviations from federal minimum standards.<sup>204</sup> For example, state administrative misinterpretation of a federal regulation, if ratified by the state’s court system, could cause the state’s regulatory system to depart more or less permanently from national standards and, thus, would not qualify as a Category 1 error.<sup>205</sup> Also, if illegal permits are part

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200. See, e.g., *supra* notes 180–81 and accompanying text (discussing provisions for EPA objection to Clean Air Act permits).

201. See *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 495 (2004) (upholding EPA’s interpretation of the Clean Air Act “to allow substantive federal Agency surveillance of state permitting authorities’ BACT [Best Available Control Technology] determinations subject to federal-court review”); see also *supra* notes 180–87 and accompanying text.

202. See, e.g., *N.Y. Pub. Interest Research Grp., Inc. v. Johnson*, 427 F.3d 172, 176 (2d Cir. 2005) (analyzing the Clean Air Act scheme for federal judicial review of state-issued Clean Air Act permits).

203. See *supra* note 143.

204. Why not sort *all* state–federal conflicts in cooperative federalist systems into Category 1? Tolerating systematic conflicts that survived state court review would undermine Congress’s goal of providing a national minimum level of protection for public health and welfare. If federal standards could be interpreted differently in each of the fifty states, an important goal of the cooperative federalist federal regulatory programs would—absent a Category 2 fix—be defeated.

205. For example, in *Andersen v. Department of Natural Resources*, 796 N.W.2d 1 (Wis. 2011), the Wisconsin Supreme Court ratified the state Department of Natural Resources’

of a pattern of practice which shows that the state agency lacks the resources, expertise, or political will to run a program consistent with federal law, the conflict would fall under Category 2 or Category 3.

## 2. *Systemic Conflicts Subject to Robust Federal Corrective Mechanisms*

Sometimes Congress and the agencies it charges with administering its statutes build into cooperative federalist systems robust mechanisms for correction of deviations from the federal mandates that those systems impose. A federal corrective mechanism is “robust” if it is reasonably calculated to remove any state-law obstacle to achievement of the full federal regulatory purpose. Therefore, a robust federal corrective mechanism in the environmental cooperative federalist context<sup>206</sup> must be likely: (1) to restore the supremacy of national standards and (2) overcome bureaucratic inertia as to both (a) the procedural questions of whether and when the federal agency will determine whether or not to invoke the mechanism, and (b) the substantive decisions as to whether and how the mechanism will apply.<sup>207</sup> In other words, a robust federal corrective

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determination that affected people could not challenge state-issued permits as violating federal regulations because a permit “properly reissued under the state’s statutory and regulatory authority . . . necessarily complies with federal law—unless and until the EPA determines otherwise.” *Id.* at 17. This arguably means that Wisconsin’s Clean Water Act program is now out of compliance with 40 C.F.R. § 123.30 (2011), which requires that state water quality programs provide for an opportunity for “judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit (see § 509 of the Clean Water Act).”

206. Other goals might be relevant to analyses of “robustness” under cooperative federalist systems other than the antipollution systems discussed here.

207. In this context, therefore, wholly discretionary EPA authority should not be viewed as “robust” because it is not reasonably calculated to overcome federal bureaucratic inertia—and therefore not an “adequate substitute” for a private right of action that any person with standing could initiate. See Tracy A. Thomas, *Congress’ Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 756 (2001) (arguing that the “key to reconciling legislative and judicial remedies is . . . the evaluation of whether the legislative remedy is an adequate substitute”); Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 432–33 (1982) (suggesting that the argument that another statutory remedy precludes use of § 1983 “is strengthened if the statute provides explicitly or implicitly for a private remedy against the federal government in the event of federal agency inaction” because the “existence of such a remedy provides evidence that Congress intended the executive, and not the courts, to be the primary guarantor of state compliance with federal law”); Elliott, *supra* note 134, at 152 (“The ability of any affected member of a citizen’s group to go to court, to an independent judiciary, to make the government live up to its obligations under the law, or to make a polluter comply with its obligations under the law, is one of the very best features of the American system.”). Similarly, when a federal mechanism for correcting a state conflict would require an unreasonably sustained commitment of resources—for example challenging every permit that a state issues as a way of



mechanism provides reliable (not, of course, guaranteed) correction for systemic problems and provides for judicial review.

One example of a robust federal corrective mechanism is the Clean Air Act's provision for EPA veto of state permits that implement Title V of that Act. The mechanism provides for judicial review to overcome bureaucratic inertia, and—although it operates on a permit-by-permit basis—it is likely to result in definitive EPA rejection of state action that conflicts with federal law.<sup>208</sup> But this mechanism would not apply to all state deviations from federal Title V permitting mandates. For example, a state policy that exempted sources from the Clean Air Act's Title V permitting process (such as by classifying those sources as “minor” rather than “major”) might fall between the cracks of this corrective mechanism and end up in Category 3, described below. This is because the Clean Air Act Title V petition process, on its face, applies to EPA review of state-issued Title V permits—not state failures to require such permits.

### 3. *Conflicts with the Full Federal Regulatory Purpose*

The third Category comprises conflicts that do not fit into Categories 1 or 2 and therefore stand as an obstacle to achievement of the full federal regulatory purpose behind environmental cooperative federalist systems. By definition, these are systemic, not isolated conflicts and also by definition they are not subject to robust federal corrective mechanisms that would be reasonably calculated to fix them. For example, to the extent that the Clean Air Act's withdrawal procedures are insulated from judicial review by an extrapolation from the enforcement–discretion doctrine,<sup>209</sup> they are clearly not robust. They fail to create a mechanism for overcoming bureaucratic inertia and therefore fall short of removing state-law obstacles to the goals of cooperative regulatory federalist systems. To provide another example, the Resource Conservation and Recovery Act's solid waste program allows EPA to cut off solid waste funding to states with inadequate programs<sup>210</sup> and authorizes “any person” to bring enforcement

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compensating for illegalities in the state permitting system—the mechanism would not be reasonably calculated to restore the supremacy of national health and welfare standards.

208. The argument on the other side is that this mechanism fails to provide a systematic fix for systematic problems. At least in theory, a litigant might need to file repeated petitions for essentially every Title V Clean Air Act permit that a state issued in order to police the cooperative federalist system effectively. But such repeated state defiance of federal mandates, even in the face of EPA rulings, should be treated as a different category of conflict—part of a pattern and practice of defiance that potentially falls within Category 3.

209. *See supra* notes 157–73 and accompanying text (discussing judicial review in relation to the doctrine of enforcement discretion).

210. 42 U.S.C. § 6947(b)(3) (2006).

suits against operators of landfills that fail to meet EPA criteria.<sup>211</sup> Neither of these mechanisms is a reliable fix for systemic conflicts between state and federal solid waste regulations. An EPA funding cutoff would have no direct effect on the offending state regulations and would likely be subject to bureaucratic inertia. Citizen enforcement actions against offending landfills would be too indirect to provide a reliable mechanism for reforming state solid waste law that falls short of federal criteria. Thus, neither mechanism is robust.

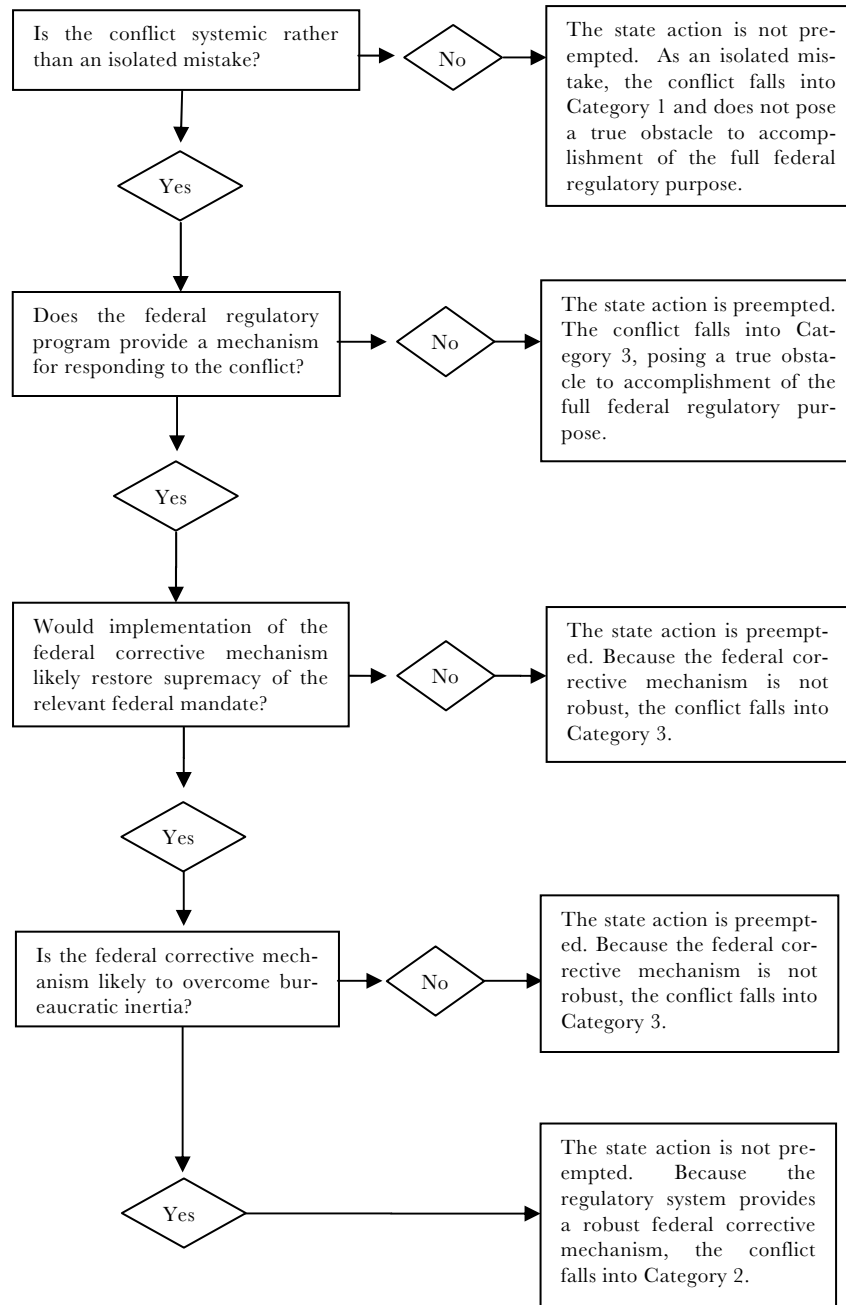
*B. Four Questions for Sorting Conflicts*

To determine which category a state–federal conflict in an environmental cooperative federalist system fits into,<sup>212</sup> courts should analyze the following four questions, presented in the form of a flow chart:

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211. *Id.* § 6945(a) (“The prohibition contained in the preceding sentence shall be enforceable under section 6972 of this title against persons engaged in the act of open dumping.”).

212. This discussion assumes that the federal purpose at issue in the state–federal conflict is “significant.” See *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1137 (2011) (“Like the regulation in *Geier* [*v. Am. Honda Motor Co.*, 529 U.S. 861 (2000)], the [seatbelt] regulation here leaves the manufacturer with a choice. And, like the tort suit in *Geier*, the tort suit here would restrict that choice. But unlike *Geier*, we do not believe here that choice is a significant regulatory objective.”).



### C. *The Robust Federal Corrective Mechanism Test*

The “robust federal corrective mechanism” test is grounded in preemption jurisprudence because it is derived from preemption’s ultimate touchstone—the federal regulatory programs’ purposes.<sup>213</sup> Accordingly, it also answers the question of whether the federal corrective mechanism is an “adequate substitute” for the private remedy of preemption.<sup>214</sup> The test is arguably similar to the Supreme Court’s “sufficiently comprehensive remedy” test,<sup>215</sup> which the Court uses to determine whether a litigant is barred by another remedy from using 42 U.S.C. § 1983 to vindicate a constitutional or statutory right.<sup>216</sup> That test asks whether “the remedial devices provided in a particular Act are sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983.”<sup>217</sup> In the § 1983 context, the Court—so far—does not “lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right.”<sup>218</sup> The question is whether “a § 1983 action would be inconsistent with Congress’s carefully tailored scheme.”<sup>219</sup> When congressional remedies “diverge in significant ways” from “rights and protections . . . existing under the Constitution,” it is appropriate to infer “lack of congressional intent” to preclude § 1983 claims.<sup>220</sup> On the other hand, the Court has stated that “the existence of a

213. *See supra* notes 133–35 and accompanying text (describing the three goals of providing citizens a minimum level of environmental protection, overcoming bureaucratic inertia, and preserving state primacy).

214. *See* Thomas, *supra* note 207, at 756 (noting that the “key to reconciling legislative and judicial remedies” is to evaluate “whether the legislative remedy is an adequate substitute”). Because the preemption doctrine implements the ultimate touchstone of the full federal regulatory purpose, an adequate substitute for a preemption claim must, with reasonable reliability, implement that same purpose.

215. *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 20 (1981).

216. Section 1983 provides a remedy for people injured by being deprived of their constitutional or statutory rights “under color of” state law. 42 U.S.C. § 1983. The tests apply to different situations; however, since § 1983 is a statutory remedy and preemption is rooted in the Constitution.

217. *Nat’l Sea Clammers Ass’n*, 453 U.S. at 20.

218. *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 107 (1989) (quoting *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423–24 (1987)); *see, e.g.*, *Charvat v. E. Ohio Reg’l Wastewater Auth.*, 246 F.3d 607, 615 (6th Cir. 2001) (“In sum, the defendants have failed to prove that Congress intended for the whistleblower provisions of the CWA and [the Safe Drinking Water Act] to preclude the enforcement of constitutional rights through § 1983.”).

219. *Charvat*, 246 F.3d at 615 (quoting *Golden State Transit Corp.*, 493 U.S. at 107).

220. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252–53 (2009).

more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under § 1983 and those in which we have held that it would not.”<sup>221</sup> To be consistent with the preemption doctrine, however, the robust federal corrective mechanism test should remain tied to the federal regulatory programs’ purposes, rather than hinging on whether a legislative remedy is “more restrictive.”

The robust federal corrective mechanism test also bears some resemblance to the “adequate remedial mechanisms”<sup>222</sup> test that the Court applies when determining whether a statutory remedy precludes availability of a *Bivens* remedy for a constitutional tort.<sup>223</sup> *Bivens* created “an implied private action for damages against federal officers alleged to have violated a citizen’s constitutional rights.”<sup>224</sup> The *Bivens* test is not crystal clear. At least for now, the bottom-line question is “whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.”<sup>225</sup> But there is a current in the Court in favor of applying *Bivens* more narrowly, characterizing *Bivens* as “a relic of the heady days in which this Court assumed common-law powers to create causes of action.”<sup>226</sup>

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221. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005). *But cf. Verizon Md. Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 643 (2002) (“The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others.” (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967))).

222. *See Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (“When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional . . . remedies.”).

223. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (inquiring whether the petitioner is entitled to redress through a “particular remedial mechanism” in the federal courts); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001) (“We first exercised this authority [to imply a new constitutional tort] in *Bivens*, where we held that a victim of a Fourth Amendment violation by federal officers may bring suit for money damages against the officers in federal court.”).

224. *Malesko*, 534 U.S. at 66; *see also Schweiker*, 487 U.S. at 421 (explaining that in *Bivens*, the “Court noted that Congress had not specifically provided for such a remedy and that ‘the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation’” but created a remedy “finding ‘no special factors counseling hesitation in the absence of affirmative action by Congress,’ and ‘no explicit congressional declaration’ that money damages may not be awarded” (quoting *Bivens*, 403 U.S. at 396–97)).

225. *Bush v. Lucas*, 462 U.S. 367, 388 (1983); *see also Wilkie v. Robbins*, 551 U.S. 537, 554 (2007) (citing *Bush*).

226. *Wilkie*, 551 U.S. at 568 (Thomas, J., concurring) (“Accordingly, in my view, *Bivens* and its progeny should be limited ‘to the precise circumstances that they involved.’” (quoting

The robust federal corrective mechanism test is related to the “detailed remedial scheme” test, which the Court uses to decide whether another remedy precludes courts from asserting jurisdiction over state officers under the *Ex parte Young* doctrine.<sup>227</sup> The tests are related because in many preemption cases about cooperative federalist programs, plaintiffs will rely on *Ex parte Young* to avoid states’ Eleventh Amendment immunity.<sup>228</sup> The *Ex parte Young* doctrine allows litigants to challenge state action or inaction in federal court by suing state officials rather than the states themselves.<sup>229</sup>

When plaintiffs use the *Ex parte Young* doctrine to bring preemption claims about cooperative federalist regulatory systems, the “robust federal

*Malesko*, 534 U.S. at 75 (Scalia, J., concurring)).

227. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (“[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.”).

228. See *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (“[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty . . .”).

229. See *Ex parte Young*, 209 U.S. 123, 159–60 (1908) (“It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional.”); *Edelman v. Jordan*, 415 U.S. 651, 664 (1974) (“*Ex parte Young* was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment of the United States Constitution.”). The *Edelman* Court noted that *Ex parte Young* “has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect.” *Edelman*, 415 U.S. at 664. The doctrine, however, is generally limited to suits for prospective relief, as opposed to retroactive awards that are “in practical effect indistinguishable in many aspects from an award of damages against the State.” *Id.* at 668. Also, the doctrine only applies to state violation of duties under *federal* law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (“A federal court’s grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. . . . We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law.”).

The doctrine is rooted in legal “fiction.” See *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) (referring to “the *Ex parte Young* fiction”). But see *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 334 n.47 (5th Cir. 2005) (“[O]ne school of thought holds that the Supremacy Clause itself creates [the *Ex parte Young* doctrine, as an] implied cause of action.” (citing 13B CHARLES A. WRIGHT ET AL. FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3566, at 102 (1984))). Cf. *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011) (“This doctrine has existed alongside our sovereign-immunity jurisprudence for more than a century, accepted as necessary to permit the federal courts to vindicate federal rights.” (quoting *Pennhurst*, 465 U.S. at 105) (internal quotation marks omitted))).

corrective mechanism” test should serve as a special application of the detailed remedial scheme test. This is because the detailed remedial scheme test is ultimately about discerning Congress’s intent.<sup>230</sup> And, as discussed above,<sup>231</sup> the robust federal corrective mechanism test is grounded in preemption doctrine’s ultimate touchstone—the “*full* purposes and objectives of Congress,”<sup>232</sup> that is, the full federal regulatory purpose.<sup>233</sup> Thus, the test should hinge on whether the relevant mechanism is reasonably calculated to remove any state-law obstacle to achievement of that purpose, i.e., to protect public health and welfare up to the minimum level of national standards and overcome bureaucratic inertia.<sup>234</sup>

#### D. An Illustrative Table

The following table illustrates the discussion above in terms of the mechanisms—discussed in Part III.D for keeping states on track. For each illustrative federal corrective mechanism, the table specifies whether the mechanism is robust and the impact that mechanism should have on preemption analysis in the context of environmental cooperative federalist systems.

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230. In *Seminole Tribe of Florida v. Florida*, the Court declined to allow an *Ex parte Young* cause of action in deference to a statutory remedy that was not only lacked robustness, it was useless—since it was unconstitutional. 517 U.S. at 75–76. But the Court justified this result in terms of Congress’s intent, explaining that when Congress tried (and failed) to create a limited remedy for state violations of the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d) (2006), Congress “strongly indicat[ed]” that it did not wish to impose broader *Ex parte Young* liability. 517 U.S. at 75–76.

231. See *supra* notes 213–14 and accompanying text.

232. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (emphasis added).

233. See *supra* notes 27–29 and accompanying text (showing that the Court’s use of the phrase “purpose of Congress” in the preemption context really refers to the federal regulatory purpose).

234. But see *Legal Envtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640, 644 (11th Cir. 1990) (“Applying *Young* in these circumstances would ignore the important distinction between remedies implied to redress constitutional violations and remedies, whether implied or express, for violations of statutory rights.”). But preemption claims can also arise in situations in which the Eleventh Amendment immunity of the states is not an issue, for example because of waiver, because the defendant is not a state, or because the action is before a state court.

| <b>Federal Mechanism</b>   | <b>Is the Federal Mechanism Robust?</b>   | <b>Impact on Preemption Analysis</b>  |
|--|---|---|
| Federal approval and delegation <sup>235</sup>   | Yes—EPA approval is a system-wide review and thus likely to maintain the supremacy of national standards. It is also subject to judicial review and therefore capable of overcoming bureaucratic inertia.                                   | Because of this mechanism, conflicts between the terms of EPA-approved state programs and federal law (that do not result from post-approval state or federal changes) belong in Category 2.  |
| Federal withdrawal proceedings <sup>236</sup>  | Maybe—EPA withdrawal is a system-wide fix and thus is likely to restore the supremacy of national standards. Judicial review may be available to overcome bureaucratic inertia. <sup>237</sup>  | If judicial review is available, systemic conflicts between EPA-approved state programs and federal mandates belong in Category 2. Otherwise, such conflicts belong in Category 3.  |
| Direct EPA administration of federal program changes pending supplemental authorization of state programs <sup>238</sup> | Yes—This mechanism preserves supremacy of federal mandates before even giving the states a chance to drop the ball. Judicial review is available if filed within sixty days after EPA publishes a final rule announcing the program change. | This mechanism should cause state conflicts with the applicable federal mandates to be classified under Category 2. Before EPA-approval, the federal mandate may be directly applied and enforced. Judicial review is available to correct any EPA attempt to approve a conflicting state program change. |

235. *See supra* notes 141–50 and accompanying text (discussing the EPA approval mechanism).

236. *See supra* notes 151–73 and accompanying text (discussing EPA authority to withdraw approval).

237. *See supra* notes 156–73 and accompanying text (discussing judicial review of EPA withdrawal proceedings).

238. *See supra* notes 146–47 and accompanying text (discussing RCRA's approach to keeping state programs up with federal program changes).



| <b>Federal Mechanism</b>   | <b>Is the Federal Mechanism Robust?</b>   | <b>Impact on Preemption Analysis</b>  |
|--|---|---|
| Other system-wide federal sanctions (e.g., withholding federal funds) <sup>239</sup> | No (at least with respect to sanctions discussed in this Article)—some of these sanctions may be strong enough to prod states into compliance, and are thus likely to restore the supremacy of national standards. But federal causes of action are generally not available to overcome bureaucratic inertia with respect to these sanctions. | These mechanisms would not prevent state action that conflicts with federal mandates from falling into Category 3.  |
| Federal objection, amendment, or termination of illegal state permits <sup>240</sup> | Sometimes—when these mechanisms apply, and when judicial review is available to overcome bureaucratic inertia, they are likely to restore the supremacy of national standards. Some permitting problems, however, may fall between the cracks of these mechanisms.  | When judicial review is available to overcome bureaucratic inertia (i.e., in the Clean Air Act's Title V petition), the conflicts at issue would fall into Category 2. When judicial review is unavailable, the conflicts belong in Category 3. |

239. See *supra* notes 174–77 and accompanying text (discussing sanctions such as withholding federal funds).

240. See *supra* notes 178–87 and accompanying text (discussing EPA authority to veto, modify, and terminate permits).

| <b>Federal Mechanism</b>           | <b>Is the Federal Mechanism Robust?</b>  | <b>Impact on Preemption Analysis</b>   |
|------------------------------------|--|--|
| Federal enforcement <sup>241</sup> | No—These mechanisms offer important protections, but do not directly address state actions that conflict with federal mandates. Instead, review of such state action would be collateral—usually in the context of an enforcement target’s defense. Also, because federal agencies enjoy enforcement discretion, judicial review is not available to overcome bureaucratic inertia. <sup>242</sup> | These mechanisms would not prevent state action that conflicts with federal mandates from falling into Category 3. |

### *E. Changing Categories*

The full federal regulatory purpose, i.e., the ultimate touchstone in preemption analysis, should not become “ossified” except by unambiguous statutory language.<sup>243</sup> Thus, particular types of conflicts may change categories as EPA amends its regulations. For example, EPA’s ability to impose sanctions (including with program withdrawal) on states with Clean Air Act programs that conflict with federal law probably does not qualify as robust. This is because EPA’s authority in this regard is—under current case law—“committed to agency discretion by law,” meaning that affected members of the public have no means to advance Congress’s goal of overcoming bureaucratic inertia. But EPA could amend its regulations to create a petition process—including an administrative obligation to respond on the merits—that would provide a mechanism to overcome bureaucratic inertia. Similarly, courts can interpret federal regulatory mechanisms that seem robust to eliminate their ability to reliably overcome

241. See *supra* notes 188–95 and accompanying text (discussing federal enforcement authority).

242. See *supra* notes 166–70 and accompanying text (discussing enforcement discretion).

243. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) (noting that if deference depended on whether the agency’s construction came before a court’s construction, it would “lead to the ossification of large portions of our statutory law” (quoting *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting))).

bureaucratic inertia.<sup>244</sup> The viability of preemption challenges to conflicting state programs could therefore change as federal regulatory programs evolve in response to agency rulemaking, judicial interpretations, and—of course—legislative changes. If regulatory programs’ built-in mechanisms for policing cooperative federalist systems become more robust, the role of preemption in policing those programs will shrink.

#### CONCLUSION

Preemption doctrine should ensure that state laws do not obstruct attainment of federal regulatory systems’ lawful goals. Cooperative federalist regulatory systems pose challenges in this regard because these systems’ goals can conflict. But with careful analysis, preemption doctrine will help strengthen cooperative federalist systems—stepping in when needed to prevent systemic conflicts between state and federal law but avoiding unnecessary marginalization of state administrative systems.

For preemption doctrine to operate appropriately in this context, courts must recognize that (a) the ultimate touchstone of preemption analysis is the full federal regulatory purpose, and (b) multiple federal goals drive cooperative federalist schemes. It is then practical to distinguish true conflicts between state action and the *full* federal regulatory purpose from false conflicts, in which state action may conflict with a particular federal mandate, but not with the federal regulatory purpose when considered as a whole. This distinction can be implemented by sorting state–federal conflicts in cooperative federalist systems into three categories: (1) isolated administrative mistakes; (2) deviations subject to robust federal corrective mechanisms, defined in terms of the cooperative federalist systems’ goals; and (3) true obstacles to accomplishment of the full federal regulatory purpose. Preemption of state action in the third category only will allow litigants—whether members of the regulated community or citizens seeking full implementation of regulatory protections—to use preemption doctrine to police, but not undermine, cooperative federalism.

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244. See *supra* note 157.

# EQUITABLE POWER IN THE TIME OF BUDGET AUSTERITY: THE PROBLEM OF JUDICIAL REMEDIES FOR UNCONSTITUTIONAL DELAYS IN CLAIMS PROCESSING BY FEDERAL AGENCIES

JAMES D. RIDGWAY\*

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[I]n theory, the political branches of our government are better positioned than are the courts to design the procedures necessary to save veterans' lives and to fulfill our country's obligation to care for those who have protected us. But that is only so if those governmental institutions are willing to do their job. We are presented here with the question of what happens when the political branches fail to act in a manner that is consistent with the Constitution.<sup>1</sup>

—Circuit Judge Stephen Reinhardt

## INTRODUCTION

Repeatedly, the Supreme Court has stressed that the Judiciary lacks both the constitutional authority and the institutional competence to manage federal benefits programs, and has stressed that problems with such programs are better left to the political branches to solve. Unfortunately, the Court's faith in the political process has often proven unfounded, and there is widespread agreement that many federal benefits programs are in crisis. This crisis involves not only welfare programs, such as Social Security and veterans compensation, but also other types of benefits conferred by the federal government, such as recognition of intellectual property, approval of drugs, and applications for citizenship and residency.<sup>2</sup> The net result of the Court's hands-off approach to delays and other systemic issues with these programs is that the problems have now reached the point of becoming due process violations. The need to fashion remedies for these due process violations is beginning to drag courts into the forbidden zone of managing federal agencies.

A pair of recent decisions indicates that the road ahead will be rough. One case at the leading edge of this remedial problem is *Veterans for Common Sense v. Shinseki* (VCS).<sup>3</sup> In May 2011, the U.S. Court of Appeals for the Ninth Circuit held that large portions of the U.S. Department of Veterans Affairs' (VA's) health and benefit programs violate due process, and suggested that a special master may need to be appointed to supervise reforms because the agency has failed to provide adequate mental health services and benefits to veterans with post-traumatic stress disorder (PTSD).<sup>4</sup> Nevertheless, the prospects for successful judicial intervention into the operations of VA (or any of the other major, trouble-plagued

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1. *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 850–51 (9th Cir. 2011), *reh'g en banc granted*, 663 F.3d 1033 (9th Cir. 2011).

2. *See infra* Part I.A.

3. 644 F.3d 845 (9th Cir. 2011), *reh'g en banc granted*, 663 F.3d 1033 (9th Cir. 2011).

4. *See infra* Part I.B (discussing the *Veterans for Common Sense* (VCS) decision in detail).

agencies discussed below<sup>5</sup>) are uncertain. Just days after the Ninth Circuit recommended a major new judicial intervention, the Supreme Court waded into the wreckage of sixteen years of failed attempts by the federal courts to meaningfully improve the conditions in the California prison system. In *Brown v. Plata*,<sup>6</sup> the Court was faced with the fact that more than a decade's worth of ineffective remedial orders have failed to improve prison conditions that are so deplorable that inmates are needlessly dying on a weekly basis due to unmet medical needs.<sup>7</sup> The Court concluded—by the narrowest of margins—that this history of failure justified the drastic remedy of a court-ordered release of over 46,000 inmates within the next two years to relieve overcrowding.<sup>8</sup>

The juxtaposition of the near-simultaneous opinions in *VCS* and *Plata* highlights a new Gordian Knot in administrative and constitutional law. How should federal courts approach the problem of remedying violations of constitutional rights by dysfunctional federal agencies administering benefits programs?<sup>9</sup> Although *Plata* is not a benefits case, it demonstrates

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5. See *infra* Part I.A (discussing similar problems at four major federal agencies besides the U.S. Department of Veterans Affairs (VA)).

6. 131 S. Ct. 1910 (2011).

7. See *infra* Part IV.C.2 (discussing the details of *Plata*).

8. *Plata*, 131 S. Ct. at 1923.

9. Though structural reform litigation prior to *VCS* has largely involved state and local agencies, one notable and controversial exception has been the litigation involving the Native American trust accounts managed by the Department of the Interior (Interior). See *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009) (ordering Interior to provide statutorily-mandated accounting for trust funds); *Cobell v. Kempthorne*, 455 F.3d 301 (D.C. Cir. 2006) (vacating a district court injunction that disconnected Interior's computer systems from Internet access to protect individual Indian trust data following the district court's holding that Interior had mismanaged trust accounts); *Cobell v. Norton (Cobell II)*, 392 F.3d 461 (D.C. Cir. 2004) (vacating, in part, a district court structural injunction against Interior); *Cobell v. Norton (Cobell I)*, 240 F.3d 1081 (D.C. Cir. 2001) (holding that Interior had breached its fiduciary duties to trust fund beneficiaries for decades). Compare Richard J. Pierce, Jr., *Judge Lamberth's Reign of Terror at the Department of the Interior*, 56 ADMIN. L. REV. 235, 261–62 (2004) (arguing that Judge Lamberth's structural injunctions against Interior in the *Cobell* litigation constituted abusive behavior), with Jamin B. Raskin, *Professor Richard J. Pierce's Reign of Error in the Administrative Law Review*, 57 ADMIN. L. REV. 229, 233 (2005) (countering that Judge Lamberth's use of power was warranted and judiciously applied). However, the *Cobell* litigation is somewhat different from *VCS* and other similar problems because the key remedy of restitution being sought in *Cobell* is unlikely to be at issue in suits against other agencies. A second exception is that, during the desegregation era, the Supreme Court found that the Department of Housing and Urban Development participated with a local agency in creating and maintaining a racially segregated public housing system. See *Hills v. Gautreaux*, 425 U.S. 284 (1976). However, in most cases, federal agencies do not participate in structural reform litigation even when state and local agencies are being sued for lack of compliance with federal programs managed by a federal agency. See ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT*

that the traditional remedial strategies used in structural reform litigation frequently fail to produce results when applied to large institutions with serious, systemic problems. This is of grave concern because the task of reforming huge federal bureaucracies is likely to be an order of magnitude more complex and difficult than reforming local school districts—the birthing grounds of structural reform litigation—or even the second largest state prison system.<sup>10</sup> At the same time, judges will have to wrestle with separation of powers concerns much more imposing than the federalism issues that have arisen with past structural injunctions. In doing so, some desegregation-era remedies almost certainly will be off the table. It is nearly impossible to imagine a federal judge attempting to order Congress to increase taxes,<sup>11</sup> or adding the Secretary of the Treasury as a defendant and ordering him to transfer money to an agency.<sup>12</sup> However, the less drastic remedial plans in favor today are often ineffective.

Still, the problems must be solved. In theoretical terms, it is difficult to accept the idea that widespread constitutional violations by the federal government are immune to effective remedies.<sup>13</sup> In practical terms, dysfunctional federal agencies can impose intolerable burdens on those whom they serve, as well as on the sociological legitimacy of the modern administrative state. In human terms, the costs can be even starker. For example, the *Plata* litigation will reach its eighteenth year before the remedial deadline imposed in the latest Supreme Court decision is reached.<sup>14</sup> Based upon the evidence accepted in that case, nearly 1,000 California prisoners may have died due to constitutional violations by that time. Now consider *VCS*. The first sentence of the court’s opinion is: “On an average day, eighteen veterans of our nation’s armed forces take their

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HAPPENS WHEN COURTS RUN GOVERNMENT 135–36 (2003) (explaining that federal agencies typically remain absent from such litigation because plaintiffs are seeking a remedy only against state and local officials).

10. See *infra* notes 71–78 and accompanying text (discussing the scope of VA’s operations).

11. See *Missouri v. Jenkins*, 495 U.S. 33 (1990) (discussed *infra* at notes 252–255 and accompanying text).

12. See *Halderman v. Pennhurst State Sch. & Hosp.*, 533 F. Supp. 631, 640 (E.D. Pa. 1981) (adding the treasurer of Pennsylvania as a party), *aff’d en banc*, 673 F.2d 628 (3d Cir. 1982).

13. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) (“It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.”).

14. In his dissent, Scalia accused the majority of “intellectual bankruptcy” for tacitly admitting that even this deadline would probably need to be extended by at least three years. *Brown v. Plata*, 131 S. Ct. 1910, 1957 (2011) (Scalia, J., dissenting).



own lives.”<sup>15</sup> What would be the cost to our nation’s veterans if it were to take eighteen years of judicial management of VA to reach a solution to the constitutional violations described in that case?<sup>16</sup> Will 118,341 more veterans commit suicide before VA’s health and benefits systems can be brought into compliance with due process?<sup>17</sup> The number of these lives that could be saved by remedying the due process violations found in *VCS* is unknowable but, given these stakes, finding effective judicial remedies soon is imperative.

This Article takes the position that the traditional playbook for structural reform remedies needs to be reconsidered in light of the new complex issues facing courts. Courts’ practical and theoretical unsuitability for agency management requires a different approach to judicial remedies in these cases. Rather than wasting years trying to micromanage problems that the experienced managers within agencies have been unable to solve themselves, judges should order blunt, timeline-based remedies up front. Although such remedies might be considered aggressive and constitutionally troubling, this Article takes the counterintuitive position that, if properly fashioned, such remedies could actually minimize separation of powers concerns. By preemptively announcing blunt remedies—equivalent to the prisoner release in *Plata*—that would be implemented in stages if aggressive progress schedules were not met, courts could credibly spur rapid improvement in agency performance where such improvement was possible through the political processes. If the blunt remedies were triggered, the resulting remedy would still minimize judicial interference in policy decisions committed to agencies, while assuring that constitutional violations do not fester. Furthermore, by focusing on outcomes rather than procedures, courts could avoid capture of the litigation by plaintiffs and give agencies and the elected branches the

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15. *VCS*, 644 F.3d 845, 849–50 (9th Cir. 2011), *reh’g en banc granted*, 663 F.3d 1033 (9th Cir. 2011).

16. Such delay is all too easy to imagine for a court attempting to wrap its arms around two major components of the nation’s second-largest cabinet department, which has 280,000 employees. DEP’T OF VETERANS AFFAIRS, FY 2010 PERFORMANCE AND ACCOUNTABILITY REPORT, at I-20 (2010) [hereinafter VA FY2010 PERFORMANCE REPORT], [http://www.va.gov/budget/docs/report/archive/FY-2010\\_VA-PerformanceAccountabilityReport.zip](http://www.va.gov/budget/docs/report/archive/FY-2010_VA-PerformanceAccountabilityReport.zip). For example, the Ninth Circuit panel in *VCS* took nearly two years after oral argument to produce a decision. *See VCS*, 644 F.3d at 846 (listing the argument date as August 12, 2009, and the decision date as May 10, 2011).

17. This total would be more than the number of American deaths in World War I (116,516) and more than twice that which occurred in the Vietnam conflict (58,220). *See* ANNE LELAND & MARI-JANA “M-J” OBOROCEANU, CONG. RESEARCH SERV., RL 32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 2–3 (2010), <http://www.fas.org/sgp/crs/natsec/RL32492.pdf>.

opportunity to figure out the best means to the constitutionally required ends. Regardless of the path followed, the timeline for judicial involvement would be minimized, and agencies could be released to independent operation more quickly. None of this is to say that such remedies would be easily swallowed, but such harsh medicine would at least hold the hope of avoiding even less palatable options.

Moreover, the blunt approach is justified as a check on the political branches' incentives to neglect benefits programs. Public choice theory predicts that the political branches will focus on creating new programs to the detriment of established benefit programs. Tolerating this tendency to allow benefits programs to fall into disarray undermines the sociological legitimacy of the government by promoting the widespread belief that the government's promises are not trustworthy. To the extent that political promises create property or liberty interests protected by due process, the Constitution allows courts to guard against political incentives to undermine the administration of these programs. Courts should be agnostic as to whether the political branches keep, modify, or withdraw their promises, but need not allow those branches to break the promises that are protected by due process.

Part I of this Article reviews several examples of crises in federal benefits programs and focuses on *VCS* as an example of the due process problems facing those agencies. *VCS* provides a concrete case for reflecting on the problem of judicial remedies for systemic problems in the function of federal agencies that administer benefits programs. Part II considers the Supreme Court's historic reluctance to allow federal courts to become entangled in running federal benefits programs. Although this hands-off approach has led to the current crises, many of the concerns expressed by the Court are well taken and must factor into a proper remedy. Part III looks more broadly at the Supreme Court's general administrative law jurisprudence and how it reinforces the concerns of Part II. The theoretical literature in this area is well developed and helps define the separation of powers concerns raised when courts begin running federal agencies. Part IV of the Article turns to the other strain of case law that must guide courts in this area: the jurisprudence regarding structural reform and equitable relief for constitutional violations by governmental units. Although the equitable powers of district courts developed rapidly in the desegregation era, in recent decades this area has struggled to adapt to concerns about judicial overreaching, leading to some problematic outcomes in difficult cases such as *Plata*. Finally, Part V synthesizes the issues raised earlier and takes the position that blunt, timeline-based remedies are not only more likely to be successful than the current cautious approaches to judicial interventions in agency operations, but are also better at promoting the

constitutional values of separation of powers and checking strategic behavior by the political branches.

## I. THE GROWING DUE PROCESS CRISIS IN FEDERAL BENEFITS CLAIMS ADMINISTRATION

Federal agency actions can be roughly grouped into three classes for purposes of considering systemic delay problems<sup>18</sup>; rulemaking,<sup>19</sup> enforcement actions,<sup>20</sup> and benefits claims. This Article focuses on the underexplored area of how federal agencies that manage benefits operate. As discussed below, the Supreme Court has conveyed a strong hands-off message to the lower courts when it comes to systemic problems within agencies.<sup>21</sup> As a result, neither courts nor scholars have delved too deeply into the root causes of dysfunction in federal benefits agencies. The bill for this neglect is now coming due in the form of chronic problems that have reached due process violation levels.

This Part examines the problem in two sections. First, it looks at the severity of the difficulties being experienced by a wide spectrum of federal benefits agencies. Although the due process problem has boiled over in the area of veterans law,<sup>22</sup> VA is hardly the only benefits agency criticized for its inability to perform core functions. The second section begins to examine what role the courts should play in remedying these widespread

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18. Of course, there are other ways to categorize federal agencies when other issues are being considered. See, e.g., Yair Sagy, *A Triptych of Regulators: A New Perspective on the Administrative State*, 44 AKRON L. REV. 425 (2011) (distinguishing three prototypes of public regulation to enhance understanding of regulatory schemes).

19. This is agency action through formal or informal means to establish general rules or standards that will apply to the community affected by the agency's jurisdiction. There is some literature dealing with the Judiciary's ability to force delayed or ignored agency rulemaking. See *infra* Part III.E.2.

20. These are proceedings initiated by the agency to enforce statutory or regulatory rules through injunctions or penalties. The Supreme Court has essentially closed the door on suits seeking to compel agencies to engage in enforcement actions. See *infra* notes 147–152 and accompanying text.

21. See *infra* Part II.B.

22. Although frequently overlooked, veterans law has actually been a fertile ground for constitutional review of agency actions. See, e.g., *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (holding that a statutory provision creating a fee ceiling for attorneys representing veterans benefits claimants did not violate due process); *Johnson v. Robison*, 415 U.S. 361 (1974) (holding that equal protection did not prevent VA from denying benefits to conscientious objectors). See generally Kenneth B. Kramer, *Judicial Review of the Theoretically Non-Reviewable: An Overview of Pre-COVA Court Action on Claims for Veteran Benefits*, 17 OHIO N.U. L. REV. 99 (1990); James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 213–16 (2011) [hereinafter Ridgway, *Splendid Isolation Revisited*].

problems by taking a close look at *VCS* as an example of the context within which courts will be forced to grapple with these problems.

#### A. *Delay and Dysfunction in Federal Benefits Agencies*

There are many types of federal systems that are vulnerable to due process challenges similar to those raised in *VCS*. Although monetary payments naturally come to mind, the federal government runs many systems in which claimants apply for some type of property or liberty interest that may rise to the level of being protected by due process. For simplicity purposes, this Article will refer to all such programs as “benefits programs” despite the somewhat unorthodox usage of that term.

Five examples give some idea of the breadth of such programs. VA and the Social Security Administration (SSA) provide monetary benefits. The U.S. Patent and Trademark Office (PTO) and the U.S. Food and Drug Administration (FDA) provide legal protections that add value to the products that they approve. The Department of Homeland Security’s U.S. Citizenship and Immigration Services Division (USCIS)<sup>23</sup> determines whether applicants should be granted temporary residence, permanent residence, or citizenship. Although these agencies are very different in many important ways, they are sadly united in experiencing chronic, systemic problems.

The struggles of VA, as described by the Ninth Circuit in *VCS* below,<sup>24</sup> are the norm for such agencies rather than the exception. The Social Security disability system has experienced a “meteoric rise in claims,”<sup>25</sup> and the number of individuals found disabled has risen from a little over 400,000 in 1980 to nearly 1.1 million in 2009.<sup>26</sup> As a result of the rise in claims, SSA has been facing huge backlogs. As the Government Accountability Office reported:

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23. The functions of U.S. Citizenship and Immigration Service were formerly part of Immigration and Naturalization Services (INS). INS was folded into the Department of Homeland Security in 2003. See Noel L. Griswold, Note, *Forgetting the Melting Pot: An Analysis of the Department of Homeland Security Takeover of the INS*, 39 SUFFOLK U. L. REV. 207, 221 (2005).

24. See *infra* notes 52–66 and accompanying text; see also James D. Ridgway, *The Veterans’ Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 268–70 (2010) [hereinafter Ridgway, *VJRA Twenty Years Later*].

25. Jeffrey S. Wolfe, *The Times They Are a Changin’: A New Jurisprudence for Social Security*, 29 J. NAT’L ASS’N ADMIN. L. JUDICIARY 515, 523 (2009).

26. SOC. SEC. ADMIN., OFFICE OF RET. & DISABILITY POLICY, OFFICE OF RESEARCH, EVALUATION, & STATISTICS, ANNUAL STATISTICAL REPORT ON THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, 2009, at 85 (2010), [http://www.ssa.gov/policy/docs/statcomps/di\\_asr/2009/di\\_asr09.pdf](http://www.ssa.gov/policy/docs/statcomps/di_asr/2009/di_asr09.pdf).

[B]y the end of fiscal year 2006, the time required to reach a decision had increased dramatically. In fiscal year 2000, SSA's average processing time was 274 days. However, by fiscal year 2006, this average had increased to 481 days, with many cases taking much longer. For example, 30 percent (about 170,000) of the decisions issued in fiscal year 2006 took 600 days or more; about 2 percent (12,000) took over 1,000 days.<sup>27</sup>

SSA asserts that it has made some progress on its backlog in recent years.<sup>28</sup> However, the problem is not limited to delay. Due in part to the fact that "SSA is prohibited from supervising [administrative law judges] or evaluating their performance," the system is experiencing wild variations in the outcomes of appeals that undermine its legitimacy.<sup>29</sup> Some of the agency's administrative law judges (ALJs) are granting benefits in virtually 100% of appeals.<sup>30</sup> As a result, many believe the system is in desperate need of reform, even if they do not agree on what form it should take.<sup>31</sup>

It is not only the monetary benefits systems that are in trouble. "There is widespread agreement that the patent system in the United States is broken."<sup>32</sup> But the PTO faces an enormous volume of work. In the last decade, "the number of patent examiners has more than doubled, from 2,900 to 6,200. The length of time to process a patent has increased 40% from 25 to 35 months. Further, the backlog of applications awaiting review increased 139 percent, from 308,000 to 736,000."<sup>33</sup> In fiscal year 2010, the PTO received over 500,000 patent applications and issued over 233,000

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27. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-40, SOCIAL SECURITY DISABILITY: BETTER PLANNING, MANAGEMENT, AND EVALUATION COULD HELP ADDRESS BACKLOGS 22 (2007) (footnote omitted), <http://www.gao.gov/new.items/d0840.pdf>.

28. See, e.g., SOC. SEC. ADMIN., NATIONAL HEARINGS AVERAGE PROCESSING TIME (FY 2007–FY 2011) (2011), (documenting a drop in processing times in appeals involving hearings from 514 days in fiscal year 2008 to 364 days in the first eight months of fiscal year 2011).

29. Richard J. Pierce, Jr., *What Should We Do About Administrative Law Judge Disability Decisionmaking?* 7 (The George Washington Univ. Law Sch. Legal Studies Research Paper No. 573, 2011), available at <http://ssrn.com/abstract=1890770>.

30. *Id.* at 2, 8 (discussing one administrative law judge (ALJ) who reversed Social Security Administration (SSA) denial decisions in 2,285 cases in 2007 and another judge who granted benefits in 1,280 out of 1,284 cases in 2010 and had a 100% award rate through the first half of 2011).

31. See *id.* at 18–23 (arguing that the ALJ level of review should be abolished); Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731 (2003) (discussing multiple options); Wolfe, *supra* note 25, at 562 (advocating a change in the "current system of rewarding claimants' representatives for delay").

32. Michael J. Burstein, *Rules for Patents*, 52 WM. & MARY L. REV. 1747, 1750 (2011).

33. U.S. PATENT & TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT, FISCAL YEAR 2010, at 113 (2010), <http://www.uspto.gov/about/stratplan/ar/2010/USPTOFY2010PAR.pdf>.

patents.<sup>34</sup> It takes an average of over two years for the PTO to take its first action on a claim and three years to receive a final decision,<sup>35</sup> even though the total amount of time spent by an examiner reviewing a claim during that time averages only eighteen hours.<sup>36</sup> There are tremendous incentives for patent examiners to “dispose of cases as quickly as possible,” despite the likely adverse effects on the quality of decisions.<sup>37</sup> Savvy applicants can wear down examiners with submissions and responses that generate no work credit for the examiner and encourage the examiner to grant the application just to be done with it.<sup>38</sup> Accordingly, there is a widely shared belief that the process not only takes too long but produces dubious results as well.<sup>39</sup>

In a similar vein, the Food and Drug Administration has been described as “in shambles” after “suffering catastrophic, highly publicized failures—think Vioxx.”<sup>40</sup> The agency is overwhelmed with drugs awaiting review and approval. In 1962, Congress required the FDA to review the efficacy of 16,573 prescription drugs that had been found safe under the prior regulatory system.<sup>41</sup> *Over forty years later*, in 2006, the agency had still not completed its review of those drugs originally designated for review, much less all the drugs submitted to it in the intervening decades.<sup>42</sup> As a result of these delays, there are thousands of unapproved drug products on the

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34. *Id.* at 125.

35. *Id.* at Performance Highlights tbl.

36. DAN L. BURK & MARK A. LEMLEY, *THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT* 23 (2009). A claim can sit at the U.S. Patent and Trademark Office for two years before it is even looked at by anyone for the first time. *Id.*

37. *Id.*

38. *See id.* at 23–24.

39. *See, e.g., id.*; JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* (2008); Burstein, *supra* note 32; Robert P. Merges, *As Many as Six Impossible Patents Before Breakfast: Property Rights for Business Concepts and Patent System Reform*, 14 *BERKELEY TECH. L.J.* 577 (1999). In response to these concerns and many others, Congress very recently passed a major patent reform package, but it is far too soon to tell what effect, if any, it will have on the process. *See Leahy-Smith America Invents Act*, Pub. L. No. 112-29, 125 Stat. 284 (2011).

40. Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 *TEX. L. REV.* 1741, 1741 (2008). Shapiro and Steinzor reach a similar verdict as to the Environmental Protection Agency, the Occupational Health and Safety Administration, the National Highway Traffic Safety Administration, and the Consumer Product Safety Commission. *See id.*

41. Michael D. Sant’Ambrogio, *Agency Delays: How a Principle-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 *GEO. WASH. L. REV.* 1381, 1401 (2011) (citing U.S. DEP’T OF HEALTH & HUMAN SERVS., CTR. FOR DRUG EVALUATION & RESEARCH, *MARKETED UNAPPROVED DRUGS—COMPLIANCE POLICY GUIDE* 9 (2006)).

42. *Id.* at 1401.

market.<sup>43</sup> Moreover, delays cost manufacturers whose patents continue to run while waiting for approval, spark litigation about drugs that are marketed without proper approval, and—most importantly—cost thousands of lives each year.<sup>44</sup>

The USCIS is yet another struggling agency.<sup>45</sup> The immigration system faces “huge backlogs” due to many factors, including the key problem that “adjudicators simply do not have the resources that they need.”<sup>46</sup> “The average processing time for citizenship applications . . . rose from approximately six months in 2003 to fifteen months in 2008, with some applicants waiting as long as six years for the adjudication of their applications.”<sup>47</sup> Similarly, applicants for legal permanent resident status can face long waits, and as a result, these applicants have begun to flood federal courts with petitions for mandamus with mixed results.<sup>48</sup> Due to these delays, applicants must wrestle with uncertainty and struggle to make long-term plans.

The five agencies discussed above are not alone in their struggles, and there are almost certainly smaller federal agencies experiencing similar problems.<sup>49</sup> Thus, there is every reason to believe that the finding of due process violations in *VCS* is not an aberration but a bellwether.<sup>50</sup>

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43. *Id.*

44. *Id.* at 1399 & n.71, 1401.

45. See U.S. DEP’T OF HOMELAND SEC., CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, ANNUAL REPORT 2010, at 9–62 (2010), [http://www.dhs.gov/xlibrary/assets/cisomb\\_2010\\_annual\\_report\\_to\\_congress.pdf](http://www.dhs.gov/xlibrary/assets/cisomb_2010_annual_report_to_congress.pdf) (discussing the many “pervasive and serious problems” facing the agency).

46. Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 542 (2011).

47. Sant’Ambrogio, *supra* note 41, at 1385 n.10 (citing U.S. DEP’T OF HOMELAND SEC., CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, ANNUAL REPORT 2008, at 2 (2008), [http://www.dhs.gov/xlibrary/assets/CISOMB\\_Annual\\_Report\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2008.pdf), and specific cases as examples of delays in application processing).

48. See Lauren E. Sasser, *Waiting in Immigration Limbo: The Federal Court Split Over Suits to Compel Action on Stalled Adjustment of Status Applications*, 76 FORDHAM L. REV. 2511 (2008) (discussing the split among districts courts over the jurisdictional authority to adjudicate lawful permanent resident applications).

49. See, e.g., Elliot Golding, Essay, *Medicare Part D: Rights Without Remedies, Bars to Relief, and Miles of Red Tape*, 77 GEO. WASH. L. REV. 1044, 1046 (2009) (arguing that “the failure of Congress to include remedial provisions leaves many on the brink of poverty with no avenue to seek redress when avoidable errors by [Health and Human Services] and the SSA push them over the edge”).

50. Shortly before this article went to press, the Ninth Circuit granted an en banc rehearing in *VCS*, 663 F.3d 1033 (9th Cir. 2011). Although the ultimate fate of the case is unknown at this point, if the problems discussed in this Part persist, the pressure for judicial remedies will continue to rise. Therefore, a close examination of the remedial problem is merited.

### B. Veterans for Common Sense

As discussed below, an equitable remedy should be narrowly tailored to the constitutional violation at issue. What exactly constitutes a due process violation based upon systemic problems in a federal benefits system is beyond the scope of this Article. However, an actual remedial problem is useful in considering the many dimensions of the issue. As such, it is helpful to begin by looking at the facts supporting the Ninth Circuit's opinion in *VCS*.

The question presented to the Ninth Circuit in *VCS* was whether the severe delays plaguing the veterans benefits system amount to a violation of veterans' constitutional rights. The plaintiffs were challenging aspects of the two main components of VA: the Veterans Health Administration (VHA), which delivers health services, including mental health treatment to eligible veterans,<sup>51</sup> and the Veterans Benefits Administration (VBA), which adjudicates claims for benefits that determine what types of services a veteran is eligible to receive from VHA.<sup>52</sup> The opinion concluded that disputed portions of both systems violated due process protections.

This was not a conclusion that the court reached easily. After nearly two years of deliberation, the panel was divided and produced 140 pages of opinions debating the issue.<sup>53</sup> The *VCS* majority began with a campaign of statistical shock and awe focused on VHA:

On an average day, eighteen veterans of our nation's armed forces take their own lives. Of those, roughly one quarter are enrolled with the [VA] health care system. Among all veterans enrolled in the VA system, an additional 1,000 attempt suicide each month. Although the VA is obligated to provide veterans mental health services, many veterans with severe depression or [PTSD] are forced to wait weeks for mental health referrals and are given no opportunity to request or demonstrate their need for expedited care. For those who commit suicide in the interim, care does not come soon enough.<sup>54</sup>

The "Background" section expanded the discussion of numbers and consequences:

From 2002 to 2003 there was a 232 percent increase in PTSD diagnoses

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51. VA FY2010 PERFORMANCE REPORT, *supra* note 16, at I-20.

52. *Id.* at I-21 to -22.

53. The dissent vigorously challenged much of the factual basis upon which the majority structured its opinion and ultimately accused the majority of "dramatically overstep[ping] its authority [and] tearing huge gaps in the congressional scheme for judicial review of VA actions." *VCS*, 644 F.3d 845, 900-05 (9th Cir. 2011) (Kozinski, C.J., dissenting), *reh'g en banc granted*, 663 F.3d 1033 (9th Cir. 2011). Whether the majority opinion should be considered correct is beyond the scope of this Article, as the district court facing the remedy problem on remand will be bound by the majority opinion.

54. *Id.* at 849-50 (majority opinion).



among veterans born after 1972. A 2008 study by the RAND Institute shows that 18.5 percent of U.S. service members who have returned from Iraq and Afghanistan currently have PTSD, and that 300,000 service members now deployed to Iraq and Afghanistan “currently suffer PTSD or major depression.” Delays in the treatment of PTSD can lead to alcoholism, drug addiction, homelessness, anti-social behavior, or suicide.<sup>55</sup>

Ultimately, the opinion turned to the current status of claimants at VHA and noted that, “as of April 2008, approximately 85,450 veterans remained on VHA waiting lists for mental health services.”<sup>56</sup>

Turning to the adjudication of benefits claims by VBA, the opinion noted that it takes an average of 3.9 years for a veteran who disputes a decision by VA to receive a decision from the Board of Veterans Appeals (BVA).<sup>57</sup> In particular, the opinion focused on “the 573-day average delay for a Regional Officer to certify an appeal to the BVA.”<sup>58</sup> “In just the six months between October 2007 and April 2008, at least 1,467 veterans died during the pendency of their appeals.”<sup>59</sup> When the BVA does decide a claim, sixty percent of the time it concludes that the local office’s decision cannot be affirmed.<sup>60</sup>

Despite the starkness of the numbers, the Ninth Circuit did not base its decision on the outcomes alone, but also upon VA’s inability to react appropriately to these problems. The opinion contained a litany of unsuccessful VA initiatives to put its house in order on its own.<sup>61</sup> As to the problems facing VHA, the Ninth Circuit took care to note that VHA’s chief

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55. *Id.* at 853.

56. *Id.* at 855.

57. *Id.* at 859. In the VA system, nonattorney adjudicators make initial claims decisions at regional offices located throughout the country. Dissatisfied veterans can appeal to the Board of Veterans Appeals (BVA), where their claims are reviewed de novo by BVA members, who are attorneys. Veterans whose claims remain denied can appeal outside the agency to the Court of Appeals for Veterans Claims and then to the Federal Circuit. See Ridgway, *VJRA Twenty Years Later*, *supra* note 24, at 257–58 (describing the origins of this system of review).

58. *VCS*, 644 F.3d at 855.

59. *Id.* at 860.

60. *Id.* (noting that BVA grants the claim 20% of the time and remands for further proceedings 40% of the time). Although not discussed by the Ninth Circuit, the overwhelming majority of BVA decisions that are appealed to the Court of Appeals for Veterans Claims (CAVC) are vacated and remanded on the grounds that the BVA decision is flawed. See James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VET. L. REV. 113, 151–57 (2009) [hereinafter Ridgway, *Why So Many Remands?*].

61. See *VCS*, 644 F.3d at 853–55 (describing Veterans Health Administration (VHA) initiatives beginning in 2004 and subsequent reports by VA’s Office of Inspector General concluding that problems remained widespread).

financial officer had denied a budget crisis and asserted that VHA had adequate resources to perform its mission.<sup>62</sup> The opinion further noted that VHA had recently been authorized thousands of new mental health staff positions, but that 500 to 600 positions remained unfilled.<sup>63</sup> As to VBA, the opinion emphasized that VA was unable to explain why its adjudication process took so long:

During the district court proceedings in this case, senior VA officials were questioned about the extraordinary delays in the VBA's claims adjudication appeal system. None of those officials, however, was able to provide the court with a sufficient justification for the delays incurred. Bradley Mayes, the Director of Compensation and Pension Services at the VBA, testified at a deposition that the VBA had not "made a concerted effort to figure out what [wa]s causing" the lengthy delays in its resolution of the appeals of veterans claims for service-connected death and disability compensation. And at trial, James Terry, the Chairman of the Board of Veterans' Appeals, was unable to explain the lengthy delays inherent in the appeals process before the Board.<sup>64</sup>

Thus, the Ninth Circuit concluded that "[m]uch of the delay appears to arise from gross inefficiency, not resource constraints."<sup>65</sup> It later reiterated, "If resource constraints are an issue, the VA has not asserted as much."<sup>66</sup>

Based upon these facts, the Ninth Circuit concluded that the relevant portions of VHA and VBA violated the due process rights of the affected veterans due to the delays involved.<sup>67</sup> The opinion rejected the district court's holding that the remedies sought by the plaintiffs were beyond its power "and would call for a complete overhaul of the VA system, something clearly outside of this Court's jurisdiction."<sup>68</sup> Instead, the majority remanded the case to the district court to hold hearings and make findings as to what procedural changes were necessary to remedy the problems causing the due process violations.<sup>69</sup> It explicitly suggested that the district court consider appointing a special master to assist it in deciding upon the necessary structural reforms.<sup>70</sup>

Before turning to the doctrinal issues presented with the *VCS* remedy, it is important to consider the enormity of the task that the Ninth Circuit

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62. *Id.* at 877.

63. *Id.* at 877–78.

64. *Id.* at 859 (alteration in original).

65. *Id.* at 885.

66. *Id.*

67. The specifics of the holding are discussed in additional detail in Part V.A, *infra*.

68. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1091–92 (N.D. Cal. 2008).

69. *VCS*, 644 F.3d at 886–87.

70. *Id.* at 878, 887.

remanded to the district court. VHA is by far the largest health care provider in the United States, if not the world.<sup>71</sup> It has nearly 250,000 employees<sup>72</sup> and operates 153 Medical Centers, 232 Vet Centers, 768 Community Based Outpatient Clinics, 134 Community Living Centers, 6 Independent Outpatient Clinics, and 50 Residential Rehabilitation Centers serving nearly 6,000,000 unique patients annually.<sup>73</sup> As for VBA, the preparation of appeals in veterans benefits claims for decision by the BVA in Washington, D.C., is handled by nearly 15,000 adjudicators located in 57 regional offices<sup>74</sup> across the country and in the Philippines.<sup>75</sup> VA projects that those regional offices will receive over 1.3 million claims for disability benefits in fiscal year 2012.<sup>76</sup> Similarly, the BVA projects that 170,000 initial decisions by those offices on benefits claims will be disputed in fiscal year 2011.<sup>77</sup> Even if a judge wanted to avoid becoming entangled in VA's far-flung operations, VA's central office in Washington, D.C., alone has 10,000 employees to "provide policy, administrative, information technology, and management support to the programs."<sup>78</sup> Even though many aspects of VA operations were not found to violate due process, the changes necessary to reform the broken pieces will certainly reverberate widely through the system and may well have serious unforeseen

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71. VA FY2010 PERFORMANCE REPORT, *supra* note 16, at I-20. Despite the problems listed in the opinion, VHA's quality generally ranks very high. See U.S. DEP'T OF VETERANS AFFAIRS, VETERANS HEALTH ADMIN., OFFICE OF QUALITY & SAFETY, 2009 VHA FACILITY QUALITY AND SAFETY REPORT 7 (2009), <http://www1.va.gov/health/docs/HospitalReportCard2009.pdf> ("Where direct comparisons are available, the performance of VHA equals or exceeds that reported by commercial health plans, Medicare or Medicaid, in several instances, by a considerable margin.").

72. VA FY2010 PERFORMANCE REPORT, *supra* note 16, at I-27.

73. *Id.* at I-23 to -24.

74. *Id.* at I-23, I-27.

75. Because the Philippines was a United States territory during World War II, Filipinos who are disabled due to injuries or diseases related to their World War II service are entitled to benefits, along with spouses and certain children of Filipino soldiers who have died from service-connected causes. 38 U.S.C. § 107 (2006).

76. U.S. DEP'T OF VETERANS AFFAIRS, FY 2012 BUDGET SUBMISSION, VOL. I, at 2B-2 (2011), [http://www.va.gov/budget/docs/summary/Fy2012\\_Volume\\_I-Summary\\_Volume.pdf](http://www.va.gov/budget/docs/summary/Fy2012_Volume_I-Summary_Volume.pdf). These predictions not only double the number of disability claims received in 2006, but also fail to capture the increasing number of individual disabilities being claimed per application. See Ridgway, *Why So Many Remands?*, *supra* note 60, at 145-48 (explaining that VA treats multiple claims by a single applicant as a single "issue" in the evaluation process, thereby obscuring the number of individual disabilities for which benefits are being sought).

77. BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN FOR FISCAL YEAR 2010, at 21 (2011), [hereinafter 2010 CHAIRMAN REPORT], [http://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2010AR.pdf](http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2010AR.pdf).

78. VA FY2010 PERFORMANCE REPORT, *supra* note 16, at I-27.

consequences.

## II. JUDICIAL REVIEW OF FEDERAL BENEFITS CLAIMS

The due process violations in *VCS* are merely one facet of the recently acknowledged and much larger “threshold problem that undermines regulatory government: ineffective efforts to hold agencies accountable for failure to accomplish their statutory missions.”<sup>79</sup> In the specific context of federal benefits claims, judicial reluctance to become entangled in such systems has a long history.

### A. *Veterans Claims and Judicial Review of Benefits Prior to the Welfare State*

The first federal benefits program was established in the very first session of Congress to provide compensation to veterans of the Revolutionary War.<sup>80</sup> More than a decade before *Marbury v. Madison*,<sup>81</sup> the Supreme Court declared the statute establishing the first veterans benefits adjudication system unconstitutional, removing the federal courts from any role in adjudicating such claims.<sup>82</sup> Although the essential problem with that statute was a separation of powers issue,<sup>83</sup> it is notable that, shortly after its ruling, the Court sent a “memorial” to Congress complaining that the tasks assigned to the Judiciary were “too burdensome” for “the small number of judges.”<sup>84</sup> Accordingly, it was apparent to the Court, even in its earliest days, that heavy involvement in benefits programs would require a large allocation of judicial resources.

To be clear, the Judiciary was not alone in its concern about the potential effects of having the program run by the courts. For its part, Congress was reluctant to cede final decisionmaking authority to the courts

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79. Shapiro & Steinzor, *supra* note 40, at 1742 (advocating the use of the Internet to develop “rigorous and concise ‘positive metrics’ that would give public notice when health and safety agencies are successful in achieving their statutory missions and when they have failed to do so”).

80. Act of Sept. 29, 1789, ch. 24, § 1, 1 Stat. 95; see JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 4 (1978).

81. 5 U.S. (1 Cranch) 137 (1803).

82. *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792). In fact, *Marbury* cites *Hayburn’s Case* as precedent for the proposition that the courts can declare federal laws unconstitutional. *Marbury*, 5 U.S. at 171 (“It must be well recollected that in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional . . .”).

83. See Ridgway, *Splendid Isolation Revisited*, *supra* note 22, at 143–45.

84. U.S. COURT OF VETERANS APPEALS, *VETERANS BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS AND THE DEVELOPMENT OF THE AMERICAN SYSTEM* 42 n.152 (1992).

and allocated decisions on veterans claims to the Secretary of War rather than accept judicial decisions as binding.<sup>85</sup> Thus, America's first major benefits program established a baseline of judicial noninvolvement.

This pattern was reinforced after the Civil War. Just prior to the conflict the U.S. Court of Claims was established, and disappointed veterans attempted to seek review of their claims in that court after the war.<sup>86</sup> However, the Supreme Court concluded that such claims could not be pursued because "[n]o pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion."<sup>87</sup> This case-or-controversy approach was a radical shift from the Revolutionary War-era dispute concerning final authority and appeared to close off the courts on Article III grounds even if Congress were inclined to grant subject matter jurisdiction. Indeed, Congress was not so inclined. Instead, private bills to establish pensions for veterans whose claims had been denied became a huge focus of client service. Such bills were passed by the thousands in the decades after the Civil War.<sup>88</sup>

### *B. Judicial Review of Agency Delays in Modern Federal Benefits Claims*

Even as the idea of federal benefits as property rights gained ground in the twentieth century, there has been a strong tendency to limit judicial involvement in the process. In 1933, when Franklin Roosevelt proposed the Economy Act, which gave him the power to establish the modern veterans benefits system, he included a provision explicitly stripping courts of any power to review the system.<sup>89</sup> To the extent that courts became involved in some review of other benefits systems, the Supreme Court has discouraged district courts from intervening to solve problems of mere delay in decisionmaking in a number of ways.<sup>90</sup> The key aspects of the Court's jurisprudence can be broken down into five parts, two statutory and three constitutional.

The first statutory part is that the Court has failed to provide any meaningful interpretation of the Administrative Procedure Act's (APA's)<sup>91</sup>

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85. See Ridgway, *Splendid Isolation Revisited*, *supra* note 22, at 144–45.

86. *Id.* at 161–63.

87. *United States v. Teller*, 107 U.S. 64, 68 (1883).

88. See Ridgway, *Splendid Isolation Revisited*, *supra* note 22, at 163.

89. *Id.* at 179–80.

90. Simply due to the size of the system, much of the Court's relevant case law comes from Social Security cases. However, there have been key decisions in other areas, and the overall picture has been one of clear hostility to judicial intervention into claim backlog problems at federal agencies.

91. 5 U.S.C. §§ 551–559, 701–706 (2006).

timeliness requirements. The APA commands agencies to complete matters in a “reasonable time”<sup>92</sup> and authorizes courts to intervene when agency action is “unreasonably delayed.”<sup>93</sup> However, the Court has declined to provide any guidance as to the application of these provisions, which has resulted in lower court jurisprudence that is “ad hoc, incoherent, and difficult to apply consistently.”<sup>94</sup> The net result has generally amounted to “an individual-rights framework without any of the constitutional bite.”<sup>95</sup>

Second, as to agencies’ organic statutes, the Court has indicated that only the clearest statutory time limits are enforceable. In *Heckler v. Day*,<sup>96</sup> the Court rejected a judicially imposed deadline for adjudication appeals of Social Security disability decisions. It held that judicially created deadlines based upon a statutory requirement to act within a reasonable amount of time were inappropriate, even when the agency was not disputing that the delays involved were unreasonable under the statute.<sup>97</sup> The Court concluded that “Congress, fully aware of the serious delays in resolution of disability claims, has declined to impose deadlines on the administrative process.”<sup>98</sup> Therefore, such deadlines were contrary to Congress’s intent and intruded upon the discretion delegated to the Secretary of Health and Human Services to establish procedures for adjudicating claims.<sup>99</sup> In essence, the Court concluded that the separation of powers doctrine required courts to leave problems of delay to the political branches, except in those situations in which the law expressly created a clear time limit that Congress intended the courts to enforce.<sup>100</sup>

Third, on the constitutional front, the Court has routinely emphasized that it has never accepted the argument that applicants for benefits have a property interest that is protected by constitutional due process. In 1960, in *Flemming v. Nestor*,<sup>101</sup> the Court concluded that a member of the Communist

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92. 5 U.S.C. § 555(b).

93. *Id.* § 706(1).

94. Sant’Ambrogio, *supra* note 41, at 1388; *see also id.* at 1411–13 (analyzing *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), and cases applying its analysis).

95. Sant’Ambrogio, *supra* note 41, at 1388.

96. 467 U.S. 104 (1984).

97. *Id.* at 110–11.

98. *Id.* at 111.

99. *Id.* at 118–19.

100. Even in areas of administrative law in which Congress had created explicit deadlines, courts often excuse noncompliance, and the track record of such deadlines is mixed. *See* Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923 (2008).

101. 363 U.S. 603 (1960).

Party who was being deported to his country of origin did not have a protected property interest in any Social Security benefits that he had otherwise accrued due to his employment in the United States.<sup>102</sup> The Court rejected the argument that such benefits were the equivalent of a contractual right and stated, “To engraft upon the Social Security system a concept of ‘accrued property rights’ would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands.”<sup>103</sup>

Although the Court held in 1970, in *Goldberg v. Kelly*,<sup>104</sup> that current recipients of benefits have a protected property interest in maintaining an award, it has never extended that holding to applicants for benefits. Two years later, in *Board of Regents of State Colleges v. Roth*,<sup>105</sup> the Court articulated a relatively narrow definition of property for due process purposes. *Roth* involved an untenured faculty member at a state university whose contract was not renewed.<sup>106</sup> In concluding that the professor had no property right that would support his due process argument for a hearing, the Court stated:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.<sup>107</sup>

During the 1980s, the Court twice reminded the lower courts that it had never recognized that applicants for a benefit have a protected property interest: once in the context of veterans disability claims<sup>108</sup> and again in the context of emergency loans administered by the Farmers Home Administration.<sup>109</sup>

Fourth, even when there is a clearly protected property interest in a benefit previously conferred, the Court held in *Cleveland Board of Education v.*

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102. *Id.* at 605–08.

103. *Id.* at 610; *see also* *Lavine v. Milne*, 424 U.S. 577, 584 n.9 (1976) (“Welfare benefits are not a fundamental right, and neither the State nor Federal Government is under any sort of constitutional obligation to guarantee minimum levels of support.”).

104. 397 U.S. 254 (1970).

105. 408 U.S. 564 (1972).

106. *See id.* at 566.

107. *Id.* at 577.

108. *See* *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985) (noting that the district court had correctly observed that the Court had never recognized such a property interest).

109. *See* *Lyng v. Payne*, 476 U.S. 926, 942 (1986) (“We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment.”).

*Loudermill*<sup>110</sup> that delay alone in decisionmaking will not ordinarily be sufficient to constitute a due process violation. Rather, there must be additional information that makes the delay constitutionally unreasonable. In particular, the Court rejected the bald allegation that a nine-month delay in providing a hearing after a government employee was terminated violated due process. In its analysis in *Loudermill*, the Court focused on the fact that

the complaint merely recites the course of proceedings and concludes that the denial of a “speedy resolution” violated due process. This reveals nothing about the delay except that it stemmed in part from the thoroughness of the procedures. A 9-month adjudication is not, of course, unconstitutionally lengthy *per se*. Yet *Loudermill* offers no indication that his wait was unreasonably prolonged other than the fact that it took nine months. The chronology of the proceedings set out in the complaint, coupled with the assertion that nine months is too long to wait, does not state a claim of a constitutional deprivation.<sup>111</sup>

This language expressly indicated that delay caused by the “thoroughness of the procedures” involved would not violate due process and clearly placed the burden on plaintiffs to prove that the alleged delay could not be justified.

Fifth and finally, the Supreme Court closed the door to indirect intervention in delay problems by holding that monetary damages are not available from officials who may be responsible for improperly denying, discontinuing, or delaying benefits in violation of due process. Despite its previous holding that a monetary damages action could be brought directly under Fifth Amendment due process,<sup>112</sup> in *Schweiker v. Chilicky*<sup>113</sup> the Court refused to apply that holding to benefits claims. The plaintiffs in *Schweiker* alleged that senior officials in Arizona’s Social Security offices had systematically ignored controlling legal authority and clear evidence in numerous cases while applying quotas to terminate a predetermined numbers of recipients so as to reduce program costs.<sup>114</sup> Despite the allegations of egregiously unlawful conduct, the Court concluded that “Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program,” and that its choice not to provide a damages remedy as part of the

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110. 470 U.S. 532 (1985).

111. *Id.* at 547 (citation omitted).

112. *See Davis v. Passman*, 442 U.S. 228, 242–49 (1979) (holding that a congressional staffer could pursue an allegation of discrimination against a congressman through a cause of action implied by due process).

113. 487 U.S. 412 (1988).

114. *See id.* at 418–19.



comprehensive benefits scheme must be respected.<sup>115</sup>

The history of veterans benefits and the language of the Supreme Court's modern case law express a clear reluctance by the Court to allow the Judiciary to become entangled in benefits programs. Key cases come from the Social Security disability arena and focus on the robust political attention and congressional oversight that program receives.<sup>116</sup> There is also the undercurrent of concern dating back to the 1883 *United States v. Teller* case<sup>117</sup> about how much protection can be afforded to benefits that Congress is free to alter or eliminate. Thus, the philosophy restricting judicial review of agency delays has a distinct flavor of the separation of powers concerns common elsewhere in administrative law.<sup>118</sup>

This attitude has been internalized by the lower federal courts. Although the circuit courts of appeals have largely concluded in recent decades that applicants for Social Security and other benefits do have a protected property interest,<sup>119</sup> the pointed doubts expressed by the Supreme Court have naturally encouraged the lower courts and public interest litigants to be cautious in pushing the development of due process rights in this area and to focus their arguments on issues more compelling than mere delay.<sup>120</sup> In one pre-*Loudermill* case, the Third Circuit held that a four-year delay in processing a claim violated due process and rejected as "patently frivolous" the agency's argument that the delays in that case were

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115. *Id.* at 428–29.

116. Congress's involvement in the design of the veterans disability system was also a key in holding that due process does not prevent Congress from excluding attorneys from the veterans benefits system. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 323–35 (1985).

117. 107 U.S. 64, 68 (1883). *See supra* notes 86–88 and accompanying text.

118. *See infra* Parts III.C–E.

119. *See Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009) (veterans disability compensation); *Kapps v. Wing*, 404 F.3d 105, 112 (2d Cir. 2005) (home heating assistance); *Hamby v. Neel*, 368 F.3d 549, 559 (6th Cir. 2004) (Medicaid); *Stieberger v. Apfel*, 134 F.3d 37, 38 (2d Cir. 1997) (Social Security); *Nat'l Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 588 n.7 (9th Cir. 1992) (veterans disability compensation); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990) (Social Security); *Daniels v. Woodbury Cnty.*, 742 F.2d 1128, 1132 (8th Cir. 1984) (state welfare benefits); *Parker v. Califano*, 644 F.2d 1199, 1203 (6th Cir. 1981) (Social Security); *Shrader v. Harris*, 631 F.2d 297, 301 (4th Cir. 1980) (Social Security); *Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 489–90 (3d Cir. 1980) (disabled child's annuity).

120. *See Cushman*, 576 F.3d at 1293–94 (alteration of evidence in the claims file); *Kapps*, 404 F.3d at 111 (right to a hearing and to notice of program eligibility requirements); *Hamby*, 368 F.3d at 556 (adequate notice and a meaningful hearing); *Stieberger*, 134 F.3d at 38 (adequate notice); *Derwinski*, 994 F.2d at 585 (right to assistance of counsel); *Gonzalez*, 914 F.2d at 1203 (notice of appellate rights); *Daniels*, 742 F.2d at 1131 (arbitrary decisionmaking and notice); *Parker*, 644 F.2d at 1203 (notice and opportunity to be heard); *Shrader*, 631 F.2d at 301 (adequacy of notice provided to a mentally ill claimant).

justified by necessary procedures.<sup>121</sup> However, cases since *Loudermill* have rejected arguments that specific delays violate due process.<sup>122</sup> Indeed, the Second Circuit has expressly rejected the argument that even a ten-year delay in reaching a final decision on a Social Security disability claim could justify awarding benefits in the absence of substantial evidence that the claimant was a qualified applicant.<sup>123</sup>

The attitude of courts toward delay in benefits programs has become one of general acceptance even in the face of steady increases. In one frequently cited case, the Seventh Circuit held that because “administrative efficiency is not a subject particularly suited to judicial evaluation, the courts should be reluctant to intervene in the administrative adjudication process.”<sup>124</sup> Further, “we are not justified in sanctioning the imposition of unrealistic and arbitrary time limitations on an agency which for good faith and unarbitrary reasons has amply demonstrated its present inability to comply.”<sup>125</sup>

In another case, the Second Circuit affirmed the dismissal of a due process claim while commenting, “delay is a natural concomitant of our administrative bureaucracy. Neither the six-month delay created by the additional fair hearing, nor the estimated total of 19 months from claim initiation to completion of ALJ review are remarkable in the Medicare, Social Security and employment benefits systems.”<sup>126</sup> Accordingly, the due process holding in *VCS* represents a significant departure from the federal courts’ traditional attitude toward delay in benefits programs or, at least, an indicator that the courts’ tolerance of agency dysfunction is not without limits.<sup>127</sup>

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121. See *Kelly*, 625 F.2d at 490–91 (condemning an agency’s rationalizations for processing delays).

122. See *Littlefield v. Heckler*, 824 F.2d 242, 247 (3d Cir. 1987) (holding that a nine-month delay in issuing a Social Security appellate decision did not violate due process); *Givens v. U.S. R.R. Ret. Bd.*, 720 F.2d 196, 201 (D.C. Cir. 1983) (holding that a nineteen-month delay in processing a claim for railroad retirement benefits did not violate due process where there was no evidence of deliberate or strategic delay); *Frock v. U.S. R.R. Ret. Bd.*, 685 F.2d 1041, 1047 n.13 (7th Cir. 1982) (holding that a two-year delay did not violate due process).

123. See *Bush v. Shalala*, 94 F.3d 40, 46 (2d Cir. 1996) (holding that delay alone is an insufficient ground upon which to reverse the agency’s denial of benefits).

124. *Wright v. Califano*, 587 F.2d 345, 353–56 (7th Cir. 1978).

125. *Id.*

126. *Isaacs v. Bowen*, 865 F.2d 468, 477 (2d Cir. 1989).

127. It is not surprising that this departure would occur in the veterans benefits arena. Although the history of the veterans benefits system is often overlooked because it was not subject to judicial review until the Veterans Judicial Review Act of 1988, veterans benefits have traditionally been at the vanguard of the development of the welfare state because veterans arouse public sympathy and have a strong moral claim to compensation for their

### III. RELATED AREAS OF ADMINISTRATIVE LAW

The line of cases addressed in Part II is part of a larger theme in administrative law that clearly counsels against significant judicial intervention into agency operations. This Part examines how this theme has developed in the Supreme Court's jurisprudence and how it has been interpreted by administrative law theorists.

#### A. *The Early Twentieth Century*

The role of the courts in the ongoing waltz of administrative law has evolved over time.<sup>128</sup> Although administrative law has a rich history tracing to the earliest days of the country,<sup>129</sup> most influential case law from the Supreme Court traces to the New Deal. Since the beginning of the twentieth century, progressives had been urging an expansion of the administrative state as a way to allow scientific expertise to replace politics in the creation of public policy.<sup>130</sup> During that pre-New Deal period, appellate—rather than trial-like—review became enshrined as the dominant framework for the Judiciary's relationship with agencies.<sup>131</sup> The Great Depression and the ensuing New Deal provided the opening necessary to attempt this progressive transformation, which occurred after courts were already predisposed to deferential review of agency actions.<sup>132</sup>

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injuries. See generally THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1995); GILBERT Y. STEINER, *THE STATE OF WELFARE* (1971).

128. See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1337 (2006) (“[A]dministrative law [is] a waltz, a three-step pattern repeated over and over again. First, something happens in the world. Second, public policymakers identify that happening as a problem, or an opportunity, and initiate new forms of governmental action to take advantage of or to remedy the new situation. Third, these new forms of action generate anxieties about the direction and control of public power.”).

129. This history has been explored in Jerry Mashaw's epic four-part series. See Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362 (2010); Jerry L. Mashaw, *Administration and “The Democracy”: Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568 (2008); Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636 (2007); Mashaw, *supra* note 128.

130. See Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1566–67 (2011).

131. See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 943–44 (2011).

132. See Jeffrey E. Shuren, *The Modern Regulatory Administrative State: A Response to Changing Circumstances*, 38 HARV. J. ON LEGIS. 291, 298 (2001) (“In fact, agency creation and expansion of existing agency authority have tended to occur during periods of national crisis or favorable political conditions, when progressive presidents enjoyed majorities in both

Modern attitudes toward judicial control of agency operations began with the nondelegation doctrine. As expressed in *J.W. Hampton, Jr., & Co. v. United States*,<sup>133</sup> this principle requires legislation to articulate “an intelligible principle to which the person or body authorized . . . is directed to conform.”<sup>134</sup> In practice, the application of the doctrine was limited to two cases decided in 1935: *Panama Refining Co. v. Ryan*<sup>135</sup> and *A.L.A. Schechter Poultry Corp. v. United States*.<sup>136</sup> In *Panama Refining*, the Supreme Court invalidated the section of the National Industrial Recovery Act (NIRA) delegating to the President the power to prohibit shipment of “hot oil” in interstate commerce in order “to eliminate unfair competitive practices” and “to conserve natural resources.”<sup>137</sup> The Court concluded that “Congress left the matter to the President without standard or rule, to be dealt with as he pleased.”<sup>138</sup> Similarly, *A.L.A. Schechter Poultry* invalidated another provision of the Act, which delegated to the President the power to approve detailed codes to govern all business subject to federal authority, because the absence of definite standards amounted to delegation of “unfettered discretion to make whatever laws [the President] thinks may be needed or advisable.”<sup>139</sup> In these two cases, the Supreme Court used the intelligible-principle standard to require clear instructions from Congress, with relatively little room for agency discretion.

Though limited in number, the nondelegation cases have continued to reverberate in the Supreme Court’s jurisprudence.<sup>140</sup> The essential

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houses of Congress.”).

133. 276 U.S. 394 (1928).

134. *Id.* at 409. Chief Justice Taft’s analysis actually began by citing “[t]he well-known maxim ‘*Delegata potestas non potest delegari*’” (no delegated powers may be further delegated), to justify the conclusion that the legislative power delegated to Congress by the Constitution could not be further delegated. *Id.* at 405–06. This concept traces to John Locke’s social contract theory. See JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* 79, para. 141 (Prometheus Books 1986) (1690). See generally Patrick W. Duff & Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 CORNELL L.Q. 168 (1928).

135. 293 U.S. 388 (1935).

136. 295 U.S. 495 (1935).

137. *Pan. Refining Co.*, 293 U.S. at 418.

138. *Id.*

139. *A.L.A. Schechter Poultry*, 295 U.S. at 537–38.

140. One particularly sharp example taken from the criminal law context is Justice Scalia’s recent dissent in *Sykes v. United States*:

We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is

principle of these cases was that ultimate control rested with Congress, which possessed little ability to share it. In such a regime, the responsibility of closely controlling agency operations is left to Congress, which must provide great detail as to what an agency can do. Limited judicial tinkering with agency operations was implicit because of the detailed level of command and control required of Congress.

### B. *Judicial Review of Agency Adjudication Actions*

As the nondelegation doctrine quickly crumbled in practice,<sup>141</sup> if not rhetoric, agencies tended to use enforcement adjudications as the primary vehicle for establishing policy.<sup>142</sup> The Supreme Court's seminal case on the proper judicial role in this era was its 1943 decision in *SEC v. Chenery Corp. (Chenery I)*.<sup>143</sup> In *Chenery I*, the Securities and Exchange Commission (SEC) had modified a stock plan proposed as part of a corporate restructuring to prevent the current management of the company from taking advantage of options made available to other preferred stockholders.<sup>144</sup> After determining that the SEC's analysis was flawed, the Court refused to consider whether the outcome might otherwise be supported:

If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court

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attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty. In the field of criminal law, at least, it is time to call a halt. I do not think it would be a radical step—indeed, I think it would be highly responsible—to limit [the Armed Career Criminal Act] to the named violent crimes. Congress can quickly add what it wishes. Because the majority prefers to let vagueness reign, I respectfully dissent.

131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

141. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 548–49 (3d ed. 2005); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 25–46 (1993); Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 *YALE L.J.* 1399, 1400–01 (2000).

142. See Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 *U. KAN. L. REV.* 473, 496–97, 500–02 (2003) (noting the evolution of administrative agencies from formal to informal adjudication, and the concomitant loss of procedural due process rights).

143. 318 U.S. 80 (1943).

144. *Id.* at 82–85.

cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.<sup>145</sup>

When the case returned to the Court four years later, it reiterated that a reviewing court

must judge the propriety of [agency] action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.<sup>146</sup>

Thus, once the nondelegation rule began to crumble in practice, courts were barred from digging deeply into issues and imagining how best to solve problems. Rather, courts were restricted to determining whether agencies' preferred solutions to a problem satisfied basic requirements.

Not only were adjudicative actions subject to limited review, eventually the Court made clear that an agency's choice not to initiate an adjudication was also an issue for courts to avoid. In *Heckler v. Chaney*,<sup>147</sup> the Court held that there is presumption of unreviewability of agency decisions not to undertake enforcement action.<sup>148</sup> The Court rejected the holding of the Court of Appeals for the D.C. Circuit that an agency could be "required 'to fulfill its statutory function.'"<sup>149</sup>

*Chaney* emphasized history and a reluctance to entangle courts in agency operations:

This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.

The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency

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145. *Id.* at 88.

146. *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 196 (1947).

147. 470 U.S. 821 (1985).

148. *Id.* at 834. Prior to *Chaney*, some review was allowed under *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Cass Sunstein has suggested that *Chaney* unnecessarily discarded the workable standards of *Volpe*. Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 658–60 (1985).

149. *Chaney*, 470 U.S. at 823 (quoting *Chaney v. Heckler*, 718 F.2d 1174, 1191 (D.C. Cir. 1983)).

resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.<sup>150</sup>

The opinion also emphasized that judicial review is not a pragmatic question "that amount[s] to an assessment of whether the interests at stake are important enough to justify intervention in the agencies' decisionmaking."<sup>151</sup> Rather, the "danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance. That decision is in the first instance for Congress."<sup>152</sup>

Thus, *Chaney* asserts four reasons of the major rationales for avoiding judicial entanglement that recur in the Court's jurisprudence on agency operations: (1) deference to agency decisions on public policy, (2) deference to agency allocation of resources, (3) the unsuitability of courts to make the types of decisions committed to agencies, and (4) a reliance on Congress and the political process to police problems with agency inaction. Unsurprisingly, these reasons strongly parallel the Court's jurisprudence on delay and other systemic problems with benefits claims. As a result, it is fair to consider the theoretical arguments that are made in this broader context when looking at the concerns that should shape the remedy in *VCS* and similar cases.

### C. Judicial Review of Agency Rulemaking

Before turning to the major theoretical arguments, the final type of agency action should be considered. In the 1960s and 1970s, rulemaking became a critical, if not the dominant, aspect of agency policymaking.<sup>153</sup> This shift has brought about some forms of robust judicial scrutiny in

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150. *Id.* at 831–32 (citations omitted).

151. *Id.* at 834.

152. *Id.*

153. See Thomas O. McGarity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243 (1987) (attributing the shift from adjudication actions to rulemaking to the enactment of a new generation of "social regulation" statutes by Congress in the late 1960s and early 1970s).

discrete contexts, such as the “hard look” doctrine.<sup>154</sup> However, even though agencies may have shifted focus from discrete enforcement to general rulemaking, the Supreme Court has kept the Judiciary on a relatively tight leash in terms of the breadth of its review of agency actions.

One component of the restrictions is the Court’s case law on standing. In *Lujan v. National Wildlife Federation*,<sup>155</sup> the Court rejected a challenge by environmental groups to a Bureau of Land Management (BLM) program for determining when public lands could be opened up for additional uses, such as mining.<sup>156</sup> The Court concluded that the organizations could not challenge the agency’s general approach to making those kinds of determinations; rather, only final BLM decisions as to specific lands could be challenged, and only then when a member could identify an immediate harm or threat of harm.<sup>157</sup> Responding to the environmental groups’ allegation that violations of governing statutory requirements were “rampant,” Justice Scalia’s majority opinion replied: “Perhaps so. But respondent cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.”<sup>158</sup> The Court made clear that the power of the Judiciary under the APA is limited and that Congress must provide for additional remedies applicable to a specific agency before a court can delve deeply into systemic issues.

Absent such a provision, however, a regulation is not ordinarily considered the type of agency action “ripe” for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant’s situation in a fashion that harms or threatens to harm him.<sup>159</sup>

The Court emphasized that this is “the traditional, and remains the normal, mode of operation of the courts.”<sup>160</sup>

Beyond standing, the Court has also taken a narrow view of the types of actions authorized by the APA. In *Norton v. Southern Utah Wilderness Alliance*

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154. See Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Action Mean?*, 63 ADMIN. L. REV. 77, 77–78 (2011) (analyzing studies of outcomes of review of agency actions applying various doctrines); Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419 (2009) (discussing the development and the current status of the “hard look” doctrine).

155. 497 U.S. 871 (1990).

156. *Id.* at 875, 900.

157. *Id.* at 891–93.

158. *Id.* at 891 (emphasis omitted).

159. *Id.*

160. *Id.* at 894.



(*SUWA*),<sup>161</sup> plaintiff environmental groups sought to use the APA to compel BLM to protect areas designated at “wildness study areas” from off-road vehicle use by forcing the agency to prohibit the use of such vehicles in those areas, conduct intensive monitoring of such use, and take a hard look at new information alleged to require reconsideration of a previously issued environmental impact statement relevant to the land. The Court unanimously agreed that the APA did not authorize any judicial remedy, and dismissed the appellants’ claims.

*SUWA* reiterated “that the only agency action that can be compelled under the APA is action legally required. This limitation appears in § 706(1)’s authorization for courts to ‘compel agency action unlawfully withheld.’”<sup>162</sup> As to the precise interpretation of this provision, *SUWA* took a historical view:

In this regard the APA carried forward the traditional practice prior to its passage, when judicial review was achieved through use of the so-called prerogative writs—principally writs of mandamus under the All Writs Act, now codified at 28 U.S.C. § 1651(a). The mandamus remedy was normally limited to enforcement of a specific, unequivocal command, the ordering of a precise, definite act . . . about which [an official] had no discretion whatever.<sup>163</sup>

“General deficiencies in compliance, unlike the failure to issue a ruling . . . lack the specificity requisite for agency action.”<sup>164</sup>

The Court held that BLM’s 100-plus-page land use plan was “a statement of priorities; it guides and constrains actions, but does not . . . prescribe them.”<sup>165</sup> It noted that “allowing general enforcement of plan terms would lead to pervasive interference with BLM’s own ordering of priorities.”<sup>166</sup> Finally, it recognized the likely effect on agency behavior. A favorable ruling in the present case “would ultimately operate to the detriment of sound environmental management. Its predictable consequence would be much vaguer plans from BLM in the future—making coordination with other agencies more difficult, and depriving the public of important information concerning the agency’s long-range intentions.”<sup>167</sup>

Ultimately, *SUWA* recognized a clear aversion to judicial micro-management of agencies:

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161. 542 U.S. 55 (2004).

162. *Id.* at 63 (quoting 5 U.S.C. § 706(1) (2006)) (emphases omitted).

163. *Id.* (alterations in original) (citations omitted) (internal quotation marks omitted).

164. *Id.* at 66.

165. *Id.* at 71.

166. *Id.*

167. *Id.* at 72.

The principal purpose of the APA limitations we have discussed—and of the traditional limitations upon mandamus from which they were derived—is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.<sup>168</sup>

This emphatic language in *SUWA* interpreting the APA was reinforced in *Summers v. Earth Island Institute*<sup>169</sup> in the context of Article III’s “case or controversy” requirement. In *Earth Island*, the district court had issued a nationwide injunction against the application of certain Forest Service regulations exempting small fire-rehabilitation and timber-salvage projects from the normal notice, comment, and appeal process applicable to larger projects, even though the parties had already reached a settlement as to the specific project that had instigated the suit.<sup>170</sup> The Supreme Court held that the district court had erred in issuing an injunction “in the absence of a live dispute over a concrete application of those regulations.”<sup>171</sup> The Court explained,

In limiting the judicial power to “Cases” and “Controversies,” Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action. This limitation “is founded in concern about the proper—and properly limited—role of the courts in a democratic society.”<sup>172</sup>

Accordingly, the essential message of *Earth Island* was the same as *Lujan* and *SUWA*, regardless of the precise presentation of the issue.<sup>173</sup>

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168. *Id.* at 66–67.

169. 129 S. Ct. 1142, 1148 (2009) (stating that, except when acting to redress actual or imminent harm, courts have no place reviewing the actions of Congress or the Executive Branch).

170. *Id.* at 1147–48.

171. *Id.* at 1147.

172. *Id.* at 1148 (citations omitted) (quoting *Warth v. Seldin*, 422 U.S. 490 (1975)).

173. Of course, it cannot be overlooked that *Lujan*, *SUWA*, and *Earth Island* have two things in common. All three cases involved independent groups trying to shape environmental policy, and all three opinions were written by Justice Scalia. Thus, it is reasonable to wonder what might happen in a different context with a different justice

*D. Judicial Discomfort with the Administrative State*

Before turning to theoretical interpretations of these cases, it must be noted that some justices have expressed discomfort with the growing power of the administrative state relative to the strength of the checks on their operation that the Court has blessed. There is a sense that by narrowing judicial review to discrete actions, too much activity is shielded from the forces of moderation. Indeed, before the dust had begun to settle on the New Deal, Justice Jackson commented that “[t]he rise of administrative bodies probably has been the most significant legal trend of the last century . . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories.”<sup>174</sup> Although his opinion was focused on the agency’s role in determining the substance of the law, his concern about the need to check agency power is generally applicable.

A more significant case contemplating review of agency action is *INS v. Chadha*,<sup>175</sup> in which the Court invalidated Congress’s attempt to oversee agency decisions by reserving a legislative veto. The respondent in *Chadha* was an alien whose deportation had been suspended by the Attorney General.<sup>176</sup> Pursuant to a section of the Immigration and Nationality Act,<sup>177</sup> the House of Representatives passed a resolution vetoing the suspension, and the alien then challenged the constitutionality of the legislative veto provision.<sup>178</sup> The Court agreed with the alien respondent that Congress could not reserve the ability to conduct a case-by-case

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writing the opinion. One such case is *Massachusetts v. EPA*, 549 U.S. 497 (2007), which was written by Justice Stevens. In that case, several environmental groups, as well as state and local governments, petitioned the Environmental Protection Agency (EPA) to issue a rule regulating greenhouse gases as pollutants. *Id.* at 510, 514. Despite *Lujan* and *Earth Island*, the Court concluded that there was a justiciable case or controversy and that the petitioners had standing. *Id.* at 516–26. However, the context of *Massachusetts v. EPA* was substantially different because the petition for rulemaking was filed under a provision of the Clean Air Act expressly allowing for such actions. See 42 U.S.C. § 7607(b)(1) (2006). Therefore, any separation of powers concern was greatly reduced. Moreover, the opinion focused on the standing of states under the Act, and concluded that Massachusetts had satisfied “the most demanding standards of the adversarial process.” 549 U.S. at 521; see also *FEC v. Akins*, 524 U.S. 11, 25 (1998) (rejecting the argument that informational harm to voters from a federal agency’s nonenforcement of election law was too generalized to support standing because such harm was shared by all voters). Thus, the posture and language of *Massachusetts v. EPA* do not suggest a significant retreat from the broader principles against private actions laid out in other cases.

174. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

175. 462 U.S. 919 (1983).

176. *Id.* at 923–25.

177. 8 U.S.C. § 1254(c)(2) (1982) (repealed 1996).

178. *Chadha*, 462 U.S. at 944–55.

intervention from a general administrative regime created by statute.<sup>179</sup>

A notable aspect of the decision was that it acknowledged that the bicameralism and presentment requirements would make it difficult to undo specific agency actions, but emphasized that the Constitution's checks and balances were intended to protect actions committed to one branch from routine interference by another, even by agreement:

[The single-house legislative veto provision at issue] doubtless has been in many respects a convenient shortcut; the "sharing" with the Executive by Congress of its authority over aliens in this manner is, on its face, an appealing compromise. In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency.<sup>180</sup>

In so stating, the Court rejected the practical concerns of Justice White's dissent, which was explicitly motivated by lingering nondelegation concerns,<sup>181</sup> and argued that the realities of modern administrative law were making a mockery of the idea that Congress was exercising any meaningful control over most policymaking.

For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process. There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term.<sup>182</sup>

In his view, Congress ought to be able to retain a check on the behavior of this emerging fourth branch of government, which exercises power that is often more legislative than executive.<sup>183</sup>

The competing positions in *Chadha* illustrate the problem that the Court faced. The reality of administrative growth demands controls on agency behavior, but that same growth makes it difficult to define controls capable of managing agencies without crashing through constitutional barriers.

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179. *Id.* at 952–59.

180. *Id.* at 958–59.

181. *Id.* at 985 (White, J., dissenting).

182. *Id.* at 985–86. There is ample support for Justice White's concern. See SANDLER & SCHOENBROD, *supra* note 9, at 22–23 (charting the growth of federal regulatory statutes); J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 772, 775 (2003) (charting the growth in *Federal Register* pages from 1,936 to 2,000 and the growth in *Code of Federal Regulations* pages from 1,970 to 1,995).

183. *Chadha*, 462 U.S. at 986–87 ("If Congress may delegate lawmaking power to independent and Executive agencies, it is most difficult to understand Art. I as prohibiting Congress from also reserving a check on legislative power for itself.").

Although the *Chadha* majority was unwilling to implicitly acknowledge agencies as a fourth branch in need of separate checks on its behavior, the concern for tempering agency behavior continued to grow, particularly in the academic literature discussed below. Even Justice Scalia—author of the environmental trio discussed above—has expressed some misgivings at the level of deference being accorded agencies<sup>184</sup> in addition to the delegation concerns he expressed in *Sykes v. United States*.<sup>185</sup>

### *E. Theoretical Arguments Concerning the Judicial Role in Managing Agencies*

Of course, Supreme Court case law will be of tremendous interest to judges looking for guidance in how to approach the problem of managing improvement in agency operations. However, there is a large body of scholarly work that also offers an important perspective on understanding the court–agency relationship.

#### *1. Theories of the Constitutional Relationships in Administrative Law*

Traditionally, constitutional administrative law has focused on accountability to the exclusion of virtually any other concern, including effectiveness.<sup>186</sup> The goal of these models was to define the general relationship, under the Constitution, between agencies and the defined branches in order to develop an intuition about how each actor should be involved in any given problem. Due to this focus on accountability, a number of models evolved that did not displace each other but rather cross-pollinated and spread to cover the wide variety of ecological niches in the administrative landscape.<sup>187</sup>

The first major model of the administrative state was the “transmission belt” model, which was named by Richard Stewart.<sup>188</sup> This model envisioned agencies as implementing clear legislative instructions and was

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184. See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2265–66 (2011) (Scalia, J., concurring) (questioning whether the Court was correct in its decision in *Auer v. Robbins*, 519 U.S. 452, 461 (1997), to extend increased deference to an agency’s interpretations of its own regulations).

185. 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting). See *supra* note 140 (noting Scalia’s criticism of “[f]uzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation”).

186. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462–63 (2003).

187. See *id.* at 469; Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1284 (1984); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2254 (2001).

188. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

consistent with the Supreme Court's nondelegation ideal.<sup>189</sup> In this model, Congress was required to exercise close control over agency operations because power could not be delegated without specific directives.<sup>190</sup>

The "transmission belt" model was inadequate to accommodate the progressive ideals of the New Deal, however, so another model arose to provide an alternative narrative of agency control. In the "expertise" model, internal agency experts exercised control because they had the education and discipline to apply science and economics to delegated problems.<sup>191</sup> Both the superior skills of the agency experts and their insulation from the occasionally selfish and irrational political processes justified this transfer of control.<sup>192</sup>

Although the expertise model obtained Supreme Court validation for the New Deal, it was also quickly criticized as imperfect. In practice, the behavior of agency experts was less than ideal.<sup>193</sup> The first cure for imperfect bureaucrats was formal procedural restrictions to minimize the opportunities for bias and conflicts to shade their decisions. The APA was passed in 1946 as the New Deal waned. The APA and its acceptance by the courts were significant because it implicitly acknowledged that the ability of Congress to broadly transfer control of issues had been settled, and the emerging issue was how to control agencies themselves.<sup>194</sup>

Unfortunately, the APA was insufficient to prevent arbitrary agency behavior, and the expertise model continued to lose credibility.<sup>195</sup> By the 1970s, there was a growing consensus that agency behavior needed to be subject to greater external controls. At the time, the balance of agency behavior was shifting toward rulemaking, which opened the door to interest group involvement.<sup>196</sup> The solution was the "interest group" model, which

189. *Id.*

190. *Id.* at 1673.

191. *Id.* at 1678. As noted above, the "expertise" model did not simply displace the "transmission belt" model. Rather, Stewart referred to the pair collectively as the "traditional" model. *Id.* at 1671–81.

192. See Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 90 n.34 (1994) (noting that an important issue for New Deal progressives in creating expert agencies was to insulate them from politics, and collecting sources).

193. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1264 (1986) (describing the 1938 comments of Roscoe Pound, chairman of a special American Bar Association committee on administrative law).

194. Bressman, *supra* note 186, at 482.

195. *Id.* at 473–74.

196. *Id.* at 475–78. Bressman attributes this development to the unstated influence of the majoritarian paradigm popularized by Alexander Bickel. See *id.* at 478–85.

demanded robust procedures for public participation in agency action.<sup>197</sup> The essential weakness of this model was quickly exposed, however. In practice, strong public participation rules can provide the opportunity for agencies to be captured by those groups with the most significant interests in the agency's behavior and the resources to exploit participation rules.<sup>198</sup>

The weaknesses in the interest group model were addressed by the "presidential control" model.<sup>199</sup> Historically, this model was driven by presidents, beginning with Ronald Reagan, asserting personal control and responsibility for agency behavior as a central feature of their governing platform.<sup>200</sup> The essence of this theory is that the national electorate provides the President with a majoritarian authority that is less vulnerable to interest group capture. In turn, robust presidential control of agencies, through mechanisms such as executive orders and the Office of Management and Budget, then provides the necessary majoritarian control to make agency behavior legitimate.<sup>201</sup>

Inevitably, the presidential control model has also been subject to much criticism. Some scholars are doubtful that presidential administrations are significantly more immune to special interest capture.<sup>202</sup> Others question how much real control an administration can exercise in practice.<sup>203</sup> Still others question whether presidential elections fairly reflect public choices about issues faced by agencies.<sup>204</sup> The debate is far from settled.<sup>205</sup>

197. *Id.* at 475–78.

198. *See id.* at 485; Stewart, *supra* note 188, at 1712 ("The viability in practice of such a pluralist theory of legitimacy is challenged at the outset by the predominant contemporary critique of the administrative process: that agencies are biased in favor of regulated and client groups, and are generally unresponsive to unorganized interests." (footnote omitted)); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010) (explaining how rules requiring agencies to consider and address public comments favor well-funded interests that can overload an agency with submissions).

199. *See* Bressman, *supra* note 186, at 485–91.

200. Cynthia R. Farina, *The "Chief Executive" and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 180 (1997); Kagan, *supra* note 187, at 2250.

201. Bressman, *supra* note 186, at 485–91.

202. Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 231–32 (1998).

203. David S. Rubenstein, *"Relative Checks": Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169, 2204 (2010).

204. Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 992–1007 (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, 197 (1995); *cf.* Kagan, *supra* note 187, at 2337 ("To the extent that presidential supervision of agencies remains hidden from public scrutiny, the President will have greater freedom to play to parochial interests. . . . It is when presidential control of administrative action is most visible that it most will reflect presidential reliance on and responsiveness to broad public sentiment.").

One approach to the problems of the majoritarian models has been to circle back around to the agencies themselves and treat them as fiduciaries or trustees.<sup>206</sup> In this model, agencies again assume primary control over their operations subject to duties of care, loyalty, and transparency.<sup>207</sup> The net result is something of a synthesis of the expertise model with majoritarian concerns. Agencies are entrusted to use their discretion to determine proper actions, subject to residual control by democratic institutions and judicial supervision of their trustee obligations.<sup>208</sup>

Regardless of the specific model, modern administrative law struggles to balance core values in policymaking and core competencies in designing detailed and effective mechanisms for handling complex problems.<sup>209</sup> Much of the struggle is between the ideal and the real. In theory, expert agencies could design and implement solutions that take advantage of the best available research and rise above petty political parochialism. In practice, the difficult modern problems allocated to agencies often have indeterminate answers that make the preferences of decisionmakers

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205. See Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 882 (2003) (concluding that an empirical analysis of presidential review demonstrates little more than “the real world is inconveniently messy; none of its details proves all that much”).

206. See Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006); Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 359–65 (2009); Sant’Ambrogio, *supra* note 41.

207. Criddle, *supra* note 206, at 122.

208. See Mantel, *supra* note 206, at 365 (“Because no bureaucratic organization can be self-policing, agencies should be monitored by those empowered to remedy an agency’s breach of the public trust.”). The interest in the trustee analogy is not limited to administrative law, and recent work indicates that it may be useful in addressing other problems. See generally David L. Ponet & Ethan J. Leib, *Fiduciary Law’s Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249 (2011); Eyal Benvenisti, *Sovereigns as Trustees of Humanity: The Minimal Other-Regarding Obligations* (June 11, 2011) (unpublished working paper), available at <http://ssrn.com/abstract=1863228>.

209. James O. Freedman observed in 1978 that there is a persistent crisis of legitimacy in administrative law that defies each generation’s solution to the perceived problem. FREEDMAN, *supra* note 80, at 6–12. Decades later, his observation remains true. See, e.g., JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 1 (1983) (describing administrative law theory as a “history of failed ideas”); Bressman, *supra* note 186, at 462 (“From the birth of the administrative state, we have struggled to describe our regulatory government as the legitimate child of a constitutional democracy.”); Criddle, *supra* note 206, at 119 (arguing that the erosion of “the administrative state’s conceptional foundations” has “precipitat[ed] a ‘crisis of legitimacy’ in administrative law” (quoting Peter H. Schuck, *Introduction*, in FOUNDATIONS OF ADMINISTRATIVE LAW 4 (Peter H. Schuck ed., 1994)); Cynthia R. Farina, *supra* note 204, at 987 (1997) (“Like an intriguing but awkward family heirloom, the legitimacy problem is handed down from generation to generation of administrative law scholars.”).



relevant. Agencies do not operate in an ideal manner due to tremendous complexity of the systems involved and public choice issues that make it difficult to give each interested party a fair opportunity to participate. Effective oversight is difficult because the political branches have strategic incentives that are often inconsistent with ideal policies, but judicial review also raises serious majoritarian concerns. Thus, invasive judicial intervention into the operation of federal agencies is a minefield of important but competing concerns.

## 2. *Theoretical Approaches to Systemic Agency Problems, Including Delay*

Unfortunately, the section of the minefield of most concern to remedying problems such as those faced in *VCS* has been explored very little. Nonetheless, the area is beginning to receive some attention. For example, Lisa Bressman argues that current models focus on accountability at the expense of potentially arbitrary results.<sup>210</sup> She correctly observes that arbitrariness is constitutionally distinct from issues of control.<sup>211</sup> However, she primarily concluded that such problems, which are normally relegated to “ordinary” administrative law, need to be considered on par with the constitutional concerns discussed above, and that the problem of arbitrariness suggests that majoritarian concerns have been overemphasized in recent theory.<sup>212</sup>

Concrete guidance for judicial intervention into administrative delay is rare.<sup>213</sup> The existence of the problem of delay was recently observed by Sidney Shapiro and Richard Murphy, who commented: “For those who prefer an activist regulatory state, perhaps the most significant limitation of judicial review as a mechanism of accountability is judicial reluctance to police the failure of an agency to act.”<sup>214</sup> Unfortunately, Shapiro and Murphy did not offer guidance but sympathized with “the reluctance of courts to police agency inaction” and noted that “[a]ddressing the problem falls back on the political system, which may or may not act.”<sup>215</sup>

A notable exception is the recent work of Michael Sant’Ambrogio. Sant’Ambrogio observes that the modest work in the area of delay tends to

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210. Bressman, *supra* note 186, at 462–64.

211. *Id.* at 468.

212. *Id.* at 553–56.

213. Sant’Ambrogio, *supra* note 41, at 1387 (“Although few would dispute that agency delays have long been a significant problem for the administrative state, they have garnered remarkably little attention . . .”).

214. Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can’t Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 26 (2009).

215. *Id.* at 28.

treat the problem as a subset of the problem of inaction.<sup>216</sup> However, both Sant'Ambrogio and the works he cites focus on strategic delay or inaction by an agency with other priorities.<sup>217</sup> Sant'Ambrogio argues that courts should use cost-benefit analysis to determine whether agency delays were justified.<sup>218</sup> However, this recommendation is moot once it has been determined that the delays involved cannot be justified because they violate due process. Although Sant'Ambrogio advocates for applying cost-benefit analysis to delays in claims adjudication, he offers judicial findings of unreasonable delay as mere leverage that beneficiaries could use in lobbying Congress.<sup>219</sup>

*F. Summary of Guidance from Administrative Law*

For the judge trying to craft solutions for agency problems like those in *VCS*, administrative law jurisprudence and scholarship offer no easy answers, but rather a series of cautionary concerns that seriously constrain remedial options. To summarize this Part, administrative law counsels the judge: (1) not to make any policy choices that are properly committed to the agency or the political process; (2) to respect the agency's expertise in dealing with the complexities of its own operations and those of the substantive law involved; (3) to avoid usurping the authority of the other branches in allocating limited resources; and (4) to rely on Congress as the primary source of solutions to politically and financially sensitive problems. The foundation of these commands is a pervasive sense that the public policy issues committed to agency discretion should be subject to some type of majoritarian control rather than judicial fiat.

IV. THE ARC OF INSTITUTIONAL REFORM LITIGATION

If judges considering a remedial problem like that presented by *VCS* were to read all the opinions discussed in Parts I and II, they may well conclude their options were quite limited. However, if they were to step through the looking glass into the world of equitable remedies for constitutional violations, then their perspective would be very different. This Part looks at the area of structural reform in four sections. First, it reviews the Supreme Court's school desegregation cases and the broad formulation of courts' equitable powers developed in those cases. Second, it briefly discusses the common pattern that structural reform litigation has

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216. Sant'Ambrogio, *supra* note 41, at 1387 n.20 (collecting sources that discuss the relationship between inaction and delay).

217. *Id.* at 1387–88.

218. *Id.* at 1435–36.

219. *Id.* at 1446–47.

developed through those cases and others. Third, it turns to the area of prison reform litigation and how the trials and tribulations of that area show that structural reform litigation is not destined to succeed based upon good intentions alone. Finally, this Part looks at some of the theoretical concerns and practical criticisms that have been raised about structural reform litigation, which help illuminate what an effective and constitutionally sensitive remedy should look like.

#### A. *Desegregation and the Rise of Comprehensive Equitable Relief*

Equitable injunctions to prevent constitutional violations date to at least the Supreme Court's 1824 decision in *Osborn v. Bank of the United States*.<sup>220</sup> In *Osborn*, the Court forbade the auditor of the state of Ohio from attempting to collect an unconstitutional state tax from the bank.<sup>221</sup> Following this holding, the story of modern structural reform litigation began in 1908 with *Ex parte Young*,<sup>222</sup> which held that a government official acting in violation of the Constitution is not protected by his office and, therefore, may be enjoined by a court from such unlawful behavior.<sup>223</sup> At that time, equitable relief was blossoming in the federal courts due to its restrictive availability in state courts.<sup>224</sup> The focus of these cases was on limiting state encroachment on the freedom of contract,<sup>225</sup> and even though this era of equitable relief was curbed long before *Brown v. Board of Education (Brown I)*,<sup>226</sup> it laid the foundations for the robust remedies that would later be needed.<sup>227</sup>

The decision in *Brown I* overruling the separate-but-equal doctrine was undoubtedly a landmark case. Its actual impact, however, was determined by the Court's willingness to bless controversial remedies designed to

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220. 22 U.S. (9 Wheat.) 738 (1824); see Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. REV. 681, 688 (2009).

221. 22 U.S. (9 Wheat.) at 844.

222. 209 U.S. 123 (1908); see *Hutto v. Finney*, 437 U.S. 678, 690 (1978) (characterizing the holding in *Ex parte Young* as a "landmark decision"); Berzon, *supra* note 220, at 689 (referring to *Ex parte Young* as "the best-known early example of a direct constitutional cause of action in equity"); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1395 (2007) (crediting *Ex parte Young* for "shunt[ing] aside the traditional presumption against equitable relief"). For a detailed discussion of the case, see John Harrison, *Ex parte Young*, 60 STAN. L. REV. 989 (2008).

223. 209 U.S. at 159–60.

224. Jeffries & Rutherglen, *supra* note 222, at 1396–97.

225. Labor injunctions to block strikes were a common feature of this era. John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1129 (1996).

226. 347 U.S. 483 (1954).

227. Jeffries & Rutherglen, *supra* note 222, at 1396–97.

enforce its substantive ruling. A year later, the Court announced in *Brown v. Board of Education (Brown II)*<sup>228</sup> that district courts enforcing *Brown I* should exercise broad equitable authority.<sup>229</sup> The tone of *Brown II* was firm but open. It indicated that district courts should work with local jurisdictions making good faith efforts to desegregate, but emphasized that “constitutional principles cannot be allowed to yield simply because of disagreement with them.”<sup>230</sup>

Predictably, the district courts soon confirmed “that injunctions are not self-executing; a court’s order to eliminate conditions that violate the Constitution rarely results in compliance with the law. The struggle for defendant’s acceptance and institutionalization of constitutional and statutory norms takes place through the remedial process.”<sup>231</sup> One of the first arguments the Court had dismissed was the problem of cost. In 1963, in *Watson v. City of Memphis*,<sup>232</sup> the Court rejected resource limitations as a defense against an equitable order remedying a constitutional violation. In *Watson*, the city challenged the district court’s judgment with an argument that it would be too expensive to desegregate the municipal parks. The Court observed that the provision of constitutional rights could not depend on whether “it is less expensive to deny them than to afford them.”<sup>233</sup> The Court was clearly suspicious that additional resources would be slow in materializing when the local government was not particularly interested in allocating funds to desegregation. It emphasized, “The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.”<sup>234</sup>

Five years later, in 1968, the Supreme Court stressed that deference to the proper democratic authorities is not a requirement when crafting a remedy. In *Green v. County School Board*,<sup>235</sup> the nominal issue was whether a specific “freedom of choice” plan adopted by the local school board was an adequate remedy. The Court noted the decade of delay by the school board and held, “The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to

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228. 349 U.S. 294 (1955).

229. *Id.* at 300.

230. *Id.* John Yoo argues that the essential innovation of *Brown II* was that it departed from the previous case permitting limited negative injunctions and “expanded the definition of the equity power to include the imposition of affirmative obligations upon states, and the ongoing judicial involvement and supervision of the remedy.” Yoo, *supra* note 225, at 1130.

231. Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 807 n.3 (1990).

232. 373 U.S. 526 (1963).

233. *Id.* at 537.

234. *Id.* at 533.

235. 391 U.S. 430 (1968).

work now.”<sup>236</sup> The Court described how ineffective the local government’s plan had been<sup>237</sup> and rejected any argument that further deference to it was required. In conclusion, the Court emphasized that the specific plan was “only a means to a constitutionally required end . . . . If the means prove effective, it is acceptable, but if it fails . . . other means must be used to achieve this end.”<sup>238</sup> Thus, it falls to courts to impose a workable plan where the government does not.

In 1969, the Court affirmed the ability of district courts to impose mandatory mathematical ratios as a remedy even though the constitutional standard involved does not require such rigidity.<sup>239</sup> Two years later, in *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>240</sup> the Court approved further use of mathematical ratios along with the imposition of a detailed integration plan. A key fact in *Swann* was the school board’s failure to propose an acceptable remedy.<sup>241</sup> As a result, the somewhat cautious and patient tone of *Brown II* was replaced with a declaration: “Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”<sup>242</sup> Nonetheless, the Court continued to characterize the remedial question as one of balancing interests.<sup>243</sup>

The school desegregation cases began to plateau in 1974 with *Milliken v. Bradley (Milliken I)*.<sup>244</sup> In *Milliken I*, the Court disapproved of a redistricting scheme that involved bussing students between an urban school district that had been found guilty of de jure segregation and an innocent suburban school district. The essential language used by the Court to emphasize the relationship between the violation and the equitable remedy was the same as in past opinions, but this time the remedy was found to exceed the scope justified by the violation.<sup>245</sup> However, four justices dissented and would have found the remedy acceptable.<sup>246</sup>

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236. *Id.* at 439 (emphasis omitted).

237. *Id.* at 440–42.

238. *Id.* at 440 (quoting *Bowman v. Cnty. Sch. Bd.*, 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring)).

239. *United States v. Montgomery Cnty. Bd. of Educ.*, 395 U.S. 225 (1969).

240. 402 U.S. 1 (1971).

241. *Id.* at 16.

242. *Id.* at 15.

243. *Id.* at 16 (“The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.”).

244. 418 U.S. 717 (1974); see Jeffries & Rutherglen, *supra* note 222, at 1409 (describing *Milliken I* as when the “expansionist tendencies came to a halt”).

245. *Milliken I*, 418 U.S. at 744–45.

246. *Id.* at 806–07 (Marshall, J., dissenting) (“The nature of a violation determines the scope of the remedy simply because the function of any remedy is to cure the violation to

*Milliken I* was not the beginning of a hard reversal. Structural reform litigation continued to receive the Court's blessing in some circumstances, especially in desegregation cases. In 1977, the Court approved an aggressive equitable order in *Milliken v. Bradley* (*Milliken II*).<sup>247</sup> In *Milliken II*, the district's court's new plan included not only forced integration but also extensive "remedial and compensatory" educational programs to address past discrimination in the Detroit school system.<sup>248</sup> In addition, the district court ordered the state of Michigan to pay half the costs of the remedial plan.<sup>249</sup> On review, the Court held that "the interests of state and local authorities in managing their own affairs, consistent with the Constitution" had to be balanced against "the nature and scope of the constitutional violation" and the ability of the proposed remedy "as nearly as possible to restore the victims . . . to the position they would have occupied in the absence of" the violation.<sup>250</sup> In applying this test, the Court upheld the district court's exercise of its equitable powers and rejected the argument that the costs imposed violated the Eleventh Amendment because they amounted to an award of monetary damages against the state, as well as the argument that they violated Tenth Amendment federalism concerns.<sup>251</sup> In essence, the Court refused to analogize an otherwise proper, prospective remedy for a constitutional violation to any type of forbidden judicial action.

The evolution of desegregation remedies came to a close with another two-part case. In 1990, in *Missouri v. Jenkins* (*Jenkins I*),<sup>252</sup> the Court held that a district judge's equitable authority extended to ordering a local government unit to raise taxes in order to fund the remedial plan imposed by the Court. In *Jenkins I*, the district court was faced with the problem of securing \$88 million to pay for its remedial plan. It enjoined a provision of state law that would have transferred \$4 million from Kansas City to other jurisdictions and ordered that voters be presented with a referendum on

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which it is addressed. . . . [A] remedy which effectively cures the violation is what is required. No more is necessary, but we can tolerate no less." (citations omitted)).

247. 433 U.S. 267 (1977).

248. *Id.* at 273–75.

249. *Id.* at 277.

250. *Id.* at 280–81 (internal quotation marks omitted).

251. *Id.* at 290–91. The Court's Eleventh Amendment ruling in particular was a departure from its holding three years earlier in *Edelman v. Jordan*, 415 U.S. 651 (1974), that the Eleventh Amendment barred an award of retroactive benefits payments that had been improperly withheld by a state. *Id.* at 677–78. The essential distinction between *Milliken II* and *Edelman* is that money used to reform state programs is not actually awarded to the plaintiffs.

252. 495 U.S. 33 (1990).

raising local taxes.<sup>253</sup> When further funds were needed, the district court ordered a doubling of the local property taxes and directed the school district to issue \$150 million in bonds.<sup>254</sup> Although the Court held that the district court should not have directly ordered a tax increase, it agreed that the district court could have required the school district “to levy property taxes at a rate adequate to fund the desegregation remedy and could have enjoined the operation of state laws that would have prevented [the school district] from exercising this power.”<sup>255</sup> Despite this language, *Jenkins I* was not so much a full-throated endorsement of such remedies as a 5–4 decision that begrudgingly recognized that in some cases bypassing opposition to raising additional funds was an unavoidable necessity.

Indeed, five years later with a different composition, the Court concluded that the judge went too far in increasing teacher salaries and requiring the creation of a lavish “magnet school” in an inner city area for the purpose of attracting suburban students.<sup>256</sup> It expressed concern that “[t]he District Court’s pursuit of the goal of ‘desegregative attractiveness’ results in so many imponderables and is so far removed from the task of eliminating the racial identifiability of the schools within the [school district] that we believe it is beyond the admittedly broad discretion of the District Court.”<sup>257</sup> The key concern was that the district court’s rationale was “not susceptible to any objective limitation.”<sup>258</sup> Accordingly, the Court indicated that remedial orders should identify the “incremental effect” of the constitutional violations and the “specific goals” necessary to address them.<sup>259</sup>

*Jenkins II* has been described as key to ending the expansion of equitable remedies in structural reform litigation by “end[ing] any presumption in favor of structural relief, at least in the absence of a clear showing that lesser remedies were inadequate.”<sup>260</sup> Nonetheless, structural reform litigation had already spread to judicial review of other state and local government agencies, and the equitable authority of the federal courts was firmly entrenched.

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253. *Id.* at 39.

254. *Id.* at 41–42.

255. *Id.* at 51. The Court noted that its conclusion was supported by a long line of cases holding “that federal courts could issue the writ of mandamus to compel local governmental bodies to levy taxes adequate to satisfy their debt obligations.” *Id.* at 55–56 (citing eight cases from 1861 to 1909).

256. *Missouri v. Jenkins (Jenkins II)*, 515 U.S. 70 (1995).

257. *Id.* at 100.

258. *Id.* at 98.

259. *Id.* at 101.

260. Jeffries & Rutherglen, *supra* note 222, at 1410.

### B. *The Modern Structural Litigation Playbook*

By the time of *Jenkins II*, the typical patterns of structural reform litigation had been established. “The characteristic relief sought in such cases is to reorganize the defendant institution so that it will routinely deal with the plaintiff class in a way that does not deprive them of the rights at issue.”<sup>261</sup> Even though the particulars vary, the progression of such a case is likely to follow a well-worn path:

The decree, or rather the series of decrees, will begin by prohibiting specific actions or conditions in violation of plaintiff’s rights and setting out a standard of proper performance of the defendant agency’s functions. Both from deference to state or local government responsibilities and from practical considerations, the initial decree may leave the defendants wide discretion to select the specific methods for meeting their substantive obligations. As defendants fail to comply because of recalcitrance, incompetence, or a combination of the two, the court will increasingly direct the detail of their performance through subsequent orders. These modifications of the original decree frequently come in the guise of civil contempt sanctions for noncompliance with prior orders.<sup>262</sup>

In short, institutions are given a limited opportunity to fix problems themselves, and if they fail to do so, then the will would determine the specific actions that must be taken. If these actions are not performed voluntarily, then the court could produce compliance through a number of means.

The traditional equitable tools are contempt, sequestration, displacement, and dissolution. Contempt and sequestration are coercive tools. Theoretically, a contempt order could involve imprisonment of an official who is the nominal defendant in the case, but it is not clear that it has ever been done in modern structural reform litigation.<sup>263</sup> Usually, it involves per diem fines against the official that are actually paid by the agency and applied toward the costs of the remedy.<sup>264</sup> The other coercive option is sequestration, in which the court orders a third party to withhold money that would otherwise be paid to the agency until it cooperates.<sup>265</sup> If coercion is ineffective or undesirable, the court can displace the leadership

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261. James M. Hirschhorn, *Where the Money Is: Remedies to Finance Compliance With Strict Structural Injunctions*, 82 MICH. L. REV. 1815, 1817–18 (1984).

262. *Id.* at 1820–21.

263. *Id.* at 1841.

264. *Id.* at 1826–27.

265. *Id.* at 1846–48. For example, in *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977), the Seventh Circuit affirmed an order suspending federal revenue-sharing payments to the city until it agreed to end racial discrimination in its police force. *Id.* at 442.



and appoint a receiver to run the agency.<sup>266</sup> Finally, in some cases, the court can order that the institution be closed altogether and let the state and local authorities scramble to pick up the pieces.<sup>267</sup>

Whether or not the court assumes direct control over the agency, a court must sometimes also use these tools to obtain additional funding from outside the agency. This is frequently required and sometimes resisted.<sup>268</sup> Many different strategies have been used by courts facing such problems, depending on the precise nature of the entities involved and the specific circumstances of the case. In a few cases, there may be direct avenues for the court to issue orders effectively appropriating money from the state or local treasury.<sup>269</sup> However, the ability of the court to employ its equitable powers on funding sources outside the agency frequently depends upon the inherent relationship between the agency and funding, as well as the relevant behavior of the funding authority.<sup>270</sup> “Whether the legislature successfully resists or ultimately provides the funds, the process of indirect financial pressure through the executive branch defendants is time consuming and full of friction because it consists in large part of bluff and counter-bluff.”<sup>271</sup>

Ultimately, some structural reform cases have foundered simply because the officials complied with an order to seek additional funds in good faith but were rebuffed.<sup>272</sup> “Trial court judges who undertook structural relief in some high-profile cases threw up their hands in apparent exhaustion or despair, dissolving injunctions purportedly because all practicable vindication of the plaintiffs’ rights had been achieved, even though little progress was detectable.”<sup>273</sup>

Rather than give up altogether in the face of intractable problems and

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266. Hirschhorn, *supra* note 261, at 1833–35.

267. *Id.* at 1849–51. As Hirschhorn notes, this “nuclear” option is a “weak device” in many types of cases. *Id.*

268. *See id.* at 1851 (finding a conflict between courts that order relief and legislators who refuse to provide funding due to potential political backlash); *see also* Barbara Kritchevsky, *Is There a Cost Defense? Budgetary Constraints as a Defense in Civil Rights Litigation*, 35 RUTGERS L.J. 483 (2004) (arguing that budgetary constraints do not justify abandoning constitutional duties); Jack B. Weinstein, *The Effect of Austerity on Institutional Litigation*, 6 LAW & HUM. BEHAV. 145 (1982) (arguing that drastic, sweeping reform might be necessary in a troubled economy). Of course, some agencies have their own funding authority, over which a court can exercise control by coercion or displacement.

269. Hirschhorn, *supra* note 261, at 1872–73.

270. For a discussion of when third parties can be the object of an equitable relief order, *see id.* at 1851.

271. *Id.* (footnote omitted).

272. *See id.* at 1838.

273. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1018 (2004).

unattainable funding increases, some courts have settled into long-term supervision of “participatory self-revision” over attempting to exercise command-and-control authority.<sup>274</sup> This approach has been called an “experimentalist”<sup>275</sup> approach or the “catalyst”<sup>276</sup> approach. In essence, “the remedy institutionalizes a process of ongoing learning and reconstruction” rather than seeking “a one-time readjustment to fixed criteria.”<sup>277</sup> However, because “[b]oth declarations of goals and performance norms are treated as provisional and subject to continuous revision with stakeholder participation,”<sup>278</sup> this type of passive management lacks any assurance that constitutional violations would actually be remedied,<sup>279</sup> especially if the problem were rooted in insufficient funding beyond the agency’s control. Moreover, such remedies impeded the progress toward a political solution. The effect of such remedies is “to increase uncertainty about both the parties’ interests and the costs of refusing to agree,” which makes it “more likely pluralist bargaining will fail” because the stakeholders have differing evaluations of the interests involved.<sup>280</sup>

Of course, many institutional reform cases blend elements of both command-and-control style orders and collaborative efforts with the stakeholders. As demonstrated by *Plata* below, however, in many cases there is simply no guarantee that successful managerial changes are possible through any blend of active or passive judicial involvement.<sup>281</sup>

### C. *The Prison Reform Cases and the Plata Problem*

#### 1. *Equitable Relief in Prison Cases Prior to Plata*

After the Supreme Court began blessing broad exercises of judicial

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274. *Id.* at 1020.

275. *Id.* at 1019.

276. Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 856–59 (1990).

277. Sabel & Simon, *supra* note 273, at 1019–20.

278. *Id.*

279. Despite their advocacy of such remedies, Sabel and Simon admit that “[n]o definite assessment of the efficacy of this ‘experimentalist’ approach is possible yet.” *Id.* at 1100; see also *id.* at 1028 (describing the breakdown of the remedial process in *Vaughn G. v. Mayor of Baltimore*, No. MJG-84-1911, 2004 WL 3467057 (D. Md. 2004), due to the unworkable complexity of the remedial order that “hampered both enforcement and renegotiation efforts”).

280. *Id.* at 1099.

281. Aside from prisons, reform of mental health institutions is another area in which “no case has come close to fulfilling the hopes of those who brought it, and the public mental health system remains plagued by disastrous failings.” *Id.* at 1034.

power in the school desegregation cases, groups began trying to invoke the equitable powers of the federal courts to reform other institutions, especially prisons, welfare agencies, public housing authorities, and mental hospitals.<sup>282</sup> A complete history of each of these areas need not be covered here, but the history of prison-reform litigation is particularly important for a number of reasons, not the least of which is that it culminates in *Plata*. Not only does *Plata* represent the latest foray by the Supreme Court into structural reform litigation, but the sad history of failure in that case will be difficult for the judge handling *VCS* to ignore because *Plata* came from and was remanded to the same District of Northern California courthouse in San Francisco.<sup>283</sup>

The lower federal courts became active in prison condition cases in the 1960s.<sup>284</sup> For example, before being elevated to the Supreme Court, then-Judge Blackmun ruled that the use of whipping to discipline prisoners in the Arkansas system violated the Eighth Amendment.<sup>285</sup> However, widespread use of such litigation began after the Supreme Court's landmark 1976 decision in *Estelle v. Gamble*,<sup>286</sup> which held that "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton

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282. Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1266.

283. The most recent remedial decision in *Plata* (and the consolidated case of *Coleman v. Schwarzenegger* from the Eastern District of California) was made by a special panel pursuant to the Prison Litigation Reform Act (PLRA) consisting of Ninth Circuit Judge Stephen Reinhardt, Northern District of California Senior District Judge Thelton E. Henderson, and Eastern District of California District Senior Judge Lawrence K. Karlton. *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK/JFM P, C01-1351 TEH, 2010 WL 99000 (E.D. Cal. & N.D. Cal. Jan. 12, 2010). Prior to the formation of the panel, Judge Henderson handled both the merits and remedial aspects of *Plata*. See Catherine Megan Bradley, *Old Remedies Are New Again: Deliberate Indifference and the Receivership in Plata v. Schwarzenegger*, 62 N.Y.U. ANN. SURV. AM. L. 703, 717–19 (2007) (describing the steps Judge Henderson took before putting the California prison health system into receivership). *VCS* was decided at the district level by Senior Judge Samuel Conti, who is based in San Francisco with Henderson. Henderson and Conti have been on the court together for more than thirty years. See *Senior District Judge Samuel Conti*, U.S. DIST. COURT FOR THE N. DIST. OF CAL., <http://www.cand.uscourts.gov/sc> (last visited Feb. 2, 2012) (stating that Judge Conti was appointed to the court in 1970); *Senior Judge Thelton E. Henderson*, U.S. DIST. COURT FOR THE N. DIST. OF CAL., <http://www.cand.uscourts.gov/teh> (last visited Feb. 2, 2012) (stating that Judge Henderson was appointed to the court in 1980). Moreover, the Ninth Circuit's opinion in *VCS* was authored by Judge Reinhardt.

284. See Horowitz, *supra* note 282, at 1266; see also Ira P. Robbins & Michael B. Buser, *Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893, 894 (1977).

285. *Jackson v. Bishop*, 404 F.2d 571, 580–81 (8th Cir. 1968).

286. 429 U.S. 97 (1976).

affliction of pain” necessary to support an Eighth Amendment claim.<sup>287</sup>

Two years after *Estelle* (and a year after *Milliken II*), the Court in *Hutto v. Finney*<sup>288</sup> cited the desegregation line of cases in approving a district court’s injunction under the Eighth Amendment limiting isolation confinements to a maximum of thirty days and imposing various other conditions to cure a host of problems.<sup>289</sup> Justices Rehnquist and White dissented on the ground that the thirty-day limit was “a prophylactic rule” that “in no way relates to any condition found offensive to the Constitution.”<sup>290</sup> However, the majority held that it was valid as a remedy for one of the “interdependen[t] . . . conditions producing the [constitutional] violation.”<sup>291</sup>

After *Hutto*, judicial intervention in prison systems became rampant:

As of January 1993, forty states plus the District of Columbia, Puerto Rico, and the Virgin Islands were under court order to reduce overcrowding and/or eliminate unconstitutional conditions of confinement. Twenty-five percent of all jails in the United States were under court order to reduce crowding in 1990, and thirty percent were under court order to improve conditions of confinement. In 1989, seven percent of the nation’s 422 facilities detaining ten percent of all incarcerated youngsters were operating under consent decrees.<sup>292</sup>

District court remedies became highly intrusive, including “specifying the exact amount of space that each prisoner must be given or capping prison population levels.”<sup>293</sup>

In response, the Supreme Court began to put on the brakes. “[T]he Court’s consistent message [was] to enlarge deference to prison administrator’s decisions, restrict the growth of existing inmate rights, and certainly reject virtually all claims to significant new rights . . . .”<sup>294</sup> For its part, in 1994, Congress stepped in with the Prison Litigation Reform Act (PLRA).<sup>295</sup> One of the many components of the PLRA imposed limitations

287. *Id.* at 104 (citation omitted) (internal quotation marks omitted).

288. 437 U.S. 678 (1978).

289. *Id.* at 684–85.

290. *Id.* at 712 (Rehnquist, J., dissenting).

291. *Id.* at 688 (majority opinion). The Court also made the unusual holding that “the exercise of discretion in this case is entitled to special deference because of the trial judge’s years of experience with the problem at hand and his recognition of the limits on a federal court’s authority in a case of this kind.” *Id.*

292. Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 641–42 (1993) (footnotes omitted).

293. Bradley, *supra* note 283, at 708.

294. Fred Cohen, *The Limits of the Judicial Reform of Prisons: What Works; What Does Not*, 40 CRIM. L. BULL. 421, 441 (2004).

295. Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (1996) (codified at

on the ability of courts to provide remedies in prison litigation cases.<sup>296</sup> The essence of the restrictions is captured in the initial section, which provides:

The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.<sup>297</sup>

Various subsequent provisions impose controls on the use of preliminary injunctive relief,<sup>298</sup> prisoner release orders,<sup>299</sup> and special masters,<sup>300</sup> among other tools.

## 2. Brown v. Plata

Although these efforts by the Court and Congress may have blunted the evolution of prisoner reform litigation,<sup>301</sup> structural reform litigation certainly continued to occur.<sup>302</sup> One of these suits was *Plata*.<sup>303</sup> Just days after Judge Reinholdt issued the majority opinion in *VCS*, the Supreme Court affirmed his remedial order as part of the special panel in *Plata*. In

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11 U.S.C. § 523 (2006); 18 U.S.C. §§ 3624, 3626 (2006); 28 U.S.C. §§ 1346, 1915, 1915A (2006); 42 U.S.C. § 1997–1997(h) (2006)). The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996. Pub. L. No. 104-134, 110 Stat. 1321. The PLRA was not the first time Congress reacted against rising use of equitable relief by federal courts against states. See PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 965–79 (2d ed. 1973) (discussing an early twentieth century statute requiring a three-judge district court in any case seeking to enjoin enforcement of a state statute); Yoo, *supra* note 225, at 1129 (discussing how the 1932 Norris-LaGuardia Act “prohibited the courts from issuing injunctions in labor disputes altogether”).

296. 18 U.S.C. § 3626. For a detailed discussion of many of the other provisions of the PLRA and their effects, see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).

297. 18 U.S.C. § 3626(a)(1)(A).

298. *Id.* § 3626(a)(2).

299. *Id.* § 3626(a)(3).

300. *Id.* § 3626(f).

301. See Jeffries & Rutherglen, *supra* note 222, at 1388 (discussing the recent legislative and judicial trend away from structural reform injunctions); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 554, 565 (2006).

302. See Schlanger, *supra* note 301, at 554–55 (arguing against “the conventional wisdom” that the era of structural reform litigation is over); Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIAMI L. REV. 143, 147 (2003) (asserting that structural reform litigation is “alive and well” based upon cited cases).

303. 131 S. Ct. 1910 (2011).

*Plata*, the Supreme Court considered the chronic dysfunction of the California prison system. It involved two consolidated cases, in which it was determined that the prison system was violating the Eighth Amendment by failing to provide minimally adequate mental and physical health services. The underlying case, *Coleman v. Wilson*,<sup>304</sup> was originally filed in 1990 and resulted in a special master being appointed in 1995 after a thirty-nine-day trial.<sup>305</sup> Six years later, after *Plata* was filed in 2001, the state conceded the violation and stipulated to a remedial injunction. Nonetheless, the state failed to comply with the injunction, and four years later, the district court appointed a receiver in 2005. After another three years of ongoing violations, in 2008, the plaintiffs in both cases moved to convene a three-judge district court to order reductions in the prison population pursuant to the PLRA. After taking extensive evidence and making extensive findings, in 2010, the panel ordered California to reduce its prison population from nearly 200% of the design capacity to 137.5% in four stages over two years.<sup>306</sup> The panel specifically ordered the state to prepare for prisoner releases in the likely event that new construction and out-of-state transfers would not remedy the problem.<sup>307</sup> Altogether, this remedy was ordered twenty years after the litigation was initiated.

The precise issue presented to the Supreme Court in *Plata* was whether the panel's order complied with the PLRA. The central issues in the PLRA analysis, however, were whether less intrusive remedies had been given adequate opportunities to work in the fifteen years since the remedial process had begun and whether any other remedy could succeed in curing the constitutional violation. Thus, the analysis required by the statute (and the Court's prior case law on narrowly tailored equitable remedies) thrust the Supreme Court squarely into the debate over the ability of district courts to manage large agencies whose dysfunctional operations cause constitutional violations.

To address this issue, the Court's opinion began by detailing the appalling conditions that had persisted in the California prison system for years.<sup>308</sup> The statistics cited were suitably shocking. "The State's prisons had operated at around 200% of design capacity for at least 11 years" to

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304. 912 F. Supp. 1282 (E.D. Cal. 1995).

305. *Plata*, 131 S. Ct. at 1926.

306. *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2010 WL 99000, at \*3 (E.D. Cal. & N.D. Cal. Jan. 12, 2010).

307. *Id.* at \*4.

308. 131 S. Ct. at 1923–26 (explaining that (1) prisoners lived in extremely overcrowded conditions, (2) prisoners suffering from serious mental illnesses did not receive adequate care, and (3) prisoners suffering from physical illnesses received severely deficient care).

the severe detriment of the prisoners' health.<sup>309</sup> "California's prisons were designed to meet the medical needs of a population at 100% of design capacity and so have only half the clinical space needed to treat the current population."<sup>310</sup> Even worse,

[a]t the time of trial, vacancy rates for medical and mental health staff ranged as high as 20% for surgeons, 25% for physicians, 39% for nurse practitioners, and 54.1% for psychiatrists. [Moreover, t]hese percentages are based on the number of positions budgeted by the State . . . [which] understate the severity of the crisis because the State has not budgeted sufficient staff to meet demand.<sup>311</sup>

As a result of these shortages, "extreme departures from the standard of [medical] care were 'widespread.'"<sup>312</sup> In particular, the trial court found that it "is an uncontested fact that, on average, an inmate in one of California's prisons needlessly dies every six to seven days due to constitutional deficiencies in the [California prisons'] medical delivery system."<sup>313</sup> Some of the examples provided by the Court included:

A prisoner with severe abdominal pain died after a 5-week delay in referral to a specialist; a prisoner with "constant and extreme" chest pain died after an 8-hour delay in evaluation by a doctor; and a prisoner died of testicular cancer after a "failure of [doctors] to work up for cancer in a young man with 17 months of testicular pain."<sup>314</sup>

Perhaps more shocking than the conditions themselves was the fact that they worsened even as the litigation brought intense attention from the state. As of the Supreme Court's 2011 decision, the California prison system had been subject to a total sixteen years of judicial oversight<sup>315</sup> as

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309. *Id.* at 1923–24. The Court elaborated, "Prisoners are crammed into spaces neither designed nor intended to house inmates. As many as 200 prisoners may live in a gymnasium, monitored by as few as two or three correctional officers." *Id.* at 1924. In case the statistics and descriptions were somehow insufficient to communicate the severity of the conditions, the Court took the highly unusual step of including an appendix of pictures so that readers would not need to use their imaginations to appreciate the extreme overcrowding. *Id.* at 1949–50.

310. *Id.* at 1925.

311. *Id.* at 1932 (citation omitted).

312. *Id.* at 1925 (quoting Dr. Ronald Shansky, former medical director of the Illinois state prison system). As a result of this lack of resources, "in one prison, up to 50 sick inmates may be held together in a 12- by 20-foot cage for up to five hours awaiting treatment." *Id.* "Wait times for mental health care range as high as 12 months." *Id.* at 1924. "Because of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth sized cages without toilets." *Id.*

313. *Id.* at 1927 (alteration in original).

314. *Id.* at 1925.

315. *Id.* at 1939.

well as a state of emergency declared in 2006 by the governor.<sup>316</sup> Far from being ignored, the woes of the California prison system were openly acknowledged by top prison officials<sup>317</sup> and had been studied by multiple independent commissions and outside experts, who unanimously concluded that the California prison system was unsafe for both inmates and staff.<sup>318</sup> Furthermore, “the *Coleman* Special Master had issued over 70 orders directed at achieving a remedy through construction, hiring, and procedural reforms.”<sup>319</sup>

Based upon the conditions and the impotence of California and the special master in remedying them, the Supreme Court held in *Plata* that if “government fails to fulfill [its] obligation [to provide adequate medical care to prisoners], the courts have a responsibility to remedy the resulting Eighth Amendment violation.”<sup>320</sup> Although acknowledging the need to be sensitive to state interests and “the need for deference to experienced and expert prison administrators,” the opinion held that “[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.”<sup>321</sup> In addressing the role of the courts, *Plata* stated: “Having engaged in remedial efforts for 5 years in *Plata* and 12 in *Coleman*, the District Courts were not required to wait to see whether their more recent efforts would yield equal disappointment.”<sup>322</sup>

Despite this initially broad characterization of judicial authority, the Court later tempered this language by suggesting,

When a court attempts to remedy an entrenched constitutional violation through reform of a complex institution, such as this statewide prison system, it may be necessary in the ordinary course to issue multiple orders directing and adjusting ongoing remedial efforts. Each new order must be given a reasonable time to succeed, but reasonableness must be assessed in light of the entire history of the court’s remedial efforts.<sup>323</sup>

Later, the opinion concluded with an admonishment that “[p]roper respect for the State and for its governmental processes require[s] that the three-

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316. Cal. Governor State of Emergency Proclamation No. 4278 (Oct. 4, 2006), *available at* <http://gov.ca.gov/news.php?id=4278>.

317. *Plata*, 131 S. Ct. at 1924 n.1 (citing the testimony of Matthew Cate, head of the California prison system, and Robin Dezember, chief deputy secretary of Correctional Healthcare Services).

318. *Id.* at 1924.

319. *Id.* at 1931.

320. *Id.* at 1928.

321. *Id.* at 1928–29.

322. *Id.* at 1931.

323. *Id.*



judge court exercise its jurisdiction to accord the State considerable latitude to find mechanisms and make plans to correct the violations in a prompt and effective way consistent with public safety.”<sup>324</sup>

The net result of *Plata* is mixed signals to lower courts. On the one hand, the Court appeared to reaffirm the power of district courts to take whatever measures are necessary to remedy a clear constitutional violation. On the other hand, the words of caution seem out of place in a case where the violations at issue are so egregious and longstanding. In some ways, *Plata* forces judges to face the question of how much failure is enough to provoke such sufficient despair that the full force of the Judiciary can finally be brought to bear on a problem. The answer, at least in *Plata*, was that sixteen years of failure and hundreds of dead prisoners was enough failure to raise the level of involvement even if the state was still to be offered “considerable latitude.”

Not only was *Plata* less than a complete green light, it was also a closely divided decision. It produced two dissents that reflect many of the concerns that have accumulated in the area. In his dissent on behalf of himself and Justice Thomas, Justice Scalia focused on the concern that the equitable relief provided in *Plata* “takes federal courts wildly beyond their institutional capacity.”<sup>325</sup> First, Scalia argued that judicial micromanagement of large institutions was inappropriate as a remedy for systemic issues when only some subset of the plaintiff class experienced an actual violation of their constitutional rights.<sup>326</sup> More importantly, in Scalia’s view, “structural injunctions are radically different from the injunctions traditionally issued by courts of equity,” which require only clear and simple acts to be performed.<sup>327</sup> He argued that by “turning judges into long-term administrators of complex social institutions,” structural reform remedies “require judges to play a role essentially indistinguishable from the role ordinarily played by executive officials.”<sup>328</sup> This is problematic because it requires judges “to make very broad empirical predictions necessarily based in large part upon policy views—the sort of predictions regularly made by legislators and executive officials, but inappropriate for the Third Branch.”<sup>329</sup>

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324. *Id.* at 1946.

325. *Id.* at 1951 (Scalia, J., dissenting).

326. *Id.* at 1951–53.

327. *Id.* at 1953. Scalia provided two examples of orders that would be valid in his view. A court could order that the temperature in a prison be raised if it was intolerably cold and could order exercise time be provided if prisoners were being denied such time. *Id.* at 1958.

328. *Id.* at 1953.

329. *Id.* at 1954. Later, Scalia reaffirmed that “the dressing-up of policy judgments as factual findings is not an error peculiar to this case. It is an unavoidable concomitant of

Writing for himself and Chief Justice Roberts, Justice Alito stated bluntly: “The Constitution does not give federal judges the authority to run state penal systems.”<sup>330</sup> However, his main concerns were somewhat different from those of Justice Scalia. First, Alito argued that the factual basis of the order was flawed because the panel did not account for rapidly changing conditions within the system.<sup>331</sup> Next, Alito argued that the panel order had not established that a prisoner release was the least-intrusive means necessary to remedy the constitutional violation.<sup>332</sup> Unlike Scalia’s focus on the limits of the judiciary, Alito’s focus was more centered on the traditional freedom of the states to balance public safety and financial concerns and “to make these decisions as they choose.”<sup>333</sup> In his view, the profound uncertainty surrounding the necessity and the consequences of the remedy ordered counseled for less deference to the trial court and greater judicial restraint.<sup>334</sup>

However the concerns are weighed or framed, there is no denying that structural reform remedies may put courts in very difficult positions where the legitimacy of their actions will be tested. Moreover, regardless of the outcome, *Plata* is a tragic example that judicial remedies for serious constitutional violations are not destined to succeed by virtue of good intentions alone.

#### D. Critiques of Structural Reform Litigation

*Plata* and the prison cases demonstrate the central theoretical concerns that have been raised about structural reform litigation. Part of the motivation for curbing structural reform litigation was majoritarian. During the heyday of such litigation, Owen Fiss theorized that “[t]he structural suit is one in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements. The injunction is the means by which these reconstructive directives are transmitted.”<sup>335</sup> However, this imperialist view was countered by Paul Mishkin’s concern that “the way to achieve desirable goals—and the only way to do so lastingly—is through the

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institutional-reform litigation.” *Id.* at 1955.

330. *Id.* at 1959 (Alito, J., dissenting).

331. *Id.* at 1960–62.

332. *Id.* at 1962–65.

333. *Id.* at 1959.

334. *Id.* at 1966.

335. Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

democratic political process which must remain the core of our polity.”<sup>336</sup> More recently, scholars have accepted that this concern was a major factor in the decline of structural-reform litigation.<sup>337</sup> Even as the tide of such cases has receded, there have been complaints that judges “often ha[ve] shown minimal regard for the limits of the federal courts’ inherent powers.”<sup>338</sup>

Nevertheless, “[r]eceptions allow administrative agencies to fail at politically unpopular tasks without serious consequences,” while politicians grandstand about overreaching.<sup>339</sup> Despite the desirability of political solutions, “[l]egislators’ desire to spend money on things that will get them re-elected may mean they disregard unpopular constitutional obligations.”<sup>340</sup> Accordingly, the debate about such litigation has much of the same ideal vs. real-world dynamic that has animated the agency-control debates in administrative law,<sup>341</sup> and serious cases have been made both for and against active judicial involvement through such litigation.<sup>342</sup>

Beyond core constitutional concerns, a number of practical issues have also been raised. First, there is a concern that structural reform is controlled less by the judge in a case than by the plaintiffs, who often have

336. Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 976 (1978).

337. Gilles, *supra* note 302, at 161 (“[T]he structural reform injunction has disappeared from the contemporary sociolegal landscape because of the essentially political fear of judicial activism.”).

338. Yoo, *supra* note 225, at 1122.

339. Bradley, *supra* note 283, at 705; *see also* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 37 (1993) (“Elected officials in the United States encourage or tacitly support judicial policymaking both as a means of avoiding political responsibility for making tough decisions and as a means of pursuing controversial policy goals that they cannot publicly advance through open legislative and electoral politics.”); Sabel & Simon, *supra* note 273, at 1093 (noting that pervasive judicial interventions “give political cover” to those officials who should be taking responsibility for solving problems).

340. Bradley, *supra* note 283, at 724.

341. *See supra* note 209 and accompanying text.

342. *Compare* MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (1998); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fiss, *supra* note 335; Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1355, 1406 (1991), *with* DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); SANDLER & SCHOENBROD, *supra* note 9; William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); and Yoo, *supra* note 225.

an agenda beyond simply remedying the constitutional violation at issue.<sup>343</sup> A related concern is that agencies try to exploit litigation for their own ends.<sup>344</sup> As one prison official was quoted as saying, “We ‘cussed’ the federal courts all the way to the bank.”<sup>345</sup> Indeed, plaintiffs and agencies sometimes are aligned in using structural litigation reform in a joint battle with the legislature for more resources.<sup>346</sup> Furthermore, in large agencies such litigation often hurts beneficiaries that are excluded from the class that is the subject of the litigation.<sup>347</sup> Aside from these strategic concerns is the problem that receiverships do not produce precedent and, therefore, fail to set standards even when successful.<sup>348</sup>

Ultimately, the most important critique may be that “the Supreme Court has provided little guidance to the lower courts to figure out how to think about the scope of the violation [in a structural reform litigation case] and how to match that to a remedy.”<sup>349</sup> Rather, the Court tends to assert that “[t]here is no universal answer to complex problems . . . [and] there is obviously no one plan that will do the job in every case.”<sup>350</sup> The Court’s overarching standard is that the scope of the violation determines the scope of the remedy, which should be narrowly tailored.<sup>351</sup> The Court’s caution in defining this standard, however, has resulted in a lack of guidance that can be usefully applied to difficult questions within a novel case.

The combination of the lack of precedent and the lack of guidance has

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343. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 647 (noting that procedural redesign has allowed for little judicial scrutiny of lawyers’ procedural choices and, therefore, control of litigation has moved from appellate courts to trial courts and from trial courts to lawyers).

344. See Horowitz, *supra* note 282, at 1294–95 (“Nominal defendants are sometimes happy to be sued and happier still to lose.”).

345. Schlanger, *supra* note 301, at 563.

346. See Horowitz, *supra* note 282, at 1294 (“This is one reason why so many consent decrees are entered in institutional reform cases”).

347. See, e.g., SANDLER & SCHOENBROD, *supra* note 9, at 91 (noting that one critic of special education litigation affecting the New York City school system quipped, “Kids who don’t have court orders in their hands are dead meat.”). Sandler and Schoenbrod also quote one education expert who described the situation as, “What you had was a road that was falling apart, and right alongside, they were building a superhighway called special education, which provided no end of money.” *Id.*

348. Bradley, *supra* note 283, at 738–42.

349. Susan Poser, *What’s a Judge to Do? Remediating the Remedy in Institutional Reform Litigation*, 102 MICH. L. REV. 1307, 1321 (2004) (reviewing ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003)).

350. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 439 (1968).

351. See Robert E. Buckholz, Jr. et al., Special Project, *Appellate Review of Trial Court Remedies, The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 854 (1978).

made it difficult for the structural litigation playbook to evolve to meet modern challenges. This has been compounded by a misperception in the academy that “judicially mandated structural reform injunctions appear to be vestiges of a bygone era.”<sup>352</sup> The unfortunate result is that the important conversation about how to think about equitable relief in new contexts has not yet taken place.

## V. THE FUTURE OF JUDICIAL REMEDIES FOR DELAYS IN ADJUDICATION OF FEDERAL CLAIMS

As courts embark on the difficult new task of managing structural reform litigation in cases like *VCS*, the failures of *Plata* make it reasonable to question whether the traditional playbook is likely to work. This Part argues that there are good reasons to believe that the traditional script—in which the courts dictate detailed changes and programs that must be adopted—is unlikely to work in reforming large federal benefits agencies, and suggests an alternative approach. The first section revisits *VCS* to examine the problems remanded to the district court. The next section argues that the differences between the desegregation cases and modern structural reform litigation indicate that the premises of the playbook do not apply to many modern situations, including the reform of federal benefits agencies. Finally, a revision to the playbook is recommended that is both more likely to be effective in cases like *VCS* and also better at addressing all the constitutional sensitivities involved.

### A. Veterans for Common Sense *Revisited*

*VCS* provides a concrete example for contemplating the problem of reforming federal benefits agencies. Before turning to the remedy, however, it is useful to examine another aspect of the opinion. Despite the separation of powers sensitivities at issue, the majority opinion could hardly be more condemning of the other branches. In the introduction, the opinion declares that “VA’s unchecked incompetence has gone on long enough.”<sup>353</sup> The court spread the blame even further by stating, “We would have preferred Congress or the President to have remedied the VA’s egregious problems,” but concluding that “those government institutions are [un]willing to do their job.”<sup>354</sup> Based upon the Supreme Court’s case law, it is reasonable to believe that the majority felt compelled to be

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352. Gilles, *supra* note 302, at 144.

353. *VCS*, 644 F.3d 845, 851 (9th Cir. 2011), *reh’g en banc granted*, 663 F.3d 1033 (9th Cir. 2011).

354. *Id.* at 850–51.

hypercritical of the other branches to justify the intervention it was ordering. By firing both barrels at VA and Congress, however, it risked poisoning a relationship that is already going to be strained by the uncomfortable measures likely to be necessary to remedy the problems plaguing VA.<sup>355</sup>

Nonetheless, the problems must be solved. The first step is identifying exactly what must be done so that appropriate targets and timelines can be crafted. Beginning with VHA, to remedy the delays in mental health evaluations and services, the plaintiffs sought: (1) procedures for appealing a decision to wait-list a claimant seeking mental health care, (2) more transparent clinical appeals procedures, and (3) expedited access to care for veterans with acute PTSD.<sup>356</sup> The Ninth Circuit remanded the matter for the district court to fashion a remedy that would address “existing due process violations in three core areas”:

- (1) individuals placed on VHA waiting lists for mental health care [should] have the opportunity to appeal the decision in a timely manner and to explain their need for earlier treatment to a qualified individual;
- (2) individuals determined to be in need of mental health care [should] receive that treatment in a timely manner; and
- (3) individuals with urgent mental health problems, particularly those at imminent risk of suicide, [should] receive immediate mental health care.<sup>357</sup>

Essentially, each of these concerns can be remedied by having more mental health professionals available to perform these tasks. Given that the evidence showed VHA had been authorized to hire hundreds of additional professionals,<sup>358</sup> there is real hope that VHA can resolve these issues without substantial court involvement. However, if these additional

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355. The criticism also failed to acknowledge: (1) the substantial increase in funding that has been provided to VA in recent budgets, *compare* U.S. DEP’T OF VETERANS AFFAIRS, FY 2012 BUDGET SUBMISSION, VOL. I, at 1A-1 (2011), [http://www.va.gov/budget/docs/summary/Fy2012\\_Volume\\_I-Summary\\_Volume.pdf](http://www.va.gov/budget/docs/summary/Fy2012_Volume_I-Summary_Volume.pdf) (requesting \$132.2 billion), *with* U.S. DEP’T OF VETERANS AFFAIRS, FY2008 BUDGET SUBMISSION, Vol. IV, at 1-3 (2007), [http://www.va.gov/budget/docs/summary/archive/FY-2008\\_VA-BudgetSubmission.zip](http://www.va.gov/budget/docs/summary/archive/FY-2008_VA-BudgetSubmission.zip) (requesting approximately \$86.7 billion); (2) the numerous congressional hearings addressing VA’s problems with claims processing, *see Senate Hearing Transcripts*, VETERANS L. LIB., [http://www.veteranslawlibrary.com/Senate\\_Hearings.html](http://www.veteranslawlibrary.com/Senate_Hearings.html) (last visited Feb. 1, 2012); *House Hearing Transcripts*, VETERANS L. LIB., [http://www.veteranslawlibrary.com/House\\_Hearings.html](http://www.veteranslawlibrary.com/House_Hearings.html) (last visited Feb. 1, 2012) (both listing dozens of relevant oversight hearings from 2005 to present); or (3) Congress’s attempts to improve the system through the Veterans’ Benefits Improvement Act of 2008, Pub. L. No. 110-38, 122 Stat. 4145 (2008).

356. *VCS*, 644 F.3d at 850.

357. *Id.* at 878.

358. *See supra* note 63 and accompanying text.

resources were insufficient to generate the necessary improvement,<sup>359</sup> then the court would have to decide what further action to take.

As to VBA, the benefits system is failing to process appeals. How this is remedied depends on how narrowly the specific violation is interpreted. In its discussion, the Ninth Circuit focused on “the 573-day average delay for a Regional Officer to certify an appeal to the BVA,” an action that the court characterized as ministerial.<sup>360</sup> Accordingly, such a discrete problem would seem easily amenable to a timeline-based remedy backed up by brute-force orders to increase the manpower assigned to the problem.

However, the opinion concluded that “delays in the VA’s claims appeals process amount to deprivation of property without due process.”<sup>361</sup> The district court could reasonably interpret the Ninth Circuit’s opinion to require a reduction in the ultimate amount of time that it takes to produce a final BVA opinion. This is a much more problematic issue. There is no reason to believe that suddenly transferring 100,000 or more appeals to the BVA would do much to speed up the process.<sup>362</sup> Each BVA member is

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359. Early indicators are not promising. In September 2011, VA reported to the Senate Veterans Affairs Committee the results of a survey of VA mental health professionals commissioned in response to a July 2011 hearing. Approximately 70% of mental health care providers responded that the facility they worked at did not have adequate staffing and a similar proportion reported shortages in space. VETERANS HEALTH ADMIN., A QUERY OF VA MENTAL HEALTH PROFESSIONALS: EXECUTIVE SUMMARY AND PRELIMINARY ANALYSIS 2–3 (2011), *available at* <http://graphics8.nytimes.com/packages/pdf/opinion/editorial/VAMentalHealth.pdf>; *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-12, VA MENTAL HEALTH: NUMBER OF VETERANS RECEIVING CARE, BARRIERS FACED, AND EFFORTS TO INCREASE ACCESS (2011).

360. *VCS*, 644 F.3d at 885. The Ninth Circuit’s opinion here curiously fails to discuss a key aspect of the relevant procedure. In 2003, the Federal Circuit invalidated the BVA’s program to develop the evidence necessary to bring finality to the claims before it and held that the BVA lacks statutory authority to consider new evidence in the first instance. *See Disabled Am. Veterans v. Sec’y of Veterans Affairs*, 327 F.3d 1339, 1346–48 (Fed. Cir. 2003). As a result, if a claimant were to *submit* new evidence after initiating an appeal, the regional office would have to issue a new decision addressing that evidence before the BVA could consider it. In many situations, the new evidence will require additional development, such as seeking additional medical or service records, or obtaining a new medical opinion addressing the new information. These procedures play a substantial part in the fact that more than half of all appeals initiated by claimants are not ultimately pursued all the way to a BVA decision. *See Ridgway, Why So Many Remands?*, *supra* note 60, at 148–49. Accordingly, the opinion’s description of certifying an appeal to the BVA as “a merely ministerial act” is an oversimplification. *See VCS*, 644 F.3d at 859.

361. *VCS*, 644 F.3d at 885.

362. It may well be harmful to many claimants. Most veterans claim numerous disabling conditions and often have multiple claims in different stages of the process. *See Ridgway, Why So Many Remands?*, *supra* note 60, at 145–47. Claims files are “historically maintained by [VA] in a single and unmanageable file containing information concerning every claim ever made by the claimant.” Kenneth M. Carpenter, *Why Paternalism in Review of*

already deciding nearly 700 appeals annually,<sup>363</sup> and these numbers wildly understate the actual number of claims being decided because decisions typically address more than a single claim and often address several.<sup>364</sup> It is highly probable that remedying the certification issue emphasized by the Ninth Circuit would merely shift the location of the backlog to a place where it will be much harder to reduce.

Deciding veterans benefits appeals faster is also a complex problem because such claims can be incredibly complicated. Unlike a Social Security disability claim, which focuses on the single question of whether the claimant is currently able to work,<sup>365</sup> a successful veterans benefits claim requires a determination that the veteran has a current disability, that there was an injury or disease in service, and that the current disability is

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*the Denial of Veterans Benefits Claims Is Detrimental to Claimants*, 13 KAN. J.L. & PUB. POL'Y 285, 294 (2004); see also VETERANS BENEFITS MANUAL § 16.1.2, at 1282 (Barton F. Stichman & Ronald B. Abrams eds., 2010 ed.) (describing the typical veteran's claims file as a "puzzle box"). If every claims file that has a claim ready for an appellate decision were transferred to the BVA in Washington, D.C., they could easily languish there and impede regional office efforts to process other pending claims. VA's troubled efforts to modernize its information technology and record-keeping systems are well documented. See PARALYZED VETERANS OF AM. ET AL., THE INDEPENDENT BUDGET FOR THE DEPARTMENT OF VETERANS AFFAIRS FISCAL YEAR 2012, at 35–37 (2011) [hereinafter FY2012 PVA BUDGET], [http://www.independentbudget.org/2012/IB\\_FY2012.pdf](http://www.independentbudget.org/2012/IB_FY2012.pdf) (discussing VA's ongoing efforts to develop a paperless claims process); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-663T, INFORMATION TECHNOLOGY: DEPARTMENT OF VETERANS AFFAIRS FACES ONGOING MANAGEMENT CHALLENGES (2011); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-265, ELECTRONIC HEALTH RECORDS: DOD AND VA SHOULD REMOVE BARRIERS AND IMPROVE EFFORTS TO MEET THEIR COMMON SYSTEM NEEDS (2011); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-115, INFORMATION TECHNOLOGY: VETERANS AFFAIRS CAN FURTHER IMPROVE ITS DEVELOPMENT PROCESS FOR ITS NEW EDUCATION BENEFITS SYSTEM (2010); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-579, INFORMATION TECHNOLOGY: MANAGEMENT IMPROVEMENTS ARE ESSENTIAL TO VA'S SECOND EFFORT TO REPLACE ITS OUTPATIENT SCHEDULING SYSTEM (2010); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-727T, INFORMATION SECURITY: VETERANS AFFAIRS NEEDS TO RESOLVE LONG-STANDING WEAKNESSES (2010).

363. See 2010 CHAIRMAN REPORT, *supra* note 77, at 3, 19 (stating that the BVA issued 49,127 decisions with sixty members and the equivalent of twelve acting members, which averages to 682 decisions per member).

364. See Ridgway, *Why So Many Remands?*, *supra* note 60, at 145–47 (discussing how VA's bookkeeping system dramatically understates its true workload).

365. See 42 U.S.C. § 416(i) (2006) (defining *disability* for purposes of the Social Security Administration). This is certainly not to say that Social Security disability claims do not have a noticeable amount of complexity. See, e.g., Jon C. Dubin, *Overcoming Gridlock: Campbell After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration's Disability Programs*, 62 ADMIN. L. REV. 937 (2010).



medically related to the in-service event.<sup>366</sup> Moreover, there are numerous theories that may be used to show the medical relationship.<sup>367</sup> If a claim is granted, then the disability must be rated on a scale of 0% to 100% disabling, using a regulatory chapter of hundreds of diagnostic codes.<sup>368</sup> Finally, an effective date must be assigned, which often requires reviewing an enormous volume of unorganized pro se correspondence to determine when the veteran first informally claimed the specific benefit at issue.<sup>369</sup>

Not only is the substance complex, but the BVA must also comply with demanding procedural requirements enacted to make the process veteran-friendly. The BVA member is obligated to address not only every argument raised by the claimant, but also every issue reasonably raised by the claims file.<sup>370</sup> The decision produced must contain an adequate statement of “reasons or bases,” which the U.S. Court of Appeals for Veterans Claims has interpreted to be a very demanding requirement.<sup>371</sup>

Any remedy would be further complicated by the fact that increasing the number of cases decided by increasing the number of BVA members is not a straightforward matter. Members of the BVA must be appointed by the Secretary of Veterans Affairs and approved by the President.<sup>372</sup> The chairman of the BVA can designate individuals to serve as acting BVA members, but the BVA’s statute requires that the total membership of the BVA must always be at least 80% properly appointed members and limits individuals to a maximum of 90 days of such service at a time and a maximum of 270 days per year.<sup>373</sup>

Accordingly, there does not appear to be an easy, pain-free solution to the backlog of appeals awaiting decision.<sup>374</sup> Perhaps there are gains to be

366. See James D. Ridgway, *Lessons the Veterans Benefits System Must Learn on Gathering Expert Witness Evidence*, 18 FED. CIR. B.J. 405, 407–08 (2009).

367. See *id.* (discussing the various theories for finding a nexus between a disability and an in-service event).

368. See *id.*; see also 38 C.F.R. pt. 4 (2010).

369. See Ridgway, *VJRA Twenty Years Later*, *supra* note 24, at 283–86.

370. Robinson v. Mansfield, 21 Vet. App. 545, 552–54 (2008), *aff’d sub nom.* Robinson v. Shinseki, 557 F.3d 1355 (Fed. Cir. 2009). See generally Ridgway, *Why So Many Remands?*, *supra* note 60, at 136–38 (comparing the Court of Appeals for Veterans Claims’ review under this standard with traditional appellate review); Ridgway, *VJRA Twenty Years Later*, *supra* note 24, at 273–75 (explaining the historical reasons behind the development of this standard).

371. Ridgway, *Why So Many Remands?*, *supra* note 60, at 136–38.

372. 38 U.S.C. § 7101A(a)(1) (2006).

373. *Id.* § 7101(c)(1)(A), (C)–(D). The BVA fully utilized this authority in fiscal year 2010. See 2010 CHAIRMAN REPORT, *supra* note 77, at 19 (noting that acting members contributed the equivalent of 12.2 full-time members).

374. See, e.g., Victoria Hadfield Moshiaswili & Aaron Hadfield Moshiaswili, *Rearranging Deck Chairs on the Titanic: Lessons from the History of VA’s Growing Disability Claims Backlog* (Oct. 31, 2011) (unpublished article), available at

made through management innovations, but there is little evidence to support this. Assuming such gains are possible, it is not clear why the court would be in a better position than VA to find them, especially given that Congress has already been investigating the problem with little apparent result.<sup>375</sup> It is quite possible that real progress can only be achieved with a substantial increase in the amount of resources devoted to deciding appeals.<sup>376</sup> Of course, procedural changes and increased resources are not mutually exclusive. However, even the question of how much of the remedy should involve procedural changes versus increased resources does not have a clear answer or even a clear path to finding an objectively reasonable answer.

Nonetheless, the traditional structural reform litigation playbook directs the district court to wade deeply into the operations of VA in an attempt to resolve these issues. The judge (or a proxy) is expected to become intimately familiar with all the moving parts involved in the relevant agency operations, to tinker with a wide variety of initiatives for years, and to be patient with the agency while it requests additional resources. Only after many years—if not a decade or more—of failure should the court begin taking steps that might be considered draconian. Even then, if the court were to choose to place significant portions of VA under the control of a receiver, it is not at all clear how that would result in improved operations if the years of prior efforts had not been successful.

This bleak picture is not a foregone conclusion, however, and whether the remedial efforts in *VCS* turn out like the intervention in *Plata* remains to be seen, but there is certainly reason to be concerned. A central feature of the remedial effort in *Plata* was that the “stipulated relief in *Plata* contain[ed] virtually no substantive commands.”<sup>377</sup> Instead, the court

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<http://ssrn.com/abstract=1952070> (arguing that VA’s claims processing system is in need of major structural change).

375. See, e.g., *Review of Veterans’ Disability Compensation: What Changes Are Needed to Improve the Appeals Process?*: Hearing Before the S. Comm. on Veterans’ Affairs, 111th Cong. (2009); *Board of Veterans’ Appeals Adjudication Process and the Appeals Management Center*: Hearing Before the Subcomm. on Disability Assistance and Mem’l Affairs of the H. Comm. on Veterans’ Affairs, 110th Cong. (2007); *Battling the Backlog: Challenges Facing the VA Claims Adjudication and Appeal Process*: Hearing Before the S. Comm. on Veterans’ Affairs, 109th Cong. (2005); *The Board of Veterans’ Appeals and Appeals Management Center*: Hearing Before the H. Comm. on Veterans’ Affairs, 109th Cong. (2005).

376. The leading consortium of veterans groups has noted that BVA’s budget has not increased proportionally to its workload in recent years and has recommended a significant increase in resources for it. See PVA FY2012 BUDGET, *supra* note 361, at 41–43 (“Funding for the Board of Veterans’ Appeals must rise at a rate commensurate with its increasing workload so it is properly staffed to decide veterans’ cases in an accurate and timely manner.”).

377. Sabel & Simon, *supra* note 273, at 1039.

engaged in the collaborative tinkering approach, which has become the new standard, while conditions continued to deteriorate. The unfortunate history of that case thus begs the question of whether there might be a better approach.

*B. Reexamining the Origins of the Structural Reform Litigation Playbook*

Fortunately, there are good reasons to think that there is indeed a better path. The current playbook developed during a different era, and there is little reason to believe that the underlying causes of current problems will be adequately addressed by a remedy approach largely developed to handle different issues.

As discussed above, modern structural reform litigation was developed to remedy desegregation, but it has since spread beyond those confines. The essential problem in the desegregation cases was a lack of willpower. The steps needed to end discrimination were not obscure, but required judicial intervention to be realized. The early prison cases were similar. For example, there was an explicit finding of bad faith on the part of the prison officials in *Hutto* that was not challenged.<sup>378</sup> Moreover, ending the worst abuses, such as floggings, inadequate nutrition, and excessive use of solitary confinement, merely required a direct order to that effect. Even the earliest cases, in which courts took action to increase funding, involved little debate about the appropriateness of the steps that needed to be funded. In contrast, in modern structural reform cases, “it is remarkable how rarely the practices that the plaintiffs attack seem to have been the result of an exercise of authority by anyone,” and agency officials frequently welcome judicial intervention in solving intractable problems.<sup>379</sup>

Furthermore, federalism—rather than separation of powers—tended to be the dominant concern in the early structural reform cases.<sup>380</sup> Federalism was a relatively easy issue to dismiss due to the ultimate supremacy of the

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378. *Hutto v. Finney*, 437 U.S. 678, 689 (1978).

379. Sabel & Simon, *supra* note 273, at 1092.

380. *But see Jenkins II*, 515 U.S. 70, 132–33 (1995) (Thomas, J., concurring) (“There is no difference between courts running school systems or prisons and courts running Executive Branch agencies.”); Yoo, *supra* note 225, at 1123–24 (arguing that structural reform litigation remedies are illegitimate because “separation of powers principles require that the answer come from the political branches”). However, separation of powers is an issue that has troubled state courts handling structural reform litigation initiated under state constitutional provisions. See, e.g., Dana E. Prescott, *Consent Decrees, the Enlightenment, and the “Modern” Social Contract: A Case Study from Bates, Olmstead, and Maine’s Separation of Powers Doctrine*, 59 ME. L. REV. 75 (2007) (discussing how the Maine courts wrestled with the issue in reforming a major state mental hospital).

Constitution.<sup>381</sup> However, courts simply cannot fall back on supremacy to issue orders to Congress that might be acceptable if they were dealing with a state legislature or local government.

In short, the original playbook, based upon detailed managerial orders, made sense when effective solutions to the problems were obvious or could be reasonably ascertained by the court or a special master with a modest amount of effort.<sup>382</sup> In such situations, detailed orders and receiverships were good tools because they allowed the court to exercise the will that the agency or funding authority lacked. Exercising this will was not problematic when the institutions involved were state or local and the ultimate authority of the courts rested on the supremacy clause.

Structural litigation reform became more troubling as the specific actions ordered by the courts became less certain to remedy the constitutional violation at issue. Creating inner-city magnet schools and mandating square footage requirements, while beneficial to the students and prisoners affected, were not *clearly* necessary to vindicate their constitutional rights. It was entirely possible these changes would not alter the key facts supporting the findings of a constitutional violation. It was this uncertainty that made the actions of the courts questionable, rather than the specific actions required by the order. As a result, the Supreme Court's evolving application of the basic equitable relief test became ever more slanted toward placing the burden on the court to demonstrate that the relief ordered was necessary to achieve a clearly valid goal.

As demonstrated by *Plata*, this playbook has struggled in cases in which effective solutions are difficult to determine *ex ante* even when the underlying violations are clear and egregious. When there is great uncertainty as to what management changes are needed or whether management is even the issue, it has a number of pernicious effects. First, the remedies chosen by the court are less likely to work simply because there is no compelling reason why the court's management will be more effective in a complex and uncertain environment. This will both prolong the court's involvement and breed resentment. Second, this experiment with court management may delay meaningful involvement by the political branches and allow them to avoid responsibility for their contributions to

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381. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 63 (1978) (“[T]he states are bound by federal law, including the Bill of Rights, and the ultimate power to determine the consistency of the state laws with these superior federal norms is allocated to a federal court, the Supreme Court of the United States.”).

382. See JENNIFER L. HOCHSCHILD, *THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION* 95–145 (1984) (arguing that school desegregation has succeeded when courts swiftly mandated specific changes and has foundered when cases have become bogged down in stakeholder participation problems).

the problems while they criticize the courts. Third, the court will often feel compelled to adopt suggestions from the parties, either individually or jointly, due to the limits on its own institutional competence. At the very least, this gives the appearance that the litigation has been captured, which can undermine its legitimacy and lead to further resistance from the political branches. The net result is outcomes like *Plata*, in which severe constitutional problems persist and grow worse year after year before courts finally force the political branches to confront the problems that they should have remedied themselves.

### C. *An Alternative Strategy for Structural Reform Remedies*

#### 1. *Defining a Timeline-Based Approach*

The sad saga of *Plata* begs the question of whether the playbook should be updated to handle emerging problems, such as the delay and dysfunction reaching epidemic proportions among federal benefits agencies. An alternative is suggested by *Plata*'s silver lining. The Supreme Court's opinion noted that measurable progress toward reducing overcrowding in California's prisons was already being made in the months between the panel's remedy order and the Supreme Court's decision affirming the order.<sup>383</sup> Although the conditional mass-release order is obviously undesirable, that blunt remedy does have the virtue of having produced progress on the overcrowding issue. More importantly, it is progress directed by the political branches, which should be the ones ultimately responsible for making the difficult policy choices that come with running a massive prison system in a constitutionally appropriate manner.

Similar blunt remedies would likely succeed in provoking political action in other contexts as well. The essence of the strategy is to identify the most direct route to satisfying the requirements of the Constitution regardless of the collateral consequences, and order the agency to take that route if it cannot make satisfactory progress by other means. This means avoiding attempts by the court to dictate management changes and either transferring resources from elsewhere within the agency to the problem area or reducing the agency's need for resources by lowering its overall level of activity.<sup>384</sup> Such orders will create a sense of urgency that may lead

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383. See *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011) (noting that "the State has reduced the population by at least 9,000 persons during the pendency of this appeal").

384. In the context of agency refusal to engage in rulemaking, Eric Biber has made a similar argument that judicial deference to agency resource allocation decisions does not require courts to stand by when agencies disobey a clear command by Congress to the agency to take action. See generally Eric Biber, *The Importance of Resource Allocation in*

to internal or political solutions, but will remedy the violation within a reasonable time nonetheless. This differs from the current “experimentalist” approach, which backs up such timelines with punitive sanctions designed to induce compliance with detailed management orders.<sup>385</sup> It creates many of the same incentives, but instead of establishing a default penalty,<sup>386</sup> which may not result in progress toward an ultimate solution, it establishes a default *remedy* that will result in progress even if it is not the most desirable solution to the problem.

The essential difference is that, instead of searching for a way to change the system to improve efficiency, the court takes the challenged system as it is (which the agency may be changing on its own) and focuses on moving resources to address its problems until it can perform its mission adequately. The premise of this remedy is that even a highly inefficient system can perform its mission given enough resources. It is not the responsibility of the court to decide whether the system could be more efficient but simply to ensure performance. The role of finding greater efficiencies belongs to the agency leadership and the political branches. If they can succeed in finding solutions within the stated timelines, then they can avoid having the court squeeze discretionary functions to improve those functions that are constitutionally required. If they cannot, then the judicial remedy will ensure the constitutional violation was cured nonetheless.

To see how this would work in practice, we can turn to yet another federal bureaucracy that has struggled in recent years. The Intelligence Reform and Terrorism Prevention Act of 2004<sup>387</sup> increased international travel security requirements by requiring American citizens to have passports for many types of international travel that were previously exempt from that requirement.<sup>388</sup> As a result of the new requirements, by early summer 2007, the Department of State was facing a backlog of two to three million applications, with long delays threatening the travel plans of even those who had applied several months in advance.<sup>389</sup> In response to congressional concerns, the Department of State undertook a massive program of redirecting available resources to solve the problem:

State instituted mandatory overtime for all government and contract staff

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*Administrative Law*, 60 ADMIN. L. REV. 1 (2008) (urging this interpretation of the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

385. See Sabel & Simon, *supra* note 273, at 1067.

386. *Id.*

387. Pub. L. No. 108-458, 118 Stat. 3638 (2004).

388. 8 U.S.C. § 1185(b) (2006).

389. See *Passport Delays: Affecting Security and Disrupting Free Travel and Trade: Hearing Before the H. Comm. on Foreign Affairs*, 110th Cong. 4 (2007) (statement of Rep. Ros-Lehtinen).

and suspended all noncritical training and travel for passport staff during the surge. State hired additional contract staff for its passport agencies to perform nonadjudication functions. State also issued a directive that contractor staff be used as acceptance agents to free up passport specialist staff to adjudicate passport applications, and called upon department employees—including Foreign Service officers, Presidential Management Fellows, retirees, and others—to supplement the department’s corps of passport specialists by adjudicating passports in Washington and at passport agencies around the United States. State also obtained an exemption from the Office of Personnel Management to the hiring cap for civil service annuitants, so that it could rehire experienced and well-trained retired adjudicators while it continued to recruit and train new passport specialists. In addition, the department dispatched teams of passport specialists to high-volume passport agencies to assist with walk-in applicants and process pending passport applications. These teams also provided customer support, including locating and expediting applications of customers with urgent travel needs. Finally, consular officers at nine overseas posts also remotely adjudicated passports, using electronic files.<sup>390</sup>

This aggressive program worked, and by October 2007 the immediate crisis had passed, even though the agency was still in need of a long-term strategy.<sup>391</sup> Although this remedy was not the result of a judicial order, it serves as a clear example of how a court could structure a blunt remedy to produce results under an existing system, while the agency and political branches take responsibility for any potential reinvention of the process.

One of the virtues of this remedy is that it appeals to the concern about judicial competence expressed by Justice Scalia in *Plata* and others.<sup>392</sup> The orders involved would be simple and outcome-oriented. As a result, they would be more consistent with traditional equitable orders and avoid decisions not well suited to the judicial role. In doing so, the court would be focusing the exercise of its authority on actions in which the judicial role is most effective and legitimate.<sup>393</sup>

This type of remedy also reduces the problem of strategic capture of the litigation by the parties. If the court were to focus its inquiry on the precise

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390. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-891, STATE DEPARTMENT: COMPREHENSIVE STRATEGY NEEDED TO IMPROVE PASSPORT OPERATIONS 25–26 (2008) (footnotes omitted), <http://www.gao.gov/new.items/d08891.pdf>.

391. *Id.* at 3–4.

392. See Yoo, *supra* note 225, at 1137–38 (arguing that “courts are structurally worse off than other arms of government at developing an intellectually coherent solution to social problems,” and citing empirical studies in support).

393. See Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27 (2003) (arguing that courts succeed in adapting to complex new litigation problems in “public law” actions when they focus on their traditional role and tools rather than straying into areas beyond their institutional competence).

goals necessary to remedy the constitutional violation, then litigants would be constrained from seeking judicial endorsement of questionable orders that may shape agency behavior to the litigants' liking while purporting to improve management. Agencies may well use such orders to extract more resources from a reluctant legislature, but there will be less danger that those resources will be utilized for purposes other than remedying the problem at issue.

These types of remedies are also beneficial to the development of constitutional law itself. By focusing on what goals must be achieved to no longer be in violation of the Constitution rather than exactly how any given agency should operate, the resulting case law will ultimately provide more *ex ante* guidance as to the Constitution's requirements. This focus will remove uncertainty from litigation and help prevent violations from occurring in the first place.<sup>394</sup>

There is still room for tailoring and moderation when applying a blunt remedy. Judicial judgment will certainly need to be exercised in determining the overall pace of the progress required to avoid the default remedy and how rapidly the blunt remedy will be implemented as deadlines pass without sufficient progress. Depending upon the court's evaluation of the severity of the problem and the apparent likelihood of progress without intervention, the court may wish to make the schedule more or less aggressive. Regardless of how high the Sword of Damocles is hung and how thin the rope, however, it is important that, absent extraordinary circumstances, courts follow through with the blunt remedies when timelines are missed. Such remedies can only motivate action by the agency and the political branches if they are taken seriously.<sup>395</sup>

## 2. *A Three-Part Balancing Test for Equitable Remedies in Structural Reform Cases*

Although such blunt remedies may score high on effectiveness, that factor alone cannot justify them, as it must be balanced against other concerns. Identifying those concerns is not straightforward, however, because the Supreme Court has not provided clear guidance on how to gauge the appropriateness of a remedy in structural reform litigation.

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394. Arguably, there is some benefit from the uncertainty because clarity may encourage agencies to operate just above the threshold of unconstitutionality.

395. In essence, the court is engaged in a game of "chicken," and its best strategy to minimize the chance of having to impose an undesirable remedy, therefore, is to convince the agency and the political branches to act first through a credible threat to follow through with the undesirable remedy if they do not do so. See, e.g., David Crump, *Game Theory, Legislation, and the Multiple Meanings of Equality*, 38 HARV. J. ON LEGIS. 331, 368–72 (2001) (describing the "chicken" game and the theoretical work done exploring the potential strategies involved).



However, to balance the concerns that are repeatedly raised in the case law discussed above, the appropriateness of a remedy should be regarded as a three-factor test.

First, how likely is it that the ordered remedy will cure the constitutional violation? The more certain a remedy is to work, the more appropriate it is. This explains why the desegregation cases are the source of the most expansive examples of equitable remedies imposed by the courts. Although the Supreme Court was always careful to state that the Constitution does not require specific mathematical ratios, the statistics demonstrating segregation and the effect of blunt remedies, such as busing, were easy to grasp. In comparison, the potential solutions to the Eighth Amendment cases became much fuzzier, much faster. *Cruel* and *unusual* are subjective terms, which led to confusion in many cases as to the precise nature of the violation and the effectiveness of the remedies involved.

Second, how much does the remedy move beyond the traditional role of the courts to intrude into the spheres of the other branches? The greater the structural constitutional concerns raised, the greater the justification required to support it. The concern for unnecessary usurpation of democratic processes—touched upon by Alito’s dissent in *Plata*—has been the central force opposing expansive equitable remedies, and there is no doubt that this factor must be weighed in each case.

Finally, how strong are the incentives of the agency and the political branches to avoid remedying the problem? In other words, both the Court’s case law and constitutional values suggest that we should not focus on absolute limits in structural litigation reform but rather gauge remedies based upon the relative competencies, responsibilities, and incentives of the involved parties. This factor is not clearly expressed in the case law but is necessary to tailor courts’ equitable powers correctly. Without it, there is an incorrect tendency to think of the line limiting the power of courts as fixed. This should not be the case. Rather, the essence of equity has always been that the power of the court should be tailored to the given situation and the specific behavior of the parties in particular. Again, the desegregation cases are a useful example. The Supreme Court’s early cases were decided against a backdrop of “massive resistance” by local authorities,<sup>396</sup> and there was a definite sense that the Supreme Court believed the authorities’ unclean hands justified greater intervention by the courts. As the objections raised to remedial efforts shifted to more genuine concerns, however, the Court required more careful consideration of the objections being raised. As detailed further below,<sup>397</sup> courts need not be

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396. Sabel & Simon, *supra* note 273, at 1022.

397. See *infra* notes 432–433 and accompanying text.

coy when they suspect the agency or the political branch has strategic incentives that conflict with remedying the constitutional violation. Instead of making explosive findings of obstruction, courts can be more diplomatic and use the strategic incentives of the parties as a factor justifying a remedy, regardless of whether there is clear evidence of such behavior in the case at hand.<sup>398</sup>

The essential idea here is one put forth by David Rubenstein. As to administrative law generally, Rubenstein argues the role of each of the branches should not be considered static but would be better conceived as a dynamic question based upon not only the inherent powers of each branch, but also on each branch's logistical ability to control the specific action at issue.<sup>399</sup> In other words, in difficult cases, power should be allocated to whichever institution is in the best position to produce a constitutionally legitimate outcome. Rubenstein's concept of "relative checks" also makes sense in evaluating equitable remedies. The structural incentives of the agency and the political branches should be an important consideration in fashioning a remedy. When those parties have incentives at odds with their constitutional duties and the court occupies a unique position to act as a check against such temptations, the court is justified in going further than in cases in which there are no public choice problems at issue.<sup>400</sup>

This balancing test cannot be conducted in a vacuum, but rather should be used to compare alternatives. In cases in which institutions are failing at their missions, there are rarely any easy answers. Every option will require the striking of some balance between potential effectiveness and separation of powers concerns. Accordingly, remedy options cannot be discarded simply for being problematic or unpalatable in the abstract. Rather, courts must pick their poison and live up to *Marbury*'s promise that every right has a remedy.

#### D. *The New Playbook as Applied to Federal Benefits Agencies*

Whether the blunt, timeline-based approach should be broadly adopted as the first alternative in structural reform litigation is beyond the scope of

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398. Sabel and Simon have already identified one of the advantages of the current experimentalist approach as being that "it directs assessment of the defendant institution's performance failures away from the motivations of the individuals who occupy its senior offices." Sabel & Simon, *supra* note 273, at 1096. This approach extends the blame-avoidance approach to analyzing the performance of the political branches.

399. Rubenstein, *supra* note 203, at 2213–14.

400. In Sabel and Simon's formulation, "immunity to political correction" is one of two *prima facie* elements of the problem that justifies judicial intervention. Sabel & Simon, *supra* note 273, at 1064 (stating that the other element is the underlying institutional failure resulting in a constitutional violation).

this Article. However, this section argues that it is a better remedy than the traditional playbook in the realm of remedying due process violations by federal benefits agencies.

Indeed, this timeline-based approach is much more likely to be effective than judicial micromanagement when it comes to improving claims processing. These types of management restructuring problems are exactly the kind of cases in which the institutional competence of the courts has been seriously questioned.<sup>401</sup> There is a rich literature describing the difficulties in understanding and improving agency operations.<sup>402</sup> There is simply no compelling reason why judges would be capable of solving complex problems of agency operations that frustrate even career managers.

By comparison, the timeline-based approach described above is much more likely to produce measurable results in a reasonable amount of time. As demonstrated by the Department of State's experience discussed above, a backlog in claims processing is exactly the type of problem that is susceptible to remedy through a surge in manpower that, while not necessarily the most efficient use of agency resources, is more easily reversed when the crisis is past. Some simpler tasks may be accomplished through short-term contract labor, while more complex tasks can be tackled by reassignment of experienced employees. Such experienced employees may be familiar with the relevant tasks from past assignments, but are still likely to be easier to retrain if not. Even if they do not have particularized

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401. See, e.g., SANDLER & SCHOENBROD, *supra* note 9, at 142 (arguing that judges cannot resolve the policy problems that lead to structural reform litigation because "what they have to offer is not what policy making requires"); Yoo, *supra* note 225, at 1137–39 (arguing that "[i]n terms of institutional competence, legislatures and bureaucracies appeared much better suited" to weighing the costs and benefits involved in institutional reform).

402. See, e.g., J.B. Ruhl & Robert L. Fischman, *Adaptive Management in the Courts*, 95 MINN. L. REV. 424 (2010) (discussing the successes, failures, and future of adaptive management in improving agency operations); J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849 (1996) (discussing how complexity theory explains how laws produce nonlinear effects that make predicting outcomes difficult); Shapiro & Steinzor, *supra* note 40 (discussing how the Government Performance and Results Act of 1993 failed to improve agency operations and proposing positive metrics as an alternative); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422 (2011) (describing the difficulty of designing systems that provide legal institutions with the information necessary to perform their missions). Some of the specific management challenges facing VA have been documented. See Ridgway, *VJRA Twenty Years Later*, *supra* note 24 (describing the problems of the VA adjudication system and how it struggles to balance complexity and informality); Ridgway, *Why So Many Remands?*, *supra* note 60, at 145–47 (discussing how VA's use of an inaccurate definition of *claim* results in a substantial underreporting of the burden faced by the agency).

experience and their assignment to claims processing is temporary, the whole system may benefit when such employees return to their primary assignments with a better understanding of how their work relates to the agency's mission of delivering on constitutionally protected promises.

The timeline-based approach also moves courts toward their traditional role of limited involvement in systemic problems based upon discrete orders. Rather than prolonged and open-ended involvement of the type that has been criticized by both conservative justices, such as Scalia in his dissent in *Plata*,<sup>403</sup> and scholars, such as John Yoo,<sup>404</sup> the court's involvement would be based upon well-defined injunctions focused on objective requirements as required by *Jenkins II*. Moreover, this approach would be consistent with the concurrent theme in administrative law that also counsels courts to keep their interventions into big-picture administrative-organizational issues to a minimum.

Such an approach also respects the separation of powers doctrine by eliminating the types of judicial management of agency operations that raise serious concerns. In the experimentalist approach, courts inevitably become involved in management decisions far beyond those that are strictly necessary to remedy the underlying issues.<sup>405</sup> There may even be a concern that choices about how the mandatory functions at issue are handled may have larger consequences.<sup>406</sup> By comparison, when a blunt, timeline-based remedy is used, the court is not pretending to know better than the other branches how an agency should be run. It avoids judicially imposed procedures that may be inefficient, cause unintended consequences, and interfere with agencies' ability to adapt to future changes. Rather, the political branches are encouraged to solve the problem themselves through management reforms, procedural changes, increased resource allocation, or any other acceptable method. If they do so, the judicial intervention into agency operations would be completely avoided and any changes would be legitimized by the democratic nature of the process.<sup>407</sup> If they fail to do so, the court's solution would be insulated from charges of overreaching.<sup>408</sup>

To the extent that the blunt remedies that might be triggered would still

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403. See *supra* notes 325–330 and accompanying text.

404. See Yoo, *supra* note 225.

405. Sabel & Simon, *supra* note 273, at 1067.

406. See Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011) (considering how judicial rulings in specific cases often have unanticipated long-term effects on how power is distributed among different types of decisionmakers within an agency).

407. See Sabel & Simon, *supra* note 273, at 1091 (discussing situations in which legislatures have responded to structural reform litigation with successful reforms).

408. This is not to say that the solution will be immune to such charges.

invade the province of the political branches, this invasion is likely to be justified by the branches' culpability in causing the constitutional problems. The widespread nature of the problems faced by these disparate federal benefits agencies suggests that their problems have a common contributing cause. The obvious answer is neither new nor surprising. The focus of politicians—both legislators and executives—is inevitably drawn to the next election, which tends to be about what they have done lately for their constituents.<sup>409</sup> Splashy new programs attract a lot more attention than necessary maintenance on past programs, and so established programs may be easily neglected.<sup>410</sup> Unfortunately, neither the new nor the old programs are free. This incentive to constantly create new initiatives and programs creates a vicious cycle in which the expanding number of programs experience ever more serious problems as they compete for limited resources and attention from Congress and the President.<sup>411</sup> This problem can be further exacerbated in situations in which the current office holders do not share the ideology or priorities of the enacting coalition.<sup>412</sup> Indeed, the experience of structural reform litigation at the state level has been that even after a constitutional violation has been found, there is a “lack of political will to provide enough resources—i.e., money—to permit the institution to function properly.”<sup>413</sup>

This pathology is often enabled by the senior leadership of the agencies themselves. Cabinet heads and senior officials often assert that they can fix problems without requiring major new expenditures. However, public choice theory and the problems described above indicate that such pronouncements are simply not trustworthy.<sup>414</sup> Political appointees are

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409. See Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

410. Sant'Ambrogio, *supra* note 41, at 1393; see also *supra* note 339 and accompanying text.

411. In this regard, it is noteworthy that the size of the BVA has remained essentially static over two decades, even as the burden on it has increased enormously. Compare 2010 CHAIRMAN REPORT, *supra* note 77, at 3 (stating that the Board had sixty members in fiscal year 2010), with BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN FOR FISCAL YEAR 1991, at 1 (1992) (noting that the BVA had fifty-seven members with six more in the process of being appointed).

412. Sant'Ambrogio, *supra* note 41, at 1419–20.

413. Hirschhorn, *supra* note 261, at 1819.

414. To continue to use the veterans system as an example, the leading consortium of veterans organizations has criticized the Administration's budget for fiscal years 2012 and 2013 for including savings to be generated by “management improvements,” which it described as “a popular gimmick used by previous Administrations used to generate spurious savings and thus offset the growing cost to deliver VA care.” PARALYZED VETERANS OF AM. ET AL., THE INDEPENDENT BUDGET FOR THE DEPARTMENT OF VETERANS AFFAIRS: CRITICAL ISSUES REPORT FOR FISCAL YEAR 2013, at 6 (2011) [hereinafter FY2013 PVA

likely to feel strong pressure to free up money for the latest presidential priorities and to deny they lack the resources to do their jobs. Those pressures are likely to filter down to career managers at agencies who can reasonably assume that advancement requires suppressing complaints about inadequate resources. This is not to say that agency officials are lying when they deny resource issues to Congress, the courts, and the media. The system necessarily favors advancement for those who perceive problems as caused by issues other than resource limitations.<sup>415</sup> It is reasonable to hypothesize that the Supreme Court's hands-off attitude toward issues of agency delay discussed below also makes things worse; not correcting any individual problem gives it the opportunity to fester.

Indeed, there is a growing recognition that "agencies cannot possibly achieve many of the mandates for which they are responsible with the resources provided by the White House and Congress."<sup>416</sup> This is not to say that management of these agencies is not a problem, as it certainly can be.<sup>417</sup> However, any court attempting to remedy systemic due process violations at a major federal agency must confront the fact that insufficient resources may very well be a major factor contributing to the problem. A confrontation of some type with Congress over the issue of resources is not desirable, as there is an extensive line of cases rejecting resource limits as a basis for state and local governmental entities not remedying constitutional violations.<sup>418</sup> The essential rationale of *Watson v. City of Memphis*, discussed above,<sup>419</sup> applies to the federal system as well. Budget difficulties do not

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BUDGET], [http://www.independentbudget.org/2013/CI\\_2013.pdf](http://www.independentbudget.org/2013/CI_2013.pdf). The report continued by observing that in the past such "savings were never realized." *Id.*

415. This is not even an inherently undesirable trait, as the political system should encourage efficient use of agency resources. The concern arises when the pressure pushes the system beyond efficiency to pathological underfunding.

416. Shapiro & Murphy, *supra* note 214, at 26.

417. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-40, SOCIAL SECURITY DISABILITY: BETTER PLANNING, MANAGEMENT, AND EVALUATION COULD HELP ADDRESS BACKLOGS 3-4 (2007), <http://www.gao.gov/new.items/d0840.pdf> ("[M]anagement weaknesses as evidenced by a number of initiatives that were not successfully implemented have limited SSA's ability to remedy the backlog. Several initiatives introduced by SSA in the last 10 years to improve processing times and eliminate backlogged claims have, because of their complexity and poor execution, actually added to the problem. For example, the 'Hearings Process Improvement' initiative implemented in fiscal year 2000 significantly increased the days it took to adjudicate a hearings claim and exacerbated the backlog after the agency had substantially reduced it."); Ridgway, *VJRA Twenty Years Later*, *supra* note 24, at 289-93 (discussing VA's struggles to adapt its claims process to the changes resulting from the institution of judicial review).

418. See Kritchevsky, *supra* note 268, at 515 n.160 (citing more than two dozen federal cases).

419. See *supra* notes 232-234.

excuse violations of constitutional rights at any level.

Although the Judiciary may not be able to directly order more resources from Congress to run benefit programs, there is nothing intrinsically wrong with the courts making the political branches confront the difficult funding choices that they have strong strategic incentives to ignore. A helpful comparison is available. Scott Baker and Kimberly Krawiec have proposed a new approach to the problem of statutory interpretation. They note that there is a rich literature in contract law that addresses the problem of incomplete contracts by looking at the reason for the problem.<sup>420</sup> The essence of their proposal is that public choice theory indicates that courts should use vagueness to declare a statute unconstitutional when it appears that Congress strategically left the law vague in order to avoid a politically difficult decision.<sup>421</sup> They argue that, theoretically, courts should invoke the nondelegation doctrine when doing so<sup>422</sup> because they would not be violating the separation of powers doctrine, but rather acting as a check against Congress's temptation to abuse its legislating authority.

The same logic can be applied to the power of the purse and related actions needed to properly support federal agencies. Tough budget decisions are the province of the political branches and should not be second-guessed by courts based upon differing values. However, it is proper for courts to act as a check against Congress's abuse of this power by ordering it to keep the promises it makes that are so well defined so as to create property rights. Of course, countless political promises are unenforceable, and the exercise of this check by the courts cautions against over-classification of statutes as creating property rights.<sup>423</sup> For those

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420. Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663, 663–64 (2004).

421. *Id.* at 664.

422. *Id.*

423. For example, in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), the Supreme Court determined that there is no protected property right in a court order of protection. *Id.* Such a result was justified because of the impracticality of enforcing all such orders or providing compensation to the victims of every violated order. Although beyond the scope of this Article, one of the core problems in structural reform litigation generally is the lack of definition as to many of the constitutional rights being protected. To the extent that such cases are based upon “a violation of some broad norm—the right to an adequate education [or] the right to access to justice,” Sabel & Simon, *supra* note 273, at 1056, it is inevitable that there will be major difficulties in finding precise and objective remedies under *Jenkins II* that correspond well to the subjective and indeterminate rights being vindicated. It is this problem that undermines the “rights essentialism” approach of Daryl Levinson, which regards finding remedies as merely a derivative issue rather than a necessary component in defining constitutional protections. Compare Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (asserting that remedies inherently reflect different values than constitutional rights), with Yoo, *supra* note 225 (discussing the possibility

promises that do rise to the level of property rights, however, the Constitution provides protections that the Judiciary can administer without trespassing on the prerogatives of the political branches.<sup>424</sup> Having the Judiciary take an increased role in holding Congress accountable would not be an unjustified expansion of judicial power, but simply a new form of the traditional role of courts in checking the political branches, which must adapt to “an era of vastly changed and expanded government activities.”<sup>425</sup>

This is not to say that courts can or should have the power to force Congress to tax and spend. As has been recognized in *Flemming* and many other cases, Congress has the option to modify or eliminate statutorily created benefits. Although some issues will arise on the margin when Congress reacts this way, there is nothing constitutionally wrong with mooting a chronic due process problem by eliminating the benefit at issue.

Instead, courts can—and should—focus Congress’s attention on the severity of the disconnect between its promises and reality. If promises were made that rise to the level of creating a property interest, then they must be kept. Otherwise, it would erode the sociological legitimacy of government. Thus, it is entirely appropriate for courts exercising their equitable powers to remedy constitutional violations to do so in a manner that confronts Congress with difficult choices that it would prefer to avoid. This remedy can be approached from two directions: shutting down the program so that Congress would be forced to intervene to restart it, or redirecting agency resources toward the problem so the political branches’ ability to use the agency for patronage is curtailed until the problem is fixed. As mentioned above, the most extreme remedy invoked in structural reform litigation is simply to shut down the offending institution.<sup>426</sup> Theoretically, courts could reduce or eliminate benefits available under programs that are underfunded. However, this approach would work only when the functions of the shuttered institution could be shifted to other bodies and would be otherwise fraught with obvious problems.<sup>427</sup>

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of courts vindicating constitutional rights through broad structural remedies).

424. This is not to say that such remedies will be immune from charges of judicial bias. It is not hard to imagine a judge being accused of imposing a hyperaggressive timetable with the secret hope of biasing the political response toward cutting the program at issue. Alternatively, a judge who imposes an overly cautious timetable could be accused of coddling the agency and trying to protect a favored program from tough choices. If either instance were clear, then the remedy could be found to be an abuse of discretion.

425. Sabel & Simon, *supra* note 273, at 1091. Although Sabel and Simon argue that this need for expanded checks justifies the expansion of remedies in structural litigation cases, this Article takes the somewhat different view that such a role can be achieved by the judiciary using simpler and more traditional approaches to equitable remedies.

426. See *supra* note 267 and accompanying text.

427. One less obvious problem is that such a remedy might amount to a judicial taking



Accordingly, the more palatable (but not easy) approach would be to continually ratchet up the shifting of resources within an agency to address the constitutional problem until the constitutional violation was cured or the disruption to secondary functions became so intolerable that a political solution was found.<sup>428</sup> In particular, a court might consider the somewhat extreme measure of enjoining an agency from devoting any resources to new initiatives by the President and Congress until the constitutional violation were fixed.<sup>429</sup> Such an order would be within the court's equitable powers as a form of sequestration.<sup>430</sup> This would create pressure on the political branches to decide whether and how to keep the promises that have been made and avoid having the Judiciary make the difficult and often unpopular decisions that governing often requires.<sup>431</sup> Regardless of whether the promise were kept, modified, or withdrawn, at least the result would be legitimate because there would be no disconnect between the promise and reality, and the political branches would have the final say in how the gap were closed.

This reveals one final advantage of timeline-based remedies. These remedies would avoid requiring courts to assign blame and make politically

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of the type Justice Scalia discussed in the portion of his majority opinion in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* that failed to attract a fifth vote. 130 S. Ct. 2592, 2601 (2010) ("Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary.").

428. To continue using VA as an example, a substantial minority of its budget is for discretionary functions. See *U.S. Department of Veterans Affairs Budget Request for Fiscal Year 2012: Hearing Before the H. Comm. on Veterans' Affairs*, 112th Cong. 11 (2011) (testimony of Secretary Eric K. Shinseki requesting \$62 billion in discretionary funds and \$70 billion in mandatory funding for VA for fiscal year 2012). Nearly 90% of these discretionary funds are used to provide health care to veterans. PARALYZED VETERANS OF AM. ET AL., *THE INDEPENDENT BUDGET FOR THE DEPARTMENT OF VETERANS AFFAIRS: CRITICAL ISSUES REPORT FOR FISCAL YEAR 2013*, at 5 (2011), [http://www.independentbudget.org/2013/CI\\_2013.pdf](http://www.independentbudget.org/2013/CI_2013.pdf). Accordingly, redirection of a substantial portion of VA's discretionary budget would likely reduce the health care available to veterans through VHA.

429. Of course, initiatives directed at fixing the problem would be an exception. VA's most recent performance report lists sixteen major initiatives, many of which are designed to address issues contributing to the problems at issue in *VCS*. VA FY2010 PERFORMANCE REPORT, *supra* note 16, at I-65 to -79.

430. See *supra* note 265 and accompanying text.

431. Aside from public choice grounds, pushing Congress toward confronting difficult resource allocation problems can also be justified on deliberative democracy grounds. As political fiduciaries, the duty of good faith requires politicians to engage in a continuing dialogue about how changing circumstances affect the continuing validity of past choices, and it is, therefore, fair for the judiciary to initiate this conversation when the political branches have strategic incentives to ignore such problems. Ponet & Leib, *supra* note 208, at 1261.

charged determinations of causation.<sup>432</sup> In particular, they would also avoid requiring courts to determine whether agency dysfunction was caused by management issues or inadequate resources.<sup>433</sup> Rather, the court could provide the political branches the opportunity to define and solve the problem however they saw fit. Should that fail, the court could narrowly focus on shifting resources toward blunt solutions that minimize policy choices by the Judiciary and continue to provide the preferred actors with the opportunity to implement better solutions.

Ultimately, the timeline-based remedy proposals here do not presuppose a cause of the constitutional violation. Rather, the proposals are based upon the much simpler proposition that delays in claims processing by federal agencies *can* be solved by the blunt application of additional resources, even though the political branches *might* be able to solve them through other means. The Constitution requires that they *must* be solved, and courts should therefore apply the available remedy that has the best chance of being effective while also minimizing separation of powers concerns. For agencies charged with managing claims for federal benefits, the timeline-based approach described above fits the bill.

### CONCLUSION

Modern structural reform litigation was developed in an era when the central problem was that some state and local officials were not interested in living up to their constitutional duties. It was the role of “hero judges” at this time to coerce these officials into doing the right thing and, if necessary, displace them altogether and impose the required changes. However, those problems of willful disobedience have given way to a new set of problems in which constitutional violations stem from a thicket of administrative complexity and legislative neglect. In this new era, the playbook followed by the judges of the desegregation era is breaking down and requires rethinking.

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432. The Supreme Court in *Plata* seemed to intentionally avoid assigning specific responsibility for the constitutional violations at issue: “In addition to overcrowding, the failure of California’s prisons to provide adequate medical and mental health care may be ascribed to chronic and worsening budget shortfalls, a lack of political will in favor of reform, inadequate facilities, and systemic administrative failures.” *Brown v. Plata*, 131 S. Ct. 1910, 1936 (2011).

433. Such determinations may not even be possible. As noted above, the complexity of agency operations makes it difficult, if not impossible, to predict in advance how changes will affect the system. Similarly, even substantially imperfect systems can function even if there may be more efficient ways of operating. Given the need to satisfy the requirements of the Constitution, it is necessary to provide sufficient resources to allow the system to function as it constantly searches for potentially more efficient methods that may or may not exist.

The purpose of this Article is not to argue that the incredibly hard problems of structural reform litigation involving federal benefits agencies have an easy answer. Rather, at least in the context of those agencies, constitutional values are better served by skipping the traditional step of years of supervised failure before applying blunt, timeline-based remedies.

The reasons for experimenting with a new playbook are numerous. First, major federal benefits agencies, like VA, are so large and complex that there is little reason to believe that a judge or special master trying to micromanage one of them would be able to succeed where experienced agency managers have not. Second, blunt timeline-based remedies respect the separation of powers by leaving primary control with the agency and the political branches so that constitutional issues can still be solved through internal reforms. Third, if the blunt remedies are triggered, systemic delay and accuracy problems are exactly the kinds of issues that would likely be improved by the brute-force application of more resources to the processing of claims. Fourth, whether the due process violation is resolved before or after some level of blunt remedy is triggered, the overall timeline for judicial involvement would be minimized. Fifth, there are good reasons, grounded in public-choice theory, for believing that resource limitations are a root cause that the political branches will ignore unless forced to confront and, therefore, it is reasonable to set the litigation on an early course to confront these issues rather than let beneficiaries suffer for years or decades while politicians deflect responsibility.

Ultimately, courts need not make politically charged determinations apportioning blame between agency dysfunction and congressional underfunding. It is debatable whether such questions have a correct answer, and increased resources can improve claims processing regardless of whether there are also management improvements to be had. Both claimants and the Constitution are better served by avoiding judicial micromanagement of complex problems beyond the institutional competence of judges. Rather, it makes sense for judges to pressure agencies and politicians to find *a* solution to the constitutional violation that works, rather than spend years in a fruitless effort to find *the* solution that perfectly balances the competing concerns involved. Such a process will not only be faster and more effective but will produce outcomes that are legitimized by the political process that produces them.

The problems facing federal benefits agencies are likely to worsen as the United States is swept up in this era of global debt crises and budgetary austerity. As budgets tighten, however, politicians will have even more incentives to avoid confronting the true costs of the promises that have been made. It is not for courts to decide what promises should be made, kept, revised, or retracted. When promises become property rights, however,

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courts can demand that rhetoric match reality. It is never easy or comfortable to force individuals or groups (especially powerful ones like the President and Congress) to face inconvenient truths. However, that is one of the roles assigned to the Judiciary in our system of checks and balances. The victims of constitutional violations—whether they are veterans, school children, or prisoners—deserve no less.

# AVOIDING NORMATIVE CANONS IN THE REVIEW OF ADMINISTRATIVE INTERPRETATIONS OF LAW: A *BRAND X* DOCTRINE OF CONSTITUTIONAL AVOIDANCE

CHRISTOPHER J. WALKER\*

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This Article explores the conflicting commands of modern constitutional avoidance (courts must construe ambiguous statutes not only to adopt a constitutional construction but to avoid constructions that raise constitutional questions) and *Chevron* deference (courts must defer to an agency's reasonable interpretation of an ambiguous statute it administers). While courts and commentators have suggested that constitutional avoidance trumps *Chevron* deference (at either step one or two), this Article advocates that modern constitutional avoidance should play no role in the review of administrative interpretations of law. Once Congress has empowered an agency to interpret an ambiguous statutory provision, a court cannot simply invalidate the agency's interpretation and replace it with one the court believes better avoids constitutional questions.

Instead, if an agency's reasonable interpretation raises constitutional questions, a court must determine whether the interpretation is indeed unconstitutional and thus an impermissible interpretation at *Chevron* step two. This approach, in essence, constitutes a return to the classical doctrine of constitutional avoidance, and it finds support in the Supreme Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*. As the Article illustrates in a variety of administrative contexts, this *Brand X* doctrine of constitutional avoidance balances the comparative strengths of courts and agencies and is necessary to preserve a proper separation of powers between the courts, the Executive, and Congress. It is also justified under Dean Edward Rubin's network theory of administrative law.

## INTRODUCTION

If a statute is susceptible to more than one reasonable interpretation, the (modern) doctrine of constitutional avoidance commands courts to construe the statute to avoid an interpretation that raises serious constitutional problems.<sup>1</sup> This canon of statutory construction has its share of advocates

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1. See, e.g., *Jones v. United States*, 526 U.S. 227, 239 (1999) (“[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court’s] duty is to adopt the latter.” (quoting *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366,

as well as opponents. Advocates underscore that, in addition to advancing the Judiciary's prudential interest in not reaching difficult constitutional questions, the doctrine helps maintain a proper separation of powers between the Judiciary and Congress, owing proper deference to legislative supremacy.<sup>2</sup> As the Supreme Court has noted, "the doctrine serve[s] the] basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made."<sup>3</sup> Constitutional avoidance thus reinforces the notion that each branch of government has a duty to uphold the Constitution, with the assumption that Congress intends to pass constitutional laws.

Critics, by contrast, emphasize that the doctrine, in practice, disserves both of these objectives.<sup>4</sup> First, the doctrine often allows courts to substitute their own interpretation for one that Congress more likely intended; it thus displaces legislative supremacy and limits Congress's ability to legislate near the constitutional limit.<sup>5</sup> Second, by holding that an interpretation raises certain constitutional doubts, a court has not really avoided the constitutional question but, instead, answered it indirectly, or at least tentatively,<sup>6</sup> with "a whisper rather than with a shout."<sup>7</sup> Much like a

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408 (1909)); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." (citing *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 499–501, 504 (1979))).

2. See, e.g., WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 348 (2000); Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 N.Y.U. ANN. SURV. AM. L. 477, 512–17.

3. *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998).

4. See generally William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 846–65 (2001) (describing both problems in more detail).

5. See, e.g., *id.* at 846–60 (illustrating the problem as seen in various cases); Harold J. Krent, *Avoidance and Its Costs: Application of the Clear Statement Rule to Supreme Court Review of NLRB Cases*, 15 CONN. L. REV. 209 (1983); Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 CHI.-KENT L. REV. 481, 488–90 (1990); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1962 (1997); see also Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 840 (1991) ("A court that sustains and applies a statute interpreted by reference to [the avoidance] canon surely shows no greater solicitude for legislative preferences than does a court that attempts to understand what was meant and then engages in a serious constitutional analysis of the validity of the statute."). Judge Posner is among those who share this view. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 285 (1985); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983). But see David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 946–47 (1992) (disagreeing with Posner).

6. See, e.g., Kelley, *supra* note 4, at 860–65; Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30

preliminary injunction, this ruling can be the whole ball game. While the constitutional question remains open as a technical matter, as a practical matter neither Congress nor future litigants attempt to revisit it.<sup>8</sup> These criticisms have received a substantial amount of scholarly attention.<sup>9</sup> A third, more recent criticism, that has received less attention, is that constitutional avoidance also infringes on separation of powers by displacing the Executive's law-elaboration authority.<sup>10</sup>

Indeed, in the administrative context, it is unclear what role constitutional avoidance should play in the review of an agency's interpretation of a statute it administers. Consider the following example:

*Congress passes a statute that requires the government to deport noncitizens who have been ordered removed within ninety days or it must release them on bond in the United States. Congress further provides that certain aliens, including those who would pose a danger to the public or a flight risk, may be detained beyond the ninety-day period. But the statute says nothing about how long beyond ninety days, and it provides no procedures for such continued detention.*

*Invoking modern constitutional avoidance, a court interprets the statute to mean that the government may only detain a noncitizen beyond ninety days so long as the deportation is reasonably foreseeable; it holds that six months is a reasonably foreseeable period of time.*

*By contrast, the Attorney General, to whom Congress has delegated authority to implement this statute, interprets the statute to allow continued detention beyond six months (and perhaps indefinitely) with respect to certain especially dangerous noncitizens—i.e., those who have been convicted of violent crimes, that due to a mental condition or a personality disorder would likely engage in acts of violence in the future, and for which no conditions of release could be expected to ensure public safety. The Attorney General also provides detailed procedural protections similar to those the Supreme Court has upheld as constitutional in the context of indefinite civil detention.*

In situations such as this, the reviewing court faces conflicting commands, or at least an order-of-battle dilemma, between constitutional avoidance and administrative deference. Under the now-familiar *Chevron* two-step approach, the court must defer to an agency's construction of a

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U.C. DAVIS L. REV. 1, 90 (1996) (stating that under "the pretense of avoidance," courts are actually making constitutional law); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 88.

7. Schauer, *supra* note 6, at 88.

8. See, e.g., Marshall, *supra* note 5, at 485 (finding no instances of congressional response to an invocation of constitutional avoidance).

9. See *supra* notes 4–6 and accompanying text.

10. See, e.g., Kelley, *supra* note 4, at 867–72.



statute it administers if the court finds, at step one, that “the statute is silent or ambiguous” and then determines, at step two, that the agency’s reading is a “permissible construction of the statute.”<sup>11</sup> In other words, constitutional avoidance and *Chevron* deference are both triggered once a court determines that a statute is ambiguous. Which doctrine should apply first? As this example illustrates, the answer to this question often forecloses agency action. If constitutional avoidance applies first, the court resolves the ambiguity in favor of its own interpretation and thus invalidates the agency’s construction at *Chevron* step one. Conversely, if *Chevron* deference applies first, the court proceeds to *Chevron* step two, and then the question becomes whether the agency’s interpretation is reasonable.

Traditionally courts and scholars have concluded that “the avoidance canon simply trumps *Chevron*,” apparently at *Chevron* step one.<sup>12</sup> In other words, the court should construe away the ambiguity to avoid constitutional doubts and not defer to the agency’s interpretation (even if the agency’s interpretation is actually constitutional). At least one court<sup>13</sup> and one scholar<sup>14</sup> have more recently suggested that constitutional avoidance may trump *Chevron* deference at step two, depending on the seriousness of the constitutional questions raised by the agency’s interpretation. But either conclusion raises serious separation of powers concerns, as Congress has delegated interpretative authority first and foremost to the agency. Notwithstanding, courts continue to apply modern avoidance at either *Chevron* step one or step two, and the Supreme Court has issued mixed messages on the subject.

In light of these separation of powers concerns, this Article advocates that once Congress has empowered an agency to interpret an ambiguous

11. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

12. Kelley, *supra* note 4, at 871 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574–75 (1988)); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1023 & n.206 (1992) (same); see also *Clearing House Ass’n v. Cuomo*, 510 F.3d 105, 113 (2d Cir. 2007) (“That broader principle is rooted in the doctrine of constitutional avoidance, which the Supreme Court has recognized may, in some instances, trump the deference typically afforded to an agency’s interpretation of the statute it administers.”), *aff’d in part, rev’d in part*, 129 S. Ct. 2710 (2009).

13. See *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1251 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 1011 (2009).

14. Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 93–94 (2008); see also Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2608–09 (2006) (“[T]he executive is not permitted to construe statutes so as to raise serious constitutional doubts. This principle is far more ambitious than the modest claim that a statute will be construed so as to be constitutional. Instead it means that the executive is forbidden to adopt interpretations that are constitutionally sensitive, even if those interpretations might ultimately be upheld.” (footnote omitted)).

statutory provision, a court no longer has discretion to replace an agency's reasonable interpretation with one the court believes better avoids constitutional questions. Instead, if an agency's interpretation raises constitutional questions, a court must determine whether the interpretation is indeed unconstitutional and thus impermissible at *Chevron* step two. This approach, in essence, constitutes a return to the classical doctrine of constitutional avoidance, which counseled that where a statute is susceptible to more than one interpretation, a court (or here, an agency) must choose an interpretation that is actually constitutional. While a court must strike down an administrative interpretation that is actually unconstitutional at *Chevron* step two, modern avoidance should play no role under *Chevron* step one or two.

This approach finds support from two relatively recent Supreme Court decisions. In the October Term of 2004, the Court both reaffirmed the viability of modern avoidance as "a tool for choosing between competing plausible interpretations of a statutory text" (in *Clark v. Martinez*),<sup>15</sup> and clarified the agency's primary role in interpreting a statute it administers (in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*).<sup>16</sup> The *Brand X* Court took *Chevron* one step further and held that "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."<sup>17</sup> That is because when there is an ambiguity in a statute an agency administers, there is a "presumption" that Congress "desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."<sup>18</sup> This insight should apply with equal force to the use of constitutional avoidance under *Chevron*. Under a "*Brand X* doctrine" of constitutional avoidance, an agency should not be bound by the court's invocation of constitutional avoidance. The agency retains the ability to construe the statute in any way it determines meets Congress's (constitutional) objectives, even if such reasonable interpretation would have been foreclosed by the court's prior interpretation—or even if a court would prefer another interpretation the court believes better avoids constitutional questions.<sup>19</sup>

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15. *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

16. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

17. *Id.* at 982–83.

18. *Id.* at 982 (quoting *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740–41 (1996)).

19. Several years before the Court issued its opinion in *Brand X*, Professors Merrill and Hickman advanced a similar argument that *Chevron* should trump modern constitutional avoidance. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 915 (2001) ("When an agency's interpretation poses an actual conflict with the Constitution, the court should displace the *Chevron* doctrine and adopt the interpretation that

This argument is exemplified by how courts have dealt with constitutional avoidance in administrative law after *Brand X*. After discussing in Part I the inconsistent role constitutional avoidance played in administrative law before *Brand X*, Part II of the Article returns to the example discussed above, which involves the same statutory provision the Supreme Court interpreted in *Clark*. Without the benefit of *Brand X*, the Fifth and Ninth Circuits held that the Supreme Court's interpretation of the statute foreclosed the Attorney General's subsequent interpretation.<sup>20</sup> By contrast, the Tenth Circuit, in an opinion authored by Judge Michael McConnell, reached the opposite conclusion by applying *Brand X* to allow the agency's subsequent interpretation to stand.<sup>21</sup> This example demonstrates how the *Brand X* doctrine of avoidance restores the proper separation of powers and allows agencies to exercise their congressionally delegated authority to interpret the statutes they administer. It also illustrates the comparative strengths of courts and agencies. Whereas courts are well equipped to decide whether a construction is actually constitutional, agencies often are in a better position to fill the holes in ambiguous statutes they administer with procedural and substantive safeguards that eliminate constitutional concerns. Moreover, because agencies may well resolve the constitutional questions through their interpretations, a *Brand X* doctrine of avoidance advances the prudential interest that motivates the avoidance canon in the first place—i.e., that courts should confront constitutional questions only when absolutely necessary.

The Article then steps back to explain why the Tenth Circuit's approach, with one major caveat, is the proper one after the Supreme Court's decision in *Brand X*. Part III examines the impact of *Brand X* on the doctrine of constitutional avoidance, as well as the separation of powers concerns that support the abandonment of modern avoidance under *Chevron*. While the Article relies primarily on traditional theories of separation of powers (in both their Article I and Article II form) to justify such abandonment, Part III also briefly explores how Dean Edward

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avoids this result. However, short of an actual conflict with the Constitution, *Chevron* instructs that courts should seek to preserve the discretion of agencies to resolve questions of policy. Thus, whatever the fate of the avoidance of questions canon in other contexts, it should be abandoned in cases that arise under the *Chevron* doctrine." (footnote omitted)).

20. *Tran v. Mukasey*, 515 F.3d 478, 485 (5th Cir. 2008); *Thai v. Ashcroft*, 366 F.3d 790, 798–99 (9th Cir. 2004).

21. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1242 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 1011 (2009). The Supreme Court may well decide to resolve this circuit conflict regarding the validity of the regulation at issue, and *Brand X* and *Clark* arguably confirm that the Tenth Circuit got it (mostly) right.

Rubin's network theory of government affects the analysis. Network theory further clarifies the separation of powers concerns at play in this context by more precisely capturing the expansive role of the modern administrative state, including the recognition that administrative agencies—not courts—“are generally the primary interpreters of statutes in the modern state.”<sup>22</sup> Under network theory, unless otherwise authorized (which they are not), courts should limit the constitutional aspect of their “supervisory” role to preclude agency constructions that are actually unconstitutional.<sup>23</sup>

Part IV then explores how this *Brand X* doctrine of constitutional avoidance plays out in a number of administrative contexts, ranging from environmental protection and national labor relations to immigration and national security. The purpose of the Article is not to advocate for specific outcomes in particular areas of administrative law. To be sure, there is often a strong correlation between the invocation of constitutional avoidance and the political nature of a particular statutory scheme. But this Article is not intended to be a call for a new administration to push constitutional boundaries and essentially reverse those judicial decisions with which the administration disagrees. The Article, instead, merely recognizes that a *Brand X* approach to constitutional avoidance in administrative law preserves the proper separation of powers and that it should be the proper reconciliation of the conflicting commands of *Chevron* deference and constitutional avoidance.

## I. CONSTITUTIONAL AVOIDANCE IN ADMINISTRATIVE LAW

Much confusion exists about the interplay between *Chevron* deference and constitutional avoidance. This confusion can be explained, in part, by two developments that complicated the role of avoidance in administrative law. First, the now-familiar *Chevron* two-step approach did not arrive until 1984—long after the doctrine of constitutional avoidance—yet the Court has never squarely reconciled the two seemingly conflicting commands. Second, the doctrine of constitutional avoidance has been modernized so as to avoid not just unconstitutional constructions, but even constructions that merely implicate constitutional doubts. It probably makes sense to begin with the latter.

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22. EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 64 (2005).

23. See *id.* at 91–94 (proposing “authorization” and “supervision” as substitutes for the concepts of “power” and “discretion”).

### A. Constitutional Avoidance: Classical v. Modern Formulations

The doctrine of constitutional avoidance is a canon of statutory construction that has a “classical” and “modern” form.<sup>24</sup> Classical avoidance, which emerged in the 1800s, commands that “as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [the Court’s] plain duty is to adopt that which will save the Act.”<sup>25</sup> In other words, this tool of statutory construction only applies if one construction is actually unconstitutional.

Developed in the 1900s, modern avoidance, however, takes the rule one step further: “[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court’s] duty is to adopt the latter.”<sup>26</sup> It is sufficient to invoke the modern doctrine if a construction implicates “‘a serious doubt’ as to its constitutionality,”<sup>27</sup> “raise[s] serious constitutional problems,”<sup>28</sup> or “raise[s] a multitude of constitutional

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24. Vermeule, *supra* note 5, at 1949. Professor Kloppenberg appears to make a similar delineation between “narrow” and “broad” constitutional avoidance. Kloppenberg, *supra* note 6, at 10–11, 90–92; *see also* Vermeule, *supra* note 5, at 1949 n.24 (“Classical and modern avoidance seem to correspond to what Kloppenberg terms the ‘narrow’ and ‘broad’ versions of the avoidance canon.”). Professor Vermeule also identifies a third form of constitutional avoidance—“procedural avoidance”—which is not a canon of statutory construction and thus not directly relevant for the purposes of this Article. *See id.* at 1948 (“This is perhaps the most general and protean category of avoidance principles, but the core tenet is that courts should order the issues for adjudication . . . with an eye to obviating the need to render constitutional rulings on the merits.”); *see also* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1015–24 (1994) (discussing various constitutional avoidance or “last resort” rules as articulated, *inter alia*, in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring)).

25. *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) (citing for this “settled rule” *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 407 (1909); *see also* *United States v. Standard Brewery, Inc.*, 251 U.S. 210, 220 (1920); *Texas v. E. Tex. R.R. Co.*, 258 U.S. 204, 217 (1922); *Bratton v. Chandler*, 260 U.S. 110, 114 (1922); *Pan. R.R. Co. v. Johnson*, 264 U.S. 375, 390 (1924)). Professor Vermeule traces classical constitutional avoidance back to before *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800). Vermeule, *supra* note 5, at 1948 & n.13. Others believe *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), was the starting point. *See, e.g.*, Kelley, *supra* note 4, at 837 & n.23; Schauer, *supra* note 6, at 73 n.9.

26. *Del. & Hudson Co.*, 213 U.S. at 408.

27. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

28. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The *DeBartolo* Court recognized an important limitation on the doctrine, in that the alternative construction the court chooses to adopt must not be “plainly contrary to the intent of Congress.” *Id.* That is because a driving rationale for constitutional avoidance is the recognition that “Congress, like this Court, is bound by and swears an oath

problems.”<sup>29</sup> The court need not determine if the interpretation at issue is actually unconstitutional.

Justice Thomas has summarized the critical difference between the classical and modern approaches:

The modern canon of avoidance is a doctrine under which courts construe ambiguous statutes to avoid constitutional doubts, but this doctrine has its origins in a very different form of the canon. Traditionally, the avoidance canon was not a doctrine under which courts read statutes to avoid mere constitutional doubts. Instead, it commanded courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose the constitutional reading.<sup>30</sup>

The “basic difference” is thus that the classical version asks whether “the statute would be unconstitutional, while the [modern version] requires only a determination that one plausible reading might be unconstitutional.”<sup>31</sup> Both are implicated only when the statute is ambiguous, but the classical version resolves the ambiguity by choosing a particular construction that is constitutional. The modern version, by contrast, construes the ambiguity to avoid even constitutional doubts without definitively resolving whether those doubts would make the statute unconstitutional.

### *B. Conflicting Commands: Modern Avoidance v. Chevron*

This wrinkle between the classical and modern forms of avoidance carries added significance in administrative law. In *Chevron*, the Court delineated between normal statutory interpretation and review of an agency’s construction of a statute it administers. It established a two-step inquiry:

First, always, is the question whether Congress has directly spoken to the

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to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.” *Id.*

29. *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005). The *Clark* Court may have further expanded the modern doctrine by holding that “[i]f one of [the plausible constructions] would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.” *Id.* This “lowest common denominator approach,” *id.* at 380, arguably “allows an end run around the black-letter constitutional doctrine governing facial and as-applied constitutional challenges to statutes: A litigant ordinarily cannot attack statutes as constitutionally invalid based on constitutional doubts concerning other litigants or factual circumstances.” *Id.* at 396 (Thomas, J., dissenting). But see *id.* at 381–82 (majority opinion) (responding to the dissent).

30. *Id.* at 395 (Thomas, J., dissenting).

31. Vermeule, *supra* note 5, at 1949 (emphases omitted); see also Kelley, *supra* note 4, at 839 (noting the same).

precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>32</sup>

The Court underscored that, at step two, a court “need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”<sup>33</sup> The Court justified such deference to administrative interpretations on two main grounds.

First, “The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.”<sup>34</sup> This is a matter of institutional competence or expertise: “Filling these gaps, the [*Chevron*] Court explained, involves difficult policy choices that agencies are better equipped to make than courts.”<sup>35</sup> Second, deference “to an agency’s construction of a statute that it administers is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”<sup>36</sup> The *Chevron* Court explained that these two main objectives reinforce core democratic principles of political accountability:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing

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32. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (footnotes omitted).

33. *Id.* at 843 n.11.

34. *Id.* at 866.

35. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 865–66).

36. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); *see also* Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2231 (1997) (“*Chevron* sends a clear message to the Legislative Branch: If you . . . decline to make a policy decision through the legislative process, we will deem your failure to so act as ceding the power to make that policy decision to the President.”).

interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.<sup>37</sup>

When modern constitutional avoidance and *Chevron* are considered together, a court is faced with conflicting commands if it determines that a statutory provision an agency administers is ambiguous and could be read to raise serious constitutional doubts. The court must begin by either avoiding a construction that implicates the constitutional question or deferring to an agency's answer to the question. Under classical avoidance, by contrast, there is no real dilemma. The court is commanded to construe a statute to be constitutional, and an agency does not have discretion to construe a statute unconstitutionally. Thus, the agency in essence must apply classical avoidance in its interpretation; otherwise, the court should strike down the agency's interpretation as impermissible because it is actually unconstitutional.

But modern avoidance, as discussed, reaches beyond prohibiting unconstitutional constructions to precluding even potentially constitutional constructions. It is quite possible, for instance, that an agency's construction of a statute would avoid all constitutional concerns. Yet, if modern avoidance were applied before *Chevron* deference, a court may well construe away all ambiguity in the statute and thus pretermite the *Chevron* inquiry at step one. In that sense, avoidance would trump *Chevron* deference.

### C. Pre-Brand X Confusion: Avoidance's Role Under Chevron

Before *Brand X* and *Clark*, it was far from clear how to reconcile the conflicting commands of constitutional avoidance and *Chevron*. And the Supreme Court oftentimes did not reach the correct result. The Court first confronted this dilemma in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*.<sup>38</sup> There, a union was distributing handbills that discouraged consumers from shopping at a mall because one of the mall contractors paid substandard wages and fringe benefits. The

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37. *Chevron*, 467 U.S. at 865–66; see also Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2373 (2001) (“As first conceived, the *Chevron* deference rule had its deepest roots in a conception of agencies as instruments of the President, entitled to make policy choices, within the gaps left by Congress, by virtue of his relationship to the public.”); Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 447 (2006) (reviewing rationales for *Chevron* deference and concluding that “the agency expertise justification plays second fiddle to the primary political accountability rationale in *Chevron*”).

38. 485 U.S. 568 (1988).



contractor filed a complaint with the National Labor Relations Board, charging that the union had engaged in unfair labor practices. The Board ultimately concluded that the handbilling activity violated labor laws because it constituted economic retaliation.<sup>39</sup> The Court noted that the Board's construction "would normally be entitled to [*Chevron*] deference," but it found pertinent "[a]nother rule of statutory construction"—i.e., modern constitutional avoidance.<sup>40</sup>

The Court found that "the Board's construction of the statute, as applied in this case, poses serious questions of the validity of [the statute] under the First Amendment."<sup>41</sup> The Court did not decide the constitutional question. Indeed, it noted that:

Even if [the Board's] construction of the Act were thought to be a permissible one, we are quite sure that in light of the traditional rule followed in *Catholic Bishop*, we must independently inquire whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to [the Act].<sup>42</sup>

The Court concluded that "the section is open to a construction that obviates deciding whether a congressional prohibition of handbilling . . . would violate the First Amendment."<sup>43</sup> Based on this holding, some scholars (and courts) have read *DeBartolo* as standing for the proposition that "the avoidance canon simply trumps *Chevron*."<sup>44</sup>

In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*,<sup>45</sup> the Court again seemed to weigh in on the interaction between *Chevron* and constitutional avoidance—and again got it wrong. There, the Court found at *Chevron* step one that the statute was clear that the federal government did not have jurisdiction under the Clean Water Act to regulate isolated ponds and mudflats. It thus refused to give *Chevron* deference to the government's contrary construction. The Court went a step further, however, and stated that it would not give *Chevron* deference even if the statute were not clear. Citing *DeBartolo*, the Court explained that "[w]here

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39. *Id.* at 573. The National Labor Relations Board originally concluded that the handbilling violated another provision of the National Labor Relations Act, but the Supreme Court reversed and remanded. *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 155–58 (1983).

40. *DeBartolo Corp.*, 485 U.S. at 574–75 (citing *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 499–501, 504 (1979)).

41. *Id.* at 575.

42. *Id.* at 577.

43. *Id.* at 578.

44. See Kelley, *supra* note 4, at 871 (discussing case law and scholarship); Merrill, *supra* note 12, at 1023 & n.206; see also *Clearing House Ass'n v. Cuomo*, 510 F.3d 105, 114 (2d Cir. 2007), *aff'd in part, rev'd in part*, 129 S. Ct. 2710 (2009).

45. 531 U.S. 159 (2001).

an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."<sup>46</sup> "This requirement," the Court explained, "stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."<sup>47</sup> The Court stressed that this rule applies if "significant constitutional questions [are] raised by [the government's] application of their regulations."<sup>48</sup> Because the government's interpretation raised such constitutional questions, the Court rejected the request for administrative deference.<sup>49</sup>

The Court reached a different conclusion in *Rust v. Sullivan*.<sup>50</sup> There, a divided 5–4 Court upheld federal regulations that prohibited projects from receiving family planning funds that provided for abortions, or even counseled patients to consider an abortion. The Court qualified modern constitutional avoidance by the principle that "avoidance of a difficulty will not be pressed to the point of disingenuous evasion."<sup>51</sup> It noted that,

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46. *Id.* at 172. This formulation of the modern doctrine as a clear statement rule appears to confuse the doctrine with other doctrines, such as what some have called the "elephants-in-mouseholes" doctrine where courts "have declined to afford deference to agency interpretations where an agency's proposed interpretation relies on an insufficiently definite statutory provision in order to greatly increase the agency's power." Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 20 (2010). This doctrine receives its name from the Court's opinion in *Whitman v. American Trucking Ass'ns*, in which Justice Scalia, writing for the Court, stated that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." 531 U.S. 457, 468 (2001). As Loshin and Nielson have explained, this doctrine is really a reinvention of the nondelegation doctrine to minimize what the Supreme Court perceives to be agency action in excess of congressional delegation. See Loshin & Nielson, *supra*, at 53. While there is some apparent overlap between these doctrines, modern constitutional avoidance sweeps much more broadly in two respects. First, it applies to all interpretations that raise constitutional questions even if there is no question that the delegation was proper. And the *American Trucking* rule seems to require an actual finding of impermissible delegation, whereas modern avoidance requires no such similar finding of unconstitutionality—only a finding of serious constitutional questions.

47. *Solid Waste Agency*, 531 U.S. at 172–73.

48. *Id.* at 174.

49. *Id.* This was a 5–4 decision with a vigorous dissent. Justice Stevens emphasized, in his dissent, that the majority's "refusal [to defer to the government's construction] is unfaithful to . . . *Chevron*"—though he did not comment on the majority's use of constitutional avoidance. *Id.* at 191 (Stevens, J., dissenting).

50. 500 U.S. 173 (1991).

51. *Id.* at 191 (quoting *George Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 379 (1933)).

because Congress forbade federal funding for programs where abortion is a method of family planning, any regulations promulgated to implement this prohibition would raise serious constitutional questions after *Roe v. Wade*. So based on this ruling, the possibility of difficult constitutional questions is not enough to trump *Chevron* deference. Although it found that the petitioners' constitutional arguments were not "without some force," the Court found the regulations to be constitutional and thus reasonable under *Chevron* step two.<sup>52</sup> In his dissent, Justice Blackmun contended that the Court had sidestepped the modern avoidance canon to reach the constitutional questions.<sup>53</sup> Justice O'Connor filed a separate dissent, arguing that the Court should have struck down the regulations based on modern constitutional avoidance: "It is enough in this litigation to conclude that neither the language nor the history of [the statute] compels the Secretary's interpretation, and that the interpretation raises serious First Amendment concerns."<sup>54</sup>

It is difficult to derive a coherent, consistent rule from *DeBartolo*, *Solid Waste Agency*, and *Rust*. It is thus unsurprising that courts have struggled to apply constitutional avoidance in administrative law.<sup>55</sup> The Ninth Circuit's en banc opinion in *Morales-Izquierdo v. Gonzales* is illustrative.<sup>56</sup> There, the petitioner challenged regulations that allowed for summary reinstatement of a removal order upon unlawful reentry to the United States. The regulations were based on a statute that provided that a "prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, [and] the alien is not eligible and may not apply for any [immigration] relief."<sup>57</sup> The challenged regulations allowed an

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52. *Id.*

53. *Id.* at 205 (Blackmun, J., dissenting) ("Whether or not one believes that these regulations are valid, it avoids reality to contend that they do not give rise to serious constitutional questions. The canon is applicable to these cases not because 'it was likely that [the regulations] . . . would be challenged on constitutional grounds,' but because the question squarely presented by the regulations—the extent to which the Government may attach an otherwise unconstitutional condition to the receipt of a public benefit—implicates a troubled area of our jurisprudence in which a court ought not entangle itself unnecessarily." (citation omitted)).

54. *Id.* at 224–25 (O'Connor, J., dissenting).

55. See, e.g., *Whitaker v. Thompson*, 353 F.3d 947, 952 (D.C. Cir. 2004) (suggesting that modern constitutional avoidance would "require [the court] to abandon or qualify *Chevron* deference"). Looking at post-9/11 national security cases, Professor Vermeule concluded that "[s]ome cases have applied just the priority rules that the commentators recommend, [*i.e.*, that constitutional avoidance trump *Chevron*], but some have not." Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1130 (2009) (discussing *Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir. 2007)).

56. 486 F.3d 484 (9th Cir. 2007) (en banc).

57. 8 U.S.C. § 1231(a)(5) (2006).

immigration officer to reinstate the removal order without a hearing before an immigration judge.<sup>58</sup> The Ninth Circuit joined the First, Sixth, Eighth, and Eleventh Circuits in upholding the regulations as a permissible construction of the statute under *Chevron*.<sup>59</sup>

Unlike the challenges raised in the other circuits, the petitioner in *Morales-Izquierdo* asked the Ninth Circuit to invoke modern avoidance. He argued that “construing the statute so as to require that reinstatement hearings be held before an immigration judge would avoid constitutional problems that arise by assigning the reinstatement function to an immigration officer.”<sup>60</sup> Judge Kozinski, writing for the en banc majority, stated that modern avoidance plays no role at *Chevron* step two:

When Congress has explicitly or implicitly left a gap for an agency to fill, and the agency has filled it, we have no authority to re-construe the statute, even to avoid potential constitutional problems; we can only decide whether the agency’s interpretation reflects a plausible reading of the statutory text.<sup>61</sup>

That is because at *Chevron* step two the inquiry is not whether the agency’s construction is the best interpretation, only whether it is reasonable. The court then held that the regulations were constitutional and reasonable.

Judge Sidney Thomas, joined by three of his colleagues on the eleven-judge en banc panel, dissented. In addition to contending that the statute unambiguously required a hearing before an immigration judge, the dissent argued that modern constitutional avoidance would preclude the government’s interpretation. The dissent conceded that constitutional avoidance may not apply at *Chevron* step two, but argued that, as a tool of statutory construction, “the avoidance canon rests on a judicial presumption that Congress always intends to steer clear of constitutional boundaries. . . . [I]t certainly pertains to the step one determination of whether Congress intended to preclude the agency’s interpretation.”<sup>62</sup> The dissent cited *DeBartolo* and *Solid Waste Agency* as cases decided at step one based on constitutional avoidance.<sup>63</sup>

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58. 8 C.F.R. § 241.8(a) (2011).

59. *Morales-Izquierdo*, 486 F.3d at 489, 495. The Ninth Circuit panel had ruled that the regulation was ultra vires because “[t]he plain statutory language, supported by the structure of the legislation, provides that an immigration judge must conduct all proceedings for deciding the inadmissibility or deportability of an alien.” *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299, 1305 (9th Cir. 2004), *reh’g en banc granted*, 423 F.3d 1118 (9th Cir. 2005). The panel thus had no occasion to invoke the doctrine of constitutional avoidance.

60. *Morales-Izquierdo*, 486 F.3d at 492.

61. *Id.* at 493.

62. *Id.* at 504 (Thomas, J., dissenting). Judge Thomas also authored the vacated panel opinion. *Morales-Izquierdo*, 388 F.3d at 1301.

63. *Morales-Izquierdo*, 486 F.3d at 504 (citing *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172–73 (2001); *Edward J. DeBartolo Corp. v.*

While theoretically plausible, the dissent's reading of *DeBartolo* and *Solid Waste Agency* arguably does not square with the Court's actual holdings in those cases. Nor, for that matter, does the majority's reading. To be sure, the Court was unambiguously clear in both cases that the agency's construction of the statute was impermissible because it did not avoid serious constitutional questions. It does not necessarily follow, however, that constitutional avoidance trumps *Chevron* at step one. Contrary to the dissent's characterization, in neither case did the Court invoke constitutional avoidance to expressly declare that the statute is unambiguous at *Chevron* step one. Instead, the *Solid Waste Agency* Court seemed to suggest that modern avoidance applies at step two. The Court held that the government's interpretation—due to the constitutional questions it raised—was unreasonable absent “a clear indication that Congress intended that result.”<sup>64</sup> The *DeBartolo* Court also seemed to apply modern avoidance at step two, only invoking the doctrine if the agency's “otherwise acceptable construction of [the] statute would raise serious constitutional problems.”<sup>65</sup> Either formulation would thus appear to conflict with the Ninth Circuit majority's view that avoidance plays no role at *Chevron* step two (in addition to the dissent's view that the doctrine applies at step one).<sup>66</sup> But even that reading is unclear.

In sum, before *Brand X* the Supreme Court had applied (incorrectly) modern avoidance in administrative law, though it never really explained why.<sup>67</sup> Contrary to the dissent in *Morales-Izquierdo* and the views of several

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Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

64. *Solid Waste Agency*, 531 U.S. at 172.

65. *DeBartolo Corp.*, 485 U.S. at 575; see also *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 387 (1998) (Rehnquist, C.J., concurring) (“We have held that when an interpretation raises such constitutional concerns, the Board's interpretation of the Act is not entitled to deference.”); *Miller v. Johnson*, 515 U.S. 900, 923 (1995) (“[W]e have rejected agency interpretations to which we would otherwise defer where they raise constitutional questions. When the Justice Department's interpretation of the [Voting Rights] Act compels race-based districting, it by definition raises a serious constitutional question and should not receive deference.” (citations omitted)).

66. The Ninth Circuit's en banc opinion could also be read as holding that constitutional avoidance plays no role at *Chevron* step two in this particular case as the regulations do not raise constitutional concerns. See *Morales-Izquierdo*, 486 F.3d at 495–98 (rejecting the constitutional challenges to the regulations).

67. See, e.g., Elliott Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1, 31 (2006) (“The [*DeBartolo*] Court provides no further justification in brushing aside *Chevron* other than its statement that the constitutional avoidance canon is a ‘cardinal principle’ that has been applied since the early days of the Court.”); Kelley, *supra* note 4, at 871 (“Unfortunately, however, the opinion in *Edward J. DeBartolo Corp.* contains no explanation for why the Court reached that conclusion.”); Merrill, *supra* note 12, at 1023 (“*Chevron* itself supplies no rationale for such a holding.”).

scholars, the Court arguably did not hold that modern constitutional avoidance trumps *Chevron* deference at step one by construing away all ambiguity in the statute.<sup>68</sup> Instead, to the extent a coherent rule can be gleaned, the Court seemed to hold that an agency's otherwise reasonable interpretation may be impermissible if that interpretation raises serious constitutional concerns (thus contradicting the Ninth Circuit majority's rule in *Morales-Izquierdo*).

## II. *BRAND X* AVOIDANCE EXEMPLIFIED

The effect of the Supreme Court's decision in *Brand X* on the interplay between modern avoidance and *Chevron* deference is best understood with a concrete example—this one from the immigration context. This example also underscores the separation of powers concerns at play when modern avoidance is applied in the review of administrative interpretations of law, as well as the comparative institutional strengths of courts and agencies in addressing constitutional problems in ambiguous statutes that agencies administer.

### A. *Competing Judicial and Administrative Interpretations*

Under the Immigration and Nationality Act, the government must generally remove from the country a noncitizen who has been ordered removed within ninety days of the issuance of a final removal order; otherwise the noncitizen must be released back into the United States.<sup>69</sup> Congress, however, provided that noncitizens “may be detained beyond the

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68. The dissent in *Morales-Izquierdo* may well have confused classical and modern constitutional avoidance. The former, where a court rules that a particular construction would violate the Constitution, would arguably eliminate a particular construction of a statute at *Chevron* step one. Of course, a court may still consider this a step two issue and hold that the agency's interpretation is impermissible or unreasonable because it is unconstitutional. It is quite another matter, as discussed in the text, to hold that an agency lacks discretion to adopt a construction, or that an agency's interpretation is unreasonable, because its interpretation raises (and then adequately answers) constitutional questions.

Notwithstanding, a panel of the Ninth Circuit has since adopted the dissent's view and held that constitutional avoidance applies at *Chevron* step one. See *Diouf v. Napolitano*, 634 F.3d 1081, 1090 n.11 (9th Cir. 2011) (“We have held that the constitutional avoidance canon plays no role during step two in the *Chevron*. But the canon applies at *Chevron* step one, because it is ‘a means of giving effect to congressional intent.’” (quoting *Clark v. Martinez*, 543 U.S. 371, 382 (2005))). As discussed, the Ninth Circuit in *Diouf* would have been well served to have distinguished between modern and classical constitutional avoidance and to have held that classical constitutional avoidance applies as *Chevron* step two (i.e., that an agency cannot choose an unconstitutional interpretation of a statute), as the panel appeared to find the regulation to be unconstitutional. See *id.* at 1091.

69. 8 U.S.C. § 1231(a)(1)(A) (2006).

[ninety-day] removal period” if they fall within one of three categories: (1) those ordered removed who are inadmissible; (2) those ordered removed as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy; and (3) those ordered removed who the Attorney General determines to be a risk to the community or a flight risk.<sup>70</sup> Congress placed no explicit limitation on the length of this continued detention.

In *Zadvydas v. Davis*,<sup>71</sup> the Supreme Court considered whether noncitizens held pursuant to the second category could be held indefinitely (and it did so in the absence of an agency’s interpretation of that statutory provision). Because no country would accept them, the government continued to detain these noncitizens for years beyond the ninety-day removal period. The government argued that the language “may be detained beyond the removal period” authorized indefinite detention.<sup>72</sup> The Court, however, reasoned that indefinite detention, especially due to the lack of any procedural protections, would present serious constitutional problems under the Due Process Clause.<sup>73</sup> Applying the modern doctrine of constitutional avoidance, the Court held that the statute was ambiguous and construed it to mean that “once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.”<sup>74</sup> The Court concluded that six months beyond the ninety-day removal period was a presumptively reasonable detention period in which to effectuate removal.<sup>75</sup>

Four years later in *Clark v. Martinez*,<sup>76</sup> the Court was asked again to interpret the continued detention statute—this time with respect to the first category of noncitizens who had never been legally admitted into the country. (Again, no formal agency interpretation was at issue.) The government argued that, unlike indefinite detention of admitted yet removable noncitizens—the second category addressed in *Zadvydas*—indefinite detention of inadmissible noncitizens does not raise serious constitutional concerns because inadmissible noncitizens do not have the same rights and privileges under the Constitution. It relied on the *Zadvydas* Court’s statement that any “[a]liens who have not yet gained initial admission to this country would present a very different question.”<sup>77</sup> The

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70. *Id.* § 1231(a)(6).

71. 533 U.S. 678 (2001).

72. *Id.* at 689.

73. *Id.* at 690.

74. *Id.* at 699.

75. *Id.* at 701.

76. 543 U.S. 371 (2005).

77. *Zadvydas*, 533 U.S. at 682.

Court disagreed, holding that “[t]he operative language of § 1231(a)(6), ‘may be detained beyond the removal period,’ applies without differentiation to all three categories of aliens that are its subject,” and that “[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one.”<sup>78</sup>

Following *Zadvydas* but before *Clark*, the Attorney General promulgated, through notice-and-comment rulemaking, a set of comprehensive regulations intended to narrow the scope of his detention authority and bring it in conformity with the Court’s ruling in *Zadvydas*.<sup>79</sup> As to most noncitizens—including those who fall within the *Clark* category one (inadmissible noncitizens) and the *Zadvydas* category two (certain removable noncitizens)—the regulations provide for release within six months if there is no likelihood of removal.<sup>80</sup> As to a subset of those noncitizens in the third category of § 1231(a)(6) (“risk to the community”) who pose heightened risks to the public or the security of the United States, the regulations establish procedures for continued detention beyond the six-month presumptively reasonable period. With respect to noncitizens who are “determined to be specially dangerous,” the regulations provide:

Subject to the review procedures provided in this section, the Service shall continue to detain an alien if the release of the alien would pose a special danger to the public, because:

- (i) The alien has previously committed one or more crimes of violence as defined in 18 U.S.C. 16;
- (ii) Due to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future; and
- (iii) No conditions of release can reasonably be expected to ensure the safety of the public.<sup>81</sup>

The review procedures set forth in the regulations include the following: If the government determines in writing—after arranging for a report by a physician based on a full medical and psychiatric exam<sup>82</sup>—that these conditions apply, then an immigration judge holds a preliminary hearing to determine whether there are grounds for further proceedings. The noncitizen is given a list of free legal service providers and provided an interpreter, he has the right to examine evidence, and he may cross-

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78. *Clark*, 543 U.S. at 378.

79. See 8 C.F.R. §§ 241.13–.14 (2011).

80. *Id.* § 241.13(g)(1).

81. *Id.* § 241.14(f)(1).

82. *Id.* § 241.14(f)(3).



examine government witnesses and physicians who issued any report.<sup>83</sup> If the government meets its burden, the immigration judge then holds a merits hearing where the government must prove by clear and convincing evidence that the noncitizen “should remain in custody because the alien’s release would pose a special danger to the public” based on the above three conditions.<sup>84</sup> The noncitizen has a right to appeal an adverse decision<sup>85</sup> and may seek review of his custody status based on changed circumstances every six months.<sup>86</sup> The government must provide an ongoing, periodic review of the noncitizen’s continued detention.<sup>87</sup>

*B. Comparative Strengths of Courts and Agencies*

Before turning to how courts have attempted to address these competing interpretations of the continued-detention statute, it is worth pausing to consider the stark difference between the judicial and administrative interpretations of the statute. The Court’s interpretation is a blunt, one-size-fits-all approach that draws a bright-line rule that lower courts (and other government actors) can apply easily and consistently. The Court makes no attempt to fill in the holes in the statute with additional procedures, substantive criteria, or other safeguards to address the constitutional concerns. Indeed, the Court appears to suggest that such efforts “would be to invent a statute rather than interpret one.”<sup>88</sup>

This observation is not meant as a criticism, as courts are not (and should not be) in the business of construing ambiguous statutes by interjecting policies and provisions not articulated by a politically accountable body. Not only would such judicial policymaking intrude on democratic process and separation of powers, but courts also lack the institutional competence to engage in such policymaking efforts in the first place. Courts are much better at deciding whether a particular statutory or regulatory scheme is constitutional than they are at figuring out how to design a statutory or regulatory scheme so as to avoid constitutional problems while still achieving stated policy objectives.

The Attorney General’s interpretation, by contrast, fills in the holes in the statute with procedural safeguards and substantive criteria aimed at eliminating the constitutional concerns while also advancing the policy objectives set forth in the statute. Unlike courts, agencies are charged by

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83. *Id.* § 241.14(g).

84. *Id.* § 241.14(i)(1) (referring to the three criteria found in 8 C.F.R. § 241.14(f)(1)).

85. *Id.* § 241.14(i)(4).

86. *Id.* § 241.14(k)(3).

87. *Id.* § 241.14(k)(1) (citing 8 C.F.R. § 241.14(f)(1)).

88. *Clark v. Martinez*, 543 U.S. 371, 378 (2005).

Congress to fill in the holes (and by the Executive to execute the law) in precisely this manner. And they have several tools to assist them in this policymaking function. For instance, as opposed to courts, agencies employ experts in the relevant regulatory context who are familiar with the policy objectives and may have encountered similar deficiencies in procedures or substantive criteria in related contexts.<sup>89</sup> Agencies also have access to bureaucrats in other administrative contexts with expertise in designing regulatory schemes that provide sufficient and efficient procedures.

Moreover, in certain contexts such as this one, agencies benefit from direct feedback from the public and nongovernmental experts through notice-and-comment rulemaking. Such rulemaking is the process by which a proposed regulation is published in the *Federal Register* and is open to comment by the general public. The agency must respond to significant objections to the agency's proposed regulation, and the adequacy of its response is subject to judicial review.<sup>90</sup> Through this notice-and-comment rulemaking process, the agency can benefit from nongovernmental experts in the field. By considering improvements suggested by these experts and the general public, the regulations agencies ultimately adopt are likely to be more effective in providing adequate procedures, realizing the policy objectives, and avoiding unintended consequences.<sup>91</sup> Indeed, Congress has imposed notice-and-comment rulemaking, as the Sixth Circuit explained, primarily "to get public input so as to get the wisest rules."<sup>92</sup> Additionally, such rulemaking allows the President and Congress to influence the regulations that agencies adopt—thus increasing political accountability.<sup>93</sup>

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89. See, e.g., 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.9, at 377 (4th ed. 2002) ("An agency with expertise in a particular area of regulation has an enormous advantage over a reviewing court in making this complicated judgment."); Bamberger, *supra* note 14, at 96 (explaining that "the shortcomings of judicial capacity, which [normative] canons are, at least in part, intended to overcome—inferior capacity for fact-finding and policymaking on one hand, and a hesitance to strike down, on direct constitutional grounds, legislation enacted through democratic processes, on the other—are the very same competencies at which agencies may excel"); Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 247 (1987) (noting that bureaucrats become experts in their own policy areas).

90. See, e.g., M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1390 (2004); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 549–50 (2000).

91. See, e.g., Pierce, *supra* note 90, at 550 ("[Notice-and-comment rulemaking] enhances the quality of rules by allowing the agency to obtain a better understanding of a proposed rule's potential effects in various circumstances and by allowing the agency to consider alternative rules that might be more effective in furthering the agency's goals or that might have fewer unintended adverse effects.").

92. *Dismas Charities, Inc. v. DOJ*, 401 F.3d 666, 680 (6th Cir. 2005).

93. See Pierce, *supra* note 90, at 550. Indeed, the President, through the Office of

In sum, this example of competing judicial and administrative interpretations underscores the comparative institutional strengths of courts and agencies. To be sure, courts have expertise to decide whether a statutory or regulatory scheme is actually constitutional. But agencies, as a practical matter, are often better equipped to fill the holes in the statutes they administer with sufficient procedural and substantive safeguards to avoid constitutional questions in the first place. This is particularly true where, as here, Congress has required the agency to engage in notice-and-comment rulemaking. This practical consideration of comparative expertise provides further support for discontinuing the use of modern constitutional avoidance in the review of administrative interpretations of law.

### C. Judicial Attempts to Address Competing Interpretations

Despite the fact that the Attorney General's interpretation arguably resolves the constitutional questions the *Zadvydas* Court identified, courts have not reached the same conclusion about whether the judicial or administrative interpretation should control.

The Ninth Circuit was the first federal court of appeals to consider the constitutionality of these regulations. In *Thai v. Ashcroft*, a three-judge panel struck down the regulations as foreclosed by *Zadvydas*.<sup>94</sup> The panel held that the agency was constrained by the *Zadvydas* Court's imposition of a six-month limitation on how long the government could hold a noncitizen subject to removal. In other words, the Supreme Court in *Zadvydas* construed away all ambiguity in the statute such that the agency no longer had discretion to provide an alternative interpretation. This approach parallels the traditional application of modern avoidance in the review of administrative interpretations of law, in that modern avoidance was arguably applied to construe away the ambiguity or otherwise override the administrative interpretation.

Judge Kozinski, joined by four other judges, dissented from the denial of rehearing en banc.<sup>95</sup> The dissent noted that *Zadvydas* only dealt with nondangerous removable noncitizens covered by the second category of the statute, not especially dangerous removable noncitizens covered by the third category. Moreover, "The [Attorney General's] regulations are

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Information and Regulatory Affairs, even requires further executive review and consultation with interested parties of certain substantial agency rulemaking. See generally Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003).

94. 366 F.3d 790 (9th Cir. 2004).

95. *Thai v. Ashcroft*, 389 F.3d 967 (9th Cir. 2004) (en banc) (Kozinski, J., dissenting).

tailored to allay the Supreme Court's constitutional doubts"<sup>96</sup>; only a narrow subset of removable noncitizens—those mentally ill, violent criminal noncitizens who are “likely to engage in acts of violence in the future” and for whom “[n]o conditions of release can reasonably be expected to ensure the safety of the public”<sup>97</sup>—are subject to continued detention. In addition, the regulations provide ample procedural protections, including required mental health evaluations, a preliminary and then plenary hearing before an immigration judge, rights to examine witnesses and evidence, and further appellate review and periodic agency re-review. Moreover, the government bears the burden to prove, by clear and convincing evidence, that the noncitizen merits continued detention.<sup>98</sup> The dissent noted that “[t]he Court said nothing about how the statute is to be construed in situations where the alien is given the procedural protections it found missing in *Zadvydas*.”<sup>99</sup>

Judge Kozinski's argument foreshadowed the reasoning of the Supreme Court's subsequent decision in *Brand X*:

There can be no doubt that, had the regulations been promulgated *before* *Zadvydas*, they would have been upheld. In adopting the regulations, the [Attorney General] drew upon a broad grant of regulatory authority, and the statute itself—as written by Congress—clearly authorizes detention of aliens beyond six months. Because the regulations obviate the constitutional doubts expressed in *Zadvydas*, the reasons given by the Court in that opinion would not have provided a basis for striking down the regulations. There is no

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96. *Id.* at 970. Indeed, when developing these regulations, the Attorney General explained that section 241.14 was created “to justify continued detention of a particular alien because of special circumstances, of the sort discussed in the Supreme Court's decision in *Zadvydas*, even though the alien's removal is not significantly likely in the reasonably foreseeable future.” Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967, 56,968–69 (Nov. 14, 2001) (codified at 8 C.F.R. pt. 241 (2010)); *see also* *Zadvydas v. Davis*, 533 U.S. 678, 690–91 (2001) (“[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections. . . . In cases in which preventive detention is of potentially *indefinite* duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger.” (citing *Kansas v. Hendricks*, 521 U.S. 346 (1997))). The Ninth Circuit panel rejected the dissent's reliance on this language from *Zadvydas*:

The statement in *Zadvydas* that noncriminal detention by the Government is permissible only in narrow nonpunitive circumstances was intended to illustrate what the Government is generally *prohibited* from doing, and what it may in some circumstances be permitted to do. It did not state what the Government is authorized to do under § 1231(a)(6).

*Thai*, 366 F.3d at 795.

97. 8 C.F.R. § 241.14(f) (2011).

98. *Thai*, 389 F.3d at 970 (Kozinski, J., dissenting).

99. *Id.*

legitimate reason the result should be different just because the [Attorney General] promulgated the regulations after *Zadvydas*.<sup>100</sup>

To hold otherwise, as the panel did, Judge Kozinski argued:

[I]mplicates important separation of powers principles. . . . Given the plenary authority of the political branches in the field of immigration, the judiciary must be particularly careful not to cut off the [Attorney General's] earnest effort to fulfill the function entrusted to him by Congress within constitutional limits. The panel's opinion takes the opposite approach, perversely leaving the [Attorney General], when acting pursuant to authority expressly granted to him by Congress, with fewer powers to detain undocumented aliens who are mentally disturbed and dangerous than the states have in detaining dangerous U.S. citizens.<sup>101</sup>

Four years later, in *Tran v. Mukasey*, the Fifth Circuit joined the Ninth Circuit in striking down the continued detention regulations.<sup>102</sup> Unlike the Ninth Circuit in *Thai v. Ashcroft*, the Fifth Circuit decided this case after the Supreme Court issued its *Brand X* decision. The government, however, did not rely on or even cite *Brand X* and instead argued that the court should adopt the reasoning in Judge Kozinski's *Thai* dissent.<sup>103</sup> The Fifth Circuit rejected that argument as foreclosed by *Zadvydas* and *Clark* because those two Supreme Court precedents had construed away any ambiguity in the statute.<sup>104</sup>

Later that year, in *Hernandez-Carrera v. Carlson*, the Tenth Circuit reached the opposite conclusion by applying *Brand X* to allow the agency's continued detention regulations to stand.<sup>105</sup> This case involved two petitioners who had sought habeas relief for their continued (and

100. *Id.*; see also *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1248 (10th Cir. 2008) ("Judge Kozinski, dissenting from denial of rehearing *en banc* in *Thai*, anticipated *Brand X* to reach a conclusion similar to that which we reach today."), *cert. denied*, 130 S. Ct. 1011 (2009).

101. *Thai*, 389 F.3d at 971 (Kozinski, J., dissenting) (citing *Boutilier v. INS*, 387 U.S. 118, 123 (1967)).

102. 515 F.3d 478, 485 (5th Cir. 2008).

103. *Id.* at 483.

104. *Id.* at 484 ("The Supreme Court has twice held that § 1231(a)(6) does not authorize indefinite detention for any class of aliens covered by the statute. We are bound by the statutory construction put forward in *Zadvydas* and *Clark*. Accordingly, 8 C.F.R. § 241.14, which was enacted under the authority of § 1231(a)(6), cannot authorize *Tran*'s indefinite detention." (citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994)). As discussed more fully below, the Fifth Circuit's conclusion is in tension with the *Brand X* Court's holding that "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005).

105. *Hernandez-Carrera*, 547 F.3d at 1242.

apparently indefinite) detention pending removal. Likely because of the petitioners' criminal history, the government had been unable to find a country that was willing to accept them. One petitioner, for instance, had been convicted of sexually assaulting a seven-year-old boy and had admitted to involvement in several hundred pedophilic contacts with children in Cuba and in the United States. While in custody, he was diagnosed with pedophilia. The other petitioner had been diagnosed with schizophrenia and had been convicted of battery and indecent exposure before being detained by the Immigration and Naturalization Service (INS). While in INS custody, the petitioners were examined by mental health professionals and deemed especially dangerous. After being provided the procedural protections set forth in the continued detention regulations, an immigration judge concluded that there were no reasonable conditions of release that could reasonably be expected to ensure the safety of the public and thus ordered continued detention for both petitioners.<sup>106</sup>

The district court, like the Fifth and Ninth Circuits, found the continued detention regulations to be ultra vires and granted the petitioners' writs of habeas corpus.<sup>107</sup> The Tenth Circuit reversed. Writing for the panel, Judge McConnell explained that the court had to answer two questions:

[I]n order to determine whether the Attorney General's construction of 8 U.S.C. § 1231(a)(6) warrants deference, notwithstanding the Supreme Court's contrary construction of the statute in *Zadvydas* and [*Clark v. Martinez*, we must ask: 1) whether "the statute is silent or ambiguous" as to the Attorney General's authority to detain certain categories of aliens beyond the ninety day removal period; and 2) whether the agency's construction of the statute represents a "permissible reading of the statute."<sup>108</sup>

After concluding that the statute was ambiguous, the court held that the agency's construction was a permissible reading of the statute for three reasons.

*First*, the court found the agency's construction permissible because "the substantive limitations built into the Attorney General's power to detain aliens beyond the removal period, as well as the procedural protections provided in such cases, are sufficient to satisfy due process," and thus "the agency's construction of § 1231(a)(6) no longer raises serious constitutional

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106. *See id.* at 1242–44 (providing background on the two petitioners).

107. *Hernandez-Carrera v. Carlson*, 546 F. Supp. 2d 1185, 1189 (D. Kan. 2008) ("The court finds no meaningful way to distinguish the facts and circumstances of the two remaining petitioners in the present case from the petitioners in *Tuan Thai* and *Tran*, and thus adopts and incorporates the reasoning of those courts and reaches the same conclusion."), *vacated and remanded*, 547 F.3d 1237 (10th Cir. 2008).

108. *Hernandez-Carrera*, 547 F.3d at 1244–45.

doubts.”<sup>109</sup> As Judge Kozinski had previously observed, the court found that the procedural protections established by the regulations avoid all of the constitutional concerns identified in *Zadvydas* (and *Clark*).<sup>110</sup>

*Second*, the Tenth Circuit rejected the petitioners’ argument that “the Supreme Court’s construction of § 1231(a)(6) in *Zadvydas* and *Martinez* forecloses any subsequent, contrary interpretation by the Attorney General.”<sup>111</sup> The court explained that the Fifth and Ninth Circuits’ contrary conclusions could not be squared with *Brand X*, which reaffirmed the holding “in *Chevron* that ‘ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.’”<sup>112</sup> The court further explained that “[j]udicial deference to administrative interpretations in these cases is not a policy choice, but rather a means of giving effect to congressional intent.”<sup>113</sup> Accordingly, under *Brand X* it did not matter that the judicial interpretation preceded the agency’s interpretation; to hold otherwise “would be ignoring Congress’ choice to empower an agency, rather than the courts, to resolve this kind of statutory ambiguity.”<sup>114</sup> Moreover, the court rejected the petitioners’ argument, perhaps first articulated by Justice Stevens in his concurring opinion in *Brand X*, that the *Brand X* rule “would not necessarily be applicable to a decision by [the Supreme Court] that would presumably remove any pre-existing ambiguity.”<sup>115</sup> The Tenth

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109. *Id.* at 1251.

110. *Id.* at 1253; *see id.* at 1253–56 (discussing at length the adequacy of the procedural protections and otherwise rejecting petitioners’ due process claims).

111. *Id.* at 1246.

112. *Id.* (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)).

113. *Id.*

114. *Id.*

115. *Id.* at 1247 (alteration in original) (quoting *Brand X*, 545 U.S. at 1003 (Stevens, J., concurring)). As the Tenth Circuit noted, Justice Stevens may have been referring to a ruling that a statute was unambiguous. *Id.* At least one commentator, as the court also noted, has argued that Justice Stevens was reserving a *Chevron* veto power for the Supreme Court. *See id.*; Kathryn A. Watts, *Adapting to Administrative Law’s Erie Doctrine*, 101 NW. U. L. REV. 997, 1000 n.19 (2007) (“[O]ne Justice (Stevens) took the view that agencies should be able to trump lower court interpretations but not necessarily Supreme Court interpretations.”). Indeed, a student note commenting on the Tenth Circuit’s opinion argues that the relevant Supreme Court precedent had foreclosed the Tenth Circuit’s holding and proposes a three-factor test for determining when the *Brand X* rule should be applied to Supreme Court precedent. *See* Brandon L. Phillips, Note, *Questioning the Supremacy of the Supreme Court: Hernandez-Carrera v. Carlson and the Tenth Circuit’s Justification for Indefinite Detention under the Brand X Framework*, 96 IOWA L. REV. 1099, 1121–23 (2011) (“(1) whether the statute was intended to limit agency action; (2) whether the statute inherently involves, or could lead to, significant constitutional issues; and (3) whether the judicial interpretation was intended to foreclose alternative agency interpretations.”).

Circuit held that *Brand X* made no such exception and that such an exception would be contrary to the administrative law principles articulated in *Chevron* and *Brand X*.

*Third*, and most relevant for the purposes of this Article, the Tenth Circuit “address[ed] whether, and in what manner, an agency’s interpretive discretion is constrained by the canon of constitutional avoidance.”<sup>116</sup> The petitioners had argued that constitutional avoidance “trumps” *Chevron*, whereas the government had argued that constitutional avoidance never precludes an agency’s interpretation of a statute when *Chevron* deference is otherwise appropriate. The court held that “the answer is in between”<sup>117</sup>: constitutional avoidance does not trump an agency’s interpretation of an ambiguous statute it administers if the interpretation is reasonable and avoids serious constitutional doubts. In reaching this conclusion, the court explained that “[i]t is well established that the canon of constitutional avoidance does constrain an agency’s discretion to interpret statutory ambiguities, even when *Chevron* deference would otherwise be due.”<sup>118</sup> After reviewing the relevant Supreme Court precedent, the Tenth Circuit concluded:

[E]ven after a court has construed a statute to avoid constitutional doubts, an agency remains free to interpret the same statute in a different manner so long as its subsequent interpretation is reasonable and avoids serious constitutional questions. A court’s prior judicial construction of a statute, applying the avoidance canon, precludes an alternative agency construction only when no alternative, reasonable construction would avoid constitutional doubts. In that case the only “permissible” construction is the reading which does not provoke a serious constitutional question. In the ordinary case, however, courts should review a new agency interpretation afresh to determine whether the agency’s reading sufficiently avoids raising constitutional doubts, such that it ought to be entitled to deference.<sup>119</sup>

Because, as discussed above, the Tenth Circuit concluded that the continued detention regulations avoided all constitutional issues, it upheld

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116. *Hernandez-Carrera*, 547 F.3d at 1249.

117. *Id.* This approach appears analogous to the approach the Court of Appeals for the D.C. Circuit had previously adopted: “This canon of constitutional avoidance trumps *Chevron* deference, and we will not submit to an agency’s interpretation of a statute if it ‘presents serious constitutional difficulties[.]’ But we do not abandon *Chevron* deference at the mere mention of a possible constitutional problem; the argument must be serious.” *Nat’l Mining Ass’n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (citations omitted).

118. *Hernandez-Carrera*, 547 F.3d at 1249; *see also id.* at 1249–50 (citing *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172–73 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577 (1988)).

119. *Id.* at 1251.



the regulations and thus reversed the habeas relief granted by the district court.

Despite the fact that the Tenth Circuit's decision in *Hernandez-Carrera* created a 2–1 circuit split,<sup>120</sup> the Supreme Court denied further review.<sup>121</sup> The denial of certiorari review is not too surprising as the circuit split was shallow and arguably could have resolved itself, as the Tenth Circuit posited,<sup>122</sup> because neither the Fifth nor the Ninth Circuit considered *Brand X*. Indeed, the Ninth Circuit—with respect to a different immigration statute—appears to have recently adopted the same rule regarding constitutional avoidance.<sup>123</sup> The Tenth Circuit has also reaffirmed this rule in a different context: “Even when a Supreme Court decision conflicts with an agency’s subsequent decision over the meaning of the same statute, we must still defer to the agency’s decision, so long as it is reasonable and constitutional.”<sup>124</sup> To date, no other court of appeals has addressed the continued-detention statute.<sup>125</sup>

While the Tenth Circuit correctly recognized that constitutional avoidance does not always trump *Chevron* deference, Judge McConnell did not go far enough. As discussed in Part III, the court should have held that avoidance plays no role under *Chevron* unless the court determines that the agency’s interpretation is not constitutional.

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120. See Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 499 n.73 (2010) (“A circuit split currently exists on the question of whether the government’s new regulation qualifies for *Chevron* deference.”).

121. *Hernandez-Carrera v. United States*, 130 S. Ct. 1011 (2009).

122. *Hernandez-Carrera*, 547 F.3d at 1248 (“We are reassured in disagreeing with the Fifth and Ninth Circuit by the fact that neither court considered the Supreme Court’s *Brand X* decision.”), *cert. denied*, 130 S. Ct. 1011 (2009).

123. See *Diouf v. Napolitano*, 634 F.3d 1081, 1090 (9th Cir. 2011) (“We may not defer to [Department of Homeland Security] regulations interpreting § 1231(a)(6), however, if they raise grave constitutional doubts.”).

124. *Olivan-Duenas v. Holder*, 416 F. App’x 678, 680 n.1 (10th Cir. 2011) (emphasis omitted) (citing *Hernandez-Carrera*, 547 F.3d at 1242).

125. One district court has adopted the Tenth Circuit’s reasoning. See *Marquez-Coromina v. Hollingsworth*, 692 F. Supp. 2d 565, 574 (D. Md. 2010) (“The court finds the reasoning of *Hernandez-Carrera* persuasive and will apply it to the near-identical facts of this case. Accordingly, the court finds that 8 C.F.R. § 241.14(f)(1) is a reasonable interpretation of 8 U.S.C. § 1231(a)(6) entitled to *Chevron* deference.”).

### III. *BRAND X* PRINCIPLES OF ADMINISTRATIVE LAW

Determining the role modern constitutional avoidance should play in the review of administrative interpretations of law is, like the *Chevron* rule itself, a two-step inquiry.

First, Part III.A explores whether modern avoidance should apply at *Chevron* step one—i.e., whether a court should invoke modern avoidance to construe away an ambiguity in the statute and thus not defer to the agency's interpretation (even if the agency's interpretation is actually constitutional). While, as discussed above, the Supreme Court's decisions on this point are unclear, many lower courts and scholars have concluded that modern avoidance trumps *Chevron* deference at step one. Part III.A explains how the Court's reasoning in *Brand X* and its progeny have made clear that modern avoidance should play no role at *Chevron* step one—a conclusion that Judge McConnell and Professor Kenneth Bamberger have similarly reached in the wake of *Brand X*.

Second, Part III.B explores the more difficult question—i.e., whether modern avoidance should apply at *Chevron* step two as a reasonableness check on agency action. In contrast to the conclusion reached by Judge McConnell and Professor Bamberger, this Article concludes that modern avoidance should play no role at *Chevron* step two. Such use of modern avoidance would do serious violence to the separation of powers by permitting a court's tentative constitutional determination to override a co-equal branch's conclusion that an otherwise permissible interpretation of an ambiguous statute comports with the Constitution. Part III.B explores both the Article I and the Article II aspects of this separation of powers concern. Part III.C then reframes the separation of power considerations through the lens of Dean Rubin's network theory, which further clarifies why modern avoidance should play no role in the review of administrative interpretations of law.

#### A. *Clark, Brand X, and Its Progeny: No Avoidance at Chevron Step One*

The October Term of 2004 brought some clarity to the role of modern avoidance in administrative law. First, in *Clark v. Martinez*, the Court addressed the doctrine of modern constitutional avoidance.<sup>126</sup> As discussed above, *Clark* dealt with the same continued-detention statute the Court had interpreted three years earlier in *Zadvydas*.<sup>127</sup> (In neither case was the Court considering an agency's interpretation that was owed *Chevron* deference.) There, the Court invoked modern avoidance to limit the government's

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126. 543 U.S. 371 (2005).

127. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

detention powers over removable noncitizens<sup>128</sup> to the time period “reasonably necessary” to remove the noncitizens from the country.<sup>129</sup> The government had been detaining certain noncitizens indefinitely, even when it knew removal was not reasonably foreseeable because no country was willing to accept the noncitizens. The *Zadvydas* Court established a six-month presumptively reasonable detention period after which the noncitizen would have to be released back into the United States if there was “no significant likelihood of removal in the reasonably foreseeable future.”<sup>130</sup>

*Clark* presented the same question but with respect to inadmissible noncitizens. The *Zadvydas* Court had noted that, because inadmissible noncitizens enjoy less constitutional protections than admitted noncitizens, those “who have not yet gained initial admission to this country would present a very different question.”<sup>131</sup> Notwithstanding these differences, the Court applied the same limitations on both groups because “[t]he operative language of [8 U.S.C.] §1231(a)(6), ‘may be detained beyond the removal period,’ applies without differentiation to all three categories of aliens that are its subject.”<sup>132</sup> In so holding, the Court clarified that the modern doctrine of constitutional avoidance “is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.”<sup>133</sup> It is not “a method of adjudicating constitutional questions by other means”; it is “a means of giving effect to congressional intent, not of subverting it.”<sup>134</sup> In sum, “The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means of choosing between*

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128. See 8 U.S.C. § 1231(a)(6) (2006) (“An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the [ninety-day] removal period . . .”).

129. *Zadvydas*, 533 U.S. at 689, 699.

130. *Id.* at 701.

131. *Id.* at 682.

132. *Clark v. Martinez*, 543 U.S. 371, 378 (2005). This statutory scheme is discussed in more detail in Part I, *infra*.

133. *Clark*, 543 U.S. at 381–82 (citing *Rust v. Sullivan*, 500 U.S. 173, 191 (1991); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

134. *Id.* at 381–82 (citing *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979); *Vermeule*, *supra* note 5, at 1949).

them.”<sup>135</sup>

Later that Term, in *Brand X*, the Court reaffirmed the general *Chevron* rule: “If a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.”<sup>136</sup> That is because “ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in a reasonable fashion.”<sup>137</sup> The *Brand X* Court took this principle one step further. The Ninth Circuit below had refused to accord *Chevron* deference because it had already construed the same provision of the Communications Act in a conflicting manner. It thus held that the administrative interpretation offered by the Federal Communications Commission (FCC) was foreclosed by that prior precedent.<sup>138</sup> The Supreme Court reversed. It held that “[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”<sup>139</sup>

In other words, once the court has identified such an ambiguity, there is a “presumption” that Congress “desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows”—regardless of any prior judicial interpretation.<sup>140</sup> Accordingly, under *Chevron*, an administrative interpretation trumps a judicial one even if the judicial one came first:

Since *Chevron* teaches that a court’s opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency’s decision to construe that statute differently from a court does not say that the court’s holding was legally wrong. Instead, the agency may, consistent with the court’s holding, choose a different

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135. *Id.* at 385. The *Clark* Court divided 5–4, with Justice Thomas arguing in dissent, *inter alia*, that the majority had distorted the modern constitutional avoidance doctrine by adopting a “lowest common denominator” approach—i.e., asking whether an interpretation would raise constitutional doubts for third parties not before the court (instead of just focusing on petitioners). Compare *id.* at 392–401 (Thomas, J., dissenting), with *id.* at 380–83 (majority opinion). See also *supra* note 29 (discussing this further extension of modern constitutional avoidance).

136. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 & n.11 (1984)).

137. *Id.*

138. *Id.* at 982.

139. *Id.* at 982–83.

140. *Id.* at 982 (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996)).

construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.<sup>141</sup>

Justice Scalia dissented, predicting that the “wonderful new world that the Court creates” is “one full of promise for administrative-law professors in need of tenure articles and, of course, for litigators.”<sup>142</sup> He accused the majority of creating a “breathtaking novelty: judicial decisions subject to reversal by executive officers.”<sup>143</sup> This new rule, he argued, is unconstitutional as it forces courts to issue advisory opinions.<sup>144</sup> The Court dismissed this accusation, noting that the judicial “precedent has not been ‘reversed’ by the agency, any more than a federal court’s interpretation of a State’s law can be said to have been ‘reversed’ by a state court that adopts a conflicting (yet authoritative) interpretation of state law.”<sup>145</sup>

The analogy between federal courts construing state law and federal statutes administered by agencies became more apt in light of the Court’s subsequent decision in *Negusie v. Holder*.<sup>146</sup> There, the Court was asked to consider whether the agency’s interpretation of a persecutor bar to asylum relief was owed *Chevron* deference. The agency had interpreted the statutory provision to require denial of asylum to any otherwise qualifying noncitizen if he had persecuted others in his native country<sup>147</sup>—regardless of whether that participation in persecution was voluntary.<sup>148</sup> The Court concluded that *Chevron* deference did not apply because the agency had misread prior Supreme Court precedent and erroneously concluded it was bound by that precedent at *Chevron* step one.

In other words, the agency had not exercised any discretion to which

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141. *Id.* at 983. The majority opinion was joined in full by six members of the Court, with Justices Scalia, Souter, and Ginsburg dissenting. Justices Stevens and Breyer both filed concurring opinions. In a brief concurrence, Justice Stevens emphasized that the *Brand X* trumping power “would not necessarily be applicable to a decision by this Court that would presumably remove any pre-existing ambiguity.” *Id.* at 1003 (Stevens, J., concurring). Justice Breyer’s concurrence took issue with an unrelated fight with respect to the deference owed under *United States v. Mead Corp.*, 553 U.S. 218 (2001). *See Brand X*, 545 U.S. at 1003–05 (Breyer, J., concurring).

142. *Brand X*, 545 U.S. at 1019 (Scalia, J., dissenting).

143. *Id.* at 1016.

144. *See id.* at 1017–19 & nn.12–13 (noting that an agency will be able to disregard a prior construction of a statute espoused by the Court and seek *Chevron* deference for its contrary construction in another case).

145. *Id.* at 983–84 (majority opinion).

146. 555 U.S. 511 (2009).

147. 8 U.S.C. §1101(a)(42) (2006) (“The term ‘refugee’ does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”).

148. *Negusie*, 555 U.S. at 514.

*Chevron* deference would apply. Instead of reaching the question itself,<sup>149</sup> however, the Court remanded the question to the agency to consider in the first instance:

Having concluded that the [Board of Immigration Appeals] has not yet exercised its *Chevron* discretion to interpret the statute in question, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” This remand rule exists, in part, because “ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts.”<sup>150</sup>

If an agency has not had an opportunity to exercise its *Chevron* discretion with respect to an ambiguous provision of the statute it administers, *Negusie* instructs that the ordinary course is for the court to remand the question to the agency. This application of the ordinary remand rule is strikingly similar to the practice of federal courts certifying state-law statutory interpretation questions to state supreme courts when they are questions of first impression.<sup>151</sup>

*Negusie* is significant here for an additional reason: Justice Scalia concurred in the outcome. Signaling perhaps a step back from his dissent in *Brand X*, Justice Scalia agreed that the agency should have the first

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149. Justice Stevens wrote separately to argue that the Court should have reached the question itself as the question is one of law to which the agency should receive no deference. *Id.* at 538 (Stevens, J., concurring in part and dissenting in part). Justice Thomas dissented, arguing that the statute unambiguously precludes any inquiry into whether the persecutor acted voluntarily. *Id.* at 542 (Thomas, J., dissenting).

150. *Id.* at 528 (majority opinion) (alteration in original) (quoting *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam); *Brand X*, 545 U.S. at 980).

151. See, e.g., *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (“[Certification] does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism.”). See generally Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157 (2003) (discussing the certification process by looking at Ohio courts). Professor Watts has taken this approach one step further and suggested an “interactive” approach where courts informally consult with the relevant agency when an action between two private parties involves an ambiguous statute the agency administers. See Watts, *supra* note 115, at 1025–47.

The Court has since reached a similar conclusion in a somewhat analogous context in *Conkright v. Frommert*, 130 S. Ct. 1640 (2010). There, the Court rejected the “‘one-strike-and-you’re-out’ approach” in the Employee Retirement Income Security Act (ERISA) context and held that a court must apply the traditional deferential standard of review to an ERISA plan administrator’s determination, even if the court had found a previous related interpretation by the administrator to be invalid. *Id.* at 1646–47, 1651–52. In other words, like the agency in *Brand X*, the Court appeared to hold in *Conkright* that a plan administrator’s subsequent interpretation may trump a prior judicial interpretation of an ambiguous provision.

opportunity to construe the statute: “It is to agency officials, not to the Members of this Court, that Congress has given discretion to choose among permissible interpretations of the statute.”<sup>152</sup> In other words, it seems that, for Justice Scalia, an agency is only out of luck when a court has weighed in on a statute before *Negusie* applied the *Ventura* ordinary remand rule to *Chevron* questions or when a court decides extraordinary circumstances justify departing from that ordinary remand rule. Agency officials, in Justice Scalia’s view, “deserve to be told clearly whether we are serious about allowing them to exercise that discretion.”<sup>153</sup>

Whatever the effect of Justice Scalia’s concurrence in *Negusie* on his *Brand X* dissent, the juxtaposition of the opinions in *Clark* and *Brand X* (and *Negusie*) leads to a natural (though unstated) conclusion: modern avoidance plays no role at *Chevron* step one because it “functions as a means of choosing between” various interpretations,<sup>154</sup> whereas “*Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.”<sup>155</sup> After all, *Brand X* held that “[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”<sup>156</sup> And modern avoidance, by definition, is not implicated unless the statute does not unambiguously foreclose an interpretation that raises constitutional questions. Just as a reasonable agency interpretation trumps prior judicial precedent per *Brand X*, a court cannot trump a reasonable interpretation by an the agency, who is the “authoritative interpreter”<sup>157</sup> of the statute it administers, by invoking constitutional avoidance at *Chevron* step one.

#### *B. Brand X and Separation of Powers: No Modern Avoidance at Chevron Step Two*

After *Brand X*, the more difficult question is whether modern avoidance plays any role at *Chevron* step two. As discussed, Judge McConnell, writing

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152. *Negusie*, 129 S. Ct. at 1170 (Scalia, J., concurring); see also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (describing *Chevron* deference as “an across-the-board presumption that, in the case of an ambiguity, agency discretion is meant”).

153. *Negusie*, 129 S. Ct. at 1170.

154. *Clark v. Martinez*, 543 U.S. 371, 385 (2005) (emphasis omitted).

155. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 & n.11 (1984)).

156. *Id.* at 982–83.

157. *Id.* at 983.

for the Tenth Circuit in *Hernandez-Carrera*, held that it does: “the only ‘permissible’ construction is the reading which does not provoke a serious constitutional question.”<sup>158</sup> Like Judge McConnell, Professor Bamberger agrees that, after *Brand X*, constitutional avoidance cannot apply at *Chevron* step one because “applying normative canons wholesale to statutory construction (whether characterized as formal step-one analysis or the functionally equivalent independent judicial judgment) would exceed the legitimate scope of judicial authority to interpret regulatory statutes.”<sup>159</sup> Instead, modern avoidance should inform whether an agency’s interpretation is reasonable at *Chevron* step two.

This approach, he argues, “can order decisionmaking to resolve important issues before they reach the judiciary” and “can induce agencies to engage their institutional strengths more fully” by incorporating normative concerns in policymaking in the first instance.<sup>160</sup> In other words, it is proper to apply modern avoidance at *Chevron* step two because the second step is concerned with normative policy judgments. This argument echoes Professor Gillian Metzger’s observation that “[d]ecisions applying the constitutional avoidance canon to agency-administered statutes create similar incentives for agencies to take constitutional concerns seriously.”<sup>161</sup> Indeed, Professor Bamberger argues that “[i]ncorporating normative canons [including modern avoidance] into the step-two reasonableness inquiry seems the only way to reconcile those tools’ continued use in judicial review with *Brand X*’s rule.”<sup>162</sup> Judge McConnell’s and Professor Bamberger’s careful approach has intuitive appeal and appears to be the most plausible way to find a place for modern constitutional avoidance within the *Chevron* framework.<sup>163</sup> And their approach addresses the

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158. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1251 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 1011 (2009).

159. Bamberger, *supra* note 14, at 106.

160. *Id.* at 111.

161. Metzger, *supra* note 120, at 499; accord Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1197 (2006) (“[I]f the reviewing court would predictably use a particular canon when construing the statute, then the agency has a tactical incentive to apply the canon even if the values supporting it apply only to the judiciary.”). Professor Morrison’s article aptly explores in more detail the Executive’s independent and somewhat distinctive use of constitutional avoidance in executing the law. See also Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005); H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313 (2006).

162. Bamberger, *supra* note 14, at 114.

163. Professor Bamberger’s approach also underscores the importance of preserving the two-step approach to *Chevron* deference—an approach that has increasingly come under fire by scholars. See, e.g., Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009).



concerns raised in Part II.B regarding comparative institutional strengths, in that an agency is afforded the first opportunity to address the constitutional questions in a statute it administers.

But, in attempting to avoid potential constitutional questions in administrative law, the approach creates actual constitutional problems. If modern avoidance were applied at step two, a court's identification of potential constitutional concerns with one plausible interpretation could supplant an agency's adoption of that interpretation—even if, in the end, the agency's interpretation passed constitutional muster.<sup>164</sup> Not only would that discount the *Clark* Court's admonition that “[t]he canon is not a method of adjudicating constitutional questions by other means,”<sup>165</sup> it would do serious violence to the separation of powers among co-equal branches of government. The violence modern avoidance causes to the separation of powers between Congress and the Judiciary has been well chronicled in the literature. But in the administrative context, this violence extends to the separation of powers between the Executive and the Judiciary. After all, the President has the constitutional duty to “take Care that the Laws be faithfully executed.”<sup>166</sup> And, as the Supreme Court has observed, “Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”<sup>167</sup>

As Professor William Kelley explains, modern avoidance strips the Executive of that constitutional authority:

[W]henever the Court denies the Executive its preferred statutory reading on avoidance grounds, the practical effect is for the Court to dictate how the laws shall be executed, or, more precisely, how they shall not be. That arrogation by the Court creates the serious potential of violating Article II by displacing the President as the executor of the laws.<sup>168</sup>

In so doing, the court also “ignores the fact that the Executive has an independent and constitutionally mandated role in the discernment and articulation of constitutional meaning in connection with its execution of the laws.”<sup>169</sup> Indeed, by displacing the Executive's interpretation with its own, the court removes any political accountability for those policy judgments. The *Chevron* Court found such accountability to be critical, noting that “federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”<sup>170</sup> Such political

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164. See Vermeule, *supra* note 5, at 1960–61.

165. *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

166. U.S. CONST. art. II, § 3.

167. *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).

168. Kelley, *supra* note 4, at 883.

169. *Id.* at 881.

170. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

accountability is of heightened importance in the modern avoidance context, where, in the court's judgment, the Executive has interpreted a statute to approach (though perhaps not exceed) constitutional limits.

Indeed, applying modern avoidance to an agency's interpretation of an ambiguous statute it administers frustrates the careful balance of powers between all three branches, as it was Congress in the first place that charged the Executive to interpret and implement the statute.<sup>171</sup> It does not appear that the Court has ever explicitly identified these constitutional effects of the modern avoidance canon.<sup>172</sup> It is worth noting, however, that the Court's wording of the *Chevron* rule hints that this separation of powers concern may have been at least an implicit factor: "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."<sup>173</sup> To the extent the Court has not previously recognized this problem, it could serve as a compelling justification to clear up the confusion created by *DeBartolo*, *Solid Waste Agency*, and *Rust*.

Moreover, while the Court has not explicitly recognized the separation of powers concerns that modern avoidance pose for the Executive, it has suggested that the canon plays no role at *Chevron* step two. Indeed, far from giving this interpretative canon *Chevron*-displacing force, the Court has suggested that it is a helpful guidepost for courts, not a binding rule of interpretation on the Executive. In *Spector v. Norwegian Cruise Line Ltd.*, the Court explained that its invocation of the avoidance canon in *Clark* "simply informed the choice among plausible readings of § 1231(a)(6)'s text."<sup>174</sup> The Court drew a sharp distinction between the canon and what it called "implied limitations on otherwise unambiguous [text]." Such "implied limitations" include, the Court explained, the presumptions that, absent a clear statement, statutes do not apply extraterritorially or impose monetary liability on states.<sup>175</sup>

In other words, the difference between the modern avoidance doctrine

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171. Kelley, *supra* note 4, at 872–73 ("The defects in the operation of the avoidance canon are particularly clear in the *Chevron* context, perhaps because the Executive has a congressional delegation of power behind its statutory interpretation. The *DeBartolo Corp.* rule, in other words, pits the Court not only against the Executive, but also against the congressional allocation of law-elaboration authority to the Executive.").

172. See *id.* at 869 (mentioning the Court's failure to "take[ ] note of these effects of the avoidance canon").

173. *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740–41 (1996).

174. 545 U.S. 119, 140 (2005).

175. *Id.* at 139.

and clear statement rules “is the distinction between a canon for choosing among plausible meanings of an ambiguous statute and a clear statement rule that implies a special substantive limit on the application of an otherwise unambiguous mandate.”<sup>176</sup> These latter sorts of implied, substantive limitations could well constrain agency discretion, just as the presumption against retroactivity limited agency discretion in *Bowen v. Georgetown University Hospital*.<sup>177</sup> By contrast, the mere possibility that a textually plausible interpretation of an ambiguous statute might present constitutional concerns in no way detracts from “*Chevron*’s premise” that “it is for agencies, not courts, to fill statutory gaps.”<sup>178</sup>

Indeed, scholars have warned that the importation of normative canons into the *Chevron* framework would impermissibly strip an agency of its congressionally delegated law-elaboration authority. Professor Adrian Vermeule, for instance, has argued that judicial reliance on the “rich brew of judge-made canons and collateral sources” would “read[ ] agency deference out of the picture by narrowing agencies’ gap-filling power to the residual area in which judicial tools run out.”<sup>179</sup> Accordingly, he has counseled that, unless Congress “clearly says otherwise,” courts should not employ any tools for resolving ambiguity but should defer to agency determinations regarding these normative values in policymaking.<sup>180</sup> Similarly, Professors Tom Merrill and Kristin Hickman have underscored that not only does modern avoidance undermine congressional delegation of difficult policy choices to the Executive; it “has the opposite effect of enlarging the scope of policymaking by courts at the expense of Congress and the agencies.”<sup>181</sup> Another commentator has likewise noted that the “danger in applying substantive canons in Step Two is that it may lead to excessive discretion on the part of judges and defeat the purposes of *Chevron*.”<sup>182</sup>

The main response to this argument appears to be two-fold. First, there is the argument that the threat of modern avoidance at *Chevron* step two creates incentives for agencies to take constitutional concerns seriously. Second, applying modern avoidance in the *Chevron* framework may help to prevent the “vetogates” problem: “The obvious consequence of the

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176. *Id.* at 141.

177. 488 U.S. 204, 213–14 (1988).

178. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

179. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 206 (2006).

180. *Id.* at 201.

181. Merrill & Hickman, *supra* note 19, at 915.

182. Greenfield, *supra* note 67, at 53.

vetogates structure is that federal statutes are hard to enact. . . . If vetogates make statutes hard to enact, they make them doubly hard to repeal.”<sup>183</sup> In other words, modern avoidance allows courts to avoid repealing statutes while preserving congressional intent to the greatest extent possible.

A closer examination of these arguments, however, reveals that neither is compelling in the administrative context. As to the former, all three branches of government have a duty to act within constitutional limits. But no branch has the constitutionally mandated duty to avoid constitutional questions. Nor does the Judiciary have the power to require another branch to avoid constitutional questions. As Professor Kelley explains, “Such treatment of a coordinate branch not only shows a lack of inter-branch comity, it positively turns *Marbury v. Madison* on its head.”<sup>184</sup> By contrast, the threat of applying *classical* constitutional avoidance at *Chevron* step two should be sufficient to ensure that the Executive fulfills its constitutional duty to interpret statutes within actual constitutional limits. Moreover, the utility of normative canons like modern avoidance as “democracy-forcing rules” has been called into question due to their inability to affect congressional behavior.<sup>185</sup> Similar concerns apply to their ability to promote administrative deliberation, and it is doubtful that the benefits of any such deliberation would outweigh the increased decision costs<sup>186</sup> and unpredictable results that follow from allowing courts to apply modern avoidance to set aside otherwise reasonable agency interpretations.<sup>187</sup>

For similar reasons, proscribing—not prescribing—modern avoidance at *Chevron* step two actually assists in preventing the vetogates problem. Unlike Congress, agencies can respond more easily and swiftly to a court’s invalidation of an agency’s interpretation of a statute on constitutional grounds “because, burdensome though administrative procedures can be, they do not involve the same types of ‘vetogates’ entailed in getting legislation through Congress and signed by the President.”<sup>188</sup> If the

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183. William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1448, 1453 (2008). It must be noted that Professor Eskridge did not argue that his vetogates framework encourages or discourages the use of modern constitutional avoidance in administrative law.

184. Kelley, *supra* note 4, at 868 (footnote omitted).

185. VERMEULE, *supra* note 179, at 198.

186. *See id.* at 215 (“The interpretive complexity shunted out of the judiciary would be managed at a lower cost by agencies.”).

187. *See id.* at 209 (“Only a kind of blind confidence in judicial capacities could suggest that judges are systematically superior to agency administrators in determining what legislators intended, or what purposes an enacting majority meant to pursue, or what policy tradeoffs the statute made.”).

188. Metzger, *supra* note 120, at 532.

agency's interpretation is struck down as unconstitutional, under *Brand X* the agency will be given another chance to construe the statute in a constitutional manner. The statute itself remains unaffected; there would be no legislative vetogates through which to jump. Utilizing modern avoidance to avoid striking down an agency's interpretation thus fails to advance the doctrine's main purpose: to prevent the statute from being struck down as unconstitutional. Perhaps for this reason, Professor Metzger has observed that "a partial remand of an agency decision does not pose the same danger of overturning careful political compromises as does application of the canon of avoidance."<sup>189</sup>

In all events, even if the prudential benefits of applying modern avoidance at *Chevron* step two outweighed their costs, which they do not, the separation of powers concerns discussed above would counsel against—if not outright prohibit—such an application.<sup>190</sup> Instead, under a *Brand X*

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189. *Id.* at 533.

190. The political accountability concerns that motivate, in part, traditional separation of powers theory bear a striking resemblance to popular constitutionalism, in that judicial review historically was (and should continue to be) "a power to be employed cautiously, only where the unconstitutionality of a law was clear beyond doubt." LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 99 (2004); *see also* MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1353 (2006) (arguing for a similarly narrow definition of judicial review but limiting the scope of the article to "judicial review of legislation, not judicial review of executive action or administrative decisionmaking"). As Dean Larry Kramer has meticulously chronicled and argued, judicial review historically began "as a 'political-legal' act, a substitute for popular resistance, required by the people's command to ignore laws that were ultra vires—though only when the unconstitutionality of a law was clear beyond dispute." KRAMER, *supra*, at 92. It was not until "the past generation or so," Dean Kramer explains, that "[c]onstitutional history was recast—turned on its head, really—as a story of judicial triumphalism. A judicial monopoly on constitutional interpretation is now depicted as inexorable and inevitable." *Id.* at 229. Popular constitutionalism thus counsels a return to the historically limited role of judicial review and the elimination of the notion of judicial supremacy in constitutional interpretation: "That means publicly repudiating Justices who say that they, not we, possess ultimate authority to say what the Constitution means"; "Above all, it means insisting that the Supreme Court is our servant and not our master." *Id.* at 247–48. In sum, "The Supreme Court is not the highest authority in the land on constitutional law. We are." *Id.* at 248.

Note how modern avoidance turns popular constitutionalism on its head, from a theory of judicial review that required *no* doubt concerning *unconstitutionality* to one that allows reconstruction of a statute where there is merely *any* doubt of *constitutionality*. To be sure, the Framers did not envision the administrative state we have today, and constitutional avoidance—even in its classical form—did not appear until the 1800s. But popular constitutionalism naturally supports a *Brand X* doctrine of avoidance. The Judiciary does not, and historically has not, had a monopoly on interpreting the Constitution. Nor, certainly, does popular constitutionalism's limited formulation of judicial review encompass

doctrine of constitutional avoidance, the only avoidance doctrine that should apply in the *Chevron* analysis is the classical form—i.e., an agency has the obligation to adopt a constitutional interpretation of an ambiguous statute it administers, and a court should strike down an agency's interpretation as impermissible if it is actually unconstitutional.

### C. *Separation of Powers Revisited Under Network Theory*

These separation of powers considerations are perhaps better understood under Dean Rubin's network theory of government. Some explanation of the theory is required. In *Beyond Camelot*, Dean Rubin explains that traditional theories of American government fail to fully account for the role of the modern administrative state; instead, they "represent a mixture of the political thought of the Middle Ages and the political fantasies of that era, in particular the legend of Camelot."<sup>191</sup> Accordingly, theories of American government must be recalibrated to align with the reality of the expansive role of the modern administrative state.<sup>192</sup> To reconstruct the proper structure of American government, Dean Rubin embarks on a quasi-Cartesian thought experiment of "bracketing" traditional concepts used to describe American government.

First and foremost, Dean Rubin discards the traditional "branches of government" metaphor because it fails on numerous levels to capture the structure and relationship of American government.<sup>193</sup> The modern administrative state is not merely a subbranch of the Executive Branch. Some independent agencies are not even located in that branch; most agencies were created by the Legislative Branch, and the agencies have their roots in all aspects of the modern state. Nor is the accompanying

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the power to strike down a politically accountable branch's interpretation of legislation on the ground that the construction raises constitutional doubts. To the contrary, such a broad view of judicial review finds no historical support. By removing the weight of judicial supremacy, as popular constitutionalists advocate, "a different equilibrium [will] emerge, as a risk-averse and potentially vulnerable Court adjusts its behavior to greater sensitivity on the part of political leadership in the other branches." *Id.* at 253. This change in "the Justices' attitudes and self-conception as they went about their routine," *id.*, should include embracing a *Brand X* doctrine of avoidance.

191. RUBIN, *supra* note 22, at 6.

192. *Id.* at 35, 36 ("The advent of the administrative state, resulting from the articulation of structure and purpose that reached their tipping points about two centuries ago, has rendered the concepts we use to describe our government outdated. . . . In fact, the modern administrative state, in its articulation and its instrumentalism, is the way we take collective action to solve the enormous problems and achieve the even more enormous promises of modern life. As we advance into this new millennium, we need to reconcile ourselves to its existence, understand its underlying structure, and make it work.").

193. *Id.* at 43–48.

concept of separation of powers between the branches particularly accurate in light of the administrative state's overlap with all three branches. All three branches have the power to supervise and give certain commands to administrative agencies.

In place of the traditional "tree" metaphor, Dean Rubin proposes the more modern metaphor of a network where each government entity is a discrete unit within the network that has a defined role, operations, interconnectivity, and an ability to receive and give commands to other units:

The network metaphor does not imply that there can be no limitations on a governmental unit's ability to issue assignments to other units. But those limits must be specifically argued for, not derived from an outmoded, pre-analytic image of government. One important limitation emerges from the structure of the network itself, in that each unit is linked only to certain other units. Thus, the network's design may provide that a given unit may only issue assignments over certain pathways, and only to certain other units that are generally designated as its subordinates. Indeed, the identity of an individual or unit as the subordinate of another individual or unit generally depends on the ability of the second unit to issue assignments to the first.<sup>194</sup>

Dean Rubin also brackets the concepts of "power" and "discretion" and replaces them with the concepts of "authorization" and "supervision."<sup>195</sup> In other words, Congress, agencies, and courts do not have some inherent power or discretion to perform certain actions; instead, they receive certain authorization to act or supervise from other governmental units and sources (including statutes and the Constitution itself). For instance, "the legislature authorizes, or designs, administrative agencies, and each agency typically authorizes a variety of subsidiary offices."<sup>196</sup> "When the legislature enacts a statute enforced by an administrative agency, it is authorizing the agency to act, but it can also be regarded as controlling the agency's operations. . . . Supervision within the administrative apparatus involves these same considerations."<sup>197</sup> Such supervision must be assigned and confined to that assignment.<sup>198</sup>

Network theory more precisely captures the expansive nature and role of the modern administrative state than the traditional separate branches metaphor. When network theory is substituted for the traditional branches

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194. *Id.* at 63 (footnote omitted).

195. *See id.* at 91–94.

196. *Id.* at 93.

197. *Id.* at 105.

198. Similarly, Dean Rubin proposes that "the bracketed concept of law can be replaced, in the administrative state, with the alternative concept of policy and implementation." *Id.* at 203.

metaphor, outdated generalities concerning the Judiciary's role are similarly discarded—i.e., “that courts are the primary interpreters of law.”<sup>199</sup> Indeed, under the network structure, “administrative agencies are generally the primary interpreters of statutes in the modern state, and most of these interpretations are never reviewed by the judiciary.”<sup>200</sup> To understand the agency's authority, one must identify the inputs. In particular, Congress, under its Article I authority, authorizes the agency to administer a particular statutory scheme, which includes a policymaking role of filling the holes in the statute. Depending on the agency, it also may have executive authority under Article II to execute and elaborate the law.

One must do the same to understand a court's scope of authority to review agency action. Courts play a certain supervisory role over administrative interpretations of law, but that role is confined to the assignments given to them by other governmental units and sources, such as Congress or the Constitution. From Congress, courts obtain supervisory authority under the Administrative Procedure Act and often additional review authority from the substantive statute the agency administers. From the Constitution, courts have the duty and authority to ensure that an agency acts within constitutional limits.

By focusing on the sources of authority instead of outdated notions of separation of powers, the role of modern avoidance (or lack thereof) in the review of administrative interpretations of law becomes clear. The Constitution plainly does not authorize courts to invoke modern avoidance to overturn an agency's otherwise permissible interpretation of a statute Congress has authorized the agency to interpret. Nor has Congress authorized courts to invoke such doctrine as part of their supervisory role. To the contrary, Congress authorizes the agency to be the primary interpreter of a statute it administers, and an executive agency also has authority under Article II to execute the law in a manner it deems is constitutional. If Congress were to determine that modern avoidance is preferred in the administrative context, it could require the agency to comply with the doctrine with respect to a particular statute, or it could authorize the Judiciary to utilize modern avoidance as part of its supervisory role over agency action. To date Congress has done neither.<sup>201</sup>

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199. *Id.* at 64.

200. *Id.*

201. Similarly, with respect to executive agencies, the President theoretically may also have authority under Article II to require an agency to apply modern avoidance when it construes statutes it administers.



## IV. APPLICATIONS

Part II explored the application of this *Brand X* doctrine in one immigration context. But its application is not so limited. This Part briefly provides a few additional examples and accompanying musings. As these examples illustrate, this *Brand X* approach to constitutional avoidance has a wide-reaching application to a variety of administrative contexts.

## A. Immigration and National Security Law

In addition to the administrative interpretation discussed in Part II, questions of constitutional avoidance abound in the immigration and national security context. This may be due, in part, to the fact that there are myriad undecided constitutional questions—or “phantom constitutional norms”—that have arisen in light of the constitutionally unsettled nature of the federal government’s plenary power over immigration and national security.<sup>202</sup> Consider another recent (and related) example.

Under the Immigration and Nationality Act, the Attorney General has discretion to authorize continued detention “beyond the removal period” of a noncitizen “who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal.”<sup>203</sup> The Attorney General has promulgated regulations that require, among other things, post-order custody reviews by agency officials within 90 days, 180 days, and 18 months of confinement; if continued detention is no longer deemed necessary, the noncitizen is released on supervised release.<sup>204</sup>

When confronted with a challenge to these regulations in *Diouf v. Napolitano*, the Ninth Circuit invoked modern avoidance (erroneously at *Chevron* step one<sup>205</sup>) and found that the regulations raise constitutional doubts because they “do not provide for an in-person hearing, they place the burden on the alien rather than the government and they do not provide for a decision by a neutral arbiter such as an immigration judge.”<sup>206</sup>

202. See, e.g., Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (discussing how invoking the plenary power doctrine without deciding whether it is indeed grounded in the Constitution has created a number of subconstitutional or phantom constitutional norms in immigration law).

203. 8 U.S.C. § 1231(a)(6) (2006).

204. See 8 C.F.R. § 241.4(k)(2)(ii)–(iii) (2011).

205. 634 F.3d 1081, 1090 n.11 (9th Cir. 2011). For the reasons set forth in Part III.A, the Ninth Circuit’s holding that “the canon applies at *Chevron* step one, because it is ‘a means of giving effect to congressional intent,’” *id.* (quoting *Clark v. Martinez*, 543 U.S. 371, 382 (2005)), cannot be squared with the Court’s decisions in *Brand X* and *Clark*.

206. *Id.* at 1091.

“To address these concerns,” the court ordered that “aliens who are denied release in their 180-day reviews must be afforded the opportunity to challenge their continued detention in a hearing before an immigration judge.”<sup>207</sup>

The effect of the Ninth Circuit’s application of modern avoidance is plain: the court in essence amended the agency’s regulations without determining that there was an actual constitutional violation, much less remanding to the agency to allow it to exercise its own expert judgment and congressionally delegated discretion. Had the court applied the *Brand X* doctrine of constitutional avoidance, it would have been forced to answer the constitutional questions and thus accord proper deference to co-equal branches of government.

### B. *National Labor Relations Law*

A second apt example is the regulation the Court confronted in *DeBartolo*.<sup>208</sup> The issue in *DeBartolo* was whether to accord *Chevron* deference to the National Labor Relations Board’s construction of a provision in the National Labor Relations Act that prohibits union strikers from engaging in acts “to threaten, coerce, or restrain any person engaged in commerce.”<sup>209</sup> The Board had construed the provision “to cover handbilling at a mall entrance urging potential customers not to trade with any retailers in the mall, in order to exert pressure on the proprietor of the mall to influence a particular mall tenant not to do business with a nonunion construction contractor.”<sup>210</sup>

As discussed in Part I.C, the Court did not decide whether the Board’s construction was constitutional and instead struck down the agency’s interpretation under modern constitutional avoidance. Indeed, the Court strained to avoid providing an answer to the constitutional question:

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207. *Id.* at 1092.

208. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988).

209. 29 U.S.C. § 158(b)(4)(ii) (2006); see *DeBartolo Corp.*, 485 U.S. at 574.

210. *DeBartolo Corp.*, 485 U.S. at 574.

Had the union simply been leafletting the public generally, including those entering every shopping mall in town, pursuant to an annual educational effort against substandard pay, there is little doubt that legislative proscription of such leaflets would pose a substantial issue of validity under the First Amendment. The same may well be true in this case, although here the handbills called attention to a specific situation in the mall allegedly involving the payment of unacceptably low wages by a construction contractor.

That a labor union is the leafletter and that a labor dispute was involved does not foreclose this analysis. We do not suggest that communications by labor unions are never of the commercial speech variety and thereby entitled to a lesser degree of constitutional protection.<sup>211</sup>

Instead of providing a definitive answer on the constitutionality of the Board's interpretation, the Court developed its own interpretation of the statute. The Court held that its own interpretation "not reaching the handbilling involved in this case is not foreclosed either by the language of the section or its legislative history" and thus was an appropriate substitution under modern avoidance.<sup>212</sup>

The point need not be belabored, but it is difficult to square the Court's substitution of its own interpretation in light of the deference rule set forth in *Chevron* and reinforced in *Brand X*—even less so in light of the separation of powers concerns raised by the Court's encroachment on the Board's congressionally delegated law-elaboration authority.<sup>213</sup> Had the Court instead applied the classical version of avoidance, the Court may well have upheld the Board's interpretation; or, more likely based on the Court's reasoning, the Board (and Congress) would have been in the same position as under modern avoidance except that the Board would have received a definitive answer on the constitutional question and an opportunity to adjust its interpretation accordingly. This case therefore further illustrates the substantial costs and the absence of any real benefits of applying modern avoidance under the *Chevron* framework.

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211. *Id.* at 576.

212. *Id.* at 588.

213. One interesting wrinkle here is that the National Labor Relations Board is an independent agency, see *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F.2d 743, 748 (7th Cir. 1945), and thus the constitutional separation of powers concerns may not be quite as compelling as in the case of an agency controlled by the President. See Kagan, *supra* note 37, at 2373–74 (arguing that agencies controlled by the President should receive greater deference than independent agencies due to political accountability factors).

*C. Environmental Law*

The same can be said of the question implicated in *Solid Waste Agency*.<sup>214</sup> At issue there was the U.S. Army Corps of Engineers's interpretation of § 404(a) of the Clean Water Act, which regulates the discharge of dredged or fill material into navigable waters.<sup>215</sup> The Corps had interpreted "navigable waters" to cover abandoned sand and gravel pits which provide habitat for migratory birds.<sup>216</sup> The Court held that the government did not have jurisdiction under the Clean Water Act to regulate isolated ponds and mudflats. Notwithstanding this ruling at *Chevron* step one, the Court also held that the Corps's interpretation was owed no *Chevron* deference because it raised serious constitutional questions under the Commerce Clause.<sup>217</sup> Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented. While not opining explicitly on the Court's invocation of modern constitutional avoidance, Justice Stevens called the Court's refusal to accord *Chevron* deference "unfaithful" and argued that the Corps's interpretation was fully consistent with the Commerce Clause.<sup>218</sup> Justice Stevens's dissent makes the Court's gratuitous invocation of modern avoidance all the more puzzling.

But *Solid Waste Agency* was not the end of this story. Five years later the Corps's (arguably unchanged) interpretation of *navigable waters* returned to the Court in *Rapanos v. United States*.<sup>219</sup> The Court again rejected the Corps's interpretation, yet could not find five votes for an interpretation of its own. The four-Justice plurality argued that the Clean Water Act only covered permanent bodies of water with a continuous connection to waters of the United States.<sup>220</sup> Justice Kennedy advocated a case-by-case assessment of whether a particular wetland has a "significant nexus" to traditional navigable waters.<sup>221</sup> Justice Kennedy's position—which garnered only his vote—controlled because it was the narrowest interpretation.<sup>222</sup>

Yet, Professor Metzger has argued that the agency—exercising its

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214. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

215. 33 U.S.C. § 1344(a) (2006); *Solid Waste Agency*, 531 U.S. at 162.

216. *Solid Waste Agency*, 531 U.S. at 162.

217. *Id.* at 174.

218. *Id.* at 191, 196–97 (Stevens, J., dissenting).

219. 547 U.S. 715 (2006).

220. *Id.* at 742.

221. *Id.* at 782 (Kennedy, J., concurring).

222. See, e.g., *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) ("For the reasons stated below, we join the Seventh and the Ninth Circuits' conclusion that Justice Kennedy's 'significant nexus' test provides the governing rule of *Rapanos*.").

expertise and facing political accountability not encountered by the Court—may have chosen other available approaches, “such as exempting any wetlands and tributaries not clearly navigable waters in their own right, or creating a rebuttable presumption that wetlands adjacent to navigable waters or their tributaries are subject to regulation.”<sup>223</sup> Indeed, in light of the *Brand X* doctrine of constitutional avoidance, the agency may yet be able to write another chapter in this story by advancing a new, less sweeping interpretation.

Chief Justice Roberts’s concurring opinion in *Rapanos* also merits mention. The Chief Justice lamented that the Corps did not refine its “essentially boundless view of the scope of its power” in light of *Solid Waste Agency* and thus did not “provid[e] guidance meriting deference under our generous standards.”<sup>224</sup> He further explained that “[g]iven the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the Environmental Protection Agency would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority.”<sup>225</sup> These points are well taken. But perhaps the agency would have had more guidance from *Solid Waste Agency* had the Court there applied the classical canon of avoidance—and answered the constitutional question(s)—instead of applying the modern canon that dodged them.

#### D. Federal Election Law

Federal election law is another context in which modern avoidance has played a critical role, as Congress has delegated broad authority to the Federal Election Commission (FEC) to interpret federal election law. For instance, in *Chamber of Commerce v. FEC*,<sup>226</sup> the U.S. Court of Appeals for the D.C. Circuit was asked to evaluate the FEC’s interpretation of “member” as used (but not defined) in the Federal Election Campaign Act. The FEC’s interpretation “in effect limit[ed] ‘members’—to whom a membership organization can convey political messages and solicitations—to individuals having the right to vote, directly or indirectly, for at least one member of the organization’s highest governing body.”<sup>227</sup> The D.C. Circuit noted that “the Supreme Court quite clearly recognized, by not attempting an ‘exegesis,’ that the word [*member*] has a range of possible meanings,” but held that the FEC was owed no *Chevron* deference because “the

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223. Metzger, *supra* note 120, at 533.

224. *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).

225. *Id.*

226. 69 F.3d 600 (D.C. Cir. 1995).

227. *Id.* at 601; *see also* 2 U.S.C. § 431(9)(B)(iii) (2006); 11 C.F.R. § 114.1(e)(2) (2011).

interpretation the Commission has codified presents serious constitutional difficulties.”<sup>228</sup> Indeed, the court appeared to extend modern avoidance as an obligation “to construe the statute to avoid constitutional difficulties if such a construction is not plainly contrary to the intent of Congress.”<sup>229</sup>

Interestingly, the following year, when faced with a challenge to an FEC interpretation of a different statute, the D.C. Circuit refused to apply modern avoidance to trump *Chevron* deference because the court decided it could “easily resolve the [petitioners’] First Amendment challenges through the application of controlling precedent.”<sup>230</sup> In light of this dichotomy, it may be fruitful to take a closer look at courts’ decisions to invoke modern avoidance to determine in what instances they invoke it because they believe the agency’s interpretation is actually unconstitutional and when they invoke it because there is reasonable doubt without such certainty. Such an inquiry is reminiscent of Professor Karl Llewellyn’s eminent legal realist argument that interpretive canons often may be used to justify reasoning by other means.<sup>231</sup>

#### E. Federal Communications Law

A final example comes from federal communications law. Under the Public Telecommunications Act, broadcasters face an indecency ban that proscribes against “utter[ing] any obscene, indecent, or profane language by means of radio communication,” which Congress has instructed the FCC to enforce between 6 a.m. and 10 p.m.<sup>232</sup> This statutory prohibition has prompted a number of Supreme Court decisions—the most recent of

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228. *Chamber of Commerce*, 69 F.3d at 604–05.

229. *Id.* at 605.

230. *Republican Nat’l Comm. v. FEC*, 76 F.3d 400, 409 (D.C. Cir. 1996).

231. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950); see also Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 648 (1992) (responding to Llewellyn and advancing a theory useful “in predicting when a judge will use a canon to decide a particular case, and when she will decline to invoke a canon, and choose instead to decide the case on some other grounds”). See generally John F. Manning, *Legal Realism & the Canons’ Revival*, 5 GREEN BAG 2D 283, 295 (2002) (“For many years, the force of Llewellyn’s essay and the triumph of strong post-war intentionalism and purposivism made it possible for such questions [concerning the usefulness of normative canons] to be neglected. With the return of realist skepticism about legislative intent and purpose, questions about the consistency, rationality, and legitimacy of the canons can no longer be ignored.”).

232. 18 U.S.C. § 1464 (2006); Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (codified at 47 U.S.C. § 303 note (2006) (Broadcasting of Indecent Programming; Federal Communications Commission (FCC) Regulations)).

which is *FCC v. Fox Television Stations, Inc.*<sup>233</sup>

In *Fox*, the Court, with Justice Scalia writing for a 5–4 majority, held that it was neither arbitrary nor capricious for the FCC to change its position and interpret the statutory indecency prohibition to cover the utterance of patently offensive words or phrases even if they are not sustained or repeated during the broadcast.<sup>234</sup> In reaching this conclusion, Justice Scalia rejected the application of the modern doctrine of constitutional avoidance to

limit the scope of authorized executive action. In the same section authorizing courts to set aside “arbitrary [or] capricious” agency action, the Administrative Procedure Act separately provides for setting aside agency action that is “unlawful,” which of course includes unconstitutional action. We think that is the only context in which constitutionality bears upon judicial review of authorized agency action.<sup>235</sup>

In other words, only the classical form of avoidance applies to authorized executive action. To be sure, Justice Scalia observed, in an accompanying footnote, that the Court had previously applied modern avoidance to statutory questions under *Chevron*.<sup>236</sup> But that does not mean the Court should continue to do so—especially in light of *Brand X* and *Norwegian Cruise Line*.<sup>237</sup>

233. 129 S. Ct. 1800 (2009).

234. *Id.* at 1812, 1819.

235. *Id.* at 1812 (alteration in original) (quoting 5 U.S.C. § 706(2)(A) (2006)).

236. *Id.* at 1812 n.3. This discussion of constitutional avoidance was in response to Justice Breyer’s suggestion in dissent that the Court should remand the matter to the agency and “ask the agency to reconsider its policy decision in light of the concerns raised in a judicial opinion.” *Id.* at 1840 (Breyer, J., dissenting). Justice Scalia responded that such a “strange and novel disposition would be entirely unrelated to the doctrine of constitutional avoidance, and would better be termed the doctrine of judicial arm-twisting or appellate review by the wagged finger.” *Id.* at 1812 n.3 (majority opinion); *see also* Metzger, *supra* note 120, at 484 (discussing further this exchange in *Fox*).

237. While not invoking modern avoidance, the Court nevertheless avoided the constitutional question whether the FCC’s orders and regulations interpreting the statute are constitutional. Justice Thomas, in his concurring opinion, argued that it may be time for the Court to revisit its precedents underlying the FCC’s interpretation of the obscenity prohibition. *See Fox Television Stations, Inc.*, 129 S. Ct. at 1819–22 (Thomas, J., concurring) (questioning *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)). The Second Circuit had not reached the constitutionality of the FCC’s interpretation, so the Court declined to address the constitutional questions raised by the parties. The Court noted that “whether it is unconstitutional, will be determined soon enough, perhaps in this very case.” *Id.* at 1819 (majority opinion). Indeed, the Second Circuit, on remand, confronted the constitutional issue directly and held that “the FCC’s policy violates the First Amendment because it is unconstitutionally vague, creating a chilling effect that goes far beyond the fleeting expletives at issue here.” *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 319 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 3065 (2011).

## CONCLUSION

This Article has demonstrated why the modern doctrine of constitutional avoidance should never have been applied in the administrative context where a court is charged “to accept the agency’s [reasonable] construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.”<sup>238</sup> The reasons are twofold: First, there are the practical considerations that, while courts are well equipped to decide whether an interpretation is actually constitutional, agencies are often better equipped to address the constitutional questions in the ambiguous statutes they administer by filling the holes with procedural safeguards and substantive criteria. Second, when a court displaces an agency’s preferred (and constitutional) interpretation of a statute it administers with one the court believes better avoids constitutional questions, the court violates separation of powers—under both Article I and Article II. Yet courts, including the Supreme Court, have on occasion applied modern avoidance to trump *Chevron*. *Brand X* and its progeny should be viewed as providing an opportunity for courts to correct course.

Accordingly, at least in the administrative context, courts should discard the use of the modern form of constitutional avoidance and, in essence, return to the classical form. If an agency has exercised its discretion to provide an otherwise reasonable interpretation that raises constitutional questions, a court must determine whether that interpretation is indeed unconstitutional and thus impermissible under *Chevron* step two. Otherwise, Congress’s delegation of authority—as well as the Executive’s fulfillment of its constitutional duty to execute the law—should be accorded proper deference. This is not only the more prudent course of action, but also the constitutional one.

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The Supreme Court has granted certiorari and will have the last word on this issue.

238. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 & n.11 (1984)).



# FOREIGN ADMINISTRATIVE LAW AND INTERNATIONAL TAXATION: A CASE STUDY OF TREATY IMPLEMENTATION IN CHINA<sup>†</sup>

WEI CUI\*

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## INTRODUCTION

The interactions between foreign and domestic tax laws have long been a preoccupation for both the U.S. government and U.S. taxpayers doing

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<sup>†</sup> Editors' Note: While we have faithfully endeavored to create accurate and convenient citations for Professor Cui's Article, many of the Chinese sources proved unwieldy and difficult to verify or translate. We have relied on Professor Cui and have provided as much information as possible so as to give our readers a sporting chance of locating a source of interest.

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business abroad.<sup>1</sup> For example, when the U.S. Internal Revenue Service (IRS) considers the grant of income tax treaty benefits to foreign persons with respect to their U.S.-source income, tax treaties require the IRS to determine whether the foreign persons are residents of the relevant treaty partner countries on the basis of the laws of such other countries.<sup>2</sup> In the United States and globally, “international tax arbitrage”—the exploitation of differences among the tax laws of different countries to reduce or even eliminate the tax burden on otherwise taxable income—has also become a central topic in international taxation.<sup>3</sup> Traditionally, this has led the international community of tax authorities, taxpayers, and tax practitioners to take serious interest in the substantive tax laws of other jurisdictions. What is less common, however, is for either government officials or tax professionals to learn about the broader administrative law framework within which substantive tax rules are applied in foreign countries. How tax rules are made in other countries and the process for ensuring their consistent and accurate application may be viewed alternatively as too esoteric or as too basic to warrant sustained attention, especially for a transaction-focused profession.<sup>4</sup>

Sometimes, though, foreign administrative law issues are harder to ignore. This is certainly the case for parties facing formal disputes (or the possibility thereof) with foreign tax authorities. Beyond specific disputes,

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1. See STAFF OF JOINT COMM. ON TAXATION, 107TH CONG., STUDY OF THE OVERALL STATE OF THE FEDERAL TAX SYSTEM AND RECOMMENDATIONS FOR SIMPLIFICATION, VOLUME I: STUDY OF THE OVERALL STATE OF THE FEDERAL TAX SYSTEM 93–100 (Comm. Print 2001) (outlining the implications of interactions between U.S. tax laws and foreign tax laws, and between tax treaties and U.S. tax laws).

2. See U.S. DEP’T OF TREASURY, U.S. MODEL TECHNICAL EXPLANATION ACCOMPANYING THE U.S. MODEL INCOME TAX CONVENTION OF NOV. 15, 2006, at 1 (2006), <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/TEMod006.pdf>. Being a tax resident of the treaty partner country is a necessary condition of treaty benefit eligibility. The United States also requires the determination of whether the treaty-benefit applicant “derives” U.S.-source income to be determined under the laws of the applicant’s resident country in cases where certain “reverse hybrid entities” are used. See I.R.C. § 894 (2006); Treas. Reg. § 1.894-1(d) (2011). The tax classification of foreign entities may also involve the analysis of foreign law. Treas. Reg. § 301.7701-3(b)(2)(ii) (2011). Many other examples may be offered.

3. See generally H. David Rosenbloom, *The David R. Tillinghast Lecture: International Tax Arbitrage and the “International Tax System,”* 53 TAX L. REV. 137 (2000) (discussing whether the level of concern over international tax arbitrage is justified); Daniel Shaviro, *Money on the Table?: Responding to Cross-Border Tax Arbitrage*, 3 CHI. J. INT’L L. 317 (2002) (considering advantages and disadvantages of international tax arbitrage); Mitchell A. Kane, *Strategy and Cooperation in National Responses to International Tax Arbitrage*, 53 EMORY L.J. 89 (2004) (emphasizing cooperation between countries to control but not eliminate international tax arbitrage).

4. But see *infra* note 9 and accompanying text, and the discussion *infra* Part V.

countries may occasionally take actions that broadly disturb the expectations of foreign investors and treaty partners, actions that must be interpreted in light of their specific legislative frameworks. The most well-known example of this is the “treaty override,” where “the domestic legislation of a State overrules provisions of either a single treaty or all treaties hitherto having had effect in that State.”<sup>5</sup> But there are also more common examples of how foreign countries’ administrative law systems matter. For instance, many countries, including the United States, tax their residents on their worldwide income and grant credits for any foreign income tax paid on foreign-source income.<sup>6</sup> However, to protect the domestic fisc, such countries typically require the foreign tax paid to be compulsory in nature. Noncompulsory or “voluntary” payments to other governments cannot be credited.<sup>7</sup> What is a compulsory tax, however, very much depends on whether the collection of the tax has sufficiently firm grounds in the law. When the other country’s legal system is in disorder, the question can be difficult to answer. This type of issue has been highlighted in protracted and intensely contested U.S. litigation in recent years.<sup>8</sup> It is likely that such disputes will occur with even greater frequency in the future.<sup>9</sup>

Indeed, in a significant and growing range of cases, it is no longer sufficient to ask just *what* the tax law is in a given foreign country. *How* tax law is adopted and enforced in that country has important implications both for those doing business in the country and for other countries’ tax authorities. This Article examines a particularly interesting class of such cases, relating to certain international tax rules recently adopted in China. All of the rules are promulgated by China’s State Administration of

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5. Org. for Econ. Cooperation and Dev. [OECD], *Tax Treaty Override* para. 2 (Oct. 2, 1989) [hereinafter *OECD Report on Treaty Override*].

6. I.R.C. §§ 901–908.

7. Treas. Reg. § 1.901-2(e)(5). See generally Alan Fischl & Michael Harper, *What Exactly Is a ‘Voluntary Tax’?*, J. INT’L TAX’N, May 2008, at 32–48 (discussing the increasing pressures on voluntary tax rules). Germany and Canada are examples of other countries with similar rules.

8. See *Riggs Nat’l Corp. v. Comm’r (Riggs I)*, 107 T.C. 301 (1996), *rev’d*, 163 F.3d 1363 (D.C. Cir. 1999) (*Riggs II*); *Riggs Nat’l Corp. v. Comm’r (Riggs III)*, 81 T.C.M. (CCH) 1023 (2001), *rev’d*, 295 F.3d 16 (D.C. Cir. 2002) (*Riggs IV*); *Riggs Nat’l Corp. v. Comm’r (Riggs V)*, 87 T.C.M. (CCH) 1276 (2004), *aff’d sub nom. PNC Fin. Servs. Grp., Inc. v. Comm’r*, 503 F.3d 119 (D.C. Cir. 2007) (detailing the interaction between the Brazilian and U.S. tax systems). These cases are further discussed *infra* Part V.

9. See *Global Reach: U.S. Bank Gets FTC for Brazilian Tax by ‘Act of State’ Doctrine*, J. INT’L TAX’N, Mar. 1999, at 4, 5 (attributing the increasing number of international tax disputes to globalization).

Taxation (SAT)<sup>10</sup> and are controversial in that they appear to conflict with China's obligations under income tax treaties. The application of these rules has resulted in disputes that directly or indirectly involve U.S. taxpayers<sup>11</sup> and has drawn high-level attention from the IRS.<sup>12</sup> The rules raise urgent questions. Should they be understood as treaty overrides on China's part? How should residents of treaty partner countries doing business in China cope with them? And what should the United States do about them?

This Article will demonstrate that these questions cannot be answered without an understanding of the Chinese administrative law system. The following features of the system are particularly relevant. Because China's legal framework for legislation and agency rulemaking is still a work in progress, important areas of rulemaking are not yet adequately regulated, such that the making and interpretation of law tend to devolve to low ranks in the government's administrative hierarchy. Indeed, devolution is so systematic in lawmaking that the domestic law procedures for giving proper legal effect to China's tax treaties are yet incomplete. Nonetheless, this has not prevented the Chinese government—including all of the legislative, executive, and judicial branches—from affirming that the treaties that it has entered into are binding on China. Nor has the government, and especially the judiciary, been prevented from both recognizing the superior effect of tax treaties over domestic tax law and from insisting that informal agency rules cannot be binding if they are inconsistent with higher, formal rules of law. It turns out that all of the controversial Chinese international tax rules discussed in this Article are informal rules of a very low rank.<sup>13</sup> To the extent that they conflict with China's domestic rules of law and its treaty

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10. The State Administration of Taxation (SAT) coordinates with the Chinese Ministry of Finance (MOF) in implementing tax policy and is therefore in many ways the counterpart to the U.S. Internal Revenue Service (IRS). The SAT does not itself engage in tax collection, however, and merely supervises subnational tax agencies in collection and enforcement.

11. For some recent cases see, for example, Jinji Wei, *SAT Receives Record Payment From Indirect Share Transfer*, 59 TAX NOTES INT'L 16, 16–17 (2010) (discussing a tax imposed on a U.S. company—believed to be a Carlyle affiliate—for an indirect transfer of shares in a Chinese resident company through a wholly owned Hong Kong subsidiary); Jinji Wei, *China Probes Goldman Sachs on Stock Transfers*, 59 TAX NOTES INT'L 635, 638–39 (2010) (reporting SAT's potential \$61 million capital gains tax assessment against Goldman Sachs); Dongmei Qiu, *China's Capital Gains Taxation of Nonresidents and the Legitimate Use of Tax Treaties*, 60 TAX NOTES INT'L 593, 617–19 (2010) (reviewing the case of a U.S.-owned Barbados company—believed to be an affiliate of the Texas Pacific Group—denied treaty benefits). See also *infra* Part IV.2 (discussing the PanAmSat controversy).

12. See, e.g., Lee A. Sheppard, *Don't Pay That Tax, Danilack Warns*, TAX NOTES TODAY, Apr. 7, 2011, available at LEXIS 2011 TNT 67-3 (commenting on certain positions taken by Chinese tax authorities).

13. See *infra* Part II.

obligations, therefore, Chinese courts may not give them legal effect, and they may also be challenged through administrative appeal.

This has two sets of implications. The first is that the SAT rules in question are not legally binding under Chinese domestic law where they conflict with tax treaties and may at best be viewed as “practically binding.”<sup>14</sup> However, if a U.S. taxpayer is subject to one of these rules and deprived of a treaty benefit, but does not attempt to prevent the application of the rule by seeking administrative or judicial review, it may be difficult for the taxpayer to argue that it has sought “practical and effective remedies” against the imposition of the tax—an important standard under the Internal Revenue Code (IRC) for determining whether a tax payment is noncompulsory and eligible for the foreign tax credit. In effect, the U.S. foreign tax credit rules impose a cost on U.S. taxpayers who do not challenge the application of the Chinese rules. In addition to protecting the U.S. fisc, this part of U.S. tax law also generates a positive externality for the Chinese legal system. This previously little-discussed type of unintended consequence of the interaction between U.S. and foreign law imparts a new meaning to the U.S. regulatory requirement that whether a foreign levy is a compulsory tax payment be determined “by principles of U.S. law.”<sup>15</sup>

The second set of implications is that because the controversial Chinese tax rules are invalid under China’s domestic law, none constitute a treaty override. Even so, to respond to these controversial rules, the IRS and the tax authorities of China’s other treaty partners must no longer make the traditional leap of faith that, *somehow*, domestic law mechanisms will secure faithful performance of treaty obligations. They must engage with China’s larger legislative and administrative framework and not just with a few individuals designated as China’s “competent authority.” U.S. foreign tax credit rules already require U.S. taxpayers to do so, and it is time for the U.S. government to acknowledge a similar need in its pursuit of U.S. tax policy.

The Article will be organized as follows. Part I will introduce the set of recent SAT rules are arguably in conflict with China’s tax treaty

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14. For the concept of practically binding rules, see generally Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1 (1990) (examining how various types of agency interpretations of statutes should be reviewed by the courts); Robert A. Anthony, “Well, You Want the Permit, Don’t You?” *Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN. L. REV. 31 (1992) (arguing that nonlegislative agency rules are not legally binding); Robert A. Anthony, *Three Settings in Which Nonlegislative Rules Should Not Bind*, 53 ADMIN. L. REV. 1313 (2001) (discussing how practically binding nonlegislative agency rules should not have a binding character).

15. Treas. Reg. § 1.901-2(a)(2)(i) (2011).

obligations. Part II characterizes the place of the rules within the Chinese administrative law framework. Part III describes the relation between tax treaties and China's domestic tax law, particularly how treaties are given the effect of law under Chinese domestic law. Part IV then reviews domestic legal mechanisms for challenging tax rules that are inconsistent with tax treaties, focusing especially on Chinese courts' likely responses. These sections lead to the conclusion that the problematic SAT rules are not legally binding. Part V goes on to draw out the implication of this conclusion for U.S. taxpayers, specifically in terms of what it would mean for them to have sought "effective and practical remedies" against tax collection pursuant to the SAT rules. Finally, Part VI examines the implications of the foregoing analysis for the management of future treaty relationships with China by the United States and other governments. Some summary remarks are offered in the Conclusion.

# I. RECENT CHINESE TAX RULES IN CONFLICT WITH TAX TREATIES

*Treaty overrides* typically refer to situations where national legislatures intentionally overrule the provisions of tax treaties.<sup>16</sup> In China, cases of direct conflict between domestic statutes and tax treaties are very rare. Only one aspect of the current Enterprise Income Tax Law (EIT Law)<sup>17</sup> generates such conflict. Most tax treaties contain nondiscrimination provisions, which generally prohibit less favorable treatments of the "permanent establishment" (PE) of an enterprise of a treaty partner country which carries on the same activities as an enterprise of the country where the PE is located.<sup>18</sup> Nonetheless, under the EIT Law, enterprises resident in China can claim both direct and indirect foreign tax credits for foreign income tax paid, whereas the Chinese establishments of nonresident enterprises, while taxed on the worldwide income effectively connected with such establishments, can claim only direct foreign tax credit.<sup>19</sup> In light of the fact that the EIT Law expressly states that where the provisions of tax treaties conflict with its own provisions, the treaty provisions shall prevail,<sup>20</sup> it is quite unclear whether this violation is intentional. And the infraction is unlikely to be significant in practice.<sup>21</sup>

16. See *OECD Report on Treaty Override*, *supra* note 5, paras. 2, 6.

17. Zhonghua Renmin Gongheguo Qiye Suo de Shui Fa (中华人民共和国企业所得税法) [Enterprise Income Tax Law] (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Jan. 1, 2008) (Lawinfochina) (China).

18. See OECD, *Articles of the Model Convention with Respect to Taxes on Income and on Capital*, art. 24(3), (July 17, 2008) [hereinafter *OECD Model Convention*].

19. Enterprise Income Tax Law arts. 23–24 (China).

20. *Id.* art. 58; see also *infra* Part III.

21. Few Chinese establishments of foreign enterprises are likely to own sufficient stakes

But more so even than in the United States, tax statutes in China form only the tip of the iceberg of the tax law. Both the EIT Law and the Individual Income Tax Law<sup>22</sup>—which together govern Chinese income taxation and therefore overlap most with the subject of income tax treaties—are brief. Somewhat more extensive rules are contained in the implementation regulations issued by the State Council—China’s Cabinet—for these statutes,<sup>23</sup> yet even these State Council regulations merely lay out the framework for the income taxes and delegate authority for further rulemaking to the Ministry of Finance (MOF) and SAT. Conflicts with tax treaties in either formal regulations<sup>24</sup> adopted by the two ministries or MOF/SAT policy documents<sup>25</sup> are also extremely rare.<sup>26</sup>

It is only when one delves into a more extensive body of rules, scattered among informal documents issued by the SAT over the years, that one finds more examples of inconsistencies with tax treaty provisions. A good place to start is a recent, comprehensive annotation of the China–Singapore treaty adopted by the SAT in July 2010, and released to the public in September 2010.<sup>27</sup> In issuing these Treaty Annotations, the SAT

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in foreign subsidiaries to claim indirect foreign trade credits (FTC) in the first place. However, “a breach of the treaty occurs when the overriding legislation is passed by the legislature and not only when it is applied to actual cases.” *OECD Report on Treaty Override*, *supra* note 5, para. 7.

22. Zhonghua Renmin Gongheguo Ge Ren Suo de Shui Fa (中华人民共和国个人所得税法) [Individual Income Tax Law] (promulgated by the Standing Comm., Sep. 10, 1980, effective as last amended June 30, 2011) (Lawinfochina) (China).

23. See Zhonghua Renmin Gongheguo Ge Ren Suo de Shui Fa Shi Shi Tiao Li (中华人民共和国个人所得税法实施条例) [Regulation on the Implementation of the Individual Income Tax Law] (promulgated by the St. Council, Jan. 28, 1994, effective July 19, 2011) (Lawinfochina) (China); Zhonghua Renmin Gongheguo Qiye Suo de Shui Fa Shi Shi Tiao Li (中华人民共和国企业所得税法实施条例) [Regulation on the Implementation of the Enterprise Income Tax Law] (promulgated by the St. Council, Dec. 6, 2007, effective Jan. 1, 2008) (Lawinfochina) (China). For a discussion of the status and legal effect of State Council regulations, see *infra* Part III.

24. For the legal status of ministerial regulations, see *infra* notes 89–91 and accompanying text.

25. The MOF and SAT, when jointly making tax policy (including in the income tax area), have adopted an unusual and controversial practice of issuing only informal circulars instead of formal regulations. For a discussion of this practice, see Wei Cui, *What Is the ‘Law’ in Chinese Tax Administration?*, 19 ASIA PAC. L. REV. 75 (2011). The legal status of these informal circulars is rather unclear, but because the MOF and SAT are institutionally endowed with the power of joint tax policymaking, they are likely to be regarded as having equal effect as formal ministerial regulations issued by the MOF or by the SAT.

26. Regulations in effect before 2008 contained two *prima facie* instances of breach of the nondiscrimination article of tax treaties similar to the breach found in the current Enterprise Income Tax (EIT) Law, and both were repealed by the EIT Law.

27. Zhonghua Renmin Gongheguo Zheng Fu He Xin Jia Po Gong He Guo Zheng Fu

intends that (1) where the corresponding provisions of other tax treaties entered into by China are identical to what is contained in the China–Singapore treaty, the interpretations offered in the Treaty Annotations would also apply to such other identical provisions; and (2) where there is any discrepancy between the Treaty Annotations and previous documents concerning the interpretation and application of tax treaties, the former shall prevail.<sup>28</sup> The Treaty Annotations go through each article of the China–Singapore treaty and are relatively lengthy (though, as discussed below, they often merely refer to previous SAT documents for further guidance), and thus have been viewed by many Chinese tax practitioners as having the status of the official “technical explanations” of all of China’s treaties.<sup>29</sup> Whether it *can* have that status, from a legal perspective, is questionable and will be considered below.<sup>30</sup> What we note first is that the Treaty Annotations reiterate a number of controversial treaty interpretations previously published by the SAT, while introducing some new, problematic interpretations.

Examples of provisions that *prima facie* conflict with international understandings of treaty provisions include the following:

1. *The expansion of the scope of PEs beyond treaty language.* The Treaty Annotations advance the position that where a foreign enterprise establishes a fixed place in China solely to provide spare parts to Chinese clients for equipment sold, the activity is a sufficiently fundamental and significant part of services provided by the head office of the enterprise to clients that it would constitute a PE.<sup>31</sup> This contradicts the clear language in the PE articles in tax treaties that “the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise” is

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Guan Yu Suo de Bi Mian Shuang Chong Zheng Shui He Fang Zhi Tou Lou Shui de Xie Ding Ji Yi Ding Shu Tiao Wen Jie Shi (中华人民共和国政府和新加坡共和国政府关于对所得避免双重征税和防止偷漏税的协定及议定书条文解释) [Interpretation of the Articles of the Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and the Protocol Thereof] (promulgated by the St. Admin. of Tax’n, July 26, 2010, effective July 26, 2010) (Lawinfochina) (China) [hereinafter Interpretation of the Articles of Agreement for the Avoidance of Double Taxation, China–Singapore (China)].

28. *Id.* Preamble para. 2.

29. *See id.* Preamble. China does not have a published model treaty, and there is no other comprehensive explanation of the provisions of the tax treaties that China has entered into.

30. *See infra* notes 59–66 and accompanying text.

31. Interpretation of the Articles of the Agreement for the Avoidance of Double Taxation, China–Singapore (China), *supra* note 27.



merely an “activity of a preparatory or auxiliary character” and therefore does not give rise to a PE.<sup>32</sup>

2. *A twelve-month look-back rule regarding an ownership requirement for reduced rates on dividends.*<sup>33</sup> Some of China’s treaties (including the one with Singapore) offer special reduced withholding tax rates on dividends declared with respect to shareholders owning at least 25% of the company. Since 2009, the SAT has required this ownership requirement to have been satisfied for a continuous period of twelve months before the dividend is declared.<sup>34</sup> The Organization for Economic Cooperation and Development (OECD) specifically mentioned this “look back” rule as one that contracting states may negotiate and incorporate into the text of treaties.<sup>35</sup> China has not negotiated such a treaty provision and has merely imposed the requirement unilaterally.
3. *The characterization of service fees as royalties in any mixed contract.*<sup>36</sup> Since 2009,<sup>37</sup> the SAT has held that where any service is performed in connection with a licensing contract, fees paid for the service, even if performed outside of China and separately invoiced, are to be characterized as royalties and thereby taxable in China (whereas fees for services performed outside of China would not be taxable). This position was reaffirmed in the Treaty Annotations. It is inconsistent with the explicit and widely followed recommendations for the treatment of mixed contracts by the OECD that mixed contract amounts should be broken down and each component appropriately taxed.<sup>38</sup>

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32. It also contradicts the OECD’s explicitly stated view that a place for delivery of spare parts to customers for machinery supplied would constitute a permanent establishment (PE) only “where, in addition, it maintains or repairs such machinery.” *OECD Model Convention*, *supra* note 18, at 103 (commentary on Article 5).

33. Interpretation of the Articles of the Agreement for the Avoidance of Double Taxation, China–Singapore (China), *supra* note 27.

34. See Zhi Xing Shui Shou Xie Ding Gu Xi Tiao Kuan You Guan Wen Ti (国家税务总局关于执行税收协定股息条款有关问题的通知) [Issues Concerning the Application of the Dividend Clauses of Tax Agreements] (promulgated by the St. Admin. of Tax’n, Feb. 20, 2009, effective Feb. 20, 2009) (Lawinfochina) (China).

35. *OECD Model Convention*, *supra* note 18, at 190 (commentary on Article 10).

36. Interpretation of the Articles of the Agreement for the Avoidance of Double Taxation, China–Singapore (China), *supra* note 27.

37. See Execution of the Royalty Clauses of Tax Treaties (promulgated by the St. Admin. of Tax’n, Sept. 14, 2009, effective Oct. 1, 2009) art. 5 (China); Administering Tax Treaty Provisions (promulgated by the St. Admin. of Tax’n, Jan. 26, 2010, effective Jan. 16, 2010) (China).

38. *OECD Model Convention*, *supra* note 18, at 226 (commentary on Article 12); see also *id.* at 230–31.

4. *Unusual position with respect to international transportation income.* China's tax treaties generally allocate the right to tax profits from the operation of ships or aircraft in international traffic to the country where the operator resides. However, contrary to international practice and the OECD position on the matter since 1963, according to which "wet leases" (leases on charter fully equipped, crewed, and supplied) themselves constitute a form of international transportation,<sup>39</sup> the Treaty Annotations hold that income from wet leases is exempt from Chinese taxation only if such leases are ancillary to some other "main business" of international transportation. Moreover, for income from activities ancillary to international transportation to be exempt from Chinese taxation, such income cannot exceed 10% of the gross income of the shipping operator, a threshold not contemplated by the China–Singapore tax treaty or any other of China's tax treaties.<sup>40</sup>
5. *Affirmation of the controversial "beneficial ownership" standards in Circular 601.*<sup>41</sup> The SAT published Circular 601 in 2009, which sets forth seven factors that count against the claim of a treaty benefit applicant to be the beneficial owner of certain passive income. These factors have been widely criticized by international tax practitioners as going beyond the customary requirements of tax treaties.<sup>42</sup> Nonetheless, the Treaty Annotations fully endorse

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39. *Id.* at 175 (commentary on Article 8).

40. Interpretation of the Articles of the Agreement for the Avoidance of Double Taxation, China–Singapore (China), *supra* note 27. For a more detailed discussion, see Wei Cui, *China: A New (Furtive) Approach to Taxing International Transportation Income*, in TAX TREATY CASE LAW AROUND THE GLOBE 159–69 (Michael Lang ed., 2011).

41. Interpretation of the Articles of the Agreement for the Avoidance of Double Taxation, China–Singapore (China), *supra* note 27, art. 10, § 2(c); *id.* art. 11, § 2; *id.* art. 12, § 2. "Circular 601" refers to Ru He Li Jie He Que Ding Shui Shou Xie Ding Zhong "Shou Yi Suo You Ren" (如何理解和认定税收协定中受益所有人) [How to Understand and Determine the "Beneficial Owners" in Tax Agreements] (promulgated by the St. Admin. of Tax'n, Oct. 27, 2009, effective Oct. 27, 2009) (Lawinfochina) (China).

42. See, e.g., James J. Tobin, *Down the BRIC Road*, 40 TAX MGMT INT'L J. (BNA) 39, 40–41 (2011) (asserting that most factors listed under Circular 601 are irrelevant to the determination of beneficial ownership); Peter H. Blessing, *Abuse and Anti-Abuse: The Role of a Tax Professional in a Changing World*, in 2 TAX LAW AND CASE REVIEW (W. Xiong ed., 2011) (noting that the criteria exceed treaty requirements); Houlu Yang, *Report on the People's Republic of China*, 95b CAHIERS DE DROIT FISCAL INT'L (IFA) 209, 221 (2010) (highlighting that the burden of proof rests on taxpayers claiming to be "beneficial owners"). One example of Circular 601's inconsistency with international understanding is its holding that "conduit companies" can never be beneficial owners. By contrast, the OECD's position is that a conduit company will not be respected as the beneficial owner only when through "the formal owner, it has, as a practical matter, very narrow powers which render it, in

Circular 601's approach.

The above is not an exhaustive list of the aspects of the Treaty Annotations that may be viewed as inconsistent with common interpretations of tax treaties. But it should be clear that the items in the list cover diverse issues and cannot be explained in terms of a single policy concern, such as international anti-avoidance, or even through a set of coherent policy concerns other than expanding China's tax base.<sup>43</sup> Moreover, even though China is not an OECD member country, and even though the OECD Commentaries do not have the status of "legally binding international instruments,"<sup>44</sup> the SAT, in drafting the Treaty Annotations and elsewhere, tends to borrow very extensively from the OECD Commentaries in elaborating China's treaty policy, occasionally explicitly citing these commentaries.<sup>45</sup> International practice as reflected in the OECD Commentaries thus likely forms an essential background to the SAT's understanding of treaty provisions (in addition, presumably, to the understanding of many of China's treaty partners) when it negotiates them. The deviant SAT interpretations therefore cannot be attributed to a systematic, alternative set of treaty policies.

SAT documents that conflict with tax treaty provisions are not limited to those that explicitly pursue treaty interpretation. There are others that do not ostensibly address the application of tax treaties but, if implemented without modification, would arguably constitute treaty breaches. A good example of this latter type is the hugely controversial Circular 698.<sup>46</sup> China taxes capital gains derived from any transfer of the shares of a Chinese

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relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties." *OECD Model Convention*, *supra* note 18, at 188 (commentary on Article 10).

43. For example, items 1, 3, and 4 do not implement any antiavoidance agenda, and while items 1 and 3 may simplify administration, 4 renders it more complex.

44. *OECD Model Convention*, *supra* note 18, at 14. See generally Hugh J. Ault, *The Role of the OECD Commentaries in the Interpretation of Tax Treaties*, in *ESSAYS ON INTERNATIONAL TAXATION* 61, 61–68 (Herbert H. Alpert & Kees van Raad eds., 1993).

45. See, e.g., Guan Yu Shui Shou Xie Ding Chang She Ji Gou Que Ding Deng You Guan Wen Ti (关于税收协定常设机构认定等有关问题) [Relevant Issues About the Determination of Permanent Establishments in Tax Agreements] (promulgated by the St. Admin. of Tax'n, Mar. 14, 2006, effective Mar. 14, 2006) (Lawinfochina) (China) (referring explicitly to OECD Commentaries). See generally Wei Cui, *China*, in *THE IMPACT OF THE OECD AND THE UN MODEL CONVENTIONS ON BILATERAL TAX TREATIES* (Michael Lang ed., forthcoming 2012).

46. Jia Qiang Fei Ju Min Qi Ye Gu Quan Zhuan Rang Suo de Qi Ye Suo De Shui Guan Li (加强非居民企业股权转让所得企业所得税管理) [Strengthening the Administration of Enterprise Income Tax on Non-resident Enterprises' Equity Transfer Income] (promulgated by the St. Admin. of Tax'n, Dec. 10, 2009, effective Jan. 1, 2008) (Lawinfochina) (China).

company by a foreign entity.<sup>47</sup> As in other countries that attempt to implement such a regime, Chinese tax authorities must confront the fact that foreigners may try to avoid the tax, when nontax considerations permit, by transferring the equity of an offshore parent (direct or indirect) and not the equity interest in a Chinese company directly. On its face, Circular 698 attempts to identify such arrangements by requiring the disclosure of indirect transfers where the holding company transferred is located in a low-tax jurisdiction. It also provides that offshore holding companies may be disregarded if their use lacks economic substance. However, the disclosure requirement has no statutory basis under Chinese domestic law because the latter does not contemplate jurisdiction over foreigners who have no Chinese-source income.<sup>48</sup> Moreover, where either the offshore holding company or the transferor of the shares of the offshore company is a resident of a treaty partner country, the tax treaty between China and that treaty partner country would typically preclude Chinese taxation of the capital gains from the transfer of the shares.<sup>49</sup> Indeed, the disregard of a holding company in contravention of treaty provisions on capital gains has been explicitly highlighted by the OECD as a form of treaty override.<sup>50</sup>

## II. THE LEGAL EFFECT OF INFORMAL ADMINISTRATIVE PRONOUNCEMENTS

Overall, the SAT rules set forth in Circular 698, the Treaty Annotations,

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47. Zhonghua Renmin Gongheguo Qiye Suo de Shui Fa (中华人民共和国企业所得税法) [Enterprise Income Tax Law] (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Jan. 1, 2008) arts. 3–4 (Lawinfochina) (China); Zhonghua Renmin Gongheguo Qiye Suo de Shui Fa Shi Shi Tiao Li (中华人民共和国企业所得税法实施条例) [Regulation on the Implementation of the Enterprise Income Tax Law] (promulgated by the St. Council, Dec. 6, 2007, effective Jan. 1, 2008) art. 7(3) (Lawinfochina) (China); Zhong Zhonghua Renmin Gongheguo Qiye Suo de Shui Fa Shi Shi Tiao Li (中华人民共和国企业所得税法实施条例) [Regulation on the Implementation of the Enterprise Income Tax Law of the People's Republic of China] (promulgated by the St. Council, Dec. 6, 2007, effective Jan. 1, 2008) art. 91(1) (Lawinfochina) (China).

48. See Wei Cui, *The Unauthorized Decision to Tax Indirect Equity Transfers in China*, 2 DIRITTO E PRATICA TRIBUTARIA INTERNAZIONALE 1075, 1077 (2010).

49. This is typically due to the residual clause of the capital gains article of tax treaties, which precludes taxation of capital gains other than in transactions specifically enumerated in the article. See, e.g., *OECD Model Convention*, *supra* note 18, art. 13(5).

50. *OECD Report on Treaty Override*, *supra* note 5, paras. 31–33. Under Chinese domestic law, because the SAT fails to specify in Circular 698 (or elsewhere) what would constitute sufficient economic substance to prevent it from disregarding a holding company, while at the same time shifts the burden of proof to the private party, it is questionable whether the application of Circular 698 would be sustained in court.

and the numerous SAT documents cited and reaffirmed in the Treaty Annotations raise serious questions about China's willingness to adhere to its treaty obligations. Indeed, the bulk of international tax discussions about China in the last year has centered on these rules.<sup>51</sup> What has been little discussed, however, is the very weak legal effect the documents setting out these rules possess.

Circulars 601 and 698, as well as a number of other circulars the positions of which the Treaty Annotations affirm, take the form of so-called "SAT correspondences" (*guoshuihan*).<sup>52</sup> According to the relevant SAT internal manual, SAT correspondences may be used for "clarifications and interpretations of *ordinary questions* in the implementation of tax policies and methods of collection."<sup>53</sup> They may also be used for a wide variety of internal administrative purposes.<sup>54</sup> In the last decade, it was not unusual for the SAT to issue over 1,200 or 1,300 SAT correspondences a year, most of which remain unpublished because they have no general relevance for taxpayers.<sup>55</sup> Because of their miscellaneous administrative uses, the issuance of SAT correspondences does not require the SAT's ministry-level

51. This is not to say that conflicts between SAT rules and common treaty interpretation are new. *See infra* note 130 and accompanying text (citing two SAT documents from the 1990s).

52. *See, e.g.,* Zhi Xing Shui Shou Xie Ding Gu Xi Tiao Kuan You Guan Wen Ti (执行税收协定股息条款有关问题) [Issues Concerning the Application of the Dividend Clauses of Tax Agreements] (promulgated by the St. Admin. of Tax'n, Feb. 20, 2009, effective Feb. 20, 2009) (Lawinfochina) (China); Zhi Xing Shui Shou Xie Ding Te Xu Quan Shi Yong Fei Tiao Kuan You Guan Wen Ti (执行税收协定特许权使用费条款有关问题) [Issues Relevant to the Execution of the Royalty Clauses of Tax Treaties] (promulgated by the St. Admin. of Tax'n, Sept. 14, 2009, effective Oct. 1, 2009) (Lawinfochina) (China); Execution of the Royalty Clauses of Tax Treaties (promulgated by the St. Admin. of Tax'n, Sept. 14, 2009, effective Oct. 1, 2009) (China); Administering Tax Treaty Provisions (promulgated by the St. Admin. of Tax'n, Jan. 26, 2010, effective Jan. 16, 2010) (China); *see also* Imposition of Tax on Rental Income Derived by PanAmSat from Leasing Satellite Communication Lines to CCTV (promulgated by the St. Admin. on Tax'n, Aug. 19, 1999, effective Aug. 19, 1999) (Lawinfochina) (China).

53. Implementation Measures for the Processing of Official Documents of All Tax Agencies of China (promulgated by the St. Admin. of Tax'n, Oct. 9, 2004, effective Oct. 9, 2004) art. 29 (China) (emphasis added).

54. These include nonlegal administrative instructions to lower-level agencies, partial or temporary budgetary adjustments for tax agencies, recommendations or reprimands of staff members, and correspondence with other government agencies. *Id.*

55. For instance, for the first six months of 2010, over three hundred SAT correspondences were issued, of which fewer than sixty are currently publicly available in the legal database China Law Info. CHINA LAW INFO, <http://chinalawinfo.com> (last visited Feb. 12, 2012). Even fewer are available at the SAT's website for the publication of rules. *See* ST. ADMIN. OF TAX'N, <http://www.chinatax.gov.cn/n8136506/n8136593/n8137537/n8138502/index.html> (last visited Jan. 23, 2012).

approval and generally is not even deliberated at the level of departments within the SAT.<sup>56</sup> They may be drafted by only one or two SAT staff members and signed by one senior (department-level) official. Moreover, because of the SAT's internal organization, it is not unusual for an SAT correspondence in the international tax area to be issued without review by the part of the SAT in charge of tax treaties. Most SAT correspondences are also not reviewed by the Legal Department. It is also not uncommon for SAT correspondences to be quietly withdrawn. The procedures for issuing SAT correspondences, in other words, were never designed for documents that set forth new substantive tax rules of general applicability, let alone ones that break new grounds in international taxation.

If the use of SAT correspondences were to be analogized to IRS practice,<sup>57</sup> the small number of staff members involved in producing an SAT correspondence, their low rank, and the tentative nature of the positions in such documents all render them similar to IRS private letter rulings (PLRs), although PLRs are applicable only to particular taxpayers. Their routine use makes them similar to the miscellaneous array of IRS internal memoranda. The lack of involvement of the SAT Legal Department, however, renders them different from any document issued by the IRS Offices of Chief and Associate Chief Counsels—that is, any document that is regarded as having the value of legal guidance in the United States. In any case, the status of SAT correspondences within the SAT rulemaking system is almost certainly lower than that of revenue rulings and revenue procedures in the IRS system.

Much of the buzz over “what China is doing” within the international tax community, therefore, in reality concerns only the views of a few SAT officials, which have not been elevated to more solid legal form. Much the same can be said of the only slightly higher-level “SAT issuances” (*guoshuifa*), which in past SAT practice were used, in addition to many internal bureaucratic purposes,<sup>58</sup> to provide “adjustments and supplements

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56. The SAT currently has thirteen departments, of which the Bureau of Policies & Legislation and the International Taxation Department are two. See Guo Jia Shui Wu Zong Ju Zhu Yao Zhi Ze Nei She Ji Gou He Ren Yuan Bian Zhi Gui Ding (国家税务总局主要职责内设机构和人员编制规定) [Provisions on the Main Functions, Internal Bodies and Staffing of the State Administration of Taxation] (promulgated by the St. Council, July 10, 2008, effective July 10, 2008) (Lawinfochina) (China). Within a department there are typically several sections: for example, the Treaty Section and the Non-Resident Section are two sections within the International Tax Department.

57. For the use of different types of regulatory documents by the U.S. Treasury and IRS, see generally Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 DUQ. L. REV. 323 (2008).

58. These include setting out general plans for tax collection, prescribing work protocols, setting annual agency budgets, issuing special awards or reprimands to staff

to tax policies and methods of collection, as well as clarifications and interpretations for important questions in the implementation” of such policies and methods.”<sup>59</sup> The Treaty Annotations took the form of a SAT issuance,<sup>60</sup> and that is why they are, in an important sense, procedurally invalid. By the end of 2009, the SAT decided the procedures for issuing substantive tax rules and interpretations through SAT issuances and correspondences were so dysfunctional that they had to be completely revamped.<sup>61</sup> In a major new ministerial regulation, the SAT required that any “tax regulatory document” “prescrib[ing] the rights and obligations of taxpayers” must be published and compiled in a “SAT bulletin” (*gonggao*) format.<sup>62</sup> To qualify as a bulletin, guidance must go through a special set of procedures. The new regulation took effect on July 1, 2010. The Treaty Annotations were adopted on July 26, 2010, and released to the public in September 2010.<sup>63</sup> Not only did the Annotations not assume the SAT bulletin format or satisfy the procedural requirements, but they were also characterized by other formal oddities.<sup>64</sup> In light of the very recent SAT regulation, therefore, the Treaty Annotations cannot have the effect of “prescribing the rights and obligations of taxpayers.”<sup>65</sup>

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members, making other important internal announcements, and so on. Implementation Measures for the Processing of Official Documents of All Tax Agencies of China (promulgated by the St. Admin. of Tax’n, Oct. 9, 2004, effective Oct. 9, 2004) art. 29 (China).

59. *Id.*

60. See Shui Shou Xie Ding Chang She Ji Gou Ren Ding Deng You Guan Wen Ti (税收协定常设机构认定等有关问题) [Relevant Issues About the Determination of Permanent Establishments in Tax Agreements] (promulgated by the St. Admin. of Tax’n, Mar. 14, 2006, effective Mar. 14, 2006) (Lawinfochina) (China); Implementation Measures for the Processing of Official Documents of All Tax Agencies of China (promulgated by the St. Admin. of Tax’n, Oct. 9, 2004, effective Oct. 9, 2004) art. 29 (China). Like SAT Correspondences, many SAT Issuances are not published.

61. For a glimpse of the internal discussions that led to this decision, see CHINA TAXATION PRESS, ANNOTATIONS ON ADMINISTRATIVE MEASURES FOR FORMULATING REGULATORY DOCUMENTS IN TAXATION 4–20 (Li Sanjiang ed. 2010).

62. Shui Shou Gui Fan Xing Wen Jian Zhi Ding Guan Li Ban Fa (税收规范性文件制定管理办法) [Administrative Measures for the Formulation of Tax Regulatory Documents] (promulgated by the St. Admin. of Tax’n, Feb. 10, 2010, effective July 1, 2010) art. 2 (Lawinfochina) (China).

63. Interpretation of the Articles of Agreement for the Avoidance of Double Taxation, China–Singapore (China), *supra* note 27.

64. For instance, as widely noted by Chinese tax practitioners, it did not state its own effective date.

65. In a bulletin, the SAT listed the Treaty Annotations as an effective “regulatory document,” presumably in an attempt to establish its legitimacy in binding taxpayers. Regarding the Publication of the List of Currently Effective Tax Regulatory Documents (promulgated by the St. Admin. of Tax’n, Dec. 13, 2010) (Lawinfochina) (China) However,

More fundamentally, SAT correspondences, issuances, and even bulletins all lack the binding effect of law, in accordance with the Law on Legislation and the Chinese Supreme People's Court's interpretation of the Administrative Litigation Law. This legal perspective on the formal character of SAT's policy documents will be elaborated upon in Part IV below. From an institutional perspective, SAT informal rules are the products of very devolved rulemaking—it can often be questioned whether they even represent the view of a department within the SAT, and it is almost certain that they do not represent the view of the SAT as a ministry, let alone that of the State Council or the National Legislature. Indeed, this fact about how the rules are made may explain the pattern of treaty violations noted earlier—i.e., an array of measures that expand China's taxing rights without a core policy agenda, adopted against a background of heavy reliance on international practice and norms to articulate China's treaty policy.

If agency rules so casually produced as those discussed above could constitute sources of law in China, one would have to conclude that China, for all intents and purposes, does not have an administrative law system. That conclusion is wrong because the premise is wrong. The next two Parts will offer a more systematic review of the place of tax treaties in the Chinese legal system, on the one hand, and the SAT rules surveyed above, on the other. The very clear conclusion is that while tax treaties are both internationally binding and binding under China's domestic law, the SAT informal documents, especially where they conflict with tax treaties and with domestic law, are not legally binding and may be discarded—in theory and in actual practice—upon administrative or judicial review. This illustrates how, without taking another country's legislative and administrative law framework into account, perceptions of what constitutes tax “law” in another country can be radically misleading.

### III. THE PLACE OF TAX TREATIES IN THE CHINESE LEGAL SYSTEM

Understanding devolved lawmaking, it turns out, is crucial for understanding the place of tax treaties in China's legal system as well. In design and also (though to a lesser extent) in practice, the conclusion of tax treaties in China lies far above the sphere of SAT bulletins, issuances, and correspondences. According to the Chinese Constitution, the State Council has the power to conclude treaties and agreements with foreign states.<sup>66</sup>

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it is not clear that one regulatory document can restore legitimacy to another when the latter is procedurally invalid under the terms of a higher, formal regulation. The weak legal effect of regulatory documents is discussed further in Part IV, *infra*.

66. XIANFA art. 89 § 9 (1982) (China).



But the Standing Committee of the National People's Congress (NPCSC) exercises the power "to decide on the ratification or abrogation of treaties and important agreements concluded with foreign states."<sup>67</sup> The power to conclude and the power to ratify or abrogate treaties are enumerated in parallel with other lawmaking powers of the State Council and the NPCSC, respectively. Some Chinese scholars have argued that, consequently, treaties ratified by the NPCSC have the same effect of law as statutes adopted by that legislative body, whereas treaties merely concluded by the State Council would have the status of regulations issued by that executive body.<sup>68</sup> For reasons we will now detail, such a view would cast significant doubt over the legal effectiveness of most of China's (tax and nontax) treaties.

The Law on the Procedure of the Conclusion of Treaties (LPCT)<sup>69</sup> specifies what treaties and agreements require the NPCSC's ratification. The enumerated categories do not explicitly refer to treaties relating to taxation,<sup>70</sup> but one category, including treaties and agreements which contain stipulations that diverge from the (statutory) laws of the People's Republic of China (PRC),<sup>71</sup> potentially implicates tax treaties.<sup>72</sup> Since tax treaties by their nature limit the taxing power of the contracting states under domestic law, a literal reading of this provision seems to imply that all tax treaties, insofar as they modify statutory tax law, require National

67. *Id.* art. 67 § 14.

68. See, e.g., Yongwei Liu, *Important and Unimportant Treaties: A Discussion of the Importance of Tax Treaties*, 26 TRIB. POL. SCI. & L. 171, 171–78 (2008); Zhang Liang, *Revisiting the Application of the WTO Agreement in China*, available from [www.chinalawinfo.com](http://www.chinalawinfo.com).

69. Zhonghua Renmin Gongheguo Di Jie Tiaoyue Cheng Xu Fa (中华人民共和国缔结条约程序法) [Procedure of the Conclusion of Treaties] (promulgated by the Standing Comm., Dec. 28, 1990, effective Dec. 28, 1990) art. 3 (Lawinfochina) (China).

70. The enumerated categories include: (1) treaties of friendship and cooperation, treaties of peace, and other treaties of a political nature; (2) treaties and agreements concerning territory and delimitation of boundary lines; (3) treaties and agreements relating to judicial assistance and extradition; (4) treaties and agreements which contain stipulations inconsistent with the laws of the PRC; (5) treaties and agreements which are subject to ratification as agreed by the contracting parties; and (6) other treaties and agreements subject to ratification. *Id.* art. 7.

71. In Chinese, the same term *falü* is used both for (i) law in the broad sense of rules having legal effect and (ii) laws and decisions adopted by the National People's Congress (NPC) or the Standing Committee of the National People's Congress (NPCSC). Where law in this latter sense is relevant, this Article uses the term *statute* or (*statutory*) *law*.

72. None of China's tax treaties specifically requires legislative ratification on China's part. See Procedure of the Conclusion of Treaties art. 7 § 5 (China). Category 6, the residual category, has not received any elaboration as to its meaning, and can be assumed not to apply to tax treaties. See *id.* art 7 § 6.

People's Congress (NPC) ratification.<sup>73</sup> An argument for this reading is that the executive branch should not be able to modify domestic statutory law without the agreement of the legislative branch. However, for tax treaties, the Chinese government has not followed this reading of the requirements for ratification nor has it offered any public explanation of its reasons for not doing so. Instead, in the tax area, the executive branch has adopted procedures in the LPCT that apply to the drafting and negotiation of treaties where NPC ratification is not required.

Under such procedures, the general rule is for the departments concerned under the State Council to negotiate and prepare a draft treaty and then submit it to the State Council "for examination and decision."<sup>74</sup> However, later in the same statute, it states, "with respect to agreements concerning specific business affairs, with the consent of the State Council, the draft agreement of the Chinese side shall be examined and decided upon by the departments concerned under the State Council or in consultation with the Ministry of Foreign Affairs when necessary."<sup>75</sup> In such latter cases, the concluded treaties merely have to be filed with the State Council, without the need of the latter's approval.<sup>76</sup> It is not entirely clear into which of these two categories—agreements requiring the State Council's decision, or "agreements concerning specific business affairs"—tax treaties fall. Some scholars have claimed that tax treaties are concluded by the MOF or SAT alone,<sup>77</sup> citing as evidence, for example, that the conclusion of new tax treaties has generally been announced by the SAT, and rarely by the State Council.<sup>78</sup> Others, however, have stated that the conclusion of tax treaties themselves is contingent on the State Council's examination and approval, while other international agreements reached in the treaty implementation process—such as agreements resulting from mutual agreement procedures—are handled by the SAT alone.<sup>79</sup>

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73. Some Chinese scholars have argued for such a reading. See, e.g., Xiong Wei, *Tax Treaties and China's Enterprise Income Tax Law*, 5 WUHAN U. L. REV. 2, 35 (2009).

74. Procedure of the Conclusion of Treaties art. 5 (China).

75. *Id.*

76. *Id.* art. 9 (imposing such a filing requirement).

77. See Liu, *supra* note 68; Liu Yongwei, *The Relation Between Sino-Foreign Tax Treaties and Domestic Tax Law: A Self-Criticism of Relevant Chinese Tax Law Provisions*, 6 WUHAN U. L. REV., 63, 63–68 (2006).

78. In terms of signatories, China's tax treaties have been signed by a wide variety of officials, ranging from premiers and vice premiers, to ministers and vice ministers of the SAT, the MOF, or the Ministry of Foreign Affairs (MFA), to ambassadors. All of them, however, could have been acting as authorized representatives of the State Council. See Procedure of the Conclusion of Treaties art. 6 (China) (providing the procedures for such authorization).

79. Interview with a Staff Member of the Treaty Section of the Int'l Tax Dep't of the

In any case, the most important from a legal perspective is the State Council's view that the signing of tax treaties does not require NPCSC ratification. The legislative branch itself appears to have acquiesced to this view. As early as 1981, before China had entered into any income tax treaty, the NPCSC provided in the Foreign Enterprise Income Tax Law<sup>80</sup> that the rules in any tax treaty between the PRC government and the governments of other countries should be given superior effect over domestic law.<sup>81</sup> Similar provisions could be found in a successor statute,<sup>82</sup> and in the Law on the Administration of Tax Collection (LATC) adopted in 1992—a statute that applies to the administration of all taxes in China.<sup>83</sup> Currently, the superior effect of tax treaties over domestic law is recognized in the EIT Law.<sup>84</sup> With the exception of the 1981 law, all of these statutory provisions were enacted with the knowledge that no tax treaty had gone through congressional ratification. At the very least, this suggests that the NPC and NPCSC have consented to the State Council's judgment that, substantively, tax treaties do not require congressional ratification. It may even reflect these legislative bodies' belief that, procedurally, nothing has been amiss in giving tax treaties legal effect under Chinese law.

Statutory acknowledgment that treaties supersede domestic law is by no means limited to the tax area. Other Chinese statutes have broadly provided that China's treaties have superior effect over domestic law and civil litigation matters, except where China has made explicit reservations to treaty provisions.<sup>85</sup> Similarly, treaties have superior effect over domestic

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SAT, in Beijing (Feb. 2011) (on file with Author).

80. Income Tax Law for Foreign Enterprises (promulgated by the Standing Comm., Dec. 13, 1981, effective Jan. 1, 1982), *replaced by* Zhonghua Renmin Gongheguo Wai Shang Tou Zi Qiye He Wai Guo Qiye (中华人民共和国外商投资企业和外国企业所得税法) [Income Tax Law for Enterprises with Foreign Investment and Foreign Enterprises] (promulgated by the Standing Comm., Apr. 9, 1991, effective July 1, 1991) (Lawinfochina) (China).

81. Income Tax Law for Enterprises with Foreign Investment and Foreign Enterprises art. 17 (China).

82. *Id.* art. 28.

83. Zhonghua Renmin Gongheguo Shui Shou Zheng Shou Guan Li Fa (中华人民共和国税收征收管理法) [Law on the Administration of Tax Collection] (promulgated by the Standing Comm. Nat'l People's Cong., Sep. 4, 1992, effective as amended May 1, 2001) art. 91 (Lawinfochina) (China).

84. Zhonghua Renmin Gongheguo Qiye Suo De Shui Fa (中华人民共和国企业所得税法) [Enterprise Income Tax Law] (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Jan. 1, 2008) art. 58 (Lawinfochina) (China).

85. Zhonghua Renmin Gongheguo Min Fa (中华人民共和国民事诉讼法通则) [General Principles of the Civil Law] (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987) art. 142 (Lawinfochina) (China); Zhonghua Renmin Gongheguo Min Shi Su Song Fa (中华人民共和国民事诉讼法) [Civil Procedure Law] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991) art. 238 (Lawinfochina) (China).

law concerning administrative litigation procedure (absent explicit reservations made to the treaties).<sup>86</sup> All of these reflect a strong consensus throughout the legislative and executive branches that China is obligated to perform under its treaties regardless of the state of domestic law. As discussed in Part IV, the Chinese judiciary also holds such a view. In all, then, that treaties are binding irrespective of domestic law (other than the Constitution) is unambiguously the Chinese government's position.

Nonetheless, there is an obvious tension in this position: if a treaty concluded by the executive branch—indeed, by a part of the executive branch exercising delegated authority from the State Council and with minimal review—can bind China as a country and have superior effect over Chinese domestic law, then the executive branch can effectively override the legislative branch in lawmaking. This, under Chinese domestic law, they supposedly cannot do.

The Law on Legislation (LL),<sup>87</sup> adopted in 2000, highlights this tension without resolving it. The LL plays an important role in delineating both what rules have the force of law in the Chinese legal system and how conflicts among different rules are to be resolved.<sup>88</sup> It applies to the enactment, revision, and nullification of national statutes (by the NPC or NPCSC), “administrative regulations” (by the State Council),<sup>89</sup> local statutes (by legislatures of provincial and certain other subnational jurisdictions), and certain regulations issued by ethnic autonomous regions. It also governs in a similar manner regulations issued by ministries under the State Council (“ministerial regulations”) and by certain local governments. These, plus the Constitution, are the only forms of law recognized by the LL, and the creation of such rules constitutes lawmaking in the broad sense. Among these rules, the following hierarchy (in descending order of authority) is stipulated: (i) the Constitution; (ii) national statutes; (iii) State Council regulations; (iv) local statutes (with priority over local regulations but not ministerial regulations); and (v) ministerial and local regulations.<sup>90</sup> A rule lower in rank cannot be applied to the extent it

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86. Zhonghua Renmin Gongheguo Xing Zheng Su Song Fa (中华人民共和国行政诉讼法) [Administrative Procedure Law] (promulgated by the Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990) art. 72 (Lawinfochina) (China).

87. Zhonghua Renmin Gongheguo Lifa Fa (中华人民共和国立法法) [Law on Legislation] (promulgated by the Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000) (Lawinfochina) (China).

88. See ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 95–130 (3d ed. 2004).

89. In the following Parts, “administrative regulations” and “State Council regulations” will be used interchangeably.

90. There are numerous refinements to the hierarchy stated in the text that are not

conflicts with any rule higher in rank in the hierarchy.

However, the LL makes no mention of treaties and thus gives no explanation of where they fit within its legal order. If only treaties ratified by the NPCSC have the status of statutory law, and if treaties concluded by the State Council or its ministries without ratification possess only the status of State Council or ministerial regulations, then these latter treaties are necessarily inferior in effect to statutory law under the LL. Where they conflict with statutory law, their nonratification would seem to mean they have not been given the effect of law in China. This paradox plagues many treaties and agreements that China has signed or acceded to. The gap in lawmaking procedure has been widely recognized by Chinese scholars of international law, and proposals to amend the LPCT have been studied in recent years by the NPC and the State Council.<sup>91</sup> However, as things stand, China's recognition of the binding nature of its treaty obligations is not always reflected in its domestic law mechanisms, and its commitment to its treaty obligations often may be said to operate *in spite of* such mechanisms.

Some may argue that the acknowledgment of the superior effect of treaties in specific statutes, such as the EIT Law and the LATC, serves to remedy the procedural flaw of nonratification of individual treaties. Moreover, it may be argued that this legislative technique provides certainty—especially to foreign investors and foreign governments—as to China's willingness to honor its treaty obligations. How plausible this argument is may be open to debate<sup>92</sup> and, in any case, it does not go far enough: China's Individual Income Tax Law has never contained a similar provision regarding the superior effect of treaties. Under this technical argument, China's tax treaties have never operated to limit domestic law under the EIT, a position that few would likely accept.

Perhaps a more compelling argument is the following. The specific statutory statements regarding the superior effect of treaties evidence a

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relevant here, as well as rules for resolving conflicts among rules within the same rank in the hierarchy. See Law on Legislation arts. 78–88 (China); see also CHEN, *supra* note 88, at 96–97, 112.

91. See REPORT OF THE NPC FOREIGN AFFAIRS COMMITTEE REGARDING THE CONCLUSIONS OF REVIEWING DELEGATES' LEGISLATIVE PROPOSALS SUBMITTED BY THE PRESIDUM OF THE FIRST MEETING OF THE 11TH NAT'L PEOPLE'S CONG. (Dec. 27, 2008).

92. To start, the EIT Law and Law on the Administration of Tax Collection (LATC), as statutes on specific legislative matters, cannot override the general procedures for lawmaking in the Law on Legislation (LL) and the Law on the Procedure of the Conclusion of Treaties (LPCT). Moreover, it would not be plausible to view such statutory provisions regarding the superior effect of treaties as delegating authority to the executive branch to conclude new treaties.

general recognition that treaties are binding under China's domestic law,<sup>93</sup> regardless of the actual procedures for bringing them into force. This recognition is also shared by the State Council through its acts of concluding binding international treaties and signing the Vienna Convention on the Law of Treaties, and, as will be discussed in Part IV, by the Chinese courts. In other words, the binding effect of treaties is a uniform position adopted throughout the Chinese government. Under this view, tax treaty overrides—in the customary sense of national legislatures intentionally overruling the provisions of treaties—are impossible in China. This is literally the case where statutes explicitly concede the superior effect of treaty law and conceptually the case even where such statutory provisions are missing.

Given this (what one might call the “orthodox”) view, and given the low rank within the Chinese domestic legal order of the controversial SAT regulatory documents discussed in Part I, it seems their threat to treaty partners could easily be contained within the Chinese legal system. In the next Part, we examine in detail whether this is the case. But an irony worth underscoring here is that, in a fundamental sense, it is the same system of devolved rulemaking that is responsible for both the controversial SAT circulars and the fact that the incorporation of tax treaties into domestic law is less than robust. In a more developed legal system, the treaties would be legislatively ratified, and the tax policy would be implemented through regulations with the binding force of law or at least other rules that receive careful legal review. However, given where the Chinese administrative law system stands now, treaties are legally binding even if not ratified by the NPC, whereas SAT circulars are not legally, but often practically, binding.

#### IV. MEANS OF CHALLENGING INVALID SAT RULES

Within the Chinese administrative law system, two well-established types of procedures exist for challenging agency rules that one believes to be substantively or procedurally invalid; several other approaches are relatively novel and untried. The two well-established procedures are administrative appeal and judicial review, either of which may be brought

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93. In published annotations that the NPCSC has given to the LATC (available through [www.chinalawinfo.com](http://www.chinalawinfo.com)), for example, the NPCSC, in connection with the LATC provision acknowledging the superior effect of treaties over itself, does not state that the intent of the provision was to meet any procedural requirements, but suggests that it merely reflects the recognition that treaties are binding on the nations that enter them. *See* *Zhonghua Renmin Gongheguo Shui Shou Zheng Shou Guan Li Fa* (中华人民共和国税收征收管理法) [Law on the Administration of Tax Collection] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 28, 2001, effective May 1, 2001) art. 91 (Lawinfochina) (China).

only on the occasion of a specific agency action against a private party and purportedly based on an agency rule that one disputes. In contrast, relatively untried procedures offer the possibility of pre-enforcement review.

#### A. Administrative Appeal, Litigation, and Pre-Enforcement Review

An administrative appeal<sup>94</sup> may be brought under the Administrative Reconsideration Law<sup>95</sup> against a “specific administrative act[ion].”<sup>96</sup> The Supreme People’s Court (SPC) has interpreted this last concept, which is also used under the Administrative Litigation Law (ALL), as not encompassing the mere adoption of “administrative rules and regulations, regulations, or decisions and orders with general binding force,”<sup>97</sup> including “all regulatory documents issued by administrative agencies repeatedly and generally applicable to more than specific parties.”<sup>98</sup> However, the applicant for an administrative review has a statutory right to request that the reviewing body examine the legal validity of informal agency rules that purport to be the legal basis of a disputed action.<sup>99</sup> “Informal” agency rules are essentially those not recognized as having the effect of law under the Law on Legislation<sup>100</sup> and, in the case of the SAT, would include all SAT bulletins, issuances, and correspondences. In response to a request for

94. In this Article, “administrative appeal,” “administrative review,” or “administrative reconsideration” are used interchangeably and correspond to *xingzhengfuyi* in Chinese.

95. Zhonghua Renmin Gongheguo Xing Zheng Fu Yi Fa (中华人民共和国行政复议法) [Administrative Reconsideration Law] (promulgated by the Nat’l People’s Cong., Apr. 29, 1999, effective Oct. 1, 1999) (Lawinfochina) (China); *see also* Zhonghua Renmin Gongheguo Xing Zheng Fu Yi Fa Shi Shi Tiao Li (中华人民共和国行政复议法实施条例) [Regulation on the Implementation of the Administrative Reconsideration Law] (promulgated by the St. Council, May 29, 2007, effective Aug. 1, 2007) (Lawinfochina) (China); Shui Wu Xing Zheng Fu Yi Gui Ze (税务行政复议规则) [Rules for Tax Administration Reconsideration] (promulgated by the St. Admin. of Tax’n, Feb. 10, 2010, effective Apr. 1, 2010) (Lawinfochina) (China) (defining procedures of administrative appeals against all tax agencies).

96. Administrative Reconsideration Law art. 1 (China).

97. Zhonghua Renmin Gongheguo Xing Zheng Su Song Fa (中华人民共和国行政诉讼法) [Administrative Litigation Law] (promulgated by the Nat’l People’s Cong., Apr. 4, 1989, effective Oct. 1, 1990) art. 12(2) (Lawinfochina) (China).

98. *In re Fashi*, art. 3 (Sup. People’s Ct., Mar. 10, 2000) (Interpretations of Certain Issues in the Implementation of the Administrative Litigation Law); *see also In re Fa*, Sec. 1(1) (Sup. People’s Ct., June 11, 1991) ((Provisional) Opinions Regarding Certain Issues in the Implementation of the Administrative Litigation Law) (“specific administrative actions” that are actionable must be directed at specific persons).

99. Administrative Reconsideration Law art. 7 (China).] Unlike administrative litigation, which is further discussed below, the validity of formal agency rules, such as ministerial or local governmental regulations, may not be reviewed. *See id.*

100. *Id.*

review, the reviewing body may revoke or modify any invalid informal rules or ask a competent government authority to do so.<sup>101</sup> In the case of informal tax rules adopted by the SAT itself, revocation would be processed by the SAT's Legal Department; taxpayer challenges through administrative appeals could thus offer that part of the SAT a chance to review problematic rules that it may not have had adequate opportunities to examine before promulgation.<sup>102</sup> According to the SAT, in nearly half of the administrative appeal cases it processed between 2000 and 2006, the appellants sought the review of the agency rules underlying the disputed agency actions; in one-third of these cases, changes were made to the rules.<sup>103</sup>

Unlike Article I judges in the United States, the reviewing bodies in Chinese administrative appeal procedures are internal to the executive branch, and typically comprised of the legal staff in the government agency that bureaucratically supervises the agency whose action is being appealed.<sup>104</sup> This institutional arrangement is not unlike those adopted by numerous countries with established traditions of the rule of law and is, at least in theory, compatible with the goals of the appeals procedure. Indeed, according to the SAT's own report, between 1994 and 2005, of all tax administrative appeals across China, agency actions were equally likely to be overturned as they were sustained. In the administrative reviews that the SAT itself processed,<sup>105</sup> agency actions were sustained in only 55% of the cases. For all administrative appeals during the same period, 62% were terminated through the withdrawal or modification of agency actions or through mediation.<sup>106</sup> The administrative appeal mechanism is thus highly effective for those taxpayers who decide to use it.<sup>107</sup> What is more, there is

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101. *Id.* art. 26.

102. *See supra* text accompanying notes 53–61. In the case of informal rules made by subnational tax agencies, their higher supervising agencies generally have the authority to demand such changes.

103. Lin Hong, *Tax Administrative Cases a Growing Trend*, CHINA TAX'N NEWS, Feb. 5, 2007, at 1 [hereinafter Lin, *Tax Administration Cases*]; Lin Hong, *The SAT Uses Administrative Review to Improve Policy*, CHINA TAX'N NEWS, Feb. 5, 2007, at 2.

104. For example, a municipal tax agency may be supervised by both the provincial tax agency that has jurisdiction over the municipality and by the mayor's office. Its action may thus be reviewed by a body in either higher agency. *See* Shui Wu Xing Zheng Fu Yi Gui Ze (税务行政复议规则) [Rules for Tax Administrative Reconsideration] (promulgated by the St. Admin. of Tax'n, Feb. 10, 2000, effective Apr. 1, 2010) arts. 12–20 (Lawinfochina) (China) (listing choice of venue rules for tax administrative appeals).

105. Many reviews were completed at subnational tax agencies and never reached the national SAT level.

106. Lin, *Tax Administrative Cases*, *supra* note 103.

107. *But see infra* text accompanying notes 136–37 (discussing the infrequency with which administrative appeals are generally made).



no government charge for bringing an administrative appeal,<sup>108</sup> nor are there qualification requirements for any agents or representatives participating in an appeal proceeding.<sup>109</sup>

If a taxpayer receives an unfavorable decision in an administrative appeal, he or she may appeal that decision in a regular court, where proceedings will be governed by the ALL. The ALL limits the types of government pronouncements that can be cited as the legal basis for agency actions<sup>110</sup>; whereas national and local statutes, as well as administrative regulations, are per se a valid basis for such actions, ministerial and local government regulations are to be taken only “as [a] reference[ ]” and not as the legal basis of decisions entered by courts.<sup>111</sup> Courts are explicitly given latitude in questioning the validity of regulations issued by ministries and local governments and in choosing whether to apply such regulations. Such latitude is even greater with respect to government pronouncements of lesser status than regulations. The ALL does not itself state that any effect should be given to these. In an important document issued in 2004 (hereinafter the “Shanghai Meeting Minutes”),<sup>112</sup> the SPC distinguished regulations, on the one hand, from “other regulatory documents,” on the other. Although “agencies frequently rely on such . . . other regulatory documents as the basis for specific administrative actions,” the SPC stated they are not “formal sources of law, and do not have the binding force of legal norms.”<sup>113</sup> It is only when a court, in the course of adjudicating cases relating to specific administrative actions, determines that such regulatory documents possess “legal validity, effectiveness, reasonableness and appropriateness,” that it may give them effect in determining whether the specific administrative act has legal basis.<sup>114</sup>

108. Zhonghua Renmin Gongheguo Xing Zheng Fu Yi Fa (中华人民共和国行政复议法) [Administrative Reconsideration Law] (promulgated by the Nat'l People's Cong., Apr. 29, 1999, effective Oct. 1, 1999) art. 39 (Lawinfochina) (China).

109. See *id.* art. 10 (allowing applicants to select an agent to participate in administrative reconsideration without imposing requirements upon that agent); Rules for Tax Administrative Reconsideration art. 31 (China).

110. See Zhonghua Renmin Gongheguo Xing Zheng Su Song Fa (中华人民共和国行政诉讼法) [Administrative Litigation Law] (promulgated by the Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990) (Lawinfochina) (China). In this respect, the Administrative Litigation Law (ALL) was historically an important precursor to the Law on Legislation in curbing the executive branch's ability to make law and is also what, one might say, gives the Law on Legislation its bite.

111. *Id.* arts. 52–53.

112. Meeting Minutes Regarding the Application of Legal Norms in Reviewing Administrative Cases, sec. 1, para. 3 (Sup. People's Ct., May 18, 2004).

113. *Id.* sec. 1.

114. *Id.* Courts may also comment on the “legal validity, effectiveness, reasonableness

As with many other civil law systems, Chinese courts generally have no power to invalidate regulations and other rules of general application.<sup>115</sup> In such systems, the courts' supposed role is not to make or even interpret the law but simply to apply the law to the facts. The nullification of invalid rules and regulations is left to the legislative and executive branch entities that make them. Procedures have long existed for seeking the nonjudicial, pre-enforcement review of statutes and formal regulations recognized as law under the LL,<sup>116</sup> but they have not been used often, in part because many government agencies tend to promulgate their rules in an informal format, which takes these rules outside the ambit of the LL.<sup>117</sup> To address this problem, a number of recent statutes and regulations have attempted to create formal procedures for reviewing informal rules. For example, the Law on the Supervision of the Standing Committees of People's Congresses at Various Levels<sup>118</sup> enables congressional bodies to revoke invalid rules issued by the executive branch, including informal "regulatory documents." Since 2005, the SAT has allowed taxpayers to apply for pre-enforcement review, conducted by higher bodies in the administrative hierarchy, of informal rules issued by subnational tax agencies,<sup>119</sup> and since 2010 the SAT has provided for such review of its own informal rules.<sup>120</sup>

It is likely, however, that these procedures will remain relatively

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and appropriateness" of regulatory documents in their written decisions. *Id.*

115. Administrative Litigation Law art. 12 (China).

116. See Law on Legislation art. 90 (China) (allowing various political organizations to submit regulations that may contradict laws to the Standing Committee of the National People's Congress for examination); Xing Zheng Fa Gui Zhi Ding Cheng Xu Tiao Li (行政法规定程序条例) [Ordinance Concerning the Procedures for the Formulation of Administrative Regulations] (promulgated by the St. Council, Nov. 16, 2001, effective Jan. 1, 2002) art. 35 (Lawinfochina) (China).

117. For examples illustrating this obstacle to the pursuit of pre-enforcement review, see Cui, *supra* note 25, pt. II.B.

118. Zhonghua Renmin Gongheguo Ge Ji Renmin Dai Biao Da Hui Chang Wu Wei Yuan Hui Jian Du Fa (中华人民共和国各级人民代表大会常务委员会监督法) [Supervision of Standing Committees of People's Congresses at Various Levels (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective Jan. 1, 2007) arts. 29–30 (Lawinfochina) (China).

119. Shui Shou Gui Fan Xin Wen Jian Zhi Ding Guan Li Ban Fa (Shi Xing) (税收规范性文件制定管理办法(试行)) [Administrative Measures for the Formulation of Regulatory Documents on Taxation (for Trial Implementation) (promulgated by the St. Admin. of Tax'n, Dec. 16, 2005, effective Mar. 1, 2006, repealed July 1, 2010) art. 33 (Lawinfochina) (China).

120. Shui Shou Gui Fan Xing Wen Jian Zhi Ding Guan Li Ban Fa (税收规范性文件制定管理办法) [Administrative Measures for the Formulation of Tax Regulatory Documents] (promulgated by the St. Admin. of Tax'n, Feb. 10, 2010, effective July 1, 2010) art. 35 (Lawinfochina) (China).

infrequently used: details of the procedures are rarely spelled out, and very often the reviewing bodies are under no obligation to respond but act only at their discretion.<sup>121</sup> From an institutional perspective, the reviewing bodies often may also lack the clout to revoke the questionable rules. Litigation, therefore, emerges (not surprisingly) as the basic option for taxpayers who wish to prevent the application of agency rules that they believe are invalid. The ALL and the SPC's Shanghai Meeting Minutes unambiguously grant the power to courts to discard informal agency rules where they conflict with higher law. Court fees for administrative litigation are also negligible.<sup>122</sup> However, most foreigners are likely to take the utmost caution in deciding to sue any government agency in their host country. A more careful assessment of the real likelihood of favorable outcomes in a lawsuit is necessary.

*B. The Likelihood of Prevailing Against Government Agencies*

As a first step in such an assessment, any casual assumption that the Chinese judicial system lacks independence is rebutted by the following statistic provided by the SAT: between 1994 and 2005, the government won in only 55% of the judicial proceedings against tax agencies.<sup>123</sup> It is difficult to gather representative samples of judicial decisions to independently assess that statistic because Chinese courts and legal professionals do not yet systematically publish and classify judicial decisions.<sup>124</sup> Nonetheless, the SAT itself should have no incentive to exaggerate the frequency of government losses. Moreover, available cases suggest that the Chinese judiciary is by no means unprepared to handle disputes about tax treaty claims.

One clear conclusion from published cases is that, since the 1990s, courts have steadily adhered to the position, later articulated in the SPC's 2004 Shanghai Meeting Minutes, that informal agency documents are not

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121. *Id.* (requiring only that authorities "shall" handle review in a timely manner). This is also the case with the congressional review prescribed by the Law on the Exercise of Supervision by the Standing Committees of People's Congresses at Various Levels. *See supra* note 118.

122. The basic fee is between 50 and 100 yuan. *Su Song Fei Yong Jiao Na Ban Fa* (诉讼费用交纳办法) [Measures on the Payment of Litigation Costs] (promulgated by the St. Council, Dec. 19, 2006, effective Apr. 1, 2007), art. 13(5) (Lawinfochina) (China).

123. Lin, *Tax Administrative Cases*, *supra* note 103.

124. In a sample of civil tax litigation comprising roughly 200 published cases gathered by the Author, the percentage of taxpayer wins was lower (around 30%), which may, however, reflect a publication bias by the courts. The sample was created from legal databases including [www.chinalawinfo.com](http://www.chinalawinfo.com) and others, which gather court cases through paper and online publications by the courts.

binding on their decisions. Instead, informal agency rules are given effect only when they are consistent with higher laws and regulations and deemed reasonable and appropriate. The rejection of informal agency rules as legally binding can be blunt. In one tax case, the court admitted into evidence an SAT Correspondence that recommended a specific tax treatment for the plaintiff, but it gave no consideration or weight to the document in its final decision.<sup>125</sup> In other tax cases, the courts expressly treated informal rules as nonbinding and revoked agency actions based on them.<sup>126</sup> Perhaps most relevant for litigation involving tax treaty claims are a well-known pair of cases, discussed below, in which the courts treated SAT interpretations of tax treaties (made through one SAT Issuance and one SAT correspondence) as nonbinding, and instead pursued treaty interpretation *de novo*.<sup>127</sup> These stances are also entirely in line with judicial decisions in nontax areas.

While administrative litigation brought by foreigners is relatively rare, and as a result treaty-based litigation is also rare, Chinese courts are also known to give treaty law superior effect over Chinese domestic law.<sup>128</sup> The most widely discussed instance of this in the tax area is a 2001 lawsuit brought by the U.S. satellite company PanAmSat claiming a refund of taxes paid on income received for satellite transmission services rendered to China's official television station, China Central Television (CCTV). The tax bureaus claimed that the income constituted rental income (for the use of satellite equipment) under Chinese domestic law and royalty income under Article 11 of the U.S.–China tax treaty.<sup>129</sup> The court of first instance disregarded two SAT informal documents that had set out these claims<sup>130</sup>

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125. See *Shenzhen Energy Grp. Ltd. v. Inspection Bureau of the Qinzhou Local Tax Bureau*, Guixingzhongzi, at 30 (Guangxi Zhuang Autonomous Region Higher People's Ct. 2002) (China).

126. See, e.g., *Shenzhen Jinmanke Electric, Ltd. v. Shenzhen State Tax Bureau Xingchuzi*, at 003 (Shenzhen Interm. People's Ct. Nov. 21, 1997) (China).

127. *PanAmSat Int'l Sys., Inc. v. Second Dep't in the External Substation of the Beijing State Tax Bureau (PanAmSat II)*, Gaoxingzhongzi, at 24 (Higher People's Ct. Beijing, Dec. 20, 2002) (China); *PanAmSat Int'l Sys., Inc. v. Second Dep't in the External Substation of the Beijing State Tax Bureau (PanAmSat I)* Yizhongxingchuzi, at 168 (First Interm. People's Ct. Beijing, Dec. 20, 2001) (China).

128. For a summary discussion, see Zuo Haicong, *A Study of the Issue of Directly Applying Treaties*, *Legal Studies*, 3 CHINESE J.L. 97, 97–100 (2008).

129. Specifically, the claim was that it constituted royalty income received as “a consideration for the use of, or the right to use . . . industrial, commercial or scientific equipment.” *PanAmSat II*, Gaoxingzhongzi at 24; see also Tax Agreement with the People's Republic of China, U.S.–China, art. XI, ¶ 3, Apr. 30, 1984, S. Treaty Doc. No. 98-30.

130. Imposition of Tax on Foreign Enterprises' Incomes from Leasing Satellite Communication Lines (promulgated by the St. Admin. of Tax'n, Nov. 12, 1998, effective Nov. 12, 1998) (Lawinfochina) (China); Imposition of Tax on Rental Income Derived by

and directly applied both a domestic tax statute and the U.S.–China tax treaty. The appeals court found a conflict between the domestic statute and the U.S.–China tax treaty, and then invoked the provision in the domestic statute<sup>131</sup> giving superior effect to the treaty to deliver a verdict on the basis of treaty provisions. In both cases, the courts’ treaty interpretations were erroneous in ways that might not have been obvious at the time.<sup>132</sup> As a result of these erroneous interpretations, PanAmSat lost the lawsuit. However, the courts made no mistake about what law is relevant: informal agency rules have no legal effect, and treaty provisions are to be given priority over domestic law.

All of Chinese law—statutes, regulations, and judicial opinions both generally and in specific cases—thus points to the following unambiguous conclusions: informal agency documents of the types discussed in Part I are not legally binding, they will not be given effect by courts if they are found to conflict with higher law, and tax treaties are a form of law that is regarded as having the highest legal effect. Why, then, do most taxpayers who are subject to the controversial SAT rules appear to treat these rules as binding?

This question is currently being debated among advisors on Chinese taxation, and while some answers have been proposed, none is at the same time plausible *and* sympathetic. One assertion—understandably almost never made in writing, and often offered only on occasions that are felt not to be too “sensitive”—is that China lacks an effective legal system for resolving disputes with government agencies. However, those who make this assertion do not explain how or to what extent the system is ineffective such that those asked to pay taxes that are not legally required should be absolved of any responsibility for formally seeking remedies. In the context of the deprivation of tax treaty benefits, depicting foreign investors (some of which are among the most powerful companies in the world) as helpless victims of a dysfunctional legal system seems unpersuasive, to say the least. Another explanation is that, even with controversial treaty interpretations, the tax burden borne by foreign investors is sufficiently low that confronting

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PanAmSat from Leasing Satellite Communication Lines to CCTV (promulgated by the St. Admin. on Tax’n, Aug. 19, 1999, effective Aug. 19, 1999) (Lawinfochina) (China).

131. Zhonghua Renmin Gongheguo Wai Shang Tou Zi Qiye He Wai Guo Qiye (中华人民共和国外商投资企业和外国企业所得税法) [Income Tax Law for Enterprises with Foreign Investment and Foreign Enterprises] (promulgated by the Nat’l People’s Cong., Apr. 9, 1991, effective July 1, 1991, annulled Jan. 1, 2008) art. 28 (Lawinfochina) (China).

132. If made today, the courts’ interpretations would clearly contradict the OECD commentary on the issue. See *OECD Model Convention*, *supra* note 18, at 223–24 (commentary on Article 12) (clarifying that income from satellite transmissions does not fall under the category of royalty income in tax treaties).

Chinese tax agencies is unnecessary from a business perspective.<sup>133</sup> This is of course quite plausible in some cases but, for U.S. taxpayers and their affiliates at least, it would certainly bar the latter from claiming U.S. foreign tax credit for the erroneously paid Chinese tax, if the facts are adequately disclosed to the IRS.<sup>134</sup>

The explanation for the ability of informal SAT rules contradicting Chinese domestic law and tax treaties to bind taxpayers that perhaps possesses the greatest combination of plausibility and exculpatory effect is that anyone pursuing a challenge would be “sticking one’s head out.”<sup>135</sup> Some data sheds light on the plausibility of this explanation. In 2006, there were a total of 91,667 cases of administrative appeals against agency actions throughout China and 52,792 cases of administrative litigation.<sup>136</sup> In more recent years, these numbers declined noticeably.<sup>137</sup> It can be estimated that each year between 1,000 and 1,200 cases of administrative appeals and fewer than 500 lawsuits are launched against tax agencies across China. These numbers—both for the total amount of administrative and judicial appeals and for tax disputes—are generally regarded as low, given China’s geographical and population size and its decentralized administrative structure. There is indeed a widely shared view among practitioners and scholars of Chinese law that the pursuit of formal administrative remedies is still a relatively uncommon, even if not rare, choice.

What factors cause this state of affairs is hotly debated. For example, the claim that the Chinese judiciary lacks independence has been challenged by scholars, especially with respect to areas that are not politically sensitive.<sup>138</sup>

133. See, e.g., Jack Grocott, *Foreign Taxpayer Takes Dispute Through Chinese Courts*, INT’L TAX REV., Dec. 13, 2011, available at <http://www.internationaltaxreview.com/Article/2731834/Foreign-taxpayer-takes-dispute-through-Chinese-courts.html> (“While China has drastically increased its collections on non-resident taxpayers, the magnitude of such efforts is potentially still not great enough to force the hand of [multinational corporations] in terms of seeking greater litigation and administrative review.”). The tax rate applicable to passive income (i.e., dividends, royalties, interests, and capital gains) received by foreigners without an establishment in China is 10% before any reduction by applicable treaties. Zhonghua Renmin Gongheguo Qiye Suo De Shui Fa Shi Shi Tiao Li (中华人民共和国企业所得税法实施条例) [Implementation Rules of Enterprise Income Tax Law] (promulgated by the Nat’l People’s Cong., Dec. 6, 2007, effective Jan. 1, 2008) art. 91 (Lawinfochina) (China).

134. See *infra* Part V.

135. If others do not pursue formal remedies, there are not only psychological but also real, practical disadvantages to resorting to such remedies. For example, it may not be easy to find competent lawyers who can handle administrative litigation if there is weak market demand for such services.

136. See Part IV: Statistics, LAW Y.B. CHINA, at 613 tbls. 2, 3 & 6 (2006).

137. By 2008 administrative appeal cases declined by 6.7% and administrative litigation cases by 16.9%. See *id.* at 634–36 tbls. 1–5.

138. For an up-to-date review of the state of judicial independence in China, see

Some Chinese tax scholars have advanced very different hypotheses. For example, some suggest that the aggregate tax rates of different taxes are so high that many Chinese taxpayers engage (or hope to engage) in negotiations with tax authorities to bring the amounts of their tax liabilities below legally-required levels. Maintaining a nonconfrontational relationship with tax agencies is believed to be necessary for preserving that option.<sup>139</sup> But this type of explanation has little relevance for major foreign investors in China, who do not negotiate with Chinese tax agencies on a routine basis.

However the current state of relative disuse of the Chinese system of public law remedies is explained, it tends to impart a practically binding effect to informal agency rules. Even rules that appear patently invalid still need to be taken very seriously. This does not mean, though, that they can be taken as given and remain unchallenged. In the next section, we show that for U.S. taxpayers doing business in China abandoning treaty benefits and Chinese legal remedies have costs at home, ones which they and their U.S. tax advisors have historically tried to avoid.

## V. EFFECTIVE AND PRACTICAL REMEDIES: U.S. TAXPAYER OPTIONS

Under U.S. federal income tax law, a creditable foreign tax must be a payment that is compulsory and pursuant to the authority of a foreign country to levy taxes.<sup>140</sup> A payment in excess of the amount of foreign tax liability determined under foreign law is not a compulsory payment.<sup>141</sup> Specifically, under U.S. Department of Treasury (Treasury) regulations, “[a]n amount paid does not exceed the amount of such liability if the amount paid is determined by the taxpayer in a manner that is consistent with a reasonable interpretation and application of the substantive and procedural provisions of foreign law (including applicable tax treaties).”<sup>142</sup> Moreover, the taxpayer should exhaust “all effective and practical remedies, including invocation of competent authority procedures available under applicable tax treaties, to reduce . . . the taxpayer’s liability for

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generally JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION (Randall Peerenboom ed., 2010), and Randall Peerenboom, Judicial Independence in China: Common Myths and Unfounded Assumptions (Sept. 1, 2008) (unpublished research paper, LaTrobe University), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1283179](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1283179).

139. See Shi Zhengwen, *High Nominal Tax Burdens: Shackles on the Scientific Development of Chinese Tax Affairs*, in TAXATION RESEARCH (forthcoming).

140. Treas. Reg. § 1.901-2(a)(1)–(2)(i) (2010).

141. See *id.* § 1.901-2(e)(5)(i).

142. *Id.*

foreign tax.”<sup>143</sup>

These basic requirements raise the following questions for U.S. taxpayers facing the application to their own and their affiliates’ transactions<sup>144</sup> of the problematic Chinese tax rules discussed in Part I. Could the payment of tax according to such rules be regarded as “consistent with a reasonable interpretation and application of the substantive and procedural provisions” of Chinese law, including applicable tax treaties? Although the relevant substantive issues may be more fully explored than they are in this Article, the answer suggested by the analysis in Parts I and IV is “No.” This is because the informal SAT rules, to the extent they conflict with treaty law,<sup>145</sup> are substantively invalid and cannot have the effect of law in China. The question then arises as to what might constitute, for U.S. taxpayers, “effective and practical remedies” against the payment of taxes pursuant to such rules, exhaustion of which entitles such taxpayers to U.S. credits for any such tax paid. Could a U.S. taxpayer simply make the following claim, perhaps relying on their Chinese tax advisors: “Practically nobody sues the government in China, and the least likely to do so are foreigners, so for all intents and purposes these rules are binding”?

The difficulty of supporting such a claim under U.S. tax law is considerable, and not only because of the facts about the frequency of tax litigation in China (infrequent, but not negligible), the likelihood of prevailing in any litigation (in fact quite high), and the past cases of litigation by foreign taxpayers discussed in the last Part. Just as important, the difficulty is on account of the consistent and high standards for compulsory tax payments, as established under U.S. law and as maintained by IRS practice. These standards are well summarized in the following statements in the Treasury regulations:

Whether a foreign levy requires a compulsory payment pursuant to a foreign country’s authority to levy taxes is determined by principles of U.S. law and not by principles of law of the foreign country. Therefore, the assertion by a

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143. *Id.*; see also Fischl & Harper, *supra* note 7, at 33–34 (“IRS policy is that a foreign tax credit should be denied unless the taxpayer has taken reasonable measures to mitigate its foreign tax liability. The foreign tax credit is designed to reduce the possibility of double taxation when a taxpayer is subject to income tax in the U.S. and a foreign country, not to permit a taxpayer to be indifferent to its potential foreign income tax liability so long as the foreign tax can be offset against its U.S. tax liability.”).

144. The requirements with respect to compulsory taxes under Treas. Reg. § 1.901-2 also apply in the context of indirect foreign tax credits provided under I.R.C. § 902 and “in lieu of” credits under § 903. Treas. Reg. § 1.902-1T(a)(7) (2009); Treas. Reg. § 1.903-1(a) (2011). In the following, reference to payments by U.S. taxpayers includes payments by their affiliates for which the U.S. taxpayers may claim indirect foreign tax credit.

145. See *supra* notes 46–50 and accompanying text (noting that some of the rules, such as Circular 698, may also be invalid under Chinese domestic law).



foreign country that a levy is pursuant to the foreign country's authority to levy taxes is not determinative that, under U.S. principles, it is pursuant thereto.<sup>146</sup>

More specifically, the Treasury regulations require a cost-benefit analysis of whether a remedy is "effective and practical"; only if the cost of seeking remedy (including the risk of offsetting or additional tax liability) "is reasonable in light of the amount at issue and the likelihood of success" is it required to be sought. While necessarily factually based, this analysis is also framed by certain legal and policy boundaries. Going to the heart of the matter, some U.S. tax practitioners have questioned whether taxpayers are "limited to considering the costs of litigation and potential counterclaims and offsets."<sup>147</sup> What about the desire to maintain and not to jeopardize the taxpayer's business relationship with the foreign sovereign, the loss of which could "lead to a significantly greater loss of business revenue than the foreign taxes at issue?"<sup>148</sup> "May the taxpayer make additional foreign tax payments to stave off an 'audit from hell' . . . [even] if the taxpayer has little or no foreign tax exposure as a strict legal matter?"<sup>149</sup> What about the desire to avoid negative publicity that one fears might ensue if one enters into a formal dispute with a part of the host country's government?

While these questions underscore difficult choices that taxpayers sometimes have to make, they do not expose ambiguities in the cost-benefit analysis described in the regulations. Cutting deals with foreign governments is certainly not what was contemplated in the cost-benefit analysis.<sup>150</sup> This is not just because a foreign levy is "not a tax, to the extent a person subject to the levy receives . . . directly or indirectly, a specific economic benefit . . . from the foreign country in exchange."<sup>151</sup> More fundamentally, the "effective and practical remedies" test is clearly intended to balance the interest of taxpayers and the U.S. government's desire to protect revenue. It follows that preserving business relationships that are conditioned upon not exercising one's entitlement to the protection of law, avoiding a confrontational audit, or simply eschewing the risk of negative publicity are objectives insufficient to outweigh the U.S. government's legitimate claim to revenue.

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146. Treas. Reg. § 1.901-2(a)(2)(i) (2011).

147. Fischl & Harper, *supra* note 7, at 42.

148. *Id.*

149. *Id.*

150. *Id.* at 40 nn. 37–38.

151. Treas. Reg. § 1.901-2(a)(2)(i). A "specific economic benefit" is one "that is not made available on substantially the same terms to substantially all persons who are subject to the income tax that is generally imposed by the foreign country." Treas. Reg. § 1.901-2(a)(2)(ii)(B).

Examples in the regulations, judicial decisions, and IRS guidance all help illustrate how the effective and practical remedies test has been applied. One example in the Treasury regulations<sup>152</sup> suggests that (i) commencing an administrative proceeding in the foreign country and requesting for competent authority (CA) assistance are both expected (where the costs of doing so are not unreasonable), and (ii) the cost consideration is applied similarly to foreign judicial proceedings and requests for the IRS's CA assistance.<sup>153</sup> In the recently decided *Proctor & Gamble* case,<sup>154</sup> a U.S. company's failure to assess whether it was possible to obtain Japanese tax relief led a district court to affirm the IRS's decision to deny U.S. foreign tax credits for certain Japanese taxes paid. Both the IRS's litigating positions in this and other cases<sup>155</sup> and published IRS guidance demonstrate that the agency has taken very seriously the compulsory tax requirement. Indeed, because the IRS makes the determination of whether a payment is compulsory on a case-by-case basis,<sup>156</sup> this has very much been an area of IRS-made policy.<sup>157</sup> For example, although the regulations provide that taxpayers "may generally rely on advice obtained in good faith from competent foreign tax advisors to whom the taxpayer has disclosed the relevant facts" in interpreting foreign tax law,<sup>158</sup> the IRS does not view the advice of foreign counsel as sufficient to satisfy the taxpayer's burden of proof that it has exhausted all effective and practical remedies.<sup>159</sup>

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152. Treas. Reg. § 1.901-2(e)(5)(ii) (Example 3).

153. That is, the regulation does not contemplate taking into account "special business factors" in weighing the cost of foreign proceedings.

154. *Proctor & Gamble Co. v. United States*, 2010-2 T.C.M. (CCH) 85,593 (S.D. Ohio 2010).

155. In an earlier case involving another major U.S. company, the taxpayer was advised by an Italian tax expert that its only argument against the application of an Italian tax rule was "a near certain loser." *Int'l Bus. Machs. Corp. v. United States*, 38 Fed. Cl. 661, 669 (1997). The taxpayer nonetheless filed for a refund and initiated the process of litigating its claim in an Italian court. *Id.* It was in such circumstances that the court held that the taxpayer had exhausted effective and practical remedies, and it was unnecessary to wait until the litigation's unsuccessful conclusion before the taxpayer can claim foreign tax credits. *Id.* at 675; see also *infra* notes 161-63 and accompanying text (discussing the *Riggs* cases).

156. See I.R.S. Field Serv. Advisory (Mar. 5, 1998), 1998 WL 1984349 (explaining that even if reasonable, "amounts are not compulsory unless petitioner exhausted all of its effective and practical remedies to reduce its foreign tax liability").

157. For a discussion of successive reformulations of the compulsory tax requirement in the Treasury regulations, see Fischl & Harper, *supra* note 7, at 34-37.

158. Treas. Reg. § 1.901-2(e)(5)(i) (2011).

159. See I.R.S. Non Docketed Serv. Advice Review (Sept. 2, 1988), 1988 WL 1092574 ("We do not think that advice of foreign counsel will satisfy the taxpayer's burden of proof in this regard."). Moreover, this nondocketed service advice review states, "As to

Probably the most striking illustration of the IRS's approach to the compulsory tax payment issue can be found in the *Riggs* litigation.<sup>160</sup> In the *Riggs* controversy, the IRS forcefully questioned the legal validity and binding effect, under Brazilian domestic law, of a private ruling prepared by the Brazilian IRS and adopted by the Brazilian Ministry of Finance.<sup>161</sup> The IRS argued that the ruling was no more than an advisory opinion and had no binding effect under Brazilian law. Further, it argued the Brazilian Ministry of Finance's "order" to withhold tax based on the ruling was also not compulsory and would be overturned if challenged in a Brazilian court. Finally, consistent with its suspicion of irregularities in the way the ruling had been issued, the IRS questioned the sufficiency of the evidence produced by the taxpayer that tax had indeed been paid to the Brazilian government. Notably, the U.S. Tax Court agreed with these IRS findings in two successive decisions.<sup>162</sup>

The IRS's perseverance in enforcing the compulsory tax requirement throughout the last few decades has compelled "U.S. tax experts to make

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administrative remedies, we think that the taxpayer and/or its foreign sub must take advantage of all administrative remedies that, under the facts, could reasonably be expected to achieve a reduction in the foreign tax liability *if the foreign tax authority is at all inclined to reduce such liability.*" *Id.* (emphasis added).

160. See *supra* note 8 and accompanying text. Although the *Riggs* controversy focused on whether certain tax payments were required under foreign law and not on the issue of "effective and practical remedies," it nonetheless illustrates the type of "principles of U.S. law" that the IRS intends to apply.

161. *Riggs Nat'l Corp. v. Comm'r (Riggs II)*, 163 F.3d 1363, 1366–67 (D.C. Cir. 1999).

162. *Riggs Nat'l Corp. v. Comm'r (Riggs I)*, 107 T.C. 301 (1996), *rev'd*, 163 F.3d 1363 (D.C. Cir. 1999) (*Riggs II*); *Riggs Nat'l Corp. v. Comm'r (Riggs III)*, 81 T.C.M. (CCH) 1023 (2001), *rev'd*, 295 F.3d 16 (D.C. Cir. 2002) (*Riggs IV*). These decisions were both overturned by the D.C. Circuit, first on the ground that the "act of state doctrine" should have precluded the Tax Court from inquiring into the legality of the Brazilian Ministry of Finance's private ruling and of the order for tax collection with respect to the U.S. lenders, *Riggs II*, 163 F.3d at 1368–69, and second on the ground that the tax receipts furnished by the borrower (the Brazilian Central Bank) were entitled to the "presumption of regularity" accorded to foreign government entities. *Riggs IV*, 295 F.3d at 20–21. The IRS indicated in a 1999 Chief Counsel Advice Memorandum that it disagreed with the first decision. Memorandum from Cynthia J. Matson, Assistant Chief Counsel (Int'l) (May 21, 1999), [www.irs.gov/pub/irs-wd/9931035.pdf](http://www.irs.gov/pub/irs-wd/9931035.pdf). As a result of these reversals, the Tax Court delivered a decision to reduce, instead of deny, Riggs Bank's FTC claim. *Riggs Nat'l Corp. v. Comm'r (Riggs V)*, 87 T.C.M. (CCH) 1276, 1287 (2004). It is unlikely for the "act of state doctrine" to prevent U.S. judicial review of whether foreign governments have pursued tax collection in violation of tax treaties, since a U.S. court can look to a treaty or other "unambiguous agreement regarding controlling legal principles" to review the legality of foreign government actions. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); see also *Am. Int'l Grp., Inc. v. Iran*, 493 F. Supp. 522, 525 (D.D.C. 1980) (explaining that the act of state doctrine does not apply where a treaty establishes applicable rule of law).

cost/benefit-type determinations regarding issues based on foreign law about which they do not have expertise.”<sup>163</sup> To a significant extent, IRS policy in this area has been internalized by U.S. taxpayers. Prima facie, it seems difficult to justify the adoption of different policies simply because in some countries formally disputing one’s tax liabilities is uncommon. Part IV, above, has shown that the monetary costs of administrative appeal and litigation in China are very low and would not in themselves justify acquiescence in the denial of treaty benefits based on invalid treaty interpretations. The chances for taxpayers to prevail in administrative and judicial proceedings, including by requesting the revocation or nonapplication of erroneous agency rules, are also by no means “remote.” Like any other legal system, the main mechanisms for resolving disagreements between Chinese government agencies and private parties depend on judicial review. The Chinese administrative law system is designed to resolve such disputes and its chief inadequacy at the present lies not in the verdicts the system delivers but in its state of relative disuse.

U.S. tax law thus likely requires U.S. taxpayers to consider pursuing, and probably to take actions to pursue, administrative or judicial remedies against the application of the controversial SAT rules discussed in Part I. Many U.S. taxpayers concerned may flinch at this conclusion<sup>164</sup>: is this not too merciless an application of the compulsory tax requirement? Does it make for good tax policy? We examine this last question in the next Part, which further demonstrates the relevance of foreign administrative law to making international tax policy.

## VI. STRENGTHENING TAX TREATIES BY SUPPORTING THE RULE OF LAW

The legal principle underlying the conclusion reached at the end of the last section is set forth in the Treasury regulations: “Whether a foreign levy requires a compulsory payment pursuant to a foreign country’s authority to levy taxes is determined by principles of U.S. law and not by principles of law of the foreign country.”<sup>165</sup> That is, U.S. legal principles govern the

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163. Fischl & Harper, *supra* note 7, at 42. For example, during the *Marks & Spencer* litigation between 2005 and 2006, “many U.S. tax experts concluded that U.K. subsidiaries of U.S. taxpayers must file protective claims for refunds or else risk a voluntary tax challenge” in light of predictions that the European Court of Justice was going to overrule certain positions held by the U.K. tax authority. *Id.* at 41. This was done even though “U.K. Inland Revenue refused to process claims for refund based on a *Marks & Spencer*-type theory at the time.” *Id.*

164. One can imagine a cry of disbelief: “What? We are being asked by the SAT to pay Chinese tax, and by the IRS to sue the SAT to prevent the collection of such tax?”

165. Treas. Reg. § 1.901-2(a)(2)(i) (2011).

overall interpretation of the compulsory tax concept, even though specific aspects of the concept (e.g., whether a payment “is consistent with a reasonable interpretation and application of the substantive and procedural provisions of foreign law”<sup>166</sup>) may be determined under foreign law. The concrete meaning of this approach has not been discussed much among U.S. tax practitioners,<sup>167</sup> but it takes on an unexpected significance in the type of cases discussed in this Article. By virtue of being part of the U.S. legal system, U.S. tax law assumes that tax authorities are constrained by the law just as taxpayers are, and that taxpayers are protected by and will exercise their legal rights. It simply does not envision U.S. taxpayers either compromising their legal rights in unprincipled fashions or taking advantage of legal loopholes.<sup>168</sup> Thus, acquiescence in legally invalid but “practically binding” rules not only does not fit into the specific regulatory cost–benefit test for the exhaustion of all effective and practical remedies, it arguably has no place in the larger foreign tax credit framework or even U.S. tax law in general. Rather, principles of U.S. law require tax to be collected according to rules that are legally valid and orders that are legally binding. Where this is not the case, the first remedies these principles look to are also legal mechanisms.

This rather fundamental feature of U.S. tax law is “exported” to other countries when potential foreign tax credit denial generates sufficient incentives for U.S. taxpayers to pursue administrative and judicial remedies in other countries. And in countries where the rule of law is weak, this “export” may constitute a positive externality. This is very likely the case in China. From the Chinese government’s point of view, the amount of tax revenue at stake under the controversial SAT rules discussed in Part I is small and will likely remain so in the foreseeable future.<sup>169</sup> By contrast,

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166. *Id.* § 1.901-2(c)(5).

167. Some guidance exists, and occasionally it is to the taxpayer’s advantage. For example, in *Schering Corp. v. Commissioner*, 69 T.C. 579 (1978), *acq. in part* 1981–82 C.B. 2, the U.S. Tax Court sustained the FTC claims of a taxpayer that had not brought its issue to the competent authority, deeming such administrative steps to be “futile” and citing U.S. case law. *Id.* at 602. The IRS acquiesced in the *Schering* decision only in result. See I.R.S. Non Docketed Serv. Advice Review 8261 (Sept. 2, 1988), 1988 WL 1092574. However, it is presumably the requirement to apply U.S. legal principles that justifies the IRS position, set out in that same document, that the opinions of foreign counsel would not be conclusive as to whether effective and practical remedies have been exhausted.

168. The IRS’s position in *Riggs I*, 107 T.C. 301 (1996) and *Riggs II*, 163 F.3d 1363 (D.C. Cir. 1999) illustrates this point.

169. In 2009, total income tax revenue collected from foreign entities constituted less than 4% of total EIT revenue collected in China, which itself was less than 20% of total tax revenue (Author’s computation based on data released by the SAT’s International Tax Department and reported in *Refining Management and Improving the Level of Service in Taxation of*

although individual officials or even certain departments in tax agencies may feel vexed by appeals and detest litigation, the Chinese government overall, not to mention legal professionals and citizens in general, is supportive of such formal challenges to agency actions. This is first because the rule of law (especially in politically nonsensitive areas) is currently one of the main strategies that the government relies on to improve the accountability and therefore legitimacy of the Chinese party-state.<sup>170</sup> It is further because the use of existing mechanisms for challenging agency rulings and actions is still low, and it is widely believed that the greater use of such mechanisms could help reduce arbitrary exercises of official discretion and opportunities for rent-seeking. It would also reduce the power of legally nonbinding rules to bind practically, by making formal dispute resolution a more normal part of everyday tax compliance. For example, by creating a market demand, it may encourage the mastery of administrative procedure by tax professionals while lowering the current market premium paid to service providers whose specialty is arranging private meetings and negotiations with tax officials.

Thus, even from the Chinese government's own perspective, the attitude toward more extensive use of administrative appeals and litigation is better than neutral. From a social perspective, it is definitely positive. China also has a foreign tax credit system that in many respects resembles the U.S. system. Foreign taxes erroneously paid (e.g., in excess of what is required under tax treaties) cannot be credited.<sup>171</sup> In enforcing the compulsory tax

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*Non-Residents*, CHINA TAX'N NEWS, Oct. 19, 2009, at 1, and on the *Report of the Ministry of Finance on the Implementation of the 2009 Central and Local Budgetary Plans*, (Mar. 5, 2010), [http://news.xinhuanet.com/politics/2010-03/16/content\\_13181369.htm](http://news.xinhuanet.com/politics/2010-03/16/content_13181369.htm)). The predominant portion of such revenue collected from foreigners was likely based on uncontroversial tax rules. The portion of tax collection pursuant to controversial rules allocable to U.S. taxpayers and affiliates should be negligible from a revenue perspective.

170. See, e.g., Key Points in Implementing the Comprehensive Promotion of Administration in Accordance with the Rule of Law (promulgated by the St. Council, Mar. 22, 2004, effective Mar. 22, 2004) (a national initiative for all executive branch agencies to improve the rule of law; paragraph thirty emphasizes administrative appeals procedures in particular); Guowuyuan Guan Yu Jia Qiang Fa Zhi Zheng Fu Jian She de Yi Jian (国务院关于加强法治政府建设的意见) [Opinions of the State Council on Strengthening the Building of a Government Ruled by Law] (promulgated by the St. Council, Oct. 10, 2010, effective Oct. 10, 2010) (Lawinfochina) (China) (setting forth a recent renewal of the 2004 initiative; paragraph twenty-four emphasizes administrative appeals procedures and paragraph twenty-five emphasizes judicial independence in administrative litigation).

171. Qiye Jing Wai Suo de Shui Shou Di Mian (企业境外所得税收抵免) [Issues Concerning the Foreign Income Tax Credit of Enterprises] (promulgated by the Ministry of Finance and the St. Admin. on Tax'n, Dec. 25, 2009, effective Jan. 1, 2008) para. 4 (Lawinfochina) (China). Other provisions similar to U.S. rules include the exclusion of penalties, fines and interests, payments rebated or in exchange for direct or indirect subsidies. *Id.*; see also

requirements set forth in the Treasury regulations with respect to payments that are inconsistent with treaties, therefore, the IRS would simply be acting in a fair, reciprocal fashion.

The foregoing considerations suggest that the denial of foreign tax credits to U.S. taxpayers who do not contest the application of the controversial SAT rules discussed in Part I not only is supported by law, but may be justified as a matter of policy: it is a rule that is socially optimal when the state of Chinese administrative law is taken into account. U.S. tax law may thus help to shape the legal and governance environments in foreign countries, much as the Foreign Corrupt Practice Act<sup>172</sup> and similar legislation do. However, once we move to the policy perspective, it is no longer sufficient just to ask whether the IRS is justified in imposing the foregoing constraints on U.S. taxpayers' actions. Clearly, the question should also be raised: what should the U.S. government do directly, as a treaty partner with China?

It is beyond the scope of this Article to examine these questions broadly in light of U.S. treaty policy. Instead, the following identifies two sets of insights on these questions that the review of Chinese tax administrative law in this Article offers.

The first set of insights has been anticipated in Part III. The challenges to foreign investors' expectations arising from the controversial SAT rules discussed in this Article should not be conceived of as treaty overrides on China's part. Instead, at least under current Chinese law, treaty overrides are not possible.<sup>173</sup> No Chinese government agency or official has argued that some national interests of overwhelming importance have arisen so that there is no other choice but to abandon China's treaty obligations.<sup>174</sup> Nor has anyone asserted that China can no longer perform under the relevant aspects of China's tax treaties due to some complications under domestic law.<sup>175</sup> Indeed, given the manner in which the SAT has continued to negotiate new tax treaties for China—which has not reflected any of the substantial deviations in treaty interpretation contained in the

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Zhonghua Renmin Gongheguo Qiye Suo de Shui Fa Shi Shi Tiao Li (中华人民共和国企业所得税法实施条例) [Regulation on the Implementation of the Enterprise Income Tax Law] (promulgated by the St. Council, Dec. 6, 2007, effective Jan. 1, 2008) art. 77 (Lawinfochina) (China) (limiting FTC to taxes paid in accordance with "foreign law and relevant rules"). There is no mitigating provision under current Chinese FTC rules that is analogous to the "effective and practical remedies" test: foreign taxes paid in excess of treaty requirements cannot be credited, period.

172. 15 U.S.C. § 78dd-1(a)–(g) (2006).

173. See generally *supra* Part III.

174. See *OECD Report on Treaty Override*, *supra* note 5, para. 17.

175. See *id.* para. 10.

controversial SAT circulars—there may not even have been any change in China’s treaty policy, in terms of mutual expectations that China aims to achieve an agreement on during treaty negotiation. Instead of turning its back on its treaty obligations, what has happened may be more properly characterized as a neglect of its treaty obligations.

In a way, this is good news: tax treaties are notoriously fragile. There are few easy remedies once a country decides to breach them. As the OECD Treaty Override Report observes, in the event of one country’s genuine decision to override treaties, its treaty partners essentially have only three options: protest,<sup>176</sup> terminate or suspend the operation of the treaties in whole or in part (where a violation is material),<sup>177</sup> or renegotiate the treaties.<sup>178</sup> Protests may often be ineffective. Termination “could do even more harm economically and endanger the possibility of finding an acceptable solution in the future, [while partial] suspension . . . would only leave things as they are.”<sup>179</sup> Renegotiation is not only time-consuming, but must also take into account the fact that the breaching party had already decided not to engage in treaty renegotiation before implementing its new position. In comparison, a reminder to a country that has strayed from its treaty obligations should be easier.

However, addressing the controversial SAT circulars also requires more than the traditional methods for resolving disagreements about treaty interpretation or application (e.g., engagement in communication with China’s competent authority through mutual agreement procedures).<sup>180</sup> This brings us to the second set of insights. As this Article has shown, both the adoption of tax treaties and their implementation and interpretation are handled in China through a rather devolved administrative process. This is a process that currently lacks sufficient legislative, judicial, and even executive oversight.<sup>181</sup> By virtue of a strong consensus among these

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176. *Id.* para. 21.

177. *Id.* para. 22.

178. *Id.* para. 33.

179. *Id.* para. 30. At the time of the report, “Member countries have so far refrained from taking retaliatory measures (which all agree would not be conducive to better understanding in the international tax field) against overriding legislation.” *Id.* para. 34.

180. *OECD Model Convention*, *supra* note 18, art. 25(3) (providing that the “competent authorities of the Contracting States shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention”). The U.S.–China Tax Treaty contains an identical provision in Article 24(3).

181. *See supra* notes 79–85 and accompanying text (discussing the lack of legislative oversight); *supra* Part IV.2 (regarding the rareness of treaty-based litigation); *supra* notes 57–62 and accompanying text (regarding the suspected lack of executive oversight).



different branches of government, this fact has not prevented tax treaties from being given, conceptually, proper legal effect within China's legal system. However, this conceptual consensus is in itself insufficient to guarantee tax treaties' faithful implementation. If China's treaty partners merely pursued dialogues with a few SAT officials, they would not be tapping any mechanism that could reliably resolve difficulties encountered in treaty application. This is because, as well-intentioned and technically competent as some of these officials might be, their work is not yet pursued within a properly disciplined administrative state, nor, most crucially, within an environment characterized by the rule of law. In such circumstances, it would be quite difficult for them to ensure China's treaty obligations are properly taken into account in agency rulemaking, or that other individuals in the government do not take upon themselves to pursue what *they* regard as China's national interests.

By contrast, when foreign taxpayers pursue administrative or judicial appeals in China—with or without the negative incentives imposed by their home countries—to uphold what they believe are their rights under tax treaties, they precisely tap mechanisms of executive or judicial oversight. Similarly, the governments of China's treaty partners should consider using such mechanisms (and mechanisms of legislative oversight), especially if they expect their own taxpayers to do so. That is, they should not simply act on the traditional habit of the treaty specialist and make the leap of faith that *somehow, whatever the other country's domestic law*, treaty obligations will be honored.<sup>182</sup> Instead, they should try to engage the mechanisms that would ultimately improve treaty implementation.

This may mean, for a start, attempting to make a wider group of officials within the Chinese executive branch (whether they be in the SAT, MOF, the Ministry of Foreign Affairs, or the State Council) aware of the specific implications of treaty provisions. And it ultimately may mean engagement with China's legislative and judicial branches. While none of these possibilities are as well established as competent authority procedures, one should remember that neither are mechanisms for executive and judicial oversight that U.S. taxpayers may be asked to resort to. Just as the unfamiliarity of these latter mechanisms may induce U.S. investors to treat the controversial SAT circulars as practically binding and to neglect the pursuit of all effective and practical remedies, the habit of merely interacting with a few SAT officials on treaty matters will do little to encourage proper treaty implementation in China. Continuing such a habit would mean that the leap of faith of the treaty specialist would remain just that—an unjustified leap of faith.

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182. See, e.g., *OECD Report on Treaty Override*, *supra* note 5, para. 10.

## CONCLUSION

For every country that has signed tax treaties and given them effect under domestic law, the country's commitment to tax treaties is stronger than the commitment of any individual tax official charged with treaty implementation (including those officials designated as the treaty competent authority of the country). The former commitment is the ultimate cure for treaty violations. And what connects the country's commitment, on the one hand, and the commitment of individual officials, departments and agencies, on the other, is the country's system of public law governing legislation, agency rulemaking, and agency adjudication. It is in this fundamental sense that the rule of law forms the backbone of the implementation of tax treaties (and indeed of all international treaties).

Chinese tax rules that deviate from treaty obligations are interesting because, at least in principle, China has taken a clear stance that tax treaty obligations must be honored regardless of domestic law.<sup>183</sup> Without an understanding of how tax rules are made and enforced in China, therefore, the adoption of rules at odds with China's treaty obligations would seem inconsistent at best. Digging beneath the surface of the laws to develop a robust appreciation of the Chinese tax system allows one not only to understand this seeming contradiction but also to appreciate a surprising set of implications for China's treaty partners and their taxpayers.

Aside from tax treaties, many countries may also engage in international coordination to alleviate double taxation, for example through the collective, though legally unilateral and internationally nonbinding, adoption of rules such as the granting of foreign tax credits. Some of them do so while assuming implicitly that such coordination will be achieved within some framework of the rule of law: as we have seen in this Article, this is true of the U.S. tax law as reflected in the compulsory tax requirement under the foreign tax credit rules. This is another reason why administrative law considerations lie close to the core of international taxation.

Although this Article focused extensively on Chinese examples, the type of cases it examines could arise between any two tax treaty partners. In every country, foreign investors may face the unpalatable decision of whether to comply with rules that are not legally binding, e.g., rules that have no formal legal basis and are procedurally or substantively invalid.

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183. This stance may be contrasted with that of the United States, where treaties may be overridden by later-enacted federal statutes. The U.S. government's tax treaty overrides are a familiar topic in U.S. international taxation. See, e.g., Richard E. Andersen, *Analysis of United States Income Tax Treaties*, ¶ 1.03[1] Legal Status of U.S. Income Tax Treaties, n.96 (Thomson/RIA 2011).

Although domestic taxpayers confront similar decisions, the decisions may be distinctively more difficult for foreign persons because their expectations may have been shaped by publicly available information about the country's legal system (including information about their rights under international treaties). Practically but not legally binding rules are more likely to be inconsistent with such expectations, and following rules that are known to be legally invalid may gradually lead one away from processes and interactions governed by law. Sometimes, confronting such choices may challenge some of the fundamental assumptions that one had made when deciding to do business in a foreign country. What this Article has shown is that these serious predicaments may not be matters of indifference to the foreign investors' home country governments. How these governments should react is a question that pushes considerations of foreign administrative law to the foreground.

# COMMENTS

## THE GAME OF THE NAME: SHORTCOMINGS IN THE DUAL-AGENCY REVIEW OF DRUG TRADEMARKS AND A REMEDIAL CURE

TY HALASZ\*

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\* J.D. Candidate, 2013; B.A., Texas Christian University (go Frogs), 2006. This Comment would have been either awful or impossible without some great people: Jonathan Stroud for the crushable inspiration; Andrew Kim for the perennial generosity with his time; Shannon Cain and David Van Fleet Bloys for being the best people to write for—two years running; Professor Lewis Grossman for his limitless expertise and guidance; and the Team for general support. Predictably saving the best for last, thanks to Twink Halasz, my mother, who told me at a young age that I could do anything I set my mind to. I believed her.

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## INTRODUCTION: THE STAKES AND MISTAKES OF PHARMACEUTICAL TRADEMARKS

What do *Viagra*, *Silagra*, *Eviva*, and *Erecto* have in common? They are not characters from a far-flung Hollywood fantasy or even a comic book; they are all trade names for the same drug.<sup>1</sup> These names are not merely random—they are sophisticated and expensive identifiers for which the stakes of creation are incredibly high. The pharmaceutical industry as a whole spends \$19 billion each year marketing its portfolio of drugs to the American public,<sup>2</sup> which is almost twice as much as it spends on research and development.<sup>3</sup> The industry is estimated to spend anywhere from \$802 million to \$1.7 billion developing each new drug from conception to approval.<sup>4</sup> Every year, 1.3 million people suffer injuries from medication

1. See Donald G. McNeil, Jr., *The Science of Naming Drugs (Sorry, ‘Z’ Is Already Taken)*, N.Y. TIMES, Dec. 27, 2003, <http://www.nytimes.com/2003/12/27/business/28mcne.html>. What we know as *Viagra* in the United States is called *Silagra* in India (derived from its generic name, sildenafil citrate), *Eviva* in Latin America, and *Erecto* in the Middle East. *Id.*

2. See Ray Moynihan, *Who Pays for the Pizza? Redefining the Relationships Between Doctors and Drug Companies. 1: Entanglement*, 326 BRIT. MED. J. 1189, 1191 (2003) (explaining that in-person sales representative visits account for a large part of the pharmaceutical industry’s \$19 billion annual promotional budget in the United States).

3. Marc-André Gagnon & Joel Lexchin, *The Cost of Pushing Pills: A New Estimate of Pharmaceutical Promotion Expenditures in the United States*, 5 PLOS MED. 29, 32 (2008), available at <http://www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0050001> (follow the “PDF” hyperlink) (finding that, based on data collected in 2004, the pharmaceutical industry spent 24.4% of sales dollars on promotion as opposed to 13.4% on research and development); see also *Big Pharma Spends More on Advertising Than Research and Development, Study Finds*, SCI. DAILY, Jan. 7, 2008, <http://www.sciencedaily.com/releases/2008/01/080105140107.htm> (distilling the 2004 data into layman’s terms).

4. See, e.g., Joseph A. DiMasi et al., *The Price of Innovation: New Estimates of Drug Development Costs*, 22 J. HEALTH ECON. 151, 166 (2003) (contending that \$802 million is the magic number); Joseph A. DiMasi & Henry G. Grabowski, *The Cost of Biopharmaceutical R&D: Is Biotech Different?*, 28 MANAGERIAL & DECISION ECON. 469, 476 (2007) (updating a previous estimate to \$1.3 billion); Jim Gilbert et al., *Rebuilding Big Pharma’s Business Model*, IN VIVO BUS. & MED. REP., Nov. 2003 (putting the number at \$1.7 billion in a Bain & Co. study). But see Donald W. Light & Rebecca Warburton, *Demythologizing the High Costs of Pharmaceutical Research*, 6 BIOSOCIETIES 1, 13 (2011) (taking issue with inflated industry-sponsored estimates and placing the true cost around \$43.4 million). The Bain & Co. study also found that the cost of drug development is rising largely as a result of an increasing failure rate for prospective drugs in clinical trials—the total cost of development increasing 55% from 1998 to 2003. Gilbert et. al., *supra*.

errors,<sup>5</sup> ten percent of which are caused by physician, pharmacist, or consumer confusion among drugs.<sup>6</sup> Approximately 7,000 of those medication errors result in deaths.<sup>7</sup> With so much money and so many lives in the balance, the differentiation between drugs like *Zantac* and *Zyrtec* has seldom been more critical.<sup>8</sup>

Of the substantial sums expended to move a drug through the approval process, a portion goes to developing a compelling, yet arbitrary, name for the drug, and then to gaining approval for the drug's proprietary name (its trademark).<sup>9</sup> Approval for new drugs is governed by the United States Food and Drug Administration (FDA),<sup>10</sup> but approval for their trademarks is governed by two agencies, each independently evaluating different aspects of the mark—yet both with virtually binding authority. The United States Patent and Trademark Office (PTO) fulfills its statutory duty by ensuring that drug trademarks are adequately distinct from existing trademarks and do not cause consumer confusion.<sup>11</sup> The FDA also

5. See *Medication Error Reports*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/Drugs/DrugSafety/MedicationErrors/ucm080629.htm> (last updated Apr. 30, 2009). The United States Food and Drug Administration (FDA) has been given reports of medication errors by the U.S. Pharmacopeia since 1992. *Id.*

6. Carol Rados, *Drug Name Confusion: Preventing Medication Errors*, FDA CONSUMER, July–Aug. 2005, at 35, 35, available at [http://permanent.access.gpo.gov/lps1609/www.fda.gov/fdac/features/2005/405\\_confusion.html](http://permanent.access.gpo.gov/lps1609/www.fda.gov/fdac/features/2005/405_confusion.html).

7. COMM. ON QUALITY OF HEALTH CARE IN AM., INST. OF MED., TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 27 (Linda T. Kohn et al. eds., 2000); see also Susan Ipaktchian, *The Name Game: Take Two Whatchamacallits and Call Me in the Morning*, STAN. MED. MAG., Summer 2005, <http://stanmed.stanford.edu/2005summer/name-game.html> (recounting studies that estimate “anywhere from 7,000 to 20,000 people die or are injured each year in the United States because of drug name confusion”).

8. See, e.g., *Medication Errors Associated with Zantac and Zyrtec*, U.S. FOOD & DRUG ADMIN. (Sept. 20, 2000), <http://www.fda.gov/Drugs/DrugSafety/MedicationErrors/ucm080702.htm> (describing a growing problem where *Zyrtec* syrup was dispensed for *Zantac* prescriptions, causing adverse reactions in the pediatric population, such as diarrhea, vomiting, and other illnesses).

9. McNeil, *supra* note 1 (“Drug companies . . . spend \$500,000 on a name and packaging. But after clinical trials costing tens or hundreds of millions of dollars, ‘even a couple of million dollars spent on a name [is] chump change.’” (quoting Bill Trombetta, professor of pharmaceutical marketing at Saint Joseph’s University in Philadelphia)).

10. See generally Michelle Meadows, *The FDA’s Drug Review Process: Ensuring Drugs Are Safe and Effective*, FDA CONSUMER, July–Aug. 2002, at 19, available at [http://permanent.access.gpo.gov/lps1609/www.fda.gov/fdac/features/2002/402\\_drug.html](http://permanent.access.gpo.gov/lps1609/www.fda.gov/fdac/features/2002/402_drug.html) (outlining the steps for the FDA’s drug review from formative and investigational stages to formalized clinical testing and approval).

11. See J. THOMAS MCCARTHY, 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:2 (4th ed. 2011); see also Stephen C. Clifford, *The Name Game: Creating a Trademark for a New Drug Product*, DRUG DELIVERY TECH., Sept. 2002, available at <http://www.drugdeliverytech.com/ME2/Default.asp> (noting that the U.S. Patent and

evaluates for confusion, but from a safety-oriented perspective; misleading drug names or labels could lead to physician errors in prescribing drugs, pharmacist errors in distributing drugs, or consumer errors in taking drugs.<sup>12</sup>

While such a redundancy is nothing new in the modern regulatory state, the trouble for drug trademarks arises from the potential for divergent decisions following PTO and FDA reviews.<sup>13</sup> It is entirely possible for either agency to approve a trademark only to have the other agency reject that mark, resetting the process. What is perhaps more concerning is the FDA's effective takeover of the PTO's authority over the usage of trademarks; while the PTO remains sovereign over federal registration of marks, the FDA, in practice, holds the real ability to accept or reject a drug trademark.<sup>14</sup> Neither agency consults with the other, and the FDA goes so far as to accord no weight to any previous PTO approval when evaluating a trademark.<sup>15</sup> This structure not only creates administrative inefficiencies and unreliable results with both consumer safety and substantial amounts of money at stake, it also leaves the PTO with little facility to perform its important responsibility.

This Comment surveys the unique jurisdictional overlap between the PTO and the FDA in the review and approval of drug trademarks. In particular, this Comment assesses the practicality and efficiency of the independent dual-agency review and offers recommendations to streamline the process for both agencies and new drug sponsors. Part I provides an overview of trademark law and the process of trademark review. Parts II and III detail the previous structures by which the PTO and FDA reviewed marks, and also explains the current processes used by the agencies to reach

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Trademark Office's (PTO's) central focus is to ensure that, through the trademark, consumers are able to identify and differentiate the source of the pharmaceutical product).

12. Clifford, *supra* note 11 (contrasting the PTO's focus with the FDA's, which is to "prevent errors in prescription, dispensing, and consumption that might result from confusing and misleading drug names and drug labels").

13. See, e.g., Gabrielle A. Holley, *Practice Guidelines for Prescription Drug Trademarks*, UPDATE MAG., July–Aug. 2002, available at <http://library.findlaw.com/2002/Sep/20/132457.html> ("It is unfortunate when a company obtains a federal registration of a trademark only to discover that the FDA will not approve the same mark for use with the company's product.").

14. See Suzanne Skolnick, *Overlap in Mark Registration Authority Between the PTO and the FDA*, 12 J. CONTEMP. LEGAL ISSUES 100, 103 (2001) (pondering whether the FDA's trademark review could be an overextension of authority into an area exclusively granted to the PTO).

15. *Pharmaceutical Trademark Law: Some Tips & Considerations to Keep in Mind*, LOMBARD & GELBERTER, LLP, THE BLOG (July 8, 2010, 4:16 PM), <http://www.blogtrademark.com/archives/815> (asserting that the FDA accords no deference to the PTO's assessment of trademark "registrability").

their decisions. Part IV evaluates the strengths and weaknesses of those current processes, and Part V recommends a significant overhaul to streamline and modernize drug trademark review. Finally, this Comment concludes that a joint committee comprised of both PTO and FDA personnel vested with binding authority on both agencies would be the most efficient and effective structure for the review of drug trademarks.

## I. A BRIEF OVERVIEW OF THE GOALS AND TENETS OF TRADEMARK LAW

Trademarks, such as the pervasive “golden arches” of McDonald’s, are indicators of the familiar and reliable, allowing the consuming public to consistently choose a Big Mac over a Whopper upon seeing the renowned arches. The regulation of trademarks serves two goals: “to protect . . . consumers from deception and confusion over trade symbols” and to protect the goodwill inherent to trademarks and their owners.<sup>16</sup> A trademark is legally defined as “any word, name, symbol, or device . . . used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods.”<sup>17</sup> Economically speaking, trademarks are symbols that allow consumers to identify goods or services they have previously found to be satisfactory and reject those that have yielded dissatisfaction.<sup>18</sup> Trademarks fix responsibility and create an incentive to maintain a predictable quality of goods or services offered<sup>19</sup> and have done so for thousands of years.<sup>20</sup>

In general, trademark law is a “part of the broader law of unfair competition,” where the central purpose is to prevent one person from passing off his goods as those of another.<sup>21</sup> “All trade-mark cases are cases

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16. See 1 MCCARTHY, *supra* note 11, § 2:2; see also Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1840–41 (2007) (stating that “trademark law was not traditionally intended to protect consumers. Instead, trademark law, like all unfair competition law, sought to protect producers from illegitimate diversions of their trade by competitors”).

17. Federal Trademark Act of 1946 (Lanham Act), 15 U.S.C. § 1127 (2006); see also ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 733 (5th ed. 2010) (defining trademarks as “devices that help to reduce information and transaction costs by allowing customers to estimate the nature and quality of goods before purchase”).

18. 1 MCCARTHY, *supra* note 11, § 2:3.

19. *Id.* at § 2:4 (suggesting that, without trademarks, a seller’s blunders or inferior goods or services are untraceable to the source).

20. MERGES, *supra* note 17, at 733 (tracing the history of trademarks back 4,000 years through discoveries in China, India, Persia, Egypt, Rome, Greece, and elsewhere (citing WILLIAM H. BROWNE, *A TREATISE ON THE LAW OF TRADEMARKS* 1–14 (2d ed. 1885))).

21. See *Am. Steel Foundries v. Robertson*, 269 U.S. 372, 380 (1926).



of unfair competition and involve the same legal wrong.”<sup>22</sup> Regardless of what avenue litigants take—trademark or unfair competition—the operative infringement test is whether the defendant’s acts are likely to cause confusion in the minds of consumers.<sup>23</sup> Trademark infringement protects the mark’s goodwill against opportunistic attempts by competitors to associate themselves with the mark’s owner for personal gain.<sup>24</sup> Goodwill itself is somewhat difficult to define, but has come to mean the expectancy of continued patronage.<sup>25</sup>

A trademark should “identify a single source; be capable of distinguishing one product from another; and be protectable under the laws of the country (or countries) in which the product will be marketed.”<sup>26</sup> Trademarks fall into four categories based on their distinctiveness: “fanciful/arbitrary,”<sup>27</sup> “suggestive,”<sup>28</sup> “merely descriptive,”<sup>29</sup> and “generic.”<sup>30</sup> While fanciful/arbitrary and suggestive marks receive a high level of legal protection, generic marks receive no protection, and merely descriptive marks only receive protection when they have acquired a secondary meaning.<sup>31</sup>

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22. S. REP. NO. 79-1333, at 4 (1946), *reprinted in* 1946 U.S.C.C.A.N. 1274, 1275 (“There is no essential difference between trade-mark infringement and what is loosely called unfair competition.”); *accord* 1 MCCARTHY, *supra* note 11, § 2:7.

23. *See* 1 MCCARTHY, *supra* note 11, § 2:8.

24. *See* *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 207 (1942) (noting that it “promotes honesty and comports with experience to assume that the wrongdoer who makes profits from the sales of goods bearing a mark belonging to another was enabled to do so because he was drawing upon the good will generated by that mark”).

25. *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 556 (1993) (basing the definition of goodwill on the notion that the value of intangible assets is, to a degree, related to the continued expectation of customer patronage).

26. Dana R. Kaplan & Michael J. Freno, *Intricacies of Choosing a Pharmaceutical Trademark*, INTELL. ASSET MGMT. (Apr. 2, 2008), <http://www.iam-magazine.com/reports/Detail.aspx?g=a484cebb-f78e-437f-9cc0-fd614e0dcade> (“Although these concepts must be considered each time a mark is chosen, there is a greater level of analysis involved in developing and branding a new chemical compound.”).

27. *Id.* Arbitrary or fanciful marks are the most abstract, such as *Kodak*, *Exxon*, and *Xerox*. They have almost no relationship to the goods or services, which typically creates the need for an extensive advertising campaign to introduce such marks. *See id.*

28. *Id.* Suggestive marks require some measure of imagination to associate with the goods or services, such as *Coppertone*, *Tums*, and *Whirlpool*.

29. *Id.* Merely descriptive marks are those indicative of what the goods or services are, such as *Rollerblade*, *Weight Watchers*, and *American Airlines*.

30. *Id.* Generic marks, such as *Aspirin*, *Corn Flakes*, and *Escalator*, are those that are most general and that have become so common in the marketplace that it is impossible to identify a single source of the goods or services.

31. *Id.* (noting that secondary meanings are typically acquired as a result of advertising).

## II. THE PATENT AND TRADEMARK OFFICE

### A. *History and Regulatory Basis*

The PTO's origins lie in the Patent Act of 1793, which tasked the clerks in the Department of State with patent examination pursuant to the Patent and Copyright Clause of the Constitution.<sup>32</sup> When the Secretary of State gave sole authority over patent review and issuance to the clerk of the Department of State in 1802, the Patent Office was born.<sup>33</sup> Trademarks only enjoyed common law protection until Congress enacted its first trademark legislation in 1870, which assigned mark registration to the Patent Office.<sup>34</sup> The Supreme Court invalidated this statute for grounding its regulatory authority in the Patent and Copyright Clause (a trademark is neither a patent nor copyright),<sup>35</sup> but Congress enacted a second trademark statute in 1881<sup>36</sup> with authority under the Commerce Clause.<sup>37</sup> Today, more than 232,000 trademark applications are received each year<sup>38</sup> by approximately 400 examining attorneys<sup>39</sup> pursuant to the Federal Trademark Act of 1946 (also called the Lanham Act).<sup>40</sup> Trademarks are organized into forty-five classifications depending on the type of good or service the mark represents.<sup>41</sup>

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32. U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”); see *History*, U.S. PATENT & TRADEMARK OFFICE, <http://usptocareers.gov/Pages/WhyWork/About.aspx> (last visited Feb. 7, 2012). Before the Patent Act of 1793, both the President (George Washington) and Secretary of State (Thomas Jefferson) had to sign off on patents, resulting in three being approved in 1790, thirty-three in 1791, eleven in 1792, and twenty in 1793. See *id.*; *Patents*, THOMAS JEFFERSON’S MONTICELLO, <http://www.monticello.org/site/research-and-collections/patents> (last visited Feb. 7, 2012).

33. See *History*, *supra* note 32.

34. See *MERGES*, *supra* note 17, at 734.

35. See *The Trade-Mark Cases*, 100 U.S. 82, 99 (1879) (striking down as unconstitutional the Trademark Act of 1870, ch. 280, 16 Stat. 198).

36. Trademark Act of 1881, ch. 138, 21 Stat. 502.

37. U.S. CONST. art. I, § 8, cl. 3 (“To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

38. *History*, *supra* note 32.

39. U.S. PATENT & TRADEMARK OFFICE, PERFORMANCE & ACCOUNTABILITY REPORT: FISCAL YEAR 2009, at 140 (2009) (listing trademark examining attorneys at a mere 388 in 2009, as opposed to 6,242 patent examiners).

40. 15 U.S.C. §§ 1051–1127 (2006).

41. T.M.R.P. § 6.1 (2010), 37 C.F.R. § 6.1 (2010). Pharmaceutical trademarks are included in Class 5. *Id.*

*B. Trademark Review Process*

There are four ways to obtain federal registration of a trademark: a use-based application,<sup>42</sup> an intent-to-use (ITU) application,<sup>43</sup> a foreign firm application,<sup>44</sup> and a Madrid Protocol application.<sup>45</sup> Because the latter two provide a structure for international firms to receive protection for their marks in the United States, this Comment focuses on the former two, especially ITU applications. Federal registration, whether use-based or ITU, does not create the trademark; rather, the mark is established by use in the marketplace.<sup>46</sup> There are two ways that the PTO publishes trademarks: the principal and the supplemental registers.<sup>47</sup> Publication on the principal register entitles the trademark owner to all the privileges of federal registration,<sup>48</sup> whereas publication on the supplemental register merely records designations “that have not yet acquired a trademark significance but are capable of doing so.”<sup>49</sup>

Though other jurisdictions allow the registration of trademarks before actual use of the mark, the United States requires (in most cases) that the

42. 3 MCCARTHY, *supra* note 11, § 19:1; *see also* 15 U.S.C. § 1051(a). These applications are based on “prior actual use of the mark in interstate or foreign commerce.” 3 MCCARTHY, *supra* note 11, § 19:1. After the advent of intent-to-use applications, use-based applications decreased and now comprise only 20% of all applications. *Id.*

43. 3 MCCARTHY, *supra* note 11, § 19:1; *see also* 15 U.S.C. § 1051(b). These applications are filed by those who have a “bona fide” intention to use the mark, and registration will not be granted until the applicant files a verified statement (with proof) that the mark has been used. 3 MCCARTHY, *supra* note 11, § 19:1. In 2004, 75% of all applications were intent-to-use (ITU) based. *Id.*

44. 3 MCCARTHY, *supra* note 11, § 19:1; *see also* 15 U.S.C. § 1126(a). These applications are filed by foreign firms with a foreign application or registration. 3 MCCARTHY, *supra* note 11, § 19:1. Applicants must state their intention to use the mark in the United States, but are not required to prove actual use. *Id.*

45. 3 MCCARTHY, *supra* note 11, § 19:1; *see also* 15 U.S.C. § 1141a(a). These applications are for foreign entities to extend trademark registration from their home nation to the United States under the Madrid Protocol. 3 MCCARTHY, *supra* note 11, § 19:1.

46. *Miller v. Glenn Miller Prods.*, 454 F.3d 975, 979 (9th Cir. 2006) (citing *Cal. Cooler, Inc. v. Loretto Winery, Ltd.*, 774 F.2d 1451, 1454 (9th Cir. 1985)).

47. *See generally* 15 U.S.C. §§ 1051–1072 (providing the primary mechanism for federal registration on the principal register); 15 U.S.C. §§ 1091–1096 (allowing for marks that are not eligible for the principal register to appear on the supplemental register).

48. Such advantages include a legal presumption of ownership and the registrant’s right to exclude other uses, 15 U.S.C. §§ 1057(b), 1115(a); the ability to bring an action in federal court, *see* 15 U.S.C. § 1121; and the ability to enlist Immigration and Customs Enforcement to prevent the importation of infringing goods, *see* 15 U.S.C. § 1124.

49. 3 MCCARTHY, *supra* note 11, § 19:32. Accordingly, the supplemental register affords the registrant less protection than the principal register. *See* 15 U.S.C. § 1094 (excluding certain advantages offered by the Lanham Act).

mark be used in the marketplace before registration is issued.<sup>50</sup> Whereas patent seekers race to the PTO to file their patent applications before any of their competitors,<sup>51</sup> trademark seekers “race to the marketplace” because the first entity to use a mark in commerce is considered the senior owner of that mark.<sup>52</sup> Requiring use prior to registration is economically efficient<sup>53</sup> and ensures that registration reflects the marketplace.<sup>54</sup>

Despite the United States’ persistence in a use-based trademark structure, the ITU option was introduced in 1989 and is now the most popular avenue to registration.<sup>55</sup> ITU functions the same as a use-based application but is broken into two stages. The first is the familiar examination, but instead of issuing registration upon the completion of a successful review, the PTO issues a Notice of Allowance that requires the applicant to prove use of the mark within a maximum of thirty-six months.<sup>56</sup> PTO processing of ITU applications took an average of 13.5 months in 2010.<sup>57</sup> The second stage is an additional examination after the applicant files a Statement of Use (SOU).<sup>58</sup> Following the issuance of a Notice of Allowance, applicants have six months to file an SOU, and, upon request, receive an extension of an additional six months for a fee.<sup>59</sup> After that, applicants can request up to four extensions in six-month increments, but only if they show good cause.<sup>60</sup> In filing an SOU, an applicant must provide a verified statement that the applicant believes it is the mark owner, that the applicant has used the mark, the dates of first use in commerce,

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50. 3 MCCARTHY, *supra* note 11, § 19:1.25.

51. The America Invents Act of 2011 changed the PTO’s existing “first to invent” rule to a “first inventor to file” rule: the first applicant to file for a particular patent is considered the senior applicant, allowing him or her to bar subsequent applications for the same patent. Pub. L. No. 112-29, § 3, 125 Stat. 284, 285–93 (2011) (to be codified at 35 U.S.C. § 100).

52. *See* 3 MCCARTHY, *supra* note 11, § 19:1.25.

53. *See* William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 282 (1987) (“If the good is not available for sale, the trademark confers no benefit. Thus, conditioning trademark rights on use is a way of limiting the use of scarce enforcement resources to situations in which the rights in question are likely to yield net social benefits.”).

54. *See* 3 MCCARTHY, *supra* note 11, § 19:2.

55. *Id.* § 19:1.

56. *Id.* § 19:13.

57. *See* 3 MCCARTHY, *supra* note 11, § 19:125.

58. *Id.* at § 19:13.

59. *Id.* The request for extension must also be accompanied by a verified statement of a continued bona fide intention to use. *Id.*

60. *Id.*; *see also* T.M.R.P. § 2.89(d) (2010), 37 C.F.R. § 2.89(d) (2010) (detailing good cause to be proof of “ongoing efforts to make use of the mark in commerce,” such as “research or development, market research, manufacturing activities, promotional activities . . . or other similar activities”).

and a specimen of use.<sup>61</sup>

Much like trademark infringement analysis in courts, the trademark review process includes a confusion analysis to determine whether a mark is “likely to cause confusion with a previously used or registered mark.”<sup>62</sup> The test for infringement is slightly different in each of the circuit courts of appeals, but most courts use about eight factors to weigh potential confusion.<sup>63</sup> For example, the United States Court of Appeals for the Ninth Circuit weighs the following factors as they relate to competing marks:

1. strength of the mark;
2. proximity of the goods;
3. similarity of the marks;
4. evidence of actual confusion;
5. marketing channels used;
6. type of goods and the degree of care likely to be exercised by the purchaser;
7. defendant’s intent in selecting the mark; and
8. the likelihood of expansion of the product lines.<sup>64</sup>

### C. Nature of Pharmaceutical Trademark Review

The PTO’s review process for pharmaceutical trademarks has been relatively consistent, in contrast to the FDA’s approach, which has frequently been in flux. Pharmaceutical trademarks are in Class 5,<sup>65</sup> which sees around 1,000 applications every month.<sup>66</sup> Though the PTO has no specified channel that drug trademark applications travel through—they are treated just like any other application—pharmaceutical companies have a specific process for the PTO. Pharmaceutical companies typically submit a cluster of ITU applications for PTO review, each with a new drug name

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61. 3 MCCARTHY, *supra* note 11, § 19:23; *see also* T.M.R.P. § 2.56(b)(1) (2010), 37 C.F.R. § 2.56(b)(1) (2010) (defining a trademark specimen as “a label, tag, or container for the goods or a display associated with the goods”).

62. 4 MCCARTHY, *supra* note 11, § 23:1.

63. *Id.*

64. AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348–49 (9th Cir. 1979).

65. T.M.R.P. § 6.1 (2010), 37 C.F.R. § 6.1 (2010) (“Pharmaceutical and veterinary preparations; sanitary preparations for medical purposes; dietetic substances adapted for medical use, food for babies; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides.”). In total, there are thirty-four trademark classifications for goods and eleven for services. *Id.*

66. R. John Fidelino, *IP for Business: The Fall and Rise of Pharma Brand Names*, WIPO MAG., June 2008, at 12, [http://www.wipo.int/wipo\\_magazine/en/pdf/2008/wipo\\_pub\\_121\\_2008\\_03.pdf](http://www.wipo.int/wipo_magazine/en/pdf/2008/wipo_pub_121_2008_03.pdf).

that may or may not be assigned to an actual new drug;<sup>67</sup> different pharmaceutical companies employ this strategy for different reasons.<sup>68</sup> Drugmakers have little choice but to choose the ITU route to registration because filing a use-based application would require companies to obtain FDA approval of the drug first, thus delaying federal trademark registration another year or more after the drug enters the marketplace.<sup>69</sup> Although the PTO treats all trademark applications equally, in administrative adjudicative proceedings involving pharmaceutical marks a “doctrine of greater care” is employed.<sup>70</sup> In these cases, the trademark applicant must meet a more rigorous standard of confusion because of the potential harm associated with drug names.<sup>71</sup>

### III. THE FOOD AND DRUG ADMINISTRATION

#### A. History and Regulatory Basis

The FDA originated with a single chemist in the Department of Agriculture, starting off as the Division of Chemistry and taking its present form in 1927.<sup>72</sup> Its central regulatory functions came with the passage of

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67. See Dana M. Herberholz, *Curing Confusion: An Overview of the Regulatory Complexities of Obtaining Pharmaceutical Trademarks and a Prescription for Reform*, 8 MINN. J. L. SCI. & TECH. 97, 118 (2007).

68. Compare *id.* (explaining that multiple ITU applications are filed with the PTO “as a shroud to prevent competitors from determining which names are actually submitted” for FDA approval), with JEROEN LALLEMAND, THOMSON COMPUMARK, PHARMACEUTICAL TRADEMARKS: HOW TO SURVIVE THE NAME GAME, NEW CHALLENGES AND OPPORTUNITIES FOR PHARMACEUTICAL COMPANIES 7 (2011), available at <http://trademarks.thomsonreuters.com/resource-request?cid=98&nid=330> (fill out information and select “Send Request,” follow “Download” hyperlink) (last visited Feb. 8, 2012) (showing that drug companies reduce to a list of five to ten the names that will be filed with the PTO as a safeguard in case the FDA or its European counterpart approves disparate names).

69. See discussion *infra* Part IV (exploring the problems with drug companies’ use of the ITU option).

70. *Schering Corp. v. Alza Corp.*, 207 U.S.P.Q. (BNA) 504, 509 (T.T.A.B. 1980) (“If there is *any* possibility of . . . confusion in the case of medicines, public policy requires that the use of the confusingly similar name be enjoined.” (emphasis added) (quoting *Morgenstern Chem. Co. v. G.D. Searle & Co.*, 253 F.2d 390, 394 (3d Cir. 1958))).

71. Skolnick, *supra* note 14, at 100–01 (“The doctrine of greater care rests on the assumption the PTO functions as a guardian of the public interest and . . . will increase the obstacles to the registration of potentially confusing marks.”).

72. John P. Swann, *Food and Drug Administration*, in A HISTORICAL GUIDE TO THE U.S. GOVERNMENT 248–49 (George Thomas Kurian ed., 1998) (recounting the FDA’s transformation from the Division of Chemistry to the Bureau of Chemistry in 1901, the Food, Drug and Insecticide Administration in 1927, the Food and Drug Administration in 1930, and eventually moving from the Department of Agriculture to the Department of

the Pure Food and Drug Act of 1906<sup>73</sup> and the Federal Food, Drug, and Cosmetic Act of 1938,<sup>74</sup> the latter providing the basis for the FDA to regulate drug trademarks and names.<sup>75</sup> The FDA's new drug and trademark reviews take place in its Center for Drug Evaluation and Research (CDER),<sup>76</sup> where the FDA reviews roughly four hundred new drug names a year and rejects a third of them.<sup>77</sup>

### B. *New Drug Application Review*

Today, it can take up to fifteen years for new drugs to travel from the laboratory to the medicine cabinet<sup>78</sup> and can cost hundreds of millions of dollars.<sup>79</sup> Pharmaceutical companies begin by preclinical (animal) testing, after which an investigational new drug (IND) application is filed with the FDA outlining what the drug sponsor proposes for clinical trials involving humans.<sup>80</sup> Clinical trials then occur in three phases—the first involving twenty to eighty people, the second involving a few dozen to three hundred people, and the final phase involving several hundred to three thousand

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Health and Human Services in 1980).

73. Pure Food and Drug Act, ch. 3915, 34 Stat. 768 (1906).

74. Federal Food, Drug, and Cosmetic Act of 1938, ch. 675, 52 Stat. 1040 (codified as amended at 21 U.S.C. §§ 301–399 (2006)). Today, the FDA regulates items accounting for a substantial twenty-five cents of every dollar spent by consumers. Swann, *supra* note 72, at 248.

75. See 21 U.S.C. § 352(a) (stipulating that a drug is misbranded—and thus unlawful—if its labeling is false or misleading in any particular way); see also James L. Dettore & Patricia Kuker Staub, *Legal and Regulatory Considerations in the Selection of a Pharmaceutical Proprietary Name*, BRAND INST. (Sept. 28, 2011), [http://www.brandinstitute.com/news/focus\\_12\\_01.htm](http://www.brandinstitute.com/news/focus_12_01.htm) (“The labeling of a drug may be misleading if it includes a proprietary name that, because of similarity in spelling or pronunciation, may be confused with the proprietary name . . . of a different drug or ingredient.” (citing 21 C.F.R. § 201.10(c)(5) (2001))).

76. 3 MCCARTHY, *supra* note 11, § 19:149.

77. *FDA 101: Medication Errors*, FDA CONSUMER HEALTH INFO., Feb. 20, 2009, at 2, <http://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/UCM143038.pdf>.

78. *Drug Discovery and Development*, PHRMA, <http://www.phrma.org/research/drug-discovery-development> (last visited Feb. 7, 2012); see also *Development Process: The Drug Development and Approval Process*, AVANIR PHARMACEUTICALS, <http://www.avanir.com/product/development.php> (last visited Feb. 7, 2011) (“Only five in 5,000 compounds that enter preclinical testing advance to human testing, and only one of these five is eventually approved.”).

79. See DiMasi et. al., *supra* note 4, at 166.

80. Michelle Meadows, *The FDA's Drug Review Process: Ensuring Drugs Are Safe and Effective*, FDA CONSUMER, July–Aug. 2002, at 19, available at [http://permanent.access.gpo.gov/lps1609/www.fda.gov/fdac/features/2002/402\\_drug.html](http://permanent.access.gpo.gov/lps1609/www.fda.gov/fdac/features/2002/402_drug.html). The investigational new drug (IND) application is reviewed by both the FDA and a local institutional review board, which is “a panel of scientists and non-scientists in hospitals and research institutions that oversees clinical research.” *Id.*

people.<sup>81</sup> Following successful clinical trials, the sponsor will file a new drug application (NDA); if the FDA accepts the NDA as complete, the agency will assign a review team “to evaluate the sponsor’s research on the drug’s safety and effectiveness.”<sup>82</sup> After inspecting the manufacturing facilities and reviewing label information, the NDA will be approved, be found “approvable,” or be found “not approvable.”<sup>83</sup>

Throughout the new drug review process, a drug will acquire three separate names: a chemical name, a generic (nonproprietary) name, and a trade (proprietary) name used by the drug sponsor for a seventeen-year period.<sup>84</sup> A drug’s chemical name is assigned at the earliest stage when the compound is developed.<sup>85</sup> The pharmaceutical company applies for a chemical name from the Chemical Abstracts Service, which assigns the compound a registry number. That number serves as a unique identifier to distinguish a compound from millions of other compounds that also have chemical names.<sup>86</sup>

Before the sponsor begins preclinical testing on animals, it submits three generic names to the United States Adopted Names Council,<sup>87</sup> which is responsible for assigning generic drug names.<sup>88</sup> The five-member council assigns the drug a U.S. adopted name (USAN) that is generic per se and can be used by anyone, including competitors.<sup>89</sup> The FDA is not bound by the council’s decision, but it cooperates with and is represented on the council, and it recognizes the council’s skill and experience.<sup>90</sup> Obtaining a

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81. *Id.* At the end of Phase 2, the FDA and sponsor discuss how large-scale Phase 3 studies should be conducted and attempt to come to a consensus. *Id.* at 22.

82. *Id.* at 19, 21. The review team will analyze study results and looks for possible issues or weaknesses in the application. Reviewers then submit their conclusions, which are evaluated by FDA brass. *See id.* at 22.

83. *See id.* at 24.

84. *See* Ipaktchian, *supra* note 7. Pharmaceutical companies have exclusive rights to make and sell an approved drug for seventeen years. *Id.*

85. *See* Kaplan & Freno, *supra* note 26 (noting that the first step taken after developing a new drug is to apply for a generic chemical name).

86. *Id.*

87. The Council is a private organization sponsored by the American Medical Association, the United States Pharmacopeia, and the American Pharmaceutical Association, and has assigned drug names since 1964. 21 C.F.R. § 299.4(c) (2010).

88. Ipaktchian, *supra* note 7. When the Council receives a completed U.S. adopted name (USAN) application, it examines the drug name using certain criteria, such as: its usefulness to healthcare providers, how safe it is for patients, its conformity to nomenclature rules, and how easy it is to pronounce. *See* Kaplan & Freno, *supra* note 26.

89. *See* Ipaktchian, *supra* note 7; Kaplan & Freno, *supra* note 26. Once a U.S. adopted name (USAN) is assigned, it goes to the World Health Organization, which assigns the drug an international nonproprietary name. *See* Ipaktchian, *supra* note 7.

90. *See* 21 C.F.R. § 299.4(c)–(e).



USAN is recommended before filing an IND or NDA with the FDA.<sup>91</sup>

Proprietary names are the names that accompany a drug in its marketing to physicians and consumers, and the names this Comment will discuss at length. In 2004, there were more than 33,000 trademarked drug names in the United States—overshadowing the mere 9,000 generic names.<sup>92</sup> To develop a trade name, pharmaceutical companies often engage branding consultants or agencies, which in turn often employ focus groups of relevant parties to gauge public response to drug names.<sup>93</sup> The ideal name typically makes proficient use of the letters X, Z, C, and D, which some say subliminally indicate power.<sup>94</sup> The FDA prohibits trade names associated with the drug's intended use and avoids names that imply effectiveness, which is why the resulting names sound so foreign—they are intended to vaguely connote positive thoughts to consumers through meaningless words.<sup>95</sup>

### C. Drug Name Review Background and Process

The FDA has consistently reevaluated and restructured its trademark review apparatuses and processes within CDER. In the late 1990s, the FDA reviewed only those drug trademarks that its reviewing divisions forwarded to the Labeling and Nomenclature Committee (LNC).<sup>96</sup> The LNC was made up of a cross section of FDA staff and had no binding authority, merely providing a recommendation of the mark's adequacy to the reviewing division, which retained the authority to approve or deny the mark.<sup>97</sup> In 1998, the FDA assigned its trademark review to the Office of

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91. *Id.* § 299.4(d) (encouraging all applicants and sponsors to contact the USAN Council for assistance in selecting a "simple and useful name" for new chemical entities).

92. Rados, *supra* note 6, at 37.

93. See Julie Kirkwood, *What's in a Name?*, EAGLE-TRIB. (N.H.), Sept. 1, 2003, <http://www.igorinternational.com/press/eagletrib-drug-names.php> (recounting a focus group made up of 200 doctors and pharmacists nationwide who participated in the marketing research for *Levitra*, which was at one point tentatively called *Nuviva*).

94. See McNeil, *supra* note 1 ("The harder the tonality of the name, the more efficacious the product in the mind of the physician and the end user." (quoting James L. Dettore, President, Brand Inst., Inc.)).

95. See Ipaktchian, *supra* note 7 (contending that the ideal trade name should be "memorable without promising efficacy," pointing to *Celebrex* (which conveys celebration) and *Claritin* (which implies clarity)).

96. See Daniel Boring & Chris Doninger, *The Need for Balancing the Regulation of Pharmaceutical Trademarks Between the Food and Drug Administration and the Patent and Trademark Office*, 52 FOOD & DRUG L.J. 109, 111 (1997). Labeling and Nomenclature Committee (LNC) members would discuss the submitted names at a monthly meeting. See *id.*

97. See Danielle A. Gentin, *You Say Zantac, I Say Xanax: A Critique of Drug Trademark Approval and Proposals for Reform*, 55 FOOD & DRUG L.J. 255, 259 (2000).

Post-Marketing Drug Risk Assessment (OPDRA),<sup>98</sup> where the mark was subject to a more stringent “safety risk assessment,” from which the OPDRA developed recommendations.<sup>99</sup> In 2002, the FDA reorganized its risk management function under the Office of Drug Safety, where trademark review was transferred to the Division of Medication Errors and Technical Support (DMETS).<sup>100</sup> The FDA later renamed DMETS as the Division of Medication Error Prevention and Analysis (DMEPA), which is now the current incarnation of the FDA trademark review apparatus.<sup>101</sup> Though DMEPA was originally like the previous incarnations—providing a recommendation on drug names to the reviewing division that retained authority—the FDA delegated all trademark review authority to DMEPA on April 29, 2009.<sup>102</sup>

DMEPA’s trademark review is set in motion as early as Phase 2 of the NDA process.<sup>103</sup> The sponsor submits its first and second choices for a proprietary name, which is forwarded to DMEPA to evaluate the trademark.<sup>104</sup> This could be before, during, or after the PTO conducts its review, but as previously noted, the timeframe is irrelevant because the FDA accords no weight to the PTO’s decision.<sup>105</sup> The DMEPA review includes the following elements: (1) an analysis of similar names and marks; (2) a review by the FDA’s Division of Drug Marketing and Advertising

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98. See Clifford, *supra* note 11.

99. See Marc J. Scheineson, *FDA Limits on Dual Trademarks Tread on Patient Safety and Law*, LEGAL BACKGROUNDER (Wash. Legal Found.), Apr. 25, 2003, at 2, available at <http://www.wlf.org/upload/042503LBScheineson.pdf> (noting that approval authority still rested with the reviewing division or the director of the Office of Drug Evaluation, and that the focus would be on reducing the potential for errors associated with “look-alike or sound-alike” names).

100. See Clifford, *supra* note 11.

101. See *DSI Participates in FDA Meeting on Naming, Labeling and Packaging*, BRANDNEWS (Drug Safety Inst.), July 2010, at 1. See generally OFFICE OF NEW DRUGS & OFFICE OF SURVEILLANCE & EPIDEMIOLOGY, CTR. FOR DRUG EVALUATION & RESEARCH, MANUAL OF POLICIES AND PROCEDURES 6720.2, PROCEDURES FOR HANDLING REQUESTS FOR PROPRIETARY NAME REVIEW 2 (2009) [hereinafter MAPP 6720.2] (listing Division of Medication Error Prevention and Analysis (DMEPA) procedures for handling proprietary name requests); Maury M. Tepper, *Preparing for the Future Pharmaceutical Trademark Regime*, WORLD TRADEMARK REV., Apr.–May 2010, at 33, 34, available at <http://www.worldtrademarkreview.com/Issues/Article.ashx?g=397eb2ec-ccbe-4938-b06b-a77edb5a3567> (describing DMEPA’s final responsibility for decisions on pharmaceutical trademarks).

102. Tepper, *supra* note 101, at 34 (noting also that any appeals of DMEPA decisions are now communicated directly between the sponsor and DMEPA).

103. See *id.*

104. See *id.* at 35; MAPP 6720.2, *supra* note 101, at 8.

105. See Holley, *supra* note 13, at 20 (showing that the review criteria and concerns are different for FDA and PTO).

Compliance to determine whether the name implies an unsubstantiated claim or is misleading; (3) a simulation to find situations where the name would be incorrectly identified when written or spoken;<sup>106</sup> and (4) a comprehensive analysis to determine potential errors the name may cause.<sup>107</sup> If the trademark is approved, such approval is merely tentative, and the mark must be reevaluated by DMEPA ninety days before the drug itself is approved to ensure that no confusion has surfaced in the time lapsed since the initial approval.<sup>108</sup>

#### D. *The Pilot Program*

The DMEPA review process, however, is currently subject to change. The 2007 reauthorization and expansion<sup>109</sup> of the Prescription Drug User Fee Act (PDUFA)<sup>110</sup> significantly broadened and strengthened the FDA's drug safety program.<sup>111</sup> In conjunction with the PDUFA reauthorization, the FDA agreed to implement a pilot program enabling participant drugmakers to evaluate proposed names and submit the data to the FDA for review, thus shifting the FDA's role from testing to evaluating data.<sup>112</sup> In the program, the FDA asks participants to offer two submissions for each potential trademark—one with the original materials and another with more comprehensive data.<sup>113</sup> DMEPA then conducts two separate reviews, the first in the usual manner and the second with the new data; both review teams meet to compare conclusions.<sup>114</sup> The comprehensive data within

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106. Tepper, *supra* note 101, at 34; see Clifford, *supra* note 11 (“Verbal analysis is . . . conducted in simulated clinical environments to assess potential communication errors with other sound-alike drugs.”).

107. CTR. FOR DRUG EVALUATION & RESEARCH, U.S. FOOD & DRUG ADMIN., HOW FDA REVIEWS PROPOSED DRUG NAMES 2–4 (2010), <http://www.fda.gov/downloads/Drugs/DrugSafety/MedicationErrors/ucm080867.pdf>.

108. See Tepper, *supra* note 101, at 34; Clifford, *supra* note 11.

109. Food & Drug Administration Amendments Act of 2007, Pub. L. No. 110-85, 121 Stat. 823 (codified as amended in scattered sections of 21 U.S.C.).

110. Pub. L. No. 102-571, 106 Stat. 4491 (1992) (codified as amended in scattered sections of 21 U.S.C.).

111. U.S. FOOD & DRUG ADMIN., PDUFA PILOT PROJECT: PROPRIETARY NAME REVIEW CONCEPT PAPER 1 (2008) [hereinafter PROGRAM PROPOSAL], <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm072229.pdf>.

112. *Id.* See generally Pilot Program to Evaluate Proposed Name Submissions; Concept Paper; Public Meeting, 73 Fed. Reg. 27,001, 27,001–02 (May 12, 2008) (publicizing a meeting to discuss logistics of the pilot program); Pilot Program to Evaluate Proposed Proprietary Name Submissions; Procedures To Register for Participation and Submit Data, 74 Fed. Reg. 50,806 (Oct. 1, 2009) (soliciting participants for the pilot program).

113. PROGRAM PROPOSAL, *supra* note 111, at 8.

114. *Id.* (indicating the first review evaluates an applicant's proprietary name according

such submissions are comprised of a new, systematic approach to evaluating the safety of a trademark, including the following seven aspects: preliminary screening,<sup>115</sup> a USAN stem search,<sup>116</sup> review for similarities,<sup>117</sup> computational methods,<sup>118</sup> medication error data,<sup>119</sup> name simulation studies,<sup>120</sup> and a failure mode and effects analysis.<sup>121</sup> The outcome of the pilot program, which was slated to close in 2011, is still uncertain, but it has succeeded in providing pharmaceutical companies a transparent rubric with which they can evaluate trademarks.<sup>122</sup>

#### IV. STRENGTHS AND WEAKNESSES OF INDEPENDENT DUAL-AGENCY REVIEW

The dual-agency review structure presents a number of obstacles to the efficiency of new drug approval, though the situation is not devoid of promise. The FDA's pilot program has been a remarkable step forward.<sup>123</sup>

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to the new methods and the second review analyses the proposed proprietary name using the FDA's traditional approach). "At the end of the review process . . . the two reviewers, along with other FDA experts in proprietary name review, will meet to discuss the data and their conclusions." *Id.*

115. *Id.* at 11–12; *see also* LALLEMAND, *supra* note 68, at 11 (explaining that preliminary screening merely indicates a first-step review to ensure that the mark does not use any medical abbreviations or dosing instructions).

116. PROGRAM PROPOSAL, *supra* note 111, at 13. The USAN stem cannot be used as a part of the trade name for a drug.

117. *Id.* at 13–14. This review is for orthographic and phonetic similarities and involves a comprehensive search to eliminate potential similarities to existing marks.

118. *Id.* at 15–16. "Some analysis must be applied to determine which of those names may bear a degree of similarity sufficient to contribute to a potential medication error;" however, the FDA did not articulate a rubric for making this determination, instead merely listing recommended data to include. *Tepper, supra* note 101, at 36. Pilot program participants, therefore, have tremendous influence as to what this step means. *Id.* (arguing that this may be the vaguest step in the pilot program).

119. PROGRAM PROPOSAL, *supra* note 111, at 16 (referring to medication errors involving the active ingredient in the United States or abroad). Most new drugs, however, would not have any such data. *See Tepper, supra* note 101, at 36.

120. PROGRAM PROPOSAL, *supra* note 111, at 17–19 (denoting a simulation with focus groups in at least twenty scenarios to ascertain diverse handwriting samples and spoken orders among at least seventy active, practicing volunteers).

121. *Id.* at 21–24 (explaining a conditional, two-prong test to determine if any similarities to current drugs would realistically cause errors in a usual practice setting).

122. *Cf. id.* at 7 (stating that the FDA expects that program enrollment will last two years).

123. *See* LALLEMAND, *supra* note 68, at 11 (contending that the steps outlined in the Pilot Program provide a relatively detailed rubric for drug sponsors to use during premarketing development); *Tepper, supra* note 101, at 36 (predicting the pilot program can increase efficiency and reduce uncertainty).

The agency has been criticized for its murky approach to trademark review, where pharmaceutical companies and their counsel are largely uncertain of the FDA's review criteria and its impact of producing unpredictable decisions.<sup>124</sup> With the advent of the pilot program, drugmakers have been empowered with a systematic approach to trademark review that, even if the program is scrapped, informs the decisionmaking process when three hundred names are being winnowed to a select few,<sup>125</sup> thus increasing the likelihood of mark approval as pharmaceutical companies go forward. As the program's processes become second nature to the major stakeholders in the drug-naming world, it will create a "more synchronous [research], marketing and regulatory relationship."<sup>126</sup>

On the PTO side of the equation, the use of a "doctrine of greater care" in administrative adjudicative proceedings is a positive step in the right direction because it confirms that the PTO, at least to a certain extent, understands and appreciates the peculiar nature of pharmaceutical marks.<sup>127</sup> Any strength in this PTO doctrine is tenuous because the doctrine of greater care is without structure and is not enacted into law at the congressional or administrative level.<sup>128</sup>

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124. See Boring & Doninger, *supra* note 96, at 114 (noting criticism of the FDA for shrouding its trademark review in secrecy and suggesting publication of guiding principles and general criteria); Herberholz, *supra* note 67, at 123 ("So long as the current system persists in its ambiguity and discretion, pharmaceutical companies will continue to face the risk of wasting millions of dollars on blind development of proposed drug names that the FDA may ultimately reject using subjective criteria not rooted in any specific rule of law."). But see CTR. FOR DRUG EVALUATION & RESEARCH AND CTR. FOR BIOLOGICS EVALUATION & RESEARCH, U.S. FOOD & DRUG ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., GUIDANCE FOR INDUSTRY: CONTENTS OF A COMPLETE SUBMISSION FOR THE EVALUATION OF PROPRIETARY NAMES (2010) [hereinafter 2010 GUIDANCE], <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm075068.pdf> (elucidating for the first time what the FDA considers when it evaluates drug trademarks in guidance for pharmaceutical companies); Guidance for Industry on the Contents of a Complete Submission for the Evaluation of Proprietary Names; Availability, 75 Fed. Reg. 6210 (Feb. 8, 2010) (publicizing the release of the drug name review guidance).

125. See LALLEMAND, *supra* note 68, at 7.

126. *Id.* at 11 (quoting Martin Burke, Managing Director, Thomson CompuMark).

127. Compare *Alfacell Corp. v. Anticancer Inc.*, 71 U.S.P.Q.2d (BNA) 1301, 1306 (T.T.A.B. 2004) (supporting a finding of likelihood of confusion with the doctrine of greater care), with *Baseball Am. Inc. v. Powerplay Sports Ltd.*, 71 U.S.P.Q.2d (BNA) 1844, 1848 (T.T.A.B. 2004) (citing *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973) (conducting the traditional trademark confusion analysis with the *du Pont* factors for Class 16 paper and printed goods).

128. See Herberholz, *supra* note 67, at 101 n.25 (explaining that the doctrine of greater care requires a more stringent quantum of proof and noting that such quantum of proof is unclear because it has not been made law).

Despite these advancements, there is a litany of problems with the dual-agency structure. Most notably, this approach leaves the PTO reviewing trademarks with no discernible meaning because the marks are simply names—they could be legitimate, they could be decoys, or they could be safety submissions, but no matter what, the PTO is in the dark.<sup>129</sup> The PTO's approval then becomes a simple rubber-stamp process, thereby according the FDA its true authority to meaningfully assess the trademark. This practice eviscerates the PTO's ability to fulfill its legislative duty of regulating trademarks and presents an administrative quandary as to whether the FDA has the authority to overtake the PTO in practice.<sup>130</sup>

In addition, the ITU provision conditions approval on the trademark owner using the mark in commerce within a maximum of three years following a notice of allowance. This requirement presents problems for pharmaceutical companies because they are subject to the FDA's separate review of both the drug and its mark, a review that could stretch well past the expiration of the PTO's conditional approval.<sup>131</sup> The resulting uncertainty creates a gamble wherein drugmakers must strategically aim to file at the appropriate time with the PTO while approximating the estimated completion of the NDA process.<sup>132</sup> Pharmaceutical companies are then forced to abuse the ITU option by filing their cluster of names<sup>133</sup> with full knowledge that some will not be used in commerce, which prevents others from using perfectly good trademarks in the marketplace.<sup>134</sup> Additionally, since the ITU trademarks are published on the principal register, another company can effectively appropriate a mark for itself if the applicant does not receive FDA approval in time to satisfy the PTO.<sup>135</sup> In

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129. Companies may submit numerous names to the PTO to prevent competitors from knowing the real drug or to have an arsenal at the ready in case of rejection by the FDA. See Herberholz, *supra* note 67, at 118–19; LALLEMAND, *supra* note 68, at 7.

130. But see Herberholz, *supra* note 67, at 120 (reasoning that such a concern exalts form over function because drug trademarks cannot be used in commerce unless approved by both agencies, so it makes no difference which order the decisions come in).

131. See *id.* at 119 (noting that completion of the FDA review “no earlier than 1.5 years into Phase III clinical trials will help ensure that the PTO's intent-to-use provisions are not ultimately exhausted”).

132. See *id.* (stating there are “temporal hurdles associated with complying with the PTO's intent-to-use provisions”).

133. Thomson CompuMark, a division of Thomson Reuters, even counsels its potential pharmaceutical clients to “file early, file often.” LALLEMAND, *supra* note 68, at 12.

134. See Herberholz, *supra* note 67, at 119 (explaining that because the PTO does not place restrictions on the number of intent-to-use applications that may be filed for a drug, applicants lock up marks they never intend to use).

135. *Id.* at 118. Competitor poaching of trademarks is a significant weakness in the trademark regulatory system because it allows the opposite of what trademarks exist to prevent—the appropriation of a given mark in commerce by another party. See 1

the end, the disparate timelines of the dual-agency review wastes PTO resources and makes the agency less efficient.<sup>136</sup>

The resources wasted by the PTO reviewing unnecessary trademarks is dwarfed by the amount of money wasted by pharmaceutical companies paying top dollar to branding consultants and trademark lawyers to devise a list of winning names and then get them registered.<sup>137</sup> Hundreds of thousands of dollars, perhaps even millions, are spent on consultants to create the perfect name,<sup>138</sup> and more is spent on the lawyers. With drugmakers spending so much, and particularly now that the burden of obtaining data appears to be shifting to the private sector under the pilot program,<sup>139</sup> a new system free from redundancy and abuse is necessary. Global filings for pharmaceutical trademarks have risen over 300% in the last thirty years to 238,010 in 2010.<sup>140</sup> Even if the pilot program results in a structured system for drug trademarks on the FDA side, the other side of the dual-agency review must be addressed and remedied in kind.

## V. RECOMMENDATIONS FOR A BETTER APPROACH

### A. *What Others Have Proposed*

Any proposals should be in light of what has previously been proffered as a possible solution. Because the FDA has reorganized its trademark review function on such a frequent basis, some commentators' recommendations address a review structure that is no longer applicable,<sup>141</sup> but their recommendations still merit discussion.

As far back as 1997, Daniel Boring (then-chair of the LNC) and Chris

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MCCARTHY, *supra* note 11, § 2:2 (stating one of the goals of trademark law is to "protect the plaintiff's infringed trademark as property").

136. Herberholz, *supra* note 67, at 119.

137. See McNeil, *supra* note 1 (calling \$2 million spent creating an unused drug name "chump change" (quoting Bill Trombetta, Professor of Pharmaceutical Marketing, St. Joseph's Univ.)).

138. See *id.* Though the article is silent on the matter, it is likely that legal costs are not included in the *Times*' estimate.

139. See Tepper, *supra* note 101, at 35 ("At the conclusion of the two-year pilot scheme, the FDA will . . . determine whether it is feasible to accept data from sponsors in lieu of engaging in its own data generation exercise").

140. LALLEMAND, *supra* note 68, at 3 (referencing a graph (Figure 1) that shows a sharp rise in filings around 2002).

141. See, e.g., Boring & Doninger, *supra* note 96, at 114 (addressing the shortcomings of the now-defunct LNC); Gentin, *supra* note 97, at 265 (proposing changes to the LNC as well); Herberholz, *supra* note 67, at 124 (offering suggestions before the pilot program brought FDA processes to light).

Doninger (an examining attorney in Class 5 at the PTO)<sup>142</sup> offered three central recommendations to increase efficiency in pharmaceutical trademark review on both sides of the dual-agency divide.<sup>143</sup> They first proposed the publication of LNC trademark review factors, which at the time were largely unspoken, specifically pointing to a document that purported to crystallize the LNC's review process.<sup>144</sup> The two asserted that publication of this document would apprise the industry of the committee's approach and allow it to self-correct.<sup>145</sup> Boring and Doninger then suggested adding PTO personnel to the LNC as a means of preventing the FDA from acting independently from the PTO.<sup>146</sup> The authors concluded by proposing the PTO alter its approach to pharmaceutical applications by refusing to review those trademarks that have yet to be reviewed by the FDA, effectively granting the PTO final say over registration.<sup>147</sup>

Not long after Boring and Doninger, in 2000, Danielle Gentin proposed empowering the LNC within the FDA and increasing dialogue between the two agencies<sup>148</sup> after dismissing options such as assigning full authority to either the PTO or FDA.<sup>149</sup> She contended that bestowing upon the LNC the authority to bind the rest of the FDA in its trademark decisions would be efficient and effective in creating a systematic process.<sup>150</sup> Gentin reasoned that the LNC's recommendation (or lack thereof) for a trademark to the PTO would inform the PTO's ability to make an appropriate

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142. Recall that the LNC was the central apparatus of FDA trademark review and that Class 5 is the PTO classification for pharmaceutical marks. In other words, these two were essentially the definitive voices on the issue from both agencies at the time.

143. Boring & Doninger, *supra* note 96, at 114–16.

144. *Id.* at 114. This document was entitled *Guidance for Industry on Proprietary and Established Drug Names*, *id.*, which seems substantially similar to the guidance published in 2010. See generally 2010 GUIDANCE, *supra* note 124.

145. See Boring & Doninger, *supra* note 96, at 114 (advocating the publication of the document, among other reasons, to provide the industry an opportunity to comment and supply constructive criticism).

146. *Id.* at 115 (contending that the inclusion of PTO personnel would contribute to the LNC's compositional balance and increase industry confidence).

147. *Id.* at 115–16 (insisting this proposal would accord deference to the FDA's safety inquiry and allow confidentiality to be maintained in the process).

148. Gentin, *supra* note 97, at 264–66 (observing that an FDA regulation empowering the LNC “would send a powerful message to pharmaceutical companies, encouraging more careful selection of potential marks”).

149. *Id.* at 263 (arguing that vesting all authority in either the PTO or the FDA is ill-conceived because of the different goals of each agency).

150. See *id.* at 264. Gentin also proposed requiring all drug names to receive LNC review, *id.*, as opposed to the voluntary basis on which the reviewing FDA divisions sought LNC review.



decision regarding federal registration.<sup>151</sup>

Years later in 2007, long after the LNC's existence, Dana Herberholz proposed recommendations for both agencies.<sup>152</sup> First, he argued, the PTO should limit the number of ITU applications that drugmakers can file and refuse to accept any pharmaceutical trademark applications until the FDA completes its review at a certain point during Phase 3 trials, instead of during Phase 2 of the NDA process.<sup>153</sup> Second, Herberholz advocated for the FDA's trademark review guidelines and criteria to be codified, like the PTO's, because their absence imposes an undue burden on pharmaceutical companies.<sup>154</sup> Finally, he criticized the FDA's orthographic and phonetic confusion analysis as too limited,<sup>155</sup> proposing instead to broaden the sample size.<sup>156</sup>

Recently, Deirdre A. Clarke, a student at Loyola New Orleans, addressed the dual-agency review directly, coming to a conclusion similar to this Comment's.<sup>157</sup> Clarke first proposed the creation of a joint commission to review drug names, wherein the review functions of each agency would be melded to focus on all aspects of the likelihood of confusion analysis.<sup>158</sup> Clarke recommended that, in the alternative to a joint commission, the agencies could establish a joint federal advisory committee to review the regulatory framework of each agency and make recommendations toward collaboration and efficiency.<sup>159</sup> Finally, Clarke

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151. *See id.* at 265 (reasoning that while "the PTO, and not the LNC, should retain the authority to deny trademark registration," the LNC should review trademarks in those areas where the PTO lacks expertise and make recommendations to the PTO about confusing claims).

152. Herberholz, *supra* note 67, at 120–25.

153. *Id.* at 120.

154. *Id.* at 122–24 (explaining that the lack of clear guidelines and criteria is expensive and wasteful).

155. Before the pilot program, the DMETS's verbal and handwriting confusion analysis samples were comprised only of FDA employees. *See id.* at 125 (citing Transcript of Public Meeting, FDA Institute for Safe Medication Practices, Evaluating Drug Names for Similarities: Methods and Approaches (June 26, 2003)) (expressing dismay that the FDA samples around 130 of its employees rather than utilizing the "qualified and diverse" base of physicians and pharmacists across the United States).

156. *Id.* at 124–25 (recommending the FDA include a randomized sample of physicians and pharmacists).

157. Deirdre A. Clarke, Comment, *Proprietary Drug Name Approval: Taking the Duel Out of the Dual Agency Process*, 12 LOY. J. PUB. INT. L. 433, 455–60 (2011) (arguing for more collaboration and a joint venture between the FDA and the PTO).

158. *Id.* at 455 (recommending, somewhat paradoxically, that a joint commission would "respect the differences" in the confusion analysis "by honing the expertise of both agencies to focus on all aspects" of the analysis (emphases added)).

159. *Id.* at 458–59 (comparing the prospect of a federal advisory committee to another such committee created between the Securities and Exchange Commission and the

concluded, as Herberholz did, with a recommendation to codify the FDA's trademark review criteria and process.<sup>160</sup>

### *B. Solutions Going Forward*

With the advent of the pilot program and its potential progeny, the FDA's trademark standards and criteria would seem to be a known quantity, negating the need for their publication and making calls for transparency somewhat of a nonissue.<sup>161</sup> However, the pharmaceutical industry still believes that, no matter who is gathering the data, the confusion analysis itself is vague and requires clarity.<sup>162</sup> The industry has criticized the FDA for reviewing trademarks without any validated measures or processes to define or determine when two names are confusingly similar.<sup>163</sup> As such, the FDA should take the initiative to codify its criteria as the PTO has,<sup>164</sup> which will promote transparency and benefit both the pharmaceutical companies that sponsor drugs and the FDA personnel who review drug names.

Beyond that persistent concern, the pilot program, barring a dramatic meltdown, is a sound program that empowers pharmaceutical companies, shifting the onus from the government to the private sector. Its approach to review is echoed by the Executive Branch's efforts to reduce unnecessary regulation.<sup>165</sup> If the pharmaceutical industry can collect the requisite

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Commodity Futures Trading Commission, which has "taken an active role in considering and developing solutions to emerging . . . issues of common interest"). This Comment counsels against federal advisory committees because of their temporary mandate, transparency requirements, and nonbinding recommendations. See *infra* notes 178–179 and accompanying text.

160. Clarke, *supra* note 157, at 460; Herberholz, *supra* note 67, at 122–24.

161. See also 2010 GUIDANCE, *supra* note 124, at 5–6 (shedding even more light on the FDA's review process). But see Comments of PhRMA, Periodic Review of Existing Regulations; Retrospective Review Under Exec. Order 13,563, (Docketing FDA-2011-N-0259) (June 27, 2011), [hereinafter PhRMA Comments], <http://www.regulations.gov/#!documentDetail;D=FDA-2011-N-0259-0045> (follow the "PDF" hyperlink) (detailing comments submitted to the FDA by the Pharmaceutical Research and Manufacturers of America, the drug industry's trade organization, in response to the following notice: Periodic Review of Existing Regulations; Retrospective Review Under Exec. Order 13,563, 76 Fed. Reg. 23,520 (Apr. 27, 2011)).

162. PhRMA Comments, *supra* note 161, at 8.

163. *Id.*

164. See generally 37 C.F.R. §§ 2.1–11.61 (2010) (codifying the Trademark Rules of Practice (TMRP)).

165. See, e.g., Exec. Order No. 13,563, 76 Fed. Reg. 3821–23 (Jan. 21, 2011) (requiring executive agencies to, among other things, conduct cost–benefit analyses before enacting significant regulation and making agencies look retroactively for regulations they can reduce or eliminate).

trademark data, then it makes sense to relieve the government of such responsibilities and transition it into a purely analytical role. The program should be extended and streamlined with comment and feedback from the participants.

Most importantly, the PTO and the FDA should combine forces in a real and comprehensive way as their statutory duties relate to pharmaceutical trademarks. The effective solution is a joint committee comprised of PTO and FDA personnel that acts as a one-stop shop for regulatory approval of drug names, producing a single decision, binding on both agencies and sponsors, and maintaining the valuable confidentiality that DMEPA currently affords sponsors. In practice, the committee would be similar to the LNC,<sup>166</sup> only without the LNC's shortcomings, since the joint committee would include all of the productive strides that DMEPA has made.<sup>167</sup> It would not need to have a set member balance—half PTO, half FDA, for example—because the agencies are not in competition to review trademarks. Rather, if the committee had, hypothetically speaking, seven FDA members (one for each pilot program step), two or three PTO attorney examiners would be sufficient to evaluate proposed marks and perform legal confusion analysis. The PTO would then perform its inquiry in tandem with the FDA and return one decision to the sponsor; a rejection from either agency on the committee would result in an overall rejection. Likewise, approval from both sides would result in overall approval. The sponsor's submission to the PTO would still be under the PTO's statutory authority for ITU applications, and the ITU provisions would still apply to the trademark's approval.<sup>168</sup> While the FDA's inquiry would remain mandatory, drug sponsors would not be forced to obtain federal registration for their trademarks, though it is difficult to imagine a scenario where a sponsor would forego the opportunity to register its mark.

Centralizing each agency's efforts would synchronize the timeline that is hampering drugmakers, thus eliminating the need for pharmaceutical companies to play the guessing game of when to file trademark applications. But there is much more to be gained through a joint

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166. The concept of a joint committee finds its roots in Boring and Doninger's suggestion of the addition of PTO personnel to the LNC. See Boring & Doninger, *supra* note 96, at 115 ("Because FDA seeks to have LNC comprised of a range of experts in the many . . . disciplines that affect the use of trademarks on drugs, it would make sense to add personnel from PTO . . .").

167. Such as reviewing every drug trademark, having the last word on those reviews, and enacting the pilot program. See *supra* notes 96–108 and accompanying text.

168. Approval from the committee would require the drug sponsor to use the trademark in commerce and submit a Statement of Use (SOU) within a maximum of thirty-six months of the decision. See *supra* notes 55–62 and accompanying text.

committee.

An empowered joint committee would enable drugmakers to assign a preferred name to a drug early in its development just like “normal” commercial products, as there would be no need to maintain an arsenal of registered trademarks in the event that the FDA rejects a name. Since the PTO would be with the FDA on the committee reviewing marks in a synchronous timeline, the PTO would review a sponsor’s backup name (or even third choice) at the same time the FDA does rather than forcing sponsors to reset their PTO clocks with new registration applications.<sup>169</sup> In addition to being much more efficient, the newfound lack of divergent timelines and “wargaming” over such timelines would conserve sponsor resources and thus replenish the treasuries at pharmaceutical companies, perhaps allowing them to spend more on research and development.<sup>170</sup>

A joint committee structure would also reduce the need for pharmaceutical companies to abuse the ITU application option. As mentioned above,<sup>171</sup> applicants either aim to shield their true trademarks from competitors or they warehouse trademarks in case the FDA rejects any. Regardless of which option is chosen, neither is a bona fide intent to use the mark in commerce. With the confidentiality of the committee providing a safe haven from opportunistic competitors and the need for a trademark warehouse taken away, abuse of the ITU applications should disappear quickly.<sup>172</sup> With less ITU abuse and more names that are associated with a drug (as opposed to names existing nebulously, unassigned to actual drugs), the PTO can conduct a more meaningful review. A joint committee would not, however, be able to prevent all ITU application abuse without statutory change at the PTO; concerned companies could still file a collection of applications at the PTO independent of the joint FDA review to shield their prospective marks from competitors.<sup>173</sup>

The clearest advantage to a joint committee approach is the seat it offers

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169. Recall that without other registered trademarks at the ready, pharmaceutical companies would have to restart the PTO application process with a new drug name if the FDA rejected its PTO-approved submissions. *See supra* Part IV.

170. *See* Gagnon & Lexchin, *supra* note 3, at 32 (noting drugmakers spend almost twice as much on marketing as they do on product development).

171. *See supra* notes 67–68 and accompanying text.

172. It is important to note that *complete* confidentiality for trademark review cannot be obtained. At the heart of the PTO’s review process is the public listing of marks, allowing for opposition. To allow pharmaceutical companies the ability to avoid a public disclosure would be to undermine competitors’ abilities to rightfully challenge an illegitimate mark.

173. Only a statutory change mandating drug trademarks be evaluated in the joint committee would prevent such abuse, though it stands to reason that this is a general weakness of the ITU option not exclusive to pharmaceutical marks, as any company can avail itself of this strategy.

the PTO at the drug trademark table. As mentioned above,<sup>174</sup> the PTO lacks a meaningful review under the current system, where it exists as a clearinghouse for whatever names pharmaceutical companies would prefer to have lying in wait.<sup>175</sup> The PTO will not likely attain the importance that the FDA carries in drug trademark evaluation because the FDA's purpose is to protect consumer health, as opposed to the PTO's protection of intellectual property. Be that as it may, the PTO should function as the equally important coordinate agency in the federal government that it is, and a joint committee would allow it to do so.

### C. *How the Committee Forms*

The obvious remaining issue is how this committee could be established. Congress certainly has the authority to mandate its creation by statute,<sup>176</sup> as Congress frequently sets the course for agency action, but moving anything through both the House of Representatives and Senate is a lengthy and cumbersome order.<sup>177</sup> Either the PTO or FDA (or the Executive) has the option to create a federal advisory committee.<sup>178</sup> Unsurprisingly, however,

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174. See *supra* notes 129–130 and accompanying text (noting how the PTO's approval becomes a simple rubber-stamp).

175. See LALLEMAND, *supra* note 68, at 7 fig.8 (reporting that it is typical for pharmaceutical companies to submit five to ten trademarks to the PTO for registration as opposed to a mere two names to the FDA).

176. Congress could easily base its power to mandate a joint committee in the Commerce Clause, where it already bases its authority to regulate trademarks and drugs. See generally *The Trade-Mark Cases*, 100 U.S. 82 (1879) (invalidating the Trademark Act of 1870 for basing congressional authority to regulate trademarks in the Patent and Copyright Clause); Trademark Act of 1881, ch. 138, 21 Stat. 502 (rooting Congressional authority to regulate trademarks in the Commerce Clause); *United States v. 7 Jugs of Dr. Salsbury's Rakos*, 53 F. Supp. 746, 752 (D. Minn. 1944) (calling the Federal Food, Drug & Cosmetic Act of 1938 one of the most important Commerce Clause enactments and stating that drug legislation should be given a liberal construction).

177. See PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, MARCH 2010 POLITICAL SURVEY 3 (2010), <http://people-press.org/files/legacy-questionnaires/598.pdf> (finding that a plurality of survey respondents chose *dysfunctional* as the one word that best describes Congress); JON STEWART ET AL., *AMERICA (THE BOOK): A CITIZEN'S GUIDE TO DEMOCRACY IN ACTION* 57 (Jon Stewart et al. eds., 2004) (equating the "convoluted" legislative process in Congress, or "quagmire," to movement through the gastrointestinal tract—satirically of course).

178. See Federal Advisory Committee Act of 1972, 5 U.S.C. app. 2 §§ 1–16 (2006). Federal advisory committees are created by Congress through statute, by the Executive through executive order, or by directive from an agency head. Whether called commissions, committees, councils, or task forces, they exist to hash out policy opinions and recommendations on topics ranging from organ transplant practices to Department of Homeland Security operations. WENDY R. GINSBERG, CONG. RESEARCH SERV., R40520, FEDERAL ADVISORY COMMITTEES: AN OVERVIEW 1, 8 (2009), <http://www.fas.gov/>

advisory committees exist to advise agencies and do not have the ability to make binding decisions on an agency's behalf, rendering such an option less than ideal to address the dual-agency review issues.<sup>179</sup>

The FDA's latitude to regulate drug trademarks is considerably wide,<sup>180</sup> and the PTO's ability to structure its offices is also quite expansive.<sup>181</sup> While the FDA could not conscript PTO personnel to participate on the committee, nor could PTO examiners invade the FDA's process, there is nothing preventing the FDA from politely inviting the PTO to participate and the PTO from accepting the invitation. Interagency collaboration is nothing new,<sup>182</sup> and that is really what this committee would be—FDA and PTO personnel would collaborate in a way that gives depth to each side's review, yet still focus on what they know best.<sup>183</sup> This committee would not reduce the substance or character of either agency's trademark review; rather, the committee would synchronize the review process.<sup>184</sup> As long as that is the case, the creation of a joint committee at the agency level would

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sgp/crs/misc/R40520.pdf.

179. 5 U.S.C. app. 2 § 2(b)(6). An advisory committee would also run into other problems as a framework for the joint committee: committees are required by the Federal Advisory Committee Act to be temporary (two years unless an enabling statute specifies otherwise) and accessible to the public (confidentiality of new drug applications would be shot). See GINSBERG, *supra* note 178, at 10–11. Such a committee would, in practice, be similar to the original LNC.

180. See 21 U.S.C. § 352(a)–(n) (2006) (giving the FDA authority to regulate a drug's label, package form, information on the label, names, directions, warnings, containers, colors, and advertisements). The FDA's expansive authority on the subject is echoed by its ability to constantly refigure its trademark review apparatus within the Center for Drug Evaluation and Research (CDER), each incarnation garnering more exclusivity over the process. See Gentin, *supra* note 97, at 259 (explaining how the LNC's role expanded since its inception); Scheineson, *supra* note 99, at 2 (noting how the FDA evaluated proposed drug trade names through the Office of Post-Marketing Drug Risk Assessment, which was a part of CDER); Tepper, *supra* note 101, at 34 (observing CDER now has final responsibility for decisions on pharmaceutical trademarks); Clifford, *supra* note 11 (stating the evaluation of proposed drug names expanded when it was undertaken by CDER).

181. See *Patent Technology Centers Management*, U.S. PATENT & TRADEMARK OFFICE, <http://www.uspto.gov/web/patents/contacts/tcmgrs.htm> (last visited Feb. 7, 2012) (listing over fifty-five patent review sections, organized into nine “technology centers” that are segregated by patent application type, thus showing the PTO's tremendous flexibility).

182. See, e.g., Office of the Vice President, *Improving Regulatory Systems*, 34 JURIMETRICS J. 331, 338 n.7 (1994) (outlining numerous interagency collaborations between the National Institute of Standards and Technology and the Nuclear Regulatory Commission, Environmental Protection Agency, and FDA itself).

183. It is important to be clear: neither agency would be telling the other what to do under this proposal. The goal should never be for the PTO's review to become more like the FDA's or vice-versa—they each perform an important and valuable function as it is.

184. See *supra* notes 131–136 and accompanying text (elaborating on the uncertainty caused by disparate timelines in the dual-agency review process).

be within the agency's administrative purview.

Since the FDA pursues the weightier mission (saving lives versus the PTO's saving of dollars) and conducts a more labor-intensive analysis in the dueling reviews of drug trademarks, it is unlikely that the PTO could initiate the creation of a joint committee. If the pilot program is permanently adopted, the FDA's process would be less laborious, but at least until that happens, the FDA would be in the appropriate position to invite the PTO's participation. It seems likely that the FDA could, rather painlessly, create a new review committee and vest in it the authoritative power it currently assigns to DMEPA with the inclusion of PTO personnel.<sup>185</sup>

The simplest method of including PTO personnel on a joint committee would be publishing a Memorandum of Understanding (MOU) in the *Federal Register*.<sup>186</sup> In 1987, the FDA published an MOU giving notice that it had collaborated with the PTO to develop procedures where the FDA assists the PTO in determining a product's eligibility for patent term restoration.<sup>187</sup> This particular MOU exhibits the agencies' ability to freely work together and even create a set of rules by which either can expect the other to operate. If the FDA and PTO could do it once, the simple notion is that they can do it again by "exchanging information" on pharmaceutical trademarks and establishing "review period determinations,"<sup>188</sup> which are, after all, the crux of the synchronization that this Comment proposes.

#### CONCLUSION

There is too much money and safety at stake for independent dual-agency review of pharmaceutical trademarks to continue in its current form. Both agencies have the legal authority to review trademarks under federal law. Both agencies therefore play a crucial role in the regulation of drugs. The administrative structure should enable them to provide their most meaningful, comprehensive evaluation and simultaneously provide an unencumbered and efficient process for industry stakeholders. The pilot

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185. Cf. Boring & Doninger, *supra* note 96, at 115 (recommending, as chair of the LNC, that PTO personnel should be added to the LNC); Tepper, *supra* note 101, at 34 (chronicling the FDA's delegation of trademark review authority to DMEPA in 2009).

186. E.g., Memorandum of Understanding Between the Patent and Trademark Office and the Food and Drug Administration, 52 Fed. Reg. 17,830, 17,830 (May 12, 1987) ("The MOU establishes procedures whereby FDA assists PTO in determining a product's eligibility for patent term restoration . . .").

187. *Id.* The Memorandum of Understanding also established procedures for exchanging information between the agencies regarding regulatory review period determinations, due diligence petitions, and informal FDA hearings. *Id.*

188. *Id.*

program should be standardized to empower pharmaceutical companies and involve them in the trademark regulation process. The FDA should also codify its trademark review standards and processes like the PTO has to increase transparency and clarity for both drug sponsors and mark reviewers. A joint committee of PTO and FDA personnel established to review all drug trademarks and provide a single, binding decision would pay substantial dividends for both agencies and pharmaceutical companies. As the FDA has shown through its constant reinvention, there are a number of different ways to move toward an efficient system, but a joint committee could be the bold move that can empower both agencies in their review efforts and keep the consumer safe. With the relative ease that accompanies an MOU, there is little reason to delay a remedy to the glaring issues caused by independent dual-agency review.



# SITTING ON THE BENCH: THE FAILURE OF YOUTH FOOTBALL HELMET REGULATION AND THE NECESSITY OF GOVERNMENT INTERVENTION

JASON NAVIA\*

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## INTRODUCTION

Over the last several years, an increasing amount of attention has been paid to the frequency and causes of traumatic brain injuries (TBIs),<sup>1</sup> commonly known as concussions.<sup>2</sup> Given several recent high-profile cases of current and former athletes suffering debilitating and life-threatening side effects of repeated brain trauma, concussions have become the focal point of heightened concern and the subject of new research within the medical and sports communities.<sup>3</sup> The Center for the Study of Traumatic

1. See *NINDS Traumatic Brain Injury Information Page*, NAT'L INST. OF NEUROLOGICAL DISORDERS & STROKE, <http://www.ninds.nih.gov/disorders/tbi/tbi.htm> (last updated Jan. 30, 2012) (stating that traumatic brain injuries (TBIs) are a form of acquired brain injury that occurs when a sudden trauma causes damage to the brain, commonly resulting from the head suddenly and violently hitting another object); see also *Traumatic Brain Injuries*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/traumaticbraininjury/> (last updated Jan. 17, 2012) (recognizing TBI as a serious public health problem in the United States as approximately 1.7 million people sustain some level of TBI annually). It should be noted that while this Comment focuses on the relationship between youth athletics and concussions, the difficulty in diagnosing and treating concussions has been addressed in other fields, particularly the military. See Gregg Zoroya, *More Troops' Concussions Diagnosed Under New Rules*, USA TODAY, Oct. 28, 2010, [http://www.usatoday.com/news/military/2010-10-28-1Aconcussions28\\_ST\\_N.htm](http://www.usatoday.com/news/military/2010-10-28-1Aconcussions28_ST_N.htm) (reviewing the new policies of the military for treating troops suffering from the effects of concussions sustained in the battlefield); see also Lizette Alvarez, *Home From War, Veterans Say Head Injuries Go Unrecognized*, N.Y. TIMES, Aug. 26, 2008, at A1 (discussing the close relationship between post-traumatic stress disorder and traumatic brain injuries).

2. See, e.g., Stephanie Smith, *Dead Athletes' Brains Shows Damage from Concussions*, CNN (Jan. 26, 2009), [http://articles.cnn.com/2009-01-26/health/athlete.brains\\_1\\_concussions-brain-damage-traumatic-encephalopathy?\\_s=PM:HEALTH](http://articles.cnn.com/2009-01-26/health/athlete.brains_1_concussions-brain-damage-traumatic-encephalopathy?_s=PM:HEALTH) (addressing the studies of the Center for the Study of Traumatic Encephalopathy in Boston, which have focused on the dangerous long-term effects of concussions and the manner in which such side effects have afflicted former athletes).

3. See *Researchers to Study 49ers RBs*, ESPN, <http://sports.espn.go.com/nfl/news/story?id=6643720&campaign=rss&source=ESPNHeadlines> (last updated June 9, 2011) (detailing the analyses of the brains of two deceased former National Football League (NFL) players who both suffered from Chronic Traumatic Encephalopathy (CTE), which is caused by repeated brain trauma); see also Alan Schwarz, *Study Says Brain Trauma Can Mimic A.L.S.*, N.Y. TIMES, Aug. 17, 2010, <http://www.nytimes.com/2010/08/18/>

Encephalopathy in Boston, in conjunction with the Sports Legacy Institute, have garnered national headlines by studying the brains of living and deceased athletes to better understand the cumulative effects of these injuries.<sup>4</sup> In its studies, the Sports Legacy Institute has found that athletes with a history of concussions have reported long-lasting symptoms of memory loss, motor function loss, and psychological disorders such as depression.<sup>5</sup> In response, the National Football League (NFL) has adopted stricter internal policies regulating when players who suffer from concussion symptoms can return to the field.<sup>6</sup> Additionally, only in 2010 did the National Collegiate Athletic Association (NCAA) create an Association-

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sports/18gehrig.html (citing a recent study demonstrating that NFL players who suffered from CTE exhibited some of the same neurological defects of Amyotrophic Lateral Sclerosis). See generally Malcolm Gladwell, *Offensive Play: How Different Are Dogfighting and Football?*, NEW YORKER, Oct. 19, 2009, [http://www.newyorker.com/reporting/2009/10/19/091019fa\\_fact\\_gladwell?currentPage=all](http://www.newyorker.com/reporting/2009/10/19/091019fa_fact_gladwell?currentPage=all) (surveying several anecdotes of former football players suffering from severe physical and psychological disorders and the medical studies seeking to explain the ailments that are frequently seen in the brains of deceased former football players).

4. See, e.g., Smith, *supra* note 2 (detailing the findings of a study that showed evidence of CTE in both a deceased former NFL player, as well as in the brain of a deceased eighteen-year-old multisport athlete who reportedly suffered multiple concussions).

5. See Alan Schwarz, *Duerson's Brain Trauma Diagnosed*, N.Y. TIMES, May 2, 2011, <http://www.nytimes.com/2011/05/03/sports/football/03duerson.html> (addressing the finding that the brain of former NFL player Dave Duerson, who died of a self-inflicted gunshot wound at fifty years old, exhibited clear patterns of CTE, which contributed to his deteriorating mental state).

6. See Goodell Issues Memo Changing Return-to-Play Rules for Concussions, NAT'L FOOTBALL LEAGUE, <http://www.nfl.com/news/story?confirm=true&id=09000d5d814a9ecd&template=with%20video%20with%20comments> (lasted visited Feb. 8, 2012) (discussing the 2009 memorandum that NFL Commissioner Roger Goodell sent to all NFL teams outlining stricter guidelines for determining when a player who previously suffered a concussion during practice or a game can return to play); see also *Protecting Student Athletes from Concussions: Hearing on H.R. 6172 Before the H. Comm. on Educ. & Labor*, 111th Cong. 22 (2010) [hereinafter *Hearings*], (statement of Sean Morey, Executive Board Member, NFL Players Association) (stating the NFL is actively working to change the locker room culture and on field management of concussions). But see Ken Belson & Alan Schwarz, *Concussion Treatment Cited in Suit Against N.F.L.*, N.Y. TIMES, July 20, 2011, <http://www.nytimes.com/2011/07/21/sports/football/retired-players-sue-nfl-over-treatment-of-concussions.html> (citing a recently filed civil action in which seventy-five former NFL players filed suit against the NFL and football helmet manufacturers, alleging teams mismanaged the players' concussions and that the NFL purposefully concealed evidence of the long-term effects of head injuries). Specifically, the complaint alleges negligence and fraud against the NFL for how it handled concussion testing procedures and treatment. Plaintiffs' Complaint for Damages & Demand for Jury Trial at paras. 524-66, *Maxwell v. NFL*, No. BC465842 (Cal. Super. Ct. July 19, 2011). Additionally, the plaintiffs allege against the helmet manufacturers claims of strict liability for design and manufacturing defects and failure to warn plaintiffs of the risk of concussions. *Id.* at paras. 567-81.

wide policy governing concussion management of injured collegiate athletes.<sup>7</sup> While it appears the long-term consequences and detrimental effects of concussions sustained by athletes are beginning to be understood and appreciated,<sup>8</sup> the sports world, both professional and amateur, is still lacking clear guidance in creating preventative measures and equipment to curb the proliferation of such injuries.

In just the last three years, over 400,000 concussions were reported as a result of participation in high school athletics<sup>9</sup>; chief among the causes of

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7. Memorandum from Debra Runkle, Chair of NCAA Comm. on Competitive Safeguards and Med. Aspects of Sports (CSMAS), to NCAA Head Athletic Trainers (Apr. 29, 2010), available at [http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/ncaa/ncaa/academics+and+athletes/personal+welfare/health+and+safety/concussion+management+plan+memo](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/academics+and+athletes/personal+welfare/health+and+safety/concussion+management+plan+memo) (notifying trainers of the adoption of an association-wide concussion management plan for universities and colleges in all three divisions of the NCAA, as well as outlining recommendations for concussion management plans). Notably, the first provision in the NCAA's recommended Concussion Management Plan states, "Institutions shall require student-athletes to sign a statement in which student-athletes accept the responsibility for reporting their injuries and illness to the institutional medical staff, including signs and symptoms of concussions. During the review and signing process student-athletes should be presented with educational material on concussions." *Id.* at 3 (footnote omitted). Clearly, the NCAA is reminding its affiliated institutions of the potential legal pitfalls of assuming responsibility for managing the observation and treatment of student athletes.

8. See *Hearings*, *supra* note 6, at 23 (statement of Sean Morey, Executive Board Member, NFL Players Association) (indicating NFL's leadership has begun to recognize the severe effects of concussions on its athletes and is taking steps to better protect its players from being cleared to play before they are medically able to do so); Smith, *supra* note 2 (highlighting the findings of CTE in the brains of recently deceased former NFL players); Memorandum from Debra Runkle to Head Athletic Trainers, *supra* note 7 (pointing out to affiliated institutions that the NCAA's policies stem from continuing research and communications with the medical community).

9. See *The Impact of Concussions on High School Athletes: Hearing Before the H. Comm. on Educ. & Labor*, 111th Cong. 3 (2010) (statement of Rep. Miller, Chairman, H. Comm. on Educ. & Labor) (introducing the topic of how concussions impact the academic wellbeing and quality of life of high school athletes). Interestingly, there are several cases in which the plaintiff was an athlete suffering from a nonconcussion injury and sued an equipment manufacturer for damages. See, e.g., *Green v. Schutt Sports Mfg. Co.*, 369 Fed. App'x 630, 637 (5th Cir. 2010) (holding, *inter alia*, that the helmet manufacturer was allowed to admit evidence that the helmet complied with National Operating Committee on Standards for Athletic Equipment's (NOCSAE's) standards); *Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567, 577–78 (5th Cir. 2001) (holding that the helmet manufacturer was not strictly liable for the reconditioner's failure to replace old padding with newer energy-absorbing foam and that the mother could not recover for bystander emotional distress); *Lister v. Bill Kelley Athletic, Inc.*, 485 N.E.2d 483, 487 (Ill. App. Ct. 1985) (finding a helmet manufacturer and retailer not liable for a plaintiff's permanent quadriplegia, as the helmet was not defectively designed, and that "the possibility of injury result[ed] from a common propensity of the product which is open and obvious"). In contrast, no cases could be found in which an

these concussions is the participation of young athletes in football.<sup>10</sup> An estimated 4.5 million children play organized football in the United States, which includes about 1.5 million high school participants.<sup>11</sup> Yet, despite the enormous number of student athletes who require proper protection, there is a noticeable lack of modern standards in terms of effective football helmet regulation. This institutional void can be seen on several levels, including the manner in which equipment manufacturers test their products, the widespread use of outdated or defective helmets, and how helmet manufacturers may advertise the safety benefits of their products to the public.<sup>12</sup>

Since its formation in 1969, the National Operating Committee on Standards for Athletic Equipment (NOCSAE), a volunteer trade association, has been the governing body responsible for the oversight of sports safety equipment standards in the United States.<sup>13</sup> Among NOCSAE's goals when it was first created was the development of a more advanced understanding of athletic equipment, particularly an understanding of protective gear for contact sports.<sup>14</sup> NOCSAE recognized that this meant developing testing standards for equipment designed for contact sports, specifically football helmets.<sup>15</sup> However, NOCSAE's testing standards for football helmets have not changed since 1973,<sup>16</sup> despite the

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injured athlete suffering from the effects of a concussion sued a football helmet manufacturer for a defective product. The majority of concussion lawsuits focus on negligence of coaches, physicians, or school administrators in properly diagnosing and treating concussions. *See, e.g.,* Cerny v. Cedar Bluffs Junior/Senior Pub. Sch., 679 N.W.2d 198 (Neb. 2004) (focusing on the negligence of coaching staff). *See generally* Alexander N. Hecht, *Legal and Ethical Aspects of Sports-Related Concussions: The Merrill Hoge Story*, 12 SETON HALL J. SPORT L. 17 (2002).

10. *See* Children's Sports Athletic Equipment Safety Act, S. 601, 112th Cong. § 2(11) (2011) ("In any given season, 20% of all high school football players sustain brain injuries."); *see also* *Guidelines for Pediatricians: Head Injuries*, Am. Acad. of Pediatrics, Feb. 2000 (estimating that 20% of high school football players and 40% of college players will sustain a head injury during their careers).

11. CSAE Act, S. 601 § 2(9).

12. *See* Alan Schwarz, *As Concussions Rise, Scant Oversight for Football Helmet Safety*, N.Y. TIMES, Oct. 20, 2010, at A1 [hereinafter Schwarz, *Scant Oversight*], (assessing issues surrounding the lack of oversight of football helmet development, testing, and marketing, and specifically addressing concerns with the NOCSAE's outdated testing standards and policies).

13. *See About NOCSAE: History and Purpose*, NAT'L OPERATING COMM. ON STANDARDS FOR ATHLETIC EQUIP., <http://www.nocsae.org/about/history.html> (last visited Feb. 8, 2012) (explaining the history and purpose behind the creation of NOCSAE in response to increasing concerns about injuries sustained in the course of participating in football).

14. *Id.*

15. *Id.*

16. *See* Alan Schwarz, *Two Bills Put Focus on Equipment Safety for Children*, N.Y. TIMES, Mar. 15, 2011 [hereinafter Schwarz, *Equipment Safety for Children*],

fact that the technology of the materials used in the design and production of football helmets has significantly advanced.<sup>17</sup> In addition, NOCSAE does not conduct independent testing or market surveillance to ensure compliance with its safety standards for either new or potentially defective reconditioned helmets.<sup>18</sup>

In response to the combination of the growing issue of concussions among school-aged athletes and the lack of clear standards and guidance from NOCSAE, Senator Tom Udall of New Mexico proposed the Children's Sports Athletic Equipment Safety Act in March 2011 (CSAE Act).<sup>19</sup> Senator Udall's bill, which has been referred to the Senate Committee on Commerce, Science, and Transportation as of March 2011,<sup>20</sup> seeks to implement more rigid standards for manufacturing, independent third-party testing, regulations on advertising, and distribution

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[http://www.nytimes.com/2011/03/16/sports/football/16helmets.html?\\_r=2](http://www.nytimes.com/2011/03/16/sports/football/16helmets.html?_r=2) (highlighting two recently drafted pieces of legislation that focus on federal regulation for the treatment of youth-sport concussions and increasing government oversight within the football helmet industry in an effort to increase the industry's focus on developing equipment designed to prevent or reduce the risk of concussions).

17. See *Newer Football Helmet Design May Reduce Incidence of Concussions in High School Players, Shows University of Pittsburgh Study*, SCI. DAILY (Jan. 14, 2006), <http://www.sciencedaily.com/releases/2006/01/060114151826.htm> (discussing a recent study released by the University of Pittsburgh Medical Center's Sports Medicine Concussion Program, which shows the Riddell Revolution football helmet may reduce the incidence of concussions in high school players when compared to standard football helmets). But see Marie-France Wilson, *Young Athletes at Risk: Preventing and Managing Consequences of Sports Concussions in Young Athletes and the Related Legal Issues*, 21 MARQ. SPORTS L. REV. 241, 249–50 (2010) (pointing out that despite the common belief that improved equipment aids in the reduction of athletics-related concussions, some studies have demonstrated that improved equipment for other parts of the body, such as the elbows or shoulders, produces a perverse result by increasing head injuries). While it is a valid point that improved technology can cause some athletes to be reckless in using their equipment to inflict greater force on their opponents, such studies do not address the main issue of this Comment, which is the development of helmets that properly protect athletes from the complexities of forces causing concussions.

18. See Children's Sports Athletic Equipment Safety (CSAE) Act, S. 601, 112th Cong. § 2(24) (2011) (addressing the legislative findings that led to the Children's Sports Athletic Equipment Safety Act proposal); see also Schwarz, *Scant Oversight*, *supra* note 12 (asserting that NOCSAE does not have a role in ensuring that new helmets or reconditioned helmets meet the limited standards that NOCSAE establishes).

19. CSAE Act, S. 601; The Constitutional Authority Statement that accompanies the House version of the Act, H.R. 1127, 112th Cong. (2011), cites Article I, Section 8, Clause 3 of the U.S. Constitution as the vehicle behind which Congress can enact the reforms proposed by the CSAE Act. See 157 CONG. REC. H1907 (daily ed. Mar. 16, 2011) (statement of Rep. Pascrell).

20. *Bill Summary & Status, 112th Cong. (2011–2012): S. 601*, LIBR. OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s:601> (last visited Feb. 8, 2012).

of football helmets used by school-aged children.<sup>21</sup> The bill has three central components. First, it instructs the Consumer Product Safety Commission (CPSC) to initiate rulemaking proceedings to develop a consumer product safety rule with respect to new and reconditioned youth football helmets.<sup>22</sup> Second, it mandates third-party testing of youth football helmets, which would be bound by the third-party testing requirements of § 2063(a)(2)<sup>23</sup> of the Consumer Product Safety Act.<sup>24</sup> And third, it instructs the Federal Trade Commission (FTC) under § 57(a)<sup>25</sup> of the Federal Trade Commission Act to regulate the manner in which helmet manufactures advertise the safety specifications of their products,<sup>26</sup> as well as empowering state attorney generals to bring actions on behalf of citizens to obtain appropriate injunctive relief or to pursue any appropriate criminal charges against manufacturers or distributors for false or misleading claims with respect to the safety benefits of their products.<sup>27</sup>

This Comment argues that NOCSAE's current standards of testing are ineffective and that its lack of market oversight has allowed inferior products to thrive, endangering the welfare of millions of student athletes.<sup>28</sup> Additionally, this Comment maintains that the proposed CSAE Act is the best mechanism to create a greater atmosphere of accountability and compliance among equipment manufacturers and school administrative personnel by developing more stringent testing and safety standards as well as stricter guidelines in the advertising and marketing of the equipment's safety capabilities.<sup>29</sup> Part I provides background on NOCSAE, including its

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21. See generally CSAE Act, S. 601 (providing new guidance in the development, testing, and advertising of the youth football helmet industry by drawing in the powers of the Consumer Product Safety Commission (CPSC) and Federal Trade Commission (FTC)). But see Laurence M. Vance, *Strong Helmets and the Stronger Hand of Government*, FUTURE OF FREEDOM FOUND. (May 31, 2011), <http://www.fff.org/comment/com1105x.asp> (condemning possible federal government involvement in the regulation of sporting equipment and arguing that such proposed legislation centralizes more power in the federal government when such issues should be regulated by state governments, if at all).

22. CSAE Act, S. 601 § 3(a)–(c).

23. Consumer Product Safety Act, 15 U.S.C. § 2063 (Supp. IV 2010).

24. CSAE Act, S. 601 § 4(a), (c).

25. Federal Trade Commission Act, 15 U.S.C. § 57a (2006).

26. CSAE Act, S. 601 § 5(a)–(b).

27. *Id.* § 5(c).

28. See Gregg Easterbrook, *Virginia Tech Helmet Research Crucial*, ESPN (July 19, 2011), [http://sports.espn.go.com/espn/page2/story?page=easterbrook-110719\\_virginia\\_tech\\_helmet\\_study&sportCat=nfl](http://sports.espn.go.com/espn/page2/story?page=easterbrook-110719_virginia_tech_helmet_study&sportCat=nfl) (citing the recently released Virginia Polytechnic Institute and State University (Virginia Tech) study, which showed the second-lowest rated helmet was the most commonly used helmet in the NFL and was prominent in both collegiate and high school programs across the country).

29. See Schwarz, *Scant Oversight*, *supra* note 12 (noting how limited oversight by

organizational structure, an overview of its policies, and its relationship to the procedures of the National Athletic Equipment Reconditioners Association (NAERA). Part II introduces the CSAE Act, explaining the context in which the bill is being proposed and the rationale behind shifting the power of youth football helmet safety regulation from NOCSAE to the FTC and CPSC.

Part III compares NOCSAE's current testing standards to the regulations mandated by the CSAE Act and argues that given NOCSAE's lack of leadership on the issues of product testing, use of reconditioned helmets, and product advertising, the CSAE Act provides the most effective environment for safer football helmets to be created, tested, and regulated. Part III will also argue that the regulations mandated by the CSAE Act must be supplemented with additional provisions including the creation of a uniform rating system for all helmets, similar to the system recently outlined by scientists at Virginia Polytechnic Institute and State University (Virginia Tech).<sup>30</sup> This Comment concludes that the CSAE Act is the most efficient vehicle currently available as it has the means and mechanisms to properly structure and guide youth football helmet development and regulation in the future. Given that the current voluntary system is inadequate for regulating youth football helmet standards, the CSAE Act should be enacted, employing federal regulation as the primary means to reform the industry.

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NOCSAE has created a lack of leadership in the current testing of new and used football helmets, as well as a lack of vision in how to properly integrate new helmet technologies to reduce the risk of concussions for school-aged players); *see also* Alan Schwarz, *Senator Calls for Helmet Safety Investigation*, N.Y. TIMES, Jan. 3, 2011 [hereinafter Schwarz, *Helmet Safety Investigation*], <http://www.nytimes.com/2011/01/04/sports/football/04helmets.html> (citing concerns that limited testing standards, which are overseen by NOCSAE, can convey a level of concussion protection for school-aged athletes that the headgear may not provide).

30. *See* Lynn Nystrom, *Virginia Tech Announces Football Helmet Ratings for Reducing Concussion Risk*, VA. TECH. COLL. OF ENG'G (May 10, 2011), <http://www.eng.vt.edu/news/virginia-tech-announces-football-helmet-ratings-reducing-concussion-risk> (announcing the creation of a five-star rating system for adult football helmets, which quantifies head impact exposure and concussion risk of helmets currently on the market or in use by professional or collegiate athletes); *see also* *National Impact Database: Adult Football Helmet Ratings—May 2011*, VA. TECH. SCH. OF BIOMED. ENG'G & SCI., <http://www.sbes.vt.edu/nid.php> (last visited Feb. 8, 2012) (delineating the most recent results of the Virginia Tech study and categorizing the tested helmets by their given test score).



## I. BACKGROUND: THE DEVELOPMENT OF VOLUNTEER INDUSTRY OVERSIGHT

### A. The Creation of NOCSAE and Early Testing Procedures

Since its inception in 1969, NOCSAE has been the central nonprofit organization in the regulation of athletic equipment.<sup>31</sup> NOCSAE was created through the efforts of several athletic and manufacturer associations<sup>32</sup> in response to a growing need for performance test standards for football helmets.<sup>33</sup> In response to the thirty-six football-related fatalities that occurred during 1968, NOCSAE's initial research efforts focused on minimizing football-related injuries.<sup>34</sup> Despite what NOCSAE determined was an upward trending problem, it was also initially concerned that improved equipment might lead to harder hits to the head because players might be inclined to use their helmets as weapons.<sup>35</sup> Given that in 1968 head injury fatalities were attributed to only two out of every 100,000 athletes, NOCSAE feared that radical changes in the materials used to manufacture the equipment could potentially inflate the number of fatalities by causing an increase in the number of head, neck, or spine injuries.<sup>36</sup> However, despite these concerns, NOCSAE developed testing systems in 1970 with the goal of establishing a uniform football helmet standard.<sup>37</sup>

By 1973, NOCSAE had established a uniform testing standard.<sup>38</sup> While NOCSAE developed the testing standard, to this date it has not performed

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31. *About NOCSAE*, *supra* note 13.

32. Michael Oliver, Exec. Dir. & Gen. Counsel of NOCSAE, Presentation Before CMH Coaches Conference 3 (July 23, 2011), <http://www.childrensmc.org/sportsmedicine/Resources/Files/2011%20Coaches%20Conference/Helmet%20Fitting%20&%20Standards%20for%20Athletic%20Equipment%20-%20Michael%20Oliver.pdf>.

33. *Frequently Asked Questions and Answers*, NAT'L OPERATING COMM. ON STANDARDS FOR ATHLETIC EQUIP., <http://www.nocsae.org/faq/index.html> (last visited Feb. 8, 2012).

34. *About NOCSAE*, *supra* note 13.

35. *Id.*; see also Reed Albergotti & Shirley S. Wang, *Is It Time to Retire the Football Helmet?*, WALL ST. J., Nov. 11, 2009, at 12 (addressing the debate over whether the use of more advanced football helmets would actually lead to increased injuries as players feel more secure and willing to lead into a tackle with their heads).

36. *About NOCSAE*, *supra* note 13.

37. *Id.*; see also Brian James Mills, Note, *Football Helmets and Products Liability*, 8 SPORTS LAW. J. 153, 155 (2001) (indicating that in response to the surge in popularity of football in the 1960s and the increase in serious sports related injuries, the American College Health Association, the National Collegiate Athletic Association (NCAA), the National Federation of State High Schools Association (NFHS), and the Sporting Goods Manufacturers Association combined their efforts to form NOCSAE with the initial purpose of researching the football helmet).

38. *About NOCSAE*, *supra* note 13.

any of the actual testing; rather, NOCSAE permits the manufacturers to test their own newly constructed helmets, while NAERA tests used helmets that need to be recertified.<sup>39</sup> By 1985 there was a decrease in the number of football-related fatalities resulting from structural head injuries.<sup>40</sup> The regression of football-related fatalities resulting from structural head injuries has continued as of the 2006 season.<sup>41</sup> However, there are no statistics on how NOCSAE's testing standards have affected the rate of concussions sustained by athletes. The essential difference between concussions and the aforementioned head injuries is that impairment from a concussion is characterized as causing functional impairment, as opposed to structural damage, which would be actual physical damage to the brain or skull.<sup>42</sup>

It is evident from NOCSAE's history that the organization's central purpose in creating a helmet standard was to reduce the risk of football-related fatalities resulting from structural damage to the head, and not the severe functional impairments that commonly accompany a concussion.<sup>43</sup> While the reduction of such structural injuries has greatly benefited professional and amateur athletics, NOCSAE's standards have not progressed or evolved since its inception and have failed to adequately address the complicated biomechanical forces that cause concussions.<sup>44</sup>

As studies continue to highlight the potential long-term and debilitating effects of concussions,<sup>45</sup> NOCSAE's policies must be revised and updated to

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39. See Mills, *supra* note 37, at 156–57 (outlining that under the testing procedures established by NOCSAE, not all helmets are tested, but only a significant sample of a particular model and size before the helmet is placed on the open market); see also *Frequently Asked Questions and Answers*, *supra* note 33 (indicating that NOCSAE's standard does not “require[] any helmet to be recertified on any regular basis”).

40. See *About NOCSAE*, *supra* note 13 (citing to an 88% percent drop in the occurrence of serious head injuries from the 1964–1968 era to the 2002–2006 era).

41. *Id.*

42. See Wilson, *supra* note 17, at 244 (describing the biomechanical forces causing a concussion and the potential adverse side effects of multiple concussions as they differ from an injury such as a skull fracture). Aside from differences between structural and functional neurological impairment, it is worth mentioning that that concussions are not only caused by focused impact on the head but can also result from force delivered to any part of the body that causes “impulsive force to be transmitted to the head.” *Id.*

43. See *About NOCSAE*, *supra* note 13 (voicing concern over head injury fatalities but remaining silent on any mention of concussions); see also William A. Staar, *Head Cases: The Coming Wave of Concussion Litigation*, FOR THE DEFENSE, Aug. 2010, at 53 (arguing that the hard-shell polycarbonate helmets developed over fifty years ago were designed to eliminate deadly head injuries and not to deal with the complexities of forces that cause concussions).

44. See Schwarz, *Scant Oversight*, *supra* note 12 (asserting that despite rising concussion rates among youth football participants and an increasing understanding of their causes and short- and long-term effects of concussions on cognitive functions, NOCSAE's standard has not adapted to new helmet technologies or medical developments).

45. See generally Michael W. Collins et al., *Cumulative Effects of Concussions in High School*

incorporate newer findings and safety standards to afford the highest level of protection possible for athletes, specifically school-aged athletes. Studies have demonstrated that children between the ages of six and fourteen are more prone to sustaining head injuries than any other group.<sup>46</sup> The accuracy of those studies is difficult to ascertain because young athletes have a tendency to underreport or conceal the symptoms of concussions to return to play quicker.<sup>47</sup> Given the difficulty in diagnosing and reporting concussions sustained by school-aged athletes, the need for safer helmets that are properly tested for optimal protection is even more crucial. While there is currently no such thing as a concussion-proof helmet,<sup>48</sup> the importance of continuing research in an effort to discover materials or equipment which reduce the risk and effects of concussions is critical. While such research is pending, properly screening and reconditioning previously used helmets is vital to the safety of school-aged athletes.

*B. The Role of the National Athletic Equipment Reconditioners Association*

While NOCSAE is the volunteer governing body that developed testing standards for football helmets, NAERA is an association of athletic equipment manufacturers licensed by NOCASE to regulate the reconditioning and recertification process for used athletic equipment.<sup>49</sup> Members of NAERA are licensed by NOCSAE to recondition and recertify football helmets, lacrosse helmets, softball/baseball helmets, and face guards.<sup>50</sup> While NAERA is an independent organization from NOCSAE, NAERA is required to use NOCSAE's testing standards when

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*Athletes*, 51 NEUROSURGERY 1175 (2002) (contending that athletes with prior concussions are more likely to experience repeated on-field loss of consciousness, amnesia, and confusion following a repeated concussion); see also Rosemarie Scolaro Moser et al., *Prolonged Effects of Concussion in High School Athletes*, 57 NEUROSURGERY 300, 302–03 (2005) (reporting findings that athletes who suffered from concussions performed significantly worse on concentration and attention tests compared to athletes without a history of concussions).

46. See Wilson, *supra* note 17, at 246–47 (noting a recent study concluding that between 2001 and 2005, half of the 502,000 emergency room visits for concussions sustained by children between the ages of eight and nineteen were sports-related).

47. See *id.* at 247 (citing a study of high school football players that demonstrated unreported concussions influence the accuracy of findings on the total rate of concussions sustained).

48. See *id.* at 249–50 (adding that for certain sports, such as rugby, there is no sport-specific helmet shown to reduce the rate of concussions).

49. *What Is NAERA?*, NAT'L ATHLETIC EQUIP. RECONDITIONING ASS'N, <http://www.naera.net/what.html> (last visited Feb. 8, 2012) (providing a background on the organization and the recertification process).

50. *Id.*

reconditioning and recertifying athletic equipment.<sup>51</sup> Members of NAERA must follow NOCSAE's standards to maintain their NOCSAE recertification licenses.<sup>52</sup> Recertification of a used helmet is a multistep process that includes cleaning, sanitizing, replacing worn parts, a shell inspection, and NOCSAE-approved testing.<sup>53</sup> Currently, there are twenty-three NAERA members that perform all the reconditioning and recertification of athletic equipment for schools and leagues across the country.<sup>54</sup> NAERA's reliance on NOCSAE's testing standards highlights the weight those within the football helmet industry give to NOCSAE as the volunteer governing body.

### C. Current NOCSAE Testing Regulations

While NOCSAE led the movement to develop and test safer football headgear, the organization's testing standards have not significantly changed since 1973.<sup>55</sup> Though NOCSAE continues to oversee testing standards, the equipment manufacturers perform helmet testing for their own newly manufactured products, while NAERA recertification facilities test used helmets—guided by NOCSAE testing standards—before allowing the helmet to be used again by an athlete.<sup>56</sup> As currently implemented under NOCSAE's standard, the football helmet is placed on a synthetic head model that is filled with glycerin and fitted with various measuring instruments.<sup>57</sup> The head model fitted with the helmet is then dropped sixteen times onto a polymer anvil with two of the drops from a height of sixty inches onto six different locations of the helmet at varying temperatures determined by NOCSAE to simulate different potential game temperatures.<sup>58</sup> After each drop a "Severity Index," which measures the severity of the impact absorbed by the head model at the moment of impact, is determined.<sup>59</sup> Helmets are graded on a pass–fail basis, and the

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51. See *Frequently Asked Questions and Answers*, *supra* note 33 (describing the requirements for the recertification of football helmets); see also *What Is NAERA?*, *supra* note 49 (contending that the NOCSAE standards are industry-accepted by institutions such as the NCAA and the NFL).

52. See *What Is NAERA?*, *supra* note 49 (detailing how recertification of football helmets became a large part of the organization's work).

53. *Id.*

54. *NAERA Member List*, NAT'L ATHLETIC EQUIP. RECONDITIONING ASS'N, [http://www.naera.net/members\\_all.html](http://www.naera.net/members_all.html) (last visited Feb. 8, 2012).

55. Schwarz, *Scant Oversight*, *supra* note 12.

56. See Mills, *supra* note 37, at 155–57 (discussing the standard NOCSAE and NAERA testing procedures).

57. *Id.* at 155.

58. *Id.* at 155–56.

59. *Id.* at 156.

helmets that pass are those meeting an acceptable Severity Index.<sup>60</sup> Once a statistically sufficient sample of helmets pass the drop test, each helmet must be stamped with a clearly legible statement that effectively communicates to the purchaser and user the following information:

Warning. No helmet can prevent all head or any neck injuries a player might receive while participating in football. Do not use this helmet to butt, ram or spear an opposing player. This is in violation of the football rules and such use can result in severe head or neck injuries, paralysis or death to you and possible injury to your opponent.<sup>61</sup>

The NOCSAE standard states that this language must be permanently affixed to the exterior of the shell of the helmet and be easily read without removal of a decal tape or other temporary material or permanent part of the helmet.<sup>62</sup> In addition, a permanent and exact replica of NOCSAE's seal that states, "MANUFACTURER CERTIFIES: MEETS NOCSAE STANDARD" must appear legibly on the exterior of the shell for the helmet to be placed on the market for sale.<sup>63</sup> It is important to note that NOCSAE's helmet standard is a voluntary testing standard which a league's governing body is free to adopt.<sup>64</sup> Currently, both the NCAA and the National Federation of State High School Associations (NFHS) abide by NOCSAE standards and require that student athletes use equipment meeting NOCSAE specifications.<sup>65</sup>

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60. See NAT'L OPERATING COMM. ON STANDARDS FOR ATHLETIC EQUIP., NOCSAE Doc (ND)002-11m11a, STANDARD PERFORMANCE SPECIFICATION FOR NEWLY MANUFACTURED FOOTBALL HELMETS (2011), <http://nocsae.org/standards/pdfs/Standards%2011/ND002-11m11a%20-%20Mfr'd%20FB%20Helmets%20Standard%20Performance%20.pdf>; see also *How are Football Helmets Tested?*, NAT'L ATHLETIC EQUIP. RECONDITIONING ASS'N, [http://www.naera.net/what\\_tested.html](http://www.naera.net/what_tested.html) (last visited Feb. 8, 2012) (defining the Severity Index as "a scientifically accepted measurement of human injury tolerance").

61. NAT'L OPERATING COMM. ON STANDARDS FOR ATHLETIC EQUIP., *supra* note 60, at 3.

62. *Id.*

63. *Id.*; see also Mills, *supra* note 37, at 157 (stating that when NOCSAE's seal is affixed to the helmet it means that the helmet meets or exceeds the gold standard for head protection, and this level of certification is required by some of the most prominent athletic organizations in the country, including the NCAA, NFHS, and the U.S. military).

64. *Frequently Asked Questions and Answers*, *supra* note 33.

65. See generally NAT'L FED'N OF STATE HIGH SCH. ASS'NS, NFHS RULES CHANGES AFFECTING RISK (1982–2011), available at <http://www.nfhs.org/WorkArea/DownloadAsset.aspx?id=5760> (last visited Feb. 8, 2012) (outlining several sports in which NOCSAE certified equipment is now required); Jeff Miller, *The College Football Helmet Has Come a Long Way*, NAT'L COLLEGE ATHLETIC ASS'N (Sept. 23, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/September+latest+news/The+college+football+helmet>

While NOCSAE does not require helmets to be recertified on a regular basis, NOCSAE does recommend organizations adopt some type of helmet reconditioning program.<sup>66</sup> Despite this recommendation, NOCSAE also makes clear that NOCSAE's standard does not mandate regular reconditioning and recertification of helmets, essentially placing the onus on the helmet manufacturer to determine what the proper timetable is for helmet recertification and reconditioning.<sup>67</sup> Examining the pre-marketing testing for new helmets and reconditioning process for used helmets, two clear concerns arise: First, an overreliance on NOCSAE's initial and now outdated testing standard by all members of the football helmet industry;<sup>68</sup> and second, despite NOCSAE's position of oversight, a clear reluctance or inability on the part of NOCSAE to properly regulate the industry.<sup>69</sup>

#### *D. NOCSAE's Current Stance on the Emerging Issues of Sports-Related Concussions*

In addition to equipment safety research and product testing oversight, NOCSAE also acts as a grant-giving foundation, supplying funds to those that seek to advance the science of sports medicine.<sup>70</sup> With the January 2011 creation of the Scientific Advisory Committee—charged with directing research efforts relating to concussions—NOCSAE has taken a more active role in promoting concussion research.<sup>71</sup> However, as a volunteer trade association, NOCSAE is comprised of a collection of

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+has+come+a+long+way (noting that in 1978 the NCAA adopted the NOCSAE standard for helmets for the NCAA's member schools). Notably, the NFL does not mandate that its players wear NOCSAE-approved helmets, and many teams are secretive of the helmet models their athletes wear. See Easterbrook, *supra* note 28.

66. *Frequently Asked Questions and Answers*, *supra* note 33.

67. *Id.* Specifically, NOCSAE's website states, "A manufacturer is also free to limit the number of times its helmet may be reconditioned, or it may establish a useful life beyond which it will not allow reconditioning." *Id.*

68. See generally Schwarz, *Scant Oversight*, *supra* note 12; *What Is NAERA?*, *supra* note 49.

69. See generally *Frequently Asked Questions and Answers*, *supra* note 33.

70. See Press Release, Nat'l Operating Comm. on Standards for Athletic Equip., NOCSAE Approves More than \$600,000 to Fund Concussion Research; Creates Scientific Advisory Committee to Direct Concussion Research (Jan. 22, 2011), <http://www.nocsae.org/MediaKit/2011/NOCSAE%20Grant%20Approval%20News%20Release%20FINAL%20%2001%2022%2011.pdf> (announcing that NOCSAE awarded nearly \$610,000 to advance research in sports medicine related to concussions, as well as announce the formation of a Scientific Advisory Committee to guide research efforts related to concussions); see also *NOCSAE Approves \$1.1 Million to Fund Concussion-Related Research*, PR NEWswire (Jun. 18, 2011), <http://www.prnewswire.com/news-releases/nocsae-approves-11-million-to-fund-concussion-related-research-124127914.html> (announcing that NOCSAE "awarded \$1.1 million in research grants to advance the science of sports medicine," specifically concussion-related research).

71. Press Release, NOCSAE, *supra* note 70.

representatives from a number of groups interested in the business of athletic equipment, including equipment manufacturers, reconditioners, athletic trainers, coaches, equipment managers, sports medicine specialists, and consumer organizations.<sup>72</sup> There is justifiable concern that because the majority of NOCSAE's funding is provided by organizations that NOCSAE should be overseeing during the helmet testing process, NOCSAE lacks the requisite independence to make changes that could alter the landscape of the helmet manufacturing industry for the better.<sup>73</sup>

## II. INCREASED FOCUS ON THE RISK OF CONCUSSIONS IN SCHOOL-AGED ATHLETES

### A. Regulatory Responses to Increasing Concerns About Concussions

As the causes and dangerous long-term effects of concussions continue to be studied and better understood in the medical community, public pressure has caused the NFL to develop stricter guidelines for evaluating athletes thought to be suffering from the effects of a concussion.<sup>74</sup> While professional sports leagues have gradually altered their stances on how best to regulate the treatment of their athletes, only a few states have regulated the evaluation and treatment of concussions suffered by amateur athletes.<sup>75</sup> Only recently has the NFHS weighed in on what it deems to be an adequate approach to regulating the treatment of concussions for student

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72. See *Frequently Asked Questions and Answers*, *supra* note 33.

73. See *NOCSAE Overview*, NAT'L OPERATING COMM. ON STANDARDS FOR ATHLETIC EQUIP., <http://www.nocsae.org/MediaKit/2011/NOCSAE%20Overview%201-14-11.pdf> (last visited Feb. 8, 2012) (stating that NOCSAE is primarily funded through licensing fees that it charges to equipment manufacturers that want to certify their equipment with the NOCSAE seal); see also *Frequently Asked Questions and Answers*, *supra* note 33 (noting that the NOCSAE helmet standard is a voluntary standard that is adopted by a sport regulatory body on its own accord).

74. See *Protecting Student Athletes from Concussions: Hearing on H.R. 6172 Before the Comm. on Educ. & Labor*, 111th Cong. 22–24 (2010) (statement of Sean Morey, Executive Board Member, NFL Players Association) (highlighting the changes that the commissioner of the NFL implemented to protect players in light of increasing transparency regarding the detrimental effects of repeated concussions to players).

75. See *States Consider Youth Concussion Laws*, ESPN, <http://sports.espn.go.com/espn/news/story?id=4865622> (last updated Jan. 28, 2010) (highlighting the six states that began to take measures to adopt state laws governing when athletes who suffered concussions can return to play); see also Alan Schwarz, *States Taking the Lead Addressing Concussions*, N.Y. TIMES, Jan. 31, 2010 [hereinafter Schwarz, *States Taking the Lead*], <http://www.nytimes.com/2010/01/31/sports/31concussions.html> (discussing Washington state law which mandates that athletes under eighteen who show symptoms of concussions must obtain the written approval of a licensed healthcare provider prior to returning to play).

athletes.<sup>76</sup>

While individual state and athletic regulatory bodies continue to generate approaches to dealing with the occurrence and effects of concussions,<sup>77</sup> representatives from the federal government have just recently entered the concussion debate. In 2010, the House of Representatives proposed and passed the Concussion Treatment and Care Tools Act of 2010 (ConTACT Act).<sup>78</sup> The ConTACT Act directs the Department of Health and Human Services to establish concussion management guidelines, focusing primarily on the prevention and management of concussions in school-aged children.<sup>79</sup> Studies have demonstrated that, given the developing nature of a school-aged child's brain, the risk of sustaining a concussion and the possibility of more severe damage when compared to a fully developed adult is significantly higher.<sup>80</sup> While the aforementioned studies have forced individual states to examine their concussion management policies for student athletes, or in many cases create such policies,<sup>81</sup> few resources have been put toward a nationwide

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76. See Erika A. Diehl, Note, *What's All the Headache?: Reform Needed to Cope with the Effects of Concussions in Football*, 23 J.L. & HEALTH 83, 107–08 (2010) (contending the NFHS should recommend a concussion-handling policy which requires an independent healthcare professional evaluate the athlete before the athlete can return to practice for games).

77. See Schwarz, *States Taking the Lead*, *supra* note 75; see also Diehl, *supra* note 76, at 107–08.

78. Concussion Treatment and Care Tools Act of 2010, H.R. 1347, 111th Cong.

79. See James Wagner, *House Approves Concussion Treatment and Care Tools (ConTACT) Act*, WASH. POST, Sept. 30, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/30/AR2010093003378.html> (discussing the mechanics of the proposed legislation, a Department of Health and Human Services conference within two years of medical and athletic experts determining concussion management guidelines).

80. See *Sports Related Concussions: Background and Significance*, UNIV. OF PITTSBURGH MED. CTR. BRAIN TRAUMA RESEARCH CTR., <http://www.neurosurgery.pitt.edu/trauma/concussion.html> (last visited Feb. 8, 2012) (finding that while there are no reported studies as to the effects of concussion in high school athletes, previous age-related studies demonstrate significant post-concussion differences in adolescent versus adult brains).

81. See, e.g., VA. CODE ANN. § 22.1-271.5(B) (West 2010) (mandating local school divisions to “develop policies and procedures regarding the identification and handling of suspected concussions in student-athletes”); TEX. EDUC. CODE ANN. § 38.153(b) (West 2011) (requiring appointed concussion oversight teams for school districts to establish return-to-play protocols for student athletes suffering from the effects of concussions); MD. CODE ANN., EDUC. § 7-443(b)(1) (LexisNexis 2010 & 2011 Supp.) (outlining an awareness program providing school officials and parents with information on risks of concussions, criteria for removing injured players, reporting injuries, and academic accommodations for students diagnosed with concussions). See generally *Concussion Information & Competition Policies by State*, ESPN RISE (Aug. 2010), <http://rise.espn.go.com/all-sports/articles/2010/08/31-Concussions-from-magazine.aspx> (follow the “state-by-state” hyperlink) (surveying the general policies regarding concussion diagnoses and treatment for student athletes in all fifty states).



effort to develop preventative and protective measures.<sup>82</sup> While the ConTACT Act is the first federal program that proposes to mandate unified concussion injury guidelines for children ages five to eighteen, the CSAE Act is the first to address directly the current concerns with the manufacturing, reconditioning, and advertising of football helmets and seek to bolster a loosely regulated area that affects millions of families. Despite the promising changes that the CSAE Act offers, it has failed to make it all the way through Congress.<sup>83</sup>

### B. *The Children's Sports Athletic Equipment Safety Act*

Senator Tom Udall introduced the CSAE Act to the 112th Congress on March 16, 2011.<sup>84</sup> Prior to drafting the proposed legislation, Senator Udall recognized what he deemed to be a severe problem in American youth sports. Senator Udall asked the CPSC to investigate the adequacy of football helmet safety standards and argued that the current voluntary industry standards do not properly address the larger issue of preventing concussions.<sup>85</sup> According to Senator Udall, the CPSC has a duty to ensure that football helmets meet safety standards that “address concussion hazards and reflect the state of the art in helmet technology.”<sup>86</sup> In response to Senator Udall's request, the CPSC told a Senate Commerce Subcommittee that it would start monitoring the football helmet industry and NOCSAE's practices.<sup>87</sup> In addition, Senator Udall wrote a letter to the FTC requesting the agency investigate “misleading safety claims and deceptive practices” by helmet manufacturers and reconditioners.<sup>88</sup> Much

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82. *But see* Football Helmets; Denial of Petition, 45 Fed. Reg. 63,326, 63,327 (Sept. 24, 1980) (denying a 1980 petition requesting that the CPSC issue a consumer product safety standard for football helmets to reduce the risk of head, neck, and spinal injuries).

83. *See Bill Summary & Status*, *supra* note 20. The last action on the bill was referral to the Committee on Commerce, Science, and Transportation on March 26, 2011.

84. *Id.* The House version of the bill, H.R. 1127, 112th Cong. (2011), sponsored by Representative Bill Pascrell of New Jersey, has been referred to the House Subcommittee on Commerce, Manufacturing, and Trade. *Bill Summary & Status, 112th Cong. (2011–2012): H.R. 1127*, LIBR. OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR01127>.

85. *See* Alan Schwarz, *Senator Seeks Federal Investigation of Football Helmet Standards*, N.Y. TIMES, Nov. 30, 2010 [hereinafter Schwarz, *Federal Investigation*], <http://www.nytimes.com/2010/12/01/sports/football/01helmets.html> (asserting that Senator Udall's disapproval of the current football helmet standards stems from the industry's inability to update modern testing standards given the improvement in football helmet safety technology).

86. *Id.* (quoting Sen. Tom Udall).

87. Alan Schwarz, *Oversight Group Vows to Pursue Updates to Football Helmet Standards*, N.Y. TIMES, Jan. 23, 2011 [hereinafter Schwarz, *Updates to Standards*], <http://www.nytimes.com/2011/01/03/sports/football/23helmet.html>.

88. *See* Schwarz, *Helmet Safety Investigation*, *supra* note 29 (citing Senator Udall's letter,

like the CPSC, the FTC acknowledged the seriousness of Senator Udall's claims and declared it would investigate the helmet manufacturers' claims that certain football helmet models can help reduce concussions.<sup>89</sup> Given Senator Udall's comments, it is evident he viewed federal regulation of the football helmet industry as a real possibility. Many of Senator Udall's concerns stemmed from an October 2010 report from the *New York Times* that depicted problems in the reconditioning of used helmets worn by nearly 1.4 million American teenagers playing high school football,<sup>90</sup> as well as concerns that the self-regulating industry has no internal repercussions for misrepresentation of the safety of its products.<sup>91</sup>

The CSAE Act has several different components each addressing different concerns regarding the testing standards governed by NOCSAE. Under the powers of the Consumer Product Safety Act<sup>92</sup> and the Federal Trade Commission Act,<sup>93</sup> the CSAE Act allows the CPSC and the FTC to take over regulation of the football helmet industry that NOCSAE previously controlled. The CSAE Act has three sections, each addressing a separate concern within the football helmet industry.

### 1. Section 3: Football Helmet Safety Standards

Section 3, entitled "Football Helmet Safety Standards," empowers the CPSC to evaluate NOCSAE's voluntary standards for testing new and

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which targets the helmet manufacturer Riddell for its claim that its latest football helmet models decrease concussion risk by thirty-one percent, conveying "a level of concussion-related protection that the headgear is not shown to provide").

89. See Frederic J. Frommer, *FTC Looking into Football Helmet Claims*, BUS. J., Jan. 14, 2011, <http://www.thebusinessjournal.com/the-business-journal-national-news/13-national/7956-ftc-looking-into-football-helmet-claims> (quoting FTC Chairman Jon Leibowitz as stating, "Given the dangers that concussions pose for young athletes engaged in contact sports, it is essential that advertising for products claiming to reduce the risk of this injury be truthful and substantiated.").

90. See Schwarz, *Scant Oversight*, *supra* note 12 (evaluating concerns within the football helmet industry, including lack of independent oversight, outdated testing standards, inadequate safety and testing procedures, and use of misleading safety statistics by helmet manufacturing companies).

91. *Id.*; see also Schwarz, *Updates to Standards*, *supra* note 87 (pointing to the issue that NOCSAE is primarily financed by the sporting goods industry, whose products NOCSAE supposedly oversees). But cf. *Riddell, Inc. v. Schutt Sports, Inc.*, 724 F. Supp. 2d 963, 980 (W.D. Wis. 2010) (rejecting Schutt's claim that the study showing Riddell's Revolution helmet reduces the risk of concussions was sufficiently unreliable to constitute false advertisement, although the court did contend that, at most, Riddell's marketing campaign of the Revolution helmet was misleading or deceptive as the advertisements did not differentiate between the adult and youth helmets).

92. Consumer Product Safety Act, 15 U.S.C. § 2051 (2006).

93. Federal Trade Commission Act, 15 U.S.C. § 41 (2006).

reconditioned helmets nine months after the CSAE Act is passed.<sup>94</sup> Particularly, Section 3 seeks to determine if the voluntary standards foster an atmosphere of compliance that will likely result in the elimination or adequate reduction of the risk of injury caused by the use of football helmets.<sup>95</sup> In addition, these standards are to be maintained by a standards-setting organization that meets the procedural requirements of American National Standards Institute.<sup>96</sup> If the CPSC determines that NOCSAE's standards are not in compliance, Section 3 empowers the CPSC to initiate a rulemaking proceeding for the development of a consumer product safety rule that establishes: (1) a standard for youth football helmets that takes into account the different physiological characteristics of children compared to adults; (2) a standard for reconditioned football helmets; (3) a standard for new football helmet concussions resistance, particularly a standard that addresses what is currently understood about concussion risks and possible prevention; (4) a standard for warning labels; (5) a standard for a label for all new helmets that states the helmet's original date of manufacture and warns consumers that a helmet's ability to protect declines over time; and (6) a standard label for reconditioned helmets that states the helmet's last date of reconditioning, its original date of manufacture, and a warning for consumers that a helmet's ability to protect declines over time despite reconditioning.<sup>97</sup> In addition, Section 3 mandates that the CPSC consult with representatives from the athletic equipment industry to assess the effectiveness of NOCSAE's safety standards for youth helmets, reconditioned helmets, and new football helmet concussion resistance.<sup>98</sup> Finally, the CPSC is charged with periodically reviewing and revising the standards they promulgate to ensure that the standards provide the most recent and the highest level of football helmet safety possible.<sup>99</sup>

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94. Children's Sports Athletic Equipment Safety (CSAE) Act, S. 601, 112th Cong. § 3(a) (2011).

95. *Id.*

96. *Id.* § 3(a)(1). *See generally* AM. NAT'L STANDARDS INST., ANSI ESSENTIAL REQUIREMENTS: DUE PROCESS REQUIREMENTS FOR AMERICAN NATIONAL STANDARDS (2010), <http://publicaa.ansi.org/essentialrequirementsites/apdl/Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/2010%20ANSI%20Essential%20Requirements%20and%20Related/2010%20ANSI%20Essential%20Requirements.pdf> (outlining the requirements of the American National Standards Institute, including transparency of information, voting procedures, coordination of procedures, and consensus voting).

97. CSAE Act, S. 601, § 3(b)(1)–(6).

98. *Id.* § 3(c)(1).

99. *Id.* § 3(c)(2).

2. *Section 4: Application of Third-Party Testing and Certification Requirements to Youth Football Helmets*

While under the current NOCSAE regulations helmet manufacturers test their own new helmets using NOCSAE's standards, Section 4 of the CSAE Act calls for third-party testing and certification as governed by § 14(a)(2) of the Consumer Product Safety Act.<sup>100</sup> Section 4 applies the standards set forth in the Consumer Product Safety Act to the testing of youth football helmets, essentially making the testing of a youth football helmet subject to the same regulations that apply to any children's product.<sup>101</sup> Under Section 4, a testing laboratory that is accredited under the International Organization for Standardization/International Electrotechnical Commission will conduct third-party testing and certification.<sup>102</sup>

3. *Section 5: False or Misleading Claims with Respect to Athletic Sporting Activity Goods*

Section 5 of the CSAE Act seeks to curb concerns that football helmet manufacturers present misleading statistics about the level of safety their products afford to buyers.<sup>103</sup> Section 5 makes it unlawful for anyone in the course of selling any piece of athletic equipment intended or designed for

100. *Id.* § 4(a)–(c); see 15 U.S.C. § 2063(a)(2) (Supp. IV 2010) (“[B]efore importing for consumption or warehousing or distributing in commerce any children’s product that is subject to a children’s product safety rule, every manufacturer of such children’s product . . . shall: (A) submit sufficient samples of the children’s product . . . to [an accredited third party] to be tested for compliance with the children’s product safety rule; and (B) based on such testing, issue a certificate that certifies that such children’s product complies with the children’s product safety rule based on the assessment [of an accredited third party] . . .”).

101. See generally Consumer Product Safety Improvement Act of 2008, 15 U.S.C. §§ 2051–2073 (Supp. IV 2010)) (outlining testing and labeling standards for children’s products as well as enforcement provisions and penalties for those found in breach of the regulatory standards).

102. CSAE Act, S. 601 § 4(c)(1)–(3).

103. See Alan Schwarz, *Studies for Competing Design Called into Question*, N.Y. TIMES, Oct. 27, 2007, <http://www.nytimes.com/2007/10/27/sports/football/27riddell.html> (highlighting industry concerns with the alleged concussion reduction ability of competing football helmets); see also Schwartz, *supra* note 12 (stating that non-NOCSAE and helmet industry experts have criticized Riddell for overselling the protective capabilities of its football helmet models); Alexa Vaughn, *Experts Skeptical of ‘Anti-Concussion’ Sports Equipment*, L.A. TIMES, Oct. 19, 2011, <http://articles.latimes.com/2011/oct/19/nation/la-na-sports-brain-damage-20111020> (pointing out that testimony at the recent Senate Committee on Commerce, Science, and Transportation Hearing reveals that although the Riddell Revolution helmet was advertised to reduce concussion by 31%, research indicates that the true reduction is less than 3%).

an athletic sporting activity to make false or misleading claims with respect to the safety benefits of the equipment.<sup>104</sup> Section 5 requires the FTC to regulate any violation under § 18 of the Federal Trade Commission Act (FTCA), codifying the principles that any misrepresentation or misleading claim with respect to the safety of an athletic product would be a violation of the FTCA.<sup>105</sup> Under this provision, any person found in violation of the CSAE Act is subject to the penalties and entitled to the privileges and immunities provided in the FTCA.<sup>106</sup> In addition, Section 5 authorizes state attorneys general to bring actions on behalf of their residents to obtain appropriate injunctive relief or to pursue any appropriate criminal charges.<sup>107</sup>

### III. RECONCILING THE CURRENT NOCSAE STANDARDS WITH THE PROPOSED LEGISLATION

#### A. *How the Children's Sports Athletic Equipment Safety Act Will Affect the Industry*

The CSAE Act seeks to remedy many of the gaps that the current NOCSAE standards have left unfilled as well as the general lack of efficient oversight throughout the industry. Chief among the goals of the CSAE Act is to foster greater transparency in testing standards and safety data reporting.<sup>108</sup> After Senator Udall's initial call to investigate the football helmet industry<sup>109</sup> and the subsequent responses of the CPSC and the FTC to monitor the self-regulated industry,<sup>110</sup> two major announcements came from the volunteer organizations monitoring the football helmet industry. First, in January 2011, NOCSAE announced that it would work with the Centers for Disease Control and Prevention to better communicate to

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104. CSAE Act, S. 601 § 5(a)–(b).

105. *Id.* § 5(a)–(b). See generally 15 U.S.C. § 57(a) (outlining the FTC's procedures for initiating investigative proceedings against those accused of partaking in unfair or deceptive trade practices). Similarly, the FTC created an advertising substantiation program, which requires advertisers to have a reasonable basis for advertising claims before dissemination; failure to rely upon a reasonable basis “constitutes an unfair and deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act.” *In re Thompson Med. Co., Inc.*, 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

106. CSAE Act, S. 601 § 5(b)(1, 3).

107. *Id.* § (c)(1).

108. See Schwarz, *Scant Oversight*, *supra* note 12 (discussing what Senator Udall deems to be a severe issue within the football helmet industry—misleading advertising by two major helmet manufacturers which could potentially be a violation of the Federal Trade Commission Act).

109. Schwarz, *Federal Investigation*, *supra* note 85.

110. Schwarz, *Updates to Standards*, *supra* note 87; Frommer, *supra* note 89.

parents of young athletes the safety limits of currently available helmets.<sup>111</sup> In addition, executive members of NOCSAE voiced their concerns that some manufacturers might not have performed as many drop-tests on helmets as required by NOCSAE standards.<sup>112</sup> Second, in March 2011, NAERA announced that it would no longer accept helmets more than ten years old for reconditioning and recertification purposes.<sup>113</sup> Finally, in January 2012, the major helmet manufacturer Riddell announced it would provide a label that documents the initial season of use and recommended maximum life of the helmet for all of its new helmets and helmets reconditioned at a Riddell facility.<sup>114</sup> This makes Riddell the first helmet manufacturer to address the growing concern that young athletes continue to use outdated and unsafe football helmets.<sup>115</sup>

As evidenced by both NOCSAE's and NAERA's promises of reform, Senator Udall's request to have the CPSC and FTC investigate the current state of volunteer oversight and the commissions' respective responses have caused more changes in the current system than at any time since NOCSAE first developed the testing standard in 1973.<sup>116</sup> Yet, despite these reforms, there are inherent problems with the voluntary system and the current structure of NOCSAE that cannot be overlooked. Chief among these issues is the source of NOCSAE's funding<sup>117</sup> and its lack of leadership

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111. See Schwarz, *Updates to Standards*, *supra* note 87 (observing that NOCSAE will also look into creating new standards that consider the complex forces that cause concussions, compared to the traditional impact tests that are currently used in testing).

112. *Id.*

113. See Alan Schwarz, *Group to Phase Out Old Football Helmets*, N.Y. TIMES, Mar. 10, 2011 [hereinafter Schwarz, *Phase Out*], [http://www.nytimes.com/2011/03/11/sports/football/11helmet.html?\\_r=1&ref=headinjuries](http://www.nytimes.com/2011/03/11/sports/football/11helmet.html?_r=1&ref=headinjuries) (explaining that football helmets more than ten years old are being worn by over 100,000 young athletes every year, a fact that experts in the field have long considered a severe safety risk).

114. *Riddell Unveils New, External Helmet Dating System*, MARKET WATCH (Jan. 4, 2012), <http://www.marketwatch.com/story/riddell-unveils-new-external-helmet-dating-system-2012-01-04>.

115. *Id.*

116. See Schwarz, *Phase Out*, *supra* note 113 (indicating that in addition to the aforementioned reforms, NOCSAE has also stated that it would pursue new safety tests specifically developed to test the varying forces that cause concussions, as well as develop separate test standards for youth and high school helmets). It is also important to point out that in light of the CPSC's and FTC's responses to Senator Udall's call for investigation, both Riddell, a major football helmet manufacturer, and NOCSAE have hired lobbying firms to protect their interests while the CSAE Act is reviewed and additional legislation becomes more likely as attention to this issue rises. Frederic J. Frommer, *Influence Game: Helmet Bill Stokes Lobbying Effort*, WASH. POST, May 16, 2011, <http://stats.washingtonpost.com/fb/story.asp?i=20110516101141686887108&ref=hea&tm=&src>.

117. *NOCSAE Overview*, *supra* note 73 (explaining that most of NOCSAE's funds come

and creativity in addressing the concussion issue.<sup>118</sup>

In light of these institutionalized concerns, federal regulations seem like the step that could most properly right the ship. Clearly, given both NOCSAE's and Riddell's recent spending on lobbying,<sup>119</sup> the notion that the CPSC and the FTC could jointly regulate the industry through the CSAE Act or through another piece of revised legislation is a distinct possibility. Not only is such reform necessary, it is vital in ensuring that as technologies develop, the proper procedures for helmet testing are implemented and manufacturers are restrained from making false claims regarding their products' safety benefits.<sup>120</sup>

While NOCSAE's and NAERA's proposed reforms are a step in the right direction, much more needs to be done to stabilize an industry with a historically weak record of oversight. On October 19, 2011, the Senate Committee on Commerce, Science, and Transportation held a hearing concerning the current state of concussions and the marketing of sports equipment.<sup>121</sup> Chief among the discussion between Committee members and those asked to partake in the discussion was the concern with equipment manufacturers instilling a false sense of comfort in parents and athletes by proclaiming that their products reduce the risk of head trauma or concussions.<sup>122</sup> Considering the attention that the members of the

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from licensing fees it charges to equipment manufacturers who want to certify their equipment meets NOCSAE standards); see Easterbrook, *supra* note 28 (highlighting the conflict of interest in that if NOCSAE called a helmet unsafe, the manufacturer of the helmet could no longer use NOCSAE's seal and would likely stop paying NOCSAE the licensing fee, thereby causing NOCSAE to lose a source of income).

118. See Easterbrook, *supra* note 28 (referring to Director of NOCSAE Michael Oliver's comments that because there is a lack of "scientific certainty" regarding the causes of football concussions, NOCSAE is unwilling to offer guidance, claiming it to be "unethical").

119. Frommer, *supra* note 116 (noting that Riddell spent \$80,000 in the first quarter of 2011 on lobbying and recounting NOCSAE's recent hire of a Washington lobbyist).

120. Cf. *In re Thompson Med. Co., Inc.*, 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986) (emphasizing the importance of advertisers and ad agencies having a reasonable basis for advertising claims before they are circulated).

121. See Frederic J. Frommer, *Senator Attacks Concussion Safety Claims by Sporting Goods Firms*, CHI. SUN-TIMES, Oct. 19, 2011, <http://www.suntimes.com/news/nation/8306473-418/senator-attacks-concussion-safety-claims-by-sporting-goods-firms.html> (highlighting the Committee's concerns with sports equipment manufacturers misrepresenting the safety capabilities of their equipment to buyers).

122. See *id.* ("The potential harm that I see being caused by products that claim to prevent concussion when they do not is far more than simply the financial harm of paying more for something that isn't likely to work as claimed . . . . It is the harm that comes from having a false sense of security, from not understanding how the injury occurs and what can actually be done to prevent it." (quoting the testimony of Dr. Jeffrey Kutcher.); see also *id.* (highlighting the concerns of Committee Chairman Senator Jay Rockefeller, who stated, "I find it so disturbing that some sports equipment manufacturers are exploiting our growing

Committee reviewing the CSAE Act are giving to the concern of equipment manufacturer misrepresentation,<sup>123</sup> it is evident that the focal point of industry reforms will not only center on creating newer and more concussion-specific testing standards, but also on a greater accountability and transparency by equipment manufacturers. Because the CSAE Act seeks to tackle the two-pronged issue of product testing standards and market advertising accountability, the CSAE Act is the most comprehensive and effective mechanism to steady the football helmet industry for America's youth.

*B. Recommendations to Improve the Effectiveness of the Children's Sports Athletic Equipment Safety Act*

Despite the remedies that the CSAE Act proposes, there are still three additional issues within the industry that need to be addressed by any legislation ultimately passed. First, concerns still linger about the current number of used helmets that might be improperly reconditioned or not recertified that are being used by school-aged football players.<sup>124</sup> The CSAE Act needs to take a stronger position on ridding the playing field of improperly reconditioned helmets. While the cost of new youth football helmets is quite expensive,<sup>125</sup> the dangers that excessively old or unsuitable helmets pose are immense.<sup>126</sup> The CSAE Act should include a provision that mandates the confiscation of any helmet that has been involved in a play that resulted in a head, neck, or spine injury to an athlete. The helmet

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concerns about sports concussions to market so-called 'anti-concussion' products to athletes and their parents.'").

123. See generally *Detection and Treatment of Concussions in Student Athletes* (C-SPAN Broadcast Oct. 19, 2011), available at <http://www.c-spanarchives.com/program/Concuss>; Frederic J. Frommer, *Senators Challenge Sports Equipment Safety Claims*, BLOOMBERG BUSINESSWEEK (Oct. 20, 2011), <http://www.businessweek.com/ap/financialnews/D9QG1ICO0.htm> (citing the comments of Senator Udall, who proclaimed that advertisers need to be monitored when putting anti-concussion and concussion-reducing devices on the market, and Dr. Ann McKee, who stated she objected to the claim that a particular mouth guard advertised to reduce the risk of concussions in fact does so).

124. See Schwarz, *Phase Out*, *supra* note 113 (citing NAERA's concerns with the safety capabilities of helmets that are ten years or older as the reason the volunteer reconditioning agency will no longer be recertifying such helmets); see also Schwarz, *Scant Oversight*, *supra* note 12 (citing that only about 10%–20% percent of school-aged football players wear new helmets, and nearly 500,000 young players will wear used helmets that have not even undergone NAERA reconditioning procedures).

125. See *id.* (documenting that a youth football helmet costs between \$150 and \$200, while the reconditioning of a used helmet costs about \$30).

126. *Id.* (describing one case where a boy was permanently disabled when playing football with a twenty-year-old reconditioned helmet).



should be taken out of commission and not used again until it is properly recertified by an independent third-party testing agency that is either NAERA licensed or, in the alternative, independently appointed by CPSC. Under the Consumer Product Safety Act, the CPSC has the authority to establish consumer product safety standards whenever such a standard “is reasonably necessary to prevent or reduce an unreasonable risk of injury.”<sup>127</sup> Considering the power the CPSC has under this provision and the clear concerns that a damaged helmet will not effectively protect its wearer, the CSAE Act should include additional provisions mandating the confiscation of such helmets pending third-party recertification.

Second, while helmets that have been damaged during the course of a season pose a great risk to the user, helmets that are ten years of age or older pose a special risk.<sup>128</sup> Interestingly, in March 2011, NAERA announced that effective September 1, 2012, its members would adopt a new policy prohibiting it from reconditioning or recertifying any football helmets ten years of age or older.<sup>129</sup> Given NAERA’s new stance, the CSAE Act should include a similar provision that codifies such a policy and imposes penalties such as financial fines or criminal investigations. Under the Consumer Product Safety Act, the CPSC has the power to ban products that are deemed hazardous.<sup>130</sup> Since NAERA will not even recondition or recertify helmets over ten years old, it seems logical that these helmets could be deemed a safety hazard and therefore be labeled as unusable by student athletes under 14 U.S.C. § 2057. However, given the costs of new helmets compared to refurbished helmets,<sup>131</sup> the CSAE Act should be supplemented with a subsidy plan that assists in funding school districts below a certain financial marker in purchasing new or more

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127. See Consumer Product Safety Act § 7, 15 U.S.C. § 2056(a) (2006) (“A consumer product safety standard shall consist of one or more of any of the following types of requirements: (1) Requirements expressed in terms of performance requirements; (2) Requirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions.”).

128. Schwarz, *Phase Out*, *supra* note 113.

129. *Id.*

130. See Consumer Product Safety Act § 8, 15 U.S.C. § 2057 (stating that the CPSC may ban a hazardous product whenever the consumer product “is being, or will be, distributed in commerce and such consumer product presents an unreasonable risk of injury; and no feasible consumer product safety standard . . . would adequately protect the public from the unreasonable risk of injury associated with such product”).

131. See Schwarz, *Phase Out*, *supra* note 113 (pointing out that a potential backlash from NAERA’s new policy would be that underfinanced schools possibly purchasing reconditioned old helmets for \$30 will likely be unable to purchase new helmets for \$150 to \$200).

recently reconditioned and recertified football helmets.<sup>132</sup> By providing such a subsidy, the CSAE Act would better prevent underfinanced schools from using older and potentially unsafe helmets instead of purchasing newer helmets. One would hope that a subsidy program and the potential legal liability that would attach to a school district<sup>133</sup> allowing its players to use unsatisfactory helmets would be sufficient to promote safe internal standards within the school programs. While the CSAE Act would provide such subsidies and standards for testing and reconditioning, the language of the bill should make it clear that the school district or governing body for the school's athletic conference are responsible for making sure each school is in compliance with the "no helmet over ten years old" policy.

In an effort to promote helmet manufacturers' involvement in the program and in redefining the acceptable use of youth football helmets, the CSAE Act should offer a tax incentive to manufacturers that provide new or reconditioned and recertified helmets that are less than five years old to schools below the aforementioned financial marker. Additionally, the CSAE Act should incentivize research and technological development by providing research grants to equipment manufacturers to continue the growth of concussion-reducing equipment.<sup>134</sup>

Third, the CSAE Act should codify a ratings standard similar to that of the Virginia Tech star-rating system, which is modeled after crash safety rankings for automobiles.<sup>135</sup> Under the proposed legislation, the FTC is

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132. The CPSC can provide such a subsidy pursuant to its statutory authority in § 7 of the Consumer Product Safety Act, which provides, "If any person participates with the Commission in the development of a consumer product safety standard, the Commission may agree to contribute to the person's cost with respect to such participation, in any case in which the Commission determines that such contribution is likely to result in a more satisfactory standard than would be developed without such contribution . . . ." 15 U.S.C. § 2056.

133. See Schwarz, *Phase Out*, *supra* note 113 (detailing the story of Joy Conradt, whose son was permanently disabled by concussions he sustained while wearing a twenty-year-old reconditioned helmet, and the subsequent out-of-court settlement for \$3.2 million for lifelong medical care paid out by the school district, insurance carrier, and reconditioning company).

134. See *supra* note 132 (discussing the CPSC's ability to incentivize cooperation in the creation of rulemaking proceedings through § 7 of the Consumer Product Safety Commission Act).

135. See Nystrom, *supra* note 30 (explaining that five stars means the helmet is the best available in terms of safety results, four stars is very good, three stars is good, two stars is adequate, one star is marginally safe, and NR means the helmet is not recommended). Similar to the automobile crash safety rankings, the Virginia Tech rating system is akin to the Ease-of-Use Ratings for child car seats, which created an accessible five-star rating system to aid consumers in evaluating the safety capabilities of child car seats. Taken into account for ratings are factors such as the clarity of the labeling attached to the restraint,

charged with monitoring and regulating false advertising or misleading claims with respect to the safety benefits of a football helmet.<sup>136</sup> Currently, under § 52 of the FTCA, it is unlawful for any person or entity to disseminate any false advertisement “for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, services . . . .”<sup>137</sup> Therefore, even without the passage of the CSAE Act, the FTCA empowers the FTC to bring suit in federal court whenever the FTC believes that a person, partnership, or corporation is engaged in the dissemination of such false advertisements.<sup>138</sup> However, the question that needs to be asked is, how can an agency properly monitor or even penalize for misrepresentation if there is no standardized way to measure the safety benefits and weakness of helmets available to consumers? Even with all of the recent studies regarding the causes and effects of concussions, the Virginia Tech star-rating system is the only current research that attempts to suggest a more effective way to independently measure the safety benefits (or lack thereof) of helmets available to consumers.<sup>139</sup> Using the Virginia Tech star-rating system as a base, the FTC should empower third-party testing agencies to evaluate all helmets under Virginia Tech’s rating rubric.

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ease of installation, and security of the child. See *CPS: Ease-of-Use Ratings FAQs*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www.nhtsa.gov/Driving+Safety/Child+Safety/CPS:+Ease-of-Use+Ratings+FAQs> (last visited Feb. 8, 2012) (discussing the criteria taken into account for determining the Ease-of-Use ratings while also distinguishing the current Ease-of-Use rating system from a pure ranking of child restraints on the market). At a minimum, the current Ease-of-Use ranking system provides a readily available database for consumers to research a third-party evaluation of car seat systems currently on the market. See *Child Seats: Ease-of-Use Ratings*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., available at <http://www.nhtsa.gov/Safety/Ease-of-Use> (last visited Feb. 8, 2012).

136. Children’s Sports Athletic Equipment Safety (CSAE) Act, S. 601, 112th Cong. § 5(a), (b)(1) (2011).

137. Federal Trade Commission Act § 12, 15 U.S.C. § 52 (2006).

138. See *id.* § 13, 15 U.S.C. § 53(a) (describing that upon a proper showing of dissemination of false advertisement, a temporary injunction or restraining order is to be granted); see also *id.* § 14, 15 U.S.C. § 54 (“Any person, partnership, or corporation who violates any provisions of section 52(a) . . . if the use of the commodity advertised may be injurious to health because of results from such use under the conditions prescribed in the advertisement thereof . . . or if such violation is with intent to defraud or mislead, be guilty of a misdemeanor, and upon conviction shall be punished by a fine or not more than \$5,000 or by imprisonment for not more than six months, or by both such fine and imprisonment; except that if the conviction is for a violation committed after a first conviction . . . punishment shall be by a fine of not more than \$10,000 or by imprisonment for not more than one year, or by both such fine and imprisonment . . .”).

139. See Nystrom, *supra* note 30.

Because the Virginia Tech star-rating system is the first to rate the safety benefits of the helmets, the CSAE Act should provide funding to further evaluate and improve the rating system in an effort to increase its effectiveness.<sup>140</sup>

### CONCLUSION

“The voluntary efforts have failed—the voluntary regulatory agency or body, whatever we want to call it, just hasn’t moved forward in an aggressive way.”<sup>141</sup> As the public became more concerned with the fatalities associated with participating in football during the 1960s and 1970s, NOCSAE answered the call to promote research and develop new equipment testing strategies.<sup>142</sup> However, as the game has evolved and the technology of equipment associated with it advanced,<sup>143</sup> NOCSAE stood on the sidelines and avoided adjusting its policies or increasing its authority over the industry to meet this changing dynamic. As the concussion crisis became a growing problem with youth football, NOCSAE did little to update its outdated testing procedures.<sup>144</sup> Specifically, given the advancement in equipment technology and the neurological and biomechanical differences of youth athletes compared to adults,<sup>145</sup> NOCSAE’s testing standards and oversight have done nothing to curb the concussion crisis among school-aged children. The question that must be asked is why, given the widespread attention to the concussion problem at both the professional and amateur levels, has the voluntary oversight system continued to fail? The answer likely lies in a combination of both business<sup>146</sup> and legal<sup>147</sup> concerns. The power that the FTC and the CPSC

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140. See *supra* note 132 (outlining the CPSC’s ability to contribute to the organization’s costs under the Consumer Product Safety Act).

141. Schwarz, *Equipment Safety for Children*, *supra* note 16 (quoting Sen. Tom Udall).

142. See *About NOCSAE*, *supra* note 13 (explaining the impetus behind creating NOCSAE).

143. See *supra* note 17.

144. See Easterbrook, *supra* note 28 (explaining how NOCSAE ranks all helmets that pass its test as equal, and has no plans to update its practice until “there may be ‘scientific certainty’ about the exact cause of football concussions”).

145. See generally Stephanie Smith, *Concussions Extra Dangerous to Teen Brains*, CNN (Feb. 3, 2010), [http://articles.cnn.com/2010-02-03/health/concussions.teen.brains\\_1\\_concussions-david-bosse-school?\\_s=PM:HEALTH](http://articles.cnn.com/2010-02-03/health/concussions.teen.brains_1_concussions-david-bosse-school?_s=PM:HEALTH) (outlining several incidents where teen football players died as a result of misdiagnosed concussions).

146. See *NOCSAE Overview*, *supra* note 73; Easterbrook, *supra* note 117 (discussing the funding structure of NOCSAE).

147. See Easterbrook, *supra* note 28 (discussing NOCSAE’s reluctance to provide guidance on the concussion issue while there is still so much uncertainty regarding the best treatment, equipment, and testing procedures).

have under their respective acts makes federal regulation the most effective tool in establishing a new standard of research, testing, maintenance, and transparency. Under the direction of Senator Udall and the CSAE Act, the youth football helmet industry could see its first positive steps toward adequate oversight, with an emphasis on not only maintenance and uniform testing standards for helmets, but also on continuing research of concussion-reducing equipment.<sup>148</sup> Yet, given the difficulties in creating concussion-reducing testing and equipment, perhaps the most important component to the CSAE Act is the increased focus on protecting consumers from equipment manufacturers falsely advertising the safety capabilities of their equipment.<sup>149</sup> In addition to the educational and preventative initiatives undertaken by individual states<sup>150</sup> and through the ConTACT Act,<sup>151</sup> Section 5 of the CSAE Act offers the greatest avenue of protection while new technologies and testing standards are explored in the hopes of developing safer and more sustainable equipment.

While the CSAE Act does not empower the FTC and the CPSC with any new responsibilities not previously outlined in the FTCA or the CPSCA, the CSAE Act does codify into a single piece of legislation powers that NOCSAE has been unwilling and, perhaps more accurately, unable to enforce throughout the industry. Moreover, the CSAE Act allows for independent agencies, under the aegis of federal legislation, to address issues that voluntary standards have been minimizing or unwilling to address.<sup>152</sup> Under the guidance of the CSAE Act and with the assistance of the CPSC and the FTC, the youth football helmet industry will be able to implement the necessary changes to finally provide the needed level of oversight to hold equipment manufacturers and reconditioners accountable for unsafe youth football helmets. Only then will the football helmet industry be able to effectively supervise and protect the millions of school-aged children participating in youth football across the country.

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148. CSAE Act, S. 601, 112th Cong. § 3(a)(1) (2011) (“[C]ompliance with the standard or standards is likely to result in the elimination or adequate reduction of the risk of injury in connection with the use of football helmets . . .”).

149. *Id.* § 5(a)–(c).

150. *See generally Concussion Information & Competition Policies by State*, *supra* note 81.

151. Concussion Treatment and Care Tools Act, H.R. 1347, 111th Cong. (2010).

152. *See* Easterbrook, *supra* note 28.

# RECENT DEVELOPMENTS

## AN IMPORTANT MEMBER OF THE FAMILY: THE ROLE OF REGULATORY EXEMPTIONS IN ADMINISTRATIVE PROCEDURE

SEAN D. CROSTON\*

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Sound administrative procedure contemplates waivers, or exceptions . . . . The process viewed as a whole leads to a general rule, and limited waivers or exceptions granted pursuant to an appropriate general standard. This combination of a general rule and limitations is the very stuff of the rule of law, and with diligent effort and attention to essentials administrative agencies may maintain the fundamentals of principled regulation without sacrifice of administrative flexibility and feasibility . . . . [T]he waiver procedure . . . is not necessarily a step-child, but may be an important member of the family of administrative procedures, one that helps the family stay together.<sup>1</sup>

### INTRODUCTION

An unusual administrative procedure has been in the news lately: regulatory exemptions (sometimes also referred to as “exceptions,” “waivers,” “variances,” or “adjustments”). For example, in January 2011, the *Washington Post* featured a front-page story that highlighted how Massey Energy “had mastered the art of the regulatory waiver” to “legally circumvent federal mining laws.”<sup>2</sup> Likewise, after a Congressional Research Service report detailed how federal agencies “waived a number of regulatory requirements” in the wake of Hurricane Katrina,<sup>3</sup> Chairman Paul R. Verkuil of the Administrative Conference of the United States testified before Congress in 2010, recognizing the potential abuse of “agency authorities and procedures for issuing waivers” during such situations.<sup>4</sup> He then raised some key, unanswered questions about the little-known nature of regulatory exemptions: “What process is required for waivers? . . . Are granting and denying waivers and exemptions rulemaking or adjudication, and what should follow” from that classification?<sup>5</sup> This Recent Development explores the curious nature of regulatory exemptions and attempts to answer the Chairman’s questions.

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1. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

2. Kimberly Kindy, *Longtime Tug of War on Mine Safety*, WASH. POST, Jan. 4, 2011, at A1.

3. See CURTIS W. COPELAND, CONG. RESEARCH SERV., RS22253, REGULATORY WAIVERS AND EXTENSIONS PURSUANT TO HURRICANE KATRINA, at CRS-1 (2005).

4. *Administrative Conference of the United States: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 57 (2010) (statement of Paul R. Verkuil, Chairman, Administrative Conference of the United States).

5. *Id.*

## I. WHAT IS THE BASIC IDEA BEHIND EXEMPTIONS?

Any child who has ever received special permission to stay up past his or her normal bedtime to finish watching the Super Bowl, the end of a movie, election results, or some other important event on television understands the basic concept of a regulatory exemption. Occasionally, the governing authority, in this case the parents, will grant an exception from the normal rule that would otherwise control the situation.

While parents undoubtedly possessed this power throughout history, governmental exemption authority can be traced back at least as far as “the royal dispensation power of early English law,” which “allowed the king largely unbounded freedom to grant individual subjects permission to disobey a law.”<sup>6</sup> This authority continues in the modern administrative state, where regulated parties can request exemptions from legal requirements.

### A. *What Is the Difference Between Exemptions and Enforcement Discretion?*

Exemption authority is similar to “enforcement discretion” or “prosecutorial discretion,” which describe an agency’s decision not to enforce its regulations in particular situations. Both enforcement discretion and exemptions involve “decisions by governmental officials not to apply the literal terms of the law in an instance where the rights of a private party are affected.”<sup>7</sup> But exemptions are more like the royal grant of permission in that they are formal, written, affirmative agency actions. An exemption can also potentially “encompass[ ] procedural and substantive rules as well as decisions outside the enforcement process.”<sup>8</sup> Presumably because of the broad manner in which they may be used, exemptions are generally subject to judicial review, albeit under the relatively lenient standards of the Administrative Procedure Act (APA).<sup>9</sup>

Enforcement discretion, on the other hand, encompasses more passive, informal (often unannounced), unilateral agency decisions not to enforce

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6. Jeffery M. Sellers, Note, *Regulatory Values and the Exceptions Process*, 93 YALE L.J. 938, 940 n.8 (1984).

7. *Id.* at 940 n.9.

8. *Id.*

9. Several courts have applied the deferential arbitrary and capricious standard in this context. See, e.g., *Honeywell Int’l, Inc. v. Nuclear Regulatory Comm’n*, 628 F.3d 568, 578 (D.C. Cir. 2010) (applying this deferential standard to petitioner’s challenge to agency denial of exemption); *Yetman v. Garvey*, 261 F.3d 664, 669 (7th Cir. 2001); *W. Neb. Res. Council v. EPA*, 793 F.2d 194, 200 (8th Cir. 1986); *Rombough v. FAA*, 594 F.2d 893, 895–97 (2d Cir. 1979).



existing regulations against private parties that are or could be violating them. Going back to the example of a child's bedtime, parents would exercise enforcement discretion by passively standing back and saying nothing when the child stays up past the normal bedtime. In the federal agency arena, this discretion has a more limited scope and an uncertain duration, as agency officials could change their minds at any moment and decide that the balancing of factors favors taking the delayed enforcement action.

Presumably for these reasons, along with the traditional prosecutorial discretion over law enforcement matters and the difficulty of evaluating an agency's priorities, chances of success, and available resources, the Supreme Court determined that an agency's exercise of enforcement discretion is, unlike its grant of exemptions, generally unreviewable by the courts.<sup>10</sup> Potential exceptions to the unreviewability doctrine remain, however, for those situations where the "substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers,"<sup>11</sup> or where an "agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."<sup>12</sup>

### *B. What Are the Bases for Exemptions?*

Some statutes provide explicit authority for exemptions,<sup>13</sup> but many others do not. Likewise, some regulations provide explicit authority for exemptions from the rules,<sup>14</sup> while other regulations do not.

Regardless of specific provisions in statutes and regulations, the Supreme Court has said that "an agency's authority to proceed in a complex area [of] regulation by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances."<sup>15</sup> In fact, in one early case, the U.S. Court of Appeals for the D.C. Circuit suggested that agencies not only *may* but *must* provide exemptions from general rules in special circumstances.<sup>16</sup> A few

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10. See *Heckler v. Chaney*, 470 U.S. 821, 831–33 (1985).

11. *Id.* at 833.

12. *Id.* at 833 n.4.

13. See, e.g., 30 U.S.C. § 811(c) (2006) (allowing for modification of any mandatory mining safety standard after a petition, investigation, and hearing).

14. See, e.g., 10 C.F.R. § 50.12 (2011) (giving the Nuclear Regulatory Commission (NRC) power to grant exemptions upon its own initiative or following a petition).

15. *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972).

16. See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances. [Some cases warrant] serious consideration of meritorious

more recent opinions, however, have implicitly disagreed with this earlier approach.<sup>17</sup>

While the Supreme Court later noted that Congress may explicitly restrain agencies from granting exemptions,<sup>18</sup> lower courts affirmed that generally, “limited grounds for the creation of exemptions are inherent in the administrative process,” and agencies may use “‘equitable’ discretion’ . . . to afford case-by-case treatment—taking into account circumstances peculiar to individual parties in the application of a general rule . . . or even in appropriate cases to grant dispensation from the rule’s operation.”<sup>19</sup> The courts have noted agencies’ need for “flexibility,” and recognize that exemptions “enhance[ ] the effective operation of the administrative process.”<sup>20</sup>

## II. HOW DO EXEMPTIONS WORK UNDER THE ADMINISTRATIVE PROCEDURE ACT?

The APA defines and governs federal agency action. Therefore, the APA is the natural starting point in determining the nature of regulatory exemptions. Under the APA, an exemption is a form of “relief,”<sup>21</sup> which is a type of final “agency action.”<sup>22</sup> Thus, an agency’s decision on an exemption is reviewable in court.<sup>23</sup>

But what *kind* of final action is it? As the Department of Justice recognized shortly after the APA’s enactment, “the entire Act is based upon a dichotomy between rule making and adjudication.”<sup>24</sup> The APA defines “rule” as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret,

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applications for waiver, and a system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties.”).

17. See, e.g., *Yetman v. Garvey*, 261 F.3d 664, 679 (7th Cir. 2001) (holding that agencies have discretion to adopt inflexible no-exemption policies if they have good reasons for doing so); *Starr v. FAA*, 589 F.2d 307, 312 (7th Cir. 1979) (an agency’s “no-exemption policy” is not necessarily unreasonable, and may be quite beneficial).

18. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977).

19. *Ala. Power Co. v. Costle*, 636 F.2d 323, 357 (D.C. Cir. 1979); see also *W. Neb. Res. Council v. EPA*, 943 F.2d 867, 870 (8th Cir. 1991) (holding that “discretionary exemption mechanism[s] . . . ‘are inherent in the administrative process’” (citing *Ala. Power Co.*, 636 F.2d at 357)).

20. *Ala. Power Co.*, 636 F.2d at 357.

21. 5 U.S.C. § 551(11).

22. *Id.* § 551(13).

23. See *id.* §§ 701–706.

24. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1947) [hereinafter ATTORNEY GENERAL’S MANUAL].

or prescribe law or policy.”<sup>25</sup> The APA then defines “adjudication” as the “agency process for the formulation of an order.”<sup>26</sup> An “order” is defined as “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.”<sup>27</sup>

In addition, “licensing” is the “agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.”<sup>28</sup> Finally, a “license” is “the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.”<sup>29</sup>

It is thus clear that a statutory exemption is a license. But what is a statutory exemption? One federal district court interpreted this provision in passing to mean that where a statute explicitly grants an agency the power to issue exemptions from its requirements in specific cases, those exemptions are statutory exemptions falling under the APA’s definition of a license.<sup>30</sup> But no other federal judge has addressed the question, and it remains unsettled. Setting that odd construct aside, the APA definition’s limitation to statutory exemptions does not clarify the wide category of regulatory exemptions—those exemptions granted by agencies exercising their inherent authority to make exceptions to general regulations. They are the focus of this Recent Development.

On the one hand, a regulatory exemption could be “an agency statement” of “particular applicability and future effect”; i.e., a rule.<sup>31</sup> But on the other hand, it could also be a “form of permission”; i.e., a license.<sup>32</sup> Or an exemption could be some other form of order.<sup>33</sup>

While some agencies published exemptions in the *Federal Register* between 1994 and 2011, the vast majority of exemptions were placed in the “Notices” section of the *Register*.<sup>34</sup> The Notices section is limited by

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25. 5 U.S.C. § 551(4).

26. *Id.* § 551(7).

27. *Id.* § 551(6).

28. *Id.* § 551(9).

29. *Id.* § 551(8).

30. *Nuclear Data, Inc. v. Atomic Energy Comm’n*, 344 F. Supp. 719, 724 (N.D. Ill. 1972).

31. *See supra* notes 24–25 and accompanying text.

32. *See supra* notes 28–29 and accompanying text.

33. *See supra* notes 26–27 and accompanying text.

34. A February 9, 2012, search at the Government Printing Office’s online Federal Digital Systems database for all *Federal Register* “Actions” whose title included “exemption” showed 3,653 entries as “Notices” and only 37 “Rules and Regulations” or “Proposed Rules” entries, plus 342 “Unknown” entries. *See FDsys Advanced Search*, U.S. GOV’T

regulation to “miscellaneous” documents and “information of public interest” not covered by the two “Rules” sections.<sup>35</sup> But the Rules sections, in turn, are limited to items that, if issued, “would have *general* applicability and legal effect.”<sup>36</sup> Moreover, the Office of the Federal Register itself advises that agencies place licenses along with any “orders or decisions affecting named parties” in the Notices section of the *Register*.<sup>37</sup> Thus, exemptions issued as an order, license, or rule of *particular* applicability would all belong in the Notices section, and the *Federal Register* provides little assistance in distinguishing between them.

Administrative law experts, including the late Professor Kenneth Culp Davis, have also been stumped by the peculiar question of how to classify regulatory exemptions:

The same function may come within the Act’s definition of rule making and also within the Act’s definition of licensing. The disposition of an application to the [Department of Labor’s] Wage and Hour Division for an exemption from wage and hour requirements is a rule, because it implements wage fixing for the future, and at the same time it is a license, which the Act defines as “any agency permit, . . . approval, . . . or other form of permission.”<sup>38</sup>

Thus, an agency might refer to its regulatory exemptions as rules or it might wish to call them adjudicatory orders. While the Supreme Court long ago held that agencies are generally free to choose either rulemaking or adjudication to make policy,<sup>39</sup> the agency’s choice of labeling is not particularly helpful. The D.C. Circuit noted, “We doubt whether the [agency’s] wrapping its finding in the mantle of an order can make it an order . . . and the label placed by the agency on its action is normally not conclusive.”<sup>40</sup> Similarly, where an order is labeled as a final rule, this “may

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PRINTING OFFICE, <http://www.gpo.gov/fdsys/search/advanced/advsearchpage.action> (select “Federal Register” from Available Collections and “Add” it as the Selected Collection, then click “Add more search criteria” from the drop-down “Search in” menu; select “Action” and search for “exemption”) (last visited Feb. 9, 2012).

35. 1 C.F.R. § 5.9(d) (2011).

36. *Id.* § 5.9(b)–(c) (2011) (emphasis added).

37. See NAT’L ARCHIVES & RECORDS ADMIN., OFFICE OF THE FED. REGISTER, FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK § 3.1 (1998), <http://www.archives.gov/federal-register/write/handbook/ddh.pdf>.

38. 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 5.02 (1958) (alterations in original).

39. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947) (discussing how agencies must employ flexibility in assessing each case on its own and deciding if rulemaking or adjudication is the proper avenue).

40. *Sea-Land Serv., Inc. v. DOT*, 137 F.3d 640, 647 (D.C. Cir. 1998) (citing *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 416 (1942)).

reveal something about the care taken in writing headings . . . but does not alter the clearly adjudicatory nature of the Order itself.”<sup>41</sup>

### III. WHY DO WE CARE?

In the child’s case, how do we classify the permission to stay up late? Is it just like any other day-to-day parental directive (analogous to an informal adjudicatory order)? Is it better seen as a special, one-time-only permission to ignore the normal bedtime rule (a license)? Or do we understand it as, in effect, a new bedtime, at least in limited circumstances, allowing the child to ignore the normal bedtime whenever a special program is on (a rule)?

Perhaps the distinction does not matter in a child’s case. But it can make a difference in the modern administrative state. One year after the APA’s passage, the Department of Justice recognized that it “prescribes radically different procedures for rule making and adjudication. Accordingly, the proper classification of agency proceedings as rule making or adjudication is of fundamental importance.”<sup>42</sup>

For example, agencies must publish notice and take comments before finalizing rulemaking,<sup>43</sup> while informal adjudication can be a much less formal process. Though substantially pared down, informal rulemaking can be even more procedurally fastidious than informal adjudication.<sup>44</sup> Rulemaking is also “typically open to any interested member of the public,” while potential intervenors in adjudicatory proceedings must often demonstrate some form of standing before they can participate.<sup>45</sup>

On the other hand, rulemaking is a legislative process, during which an agency, like Congress,

may act on the basis of data contained in its own files, on information informally gained by members of the body, on its own expertise, or on its own views or opinions. It is not necessary for the regulatory agency to cause to be submitted at hearings evidence that would support its rule-making decisions.<sup>46</sup>

The nature of judicial review of an agency’s decision on an exemption may also depend on its characterization as rulemaking or adjudication. For instance, the federal courts of appeal have exclusive jurisdiction only over

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41. *Goodman v. FCC*, 182 F.3d 987, 994 (D.C. Cir. 1999).

42. ATTORNEY GENERAL’S MANUAL, *supra* note 24, at 12.

43. Administrative Procedure Act (APA), 5 U.S.C. § 553(b)–(c) (2006).

44. Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park’s Requirement of Judicial Review* “On the Record”, 10 ADMIN. L.J. AM. U. 179, 205 (1996).

45. *Goodman*, 182 F.3d at 994 (citing 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.7 (3d ed. 1994)).

46. *Flying Tiger Line, Inc. v. Boyd*, 244 F. Supp. 889, 892 (D.D.C. 1965).

certain “final orders” of some agencies.<sup>47</sup> Thus, in a recent case, the Second Circuit held that it lacked jurisdiction over a challenge to an exemption issued by the Nuclear Regulatory Commission (NRC).<sup>48</sup> Therefore, it can make a difference whether regulatory exemptions are rules, orders, licenses, or something else under the APA.

The proper classification of regulatory exemptions also matters because it gives guidance to agencies in drafting rules. For example, if regulatory exemptions are classified as separate, particularized rules that must go through the notice-and-comment process, then agencies may need to be even more careful in how they word their regulations. More specific standards could lead to a need for more exemptions to counter unforeseen circumstances, while broader, more generic standards could obviate this problem.

#### IV. ARE EXEMPTIONS “RULES”?

As noted previously, the APA definition of adjudication is “largely a residual one”<sup>49</sup>—agency action other than rulemaking. “Thus, in determining whether a particular agency function is rule making or adjudication, the first rule of construction is to determine whether it falls within the more affirmative and specific definition of ‘rule’ in [the APA]; if not, it is adjudication.”<sup>50</sup>

The eminent Professor Davis is not the only scholar who has suggested that an exemption may be a rule. For example, a recent treatise agreed that the “creation of an exception or waiver of a requirement may itself be a rule, as it has prospective effect to a group of regulated persons.”<sup>51</sup> Testimony in a fairly recent congressional hearing also addressed the subject of “waivers from existing statutes and regulations,” asking, “Is it rulemaking or adjudication?”<sup>52</sup> The question remains unsettled.

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47. See 28 U.S.C. § 2342 (2006) (giving the courts of appeals exclusive jurisdiction over orders issued by the Federal Communications Commission, the NRC, and the Secretary of Agriculture). But see *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 345–47 (1st Cir. 2004) (holding that, in light of 42 U.S.C. § 2239(a)(1)(A) & (b)(1) and the Supreme Court’s decision in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), “final orders” also encompass some final NRC rules).

48. See *Brodsky v. NRC*, 578 F.3d 175, 182 (2d Cir. 2009).

49. ATTORNEY GENERAL’S MANUAL, *supra* note 24, at 13.

50. Robert W. Ginnane, “Rule Making,” “Adjudication,” and Exemptions Under the *Administrative Procedure Act*, 95 U. PA. L. REV. 621, 623 (1947).

51. JAMES T. O’REILLY, ADMINISTRATIVE RULEMAKING § 12:9 (2d ed. 2011).

52. *Administrative Law, Process and Procedure Project: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 109th Cong. 71 (2005) (statement of Jeffrey S. Lubbers, Fellow in Law and Government Program, American University Washington College of Law).

The debate focuses on the term *particular applicability* in the APA definition of a rule,<sup>53</sup> which was added to the APA definition of rule late in the process of drafting the APA.<sup>54</sup> As a footnote in a committee report explained, the phrase was added “in order to avoid controversy and assure coverage of rule making addressed to named persons,” and thus, “the definition of ‘rule’ ended up with the entire emphasis on ‘future effect.’”<sup>55</sup>

Although unstated, the particular applicability language could also apply beyond rules addressed to named *persons* to include rules directed at very narrow, specific (or particular) events, companies, or facilities.<sup>56</sup> In this sense, “the issuance of a waiver or an exception simply represents . . . promulgation of a rule applicable to a category of one entity.”<sup>57</sup> On the other hand, a rule can probably “be considered to be of ‘general applicability’ even though it is directly applicable to a class which consists of only one or a few persons if the class is open in the sense that in the future the number of members of the class may be increased.”<sup>58</sup>

While some would argue that an agency proceeding focused on a named person or facility seems more in line with the common understanding of adjudication, such proceedings can also be characterized and conducted as rulemaking. As described by the U.S. Court of Appeals for the First Circuit, “what is otherwise rule making does not become adjudication merely because it applies only to particular parties or to a particular situation.”<sup>59</sup> Likewise, the number of parties involved “is not conclusive on the question” of whether a proceeding is rulemaking or adjudication.<sup>60</sup> “Just as a class action can encompass the claims of a large group of plaintiffs without thereby becoming a legislative proceeding, an adjudication can affect a large group of individuals without becoming a rulemaking.”<sup>61</sup>

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53. 5 U.S.C. § 551(4) (2006).

54. See Ginnane, *supra* note 50, at 626–27 (discussing the decision to change the language of the definition of *rule*).

55. *Id.* at 626 (citing H.R. REP. NO. 79-1980, at 49 (1946)).

56. See, e.g., 10 C.F.R. § 63.1 (2011) (stating that the NRC’s rules at 10 C.F.R. Part 63 apply only to the Department of Energy’s application to construct and operate a high-level radioactive waste repository at Yucca Mountain, Nevada).

57. SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, *RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH* 161 (2003).

58. Statement of the Administrative Conference on ABA Resolution No.1 Proposing to Amend the Definition of “Rule” in the Administrative Procedure Act, 1 C.F.R. § 310.3(a) (1975) (“Thus, for example, smoke emission standards for a particular area are of general applicability even though at the time of their issuance they may, as a practical matter, be applicable to only one plant.”).

59. *Law Motor Freight, Inc. v. Civil Aeronautics Bd.*, 364 F.2d 139, 143 n.4 (1st Cir. 1966) (citing *DAVIS*, *supra* note 38, § 5.02).

60. *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1306 (10th Cir. 1973).

61. *Goodman v. FCC*, 182 F.3d 987, 994 (D.C. Cir. 1999) (citing *NLRB v. Bell*

Admittedly, courts and scholars have struggled with the “particular applicability” language in the APA’s definition of *rule*.<sup>62</sup> For example, then-Professor Antonin Scalia disparagingly remarked that “it is generally acknowledged that the only responsible judicial attitude toward this central APA definition is one of benign disregard.”<sup>63</sup> Most commentators therefore focus on other distinctions between rules and adjudications.

The House Committee on the Judiciary attempted to summarize the difference as follows: “‘Rules’ formally prescribe a course of conduct for the future rather than pronounce past or existing rights or liabilities,” while “licenses involve a pronouncement of present rights of named parties although they may also prescribe terms and conditions for future observance.”<sup>64</sup>

Representative Francis Walter was Chairman of the House Committee on the Judiciary during the drafting of the APA. He also attempted to explain the difference between adjudication and rulemaking, stating that rules “in form or effect are like the statutes of the Congress,” while adjudications are “those familiar situations in which an officer or agency determines the particular case just as, in other fields of law, the courts determine cases.”<sup>65</sup> The Supreme Court likewise noted a “distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards . . . and proceedings designed to adjudicate . . . particular cases.”<sup>66</sup>

But this conception of administrative rulemaking as a procedure used to determine policy questions while adjudication decides individual cases is not rooted in the text of the APA and has not always withstood Supreme Court scrutiny. One year later, the Court clarified that agencies are “not precluded from announcing new principles in an adjudicative proceeding.”<sup>67</sup> In an earlier case, the Court also announced, “Adjudicated cases may . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein. They generally provide a guide to action that the agency may be expected to take in future cases.”<sup>68</sup>

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Aerospace Co., 416 U.S. 267, 292 (1974)).

62. See Ronald M. Levin, *The Case for (Finally) Fixing the APA’s Definition of “Rule”*, 56 ADMIN. L. REV. 1077, 1078–79 (2004) (noting how some have focused on “future use” language with regard to the use of “particular applicability” and this has caused confusion).

63. Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 383.

64. H.R. REP. NO. 79-1980, at 20 (1946).

65. 92 CONG. REC. 5648 (1946) (statement of Rep. Walter).

66. *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 245 (1973).

67. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

68. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765–66 (1969).



Attorney General (and later Supreme Court Justice) Tom Clark attempted to clarify the difference between rulemaking and adjudication by explaining

Proceedings are classed as rule making under [the APA] . . . because they involve subject matter demanding judgments based on technical knowledge and experience. . . . In many instances of adjudication, on the other hand, the accusatory element is strong, and individual compliance or behavior is challenged . . . .<sup>69</sup>

Adjudications are more “concerned with the determination of past and present rights and liabilities,” such as “a decision as to whether past conduct was unlawful,” or a “determination of a person’s right to benefits under existing law.”<sup>70</sup> In such proceedings, parties often fiercely dispute issues of fact.<sup>71</sup> Finally, an early scholar, also a member of the Assistant Solicitor General’s office, remarked, “In rule making, disciplinary or accusatory elements are absent,” and “the purpose of the proceeding” is “to determine future policy.”<sup>72</sup>

These early opinions indicate that rules were intended to pronounce future rights, based on policy decisions and broad technical knowledge and experience. Adjudications were meant to be more individualized, fact-based proceedings, determining past or present rights. Still, as the House Committee on the Judiciary admitted, licenses also prescribe future rights, so there is some potential overlap between rules and certain orders, particularly licenses. Exemptions tend to be individualized, fact-specific proceedings that focus on future rights. So perhaps exemptions can be *either* rulemaking or adjudication.

Although the plain text of the APA’s definition section does not provide a compelling answer, one can look deeper into the statute for guidance. For example, the definition of *rulemaking* describes loosened publication requirements for “a substantive rule which grants or recognizes an exemption or relieves a restriction.”<sup>73</sup> Further, the Attorney General stated that substantive rules are those “rules, other than organizational or procedural” that are “issued by an agency pursuant to statutory authority and which implement the statute . . . . Such rules have the force and effect of law.”<sup>74</sup> Thus, substantive rules, as opposed to interpretive rules, have

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69. SEN. REP. NO. 79-752, at 39 (1945) (statement of Tom C. Clar, Att’y Gen., appendix).

70. ATTORNEY GENERAL’S MANUAL, *supra* note 24, at 14–15.

71. *Id.* at 15.

72. Ginnane, *supra* note 50, at 630.

73. APA, 5 U.S.C. § 553(d)(1) (2006).

74. ATTORNEY GENERAL’S MANUAL, *supra* note 24, at 30 n.3. The Manual also contrasts substantive rules with “interpretative rules” that “advise the public of the agency’s

binding legal effect.<sup>75</sup> Any exemption would be an action with legal effect, allowing the recipient not to comply with particular regulatory requirements.

Considering its definition of rule and the above-noted loose publication requirement, the APA clearly implies that an agency may grant an exemption through a rulemaking. The Attorney General also stated that there may be rules “granting or recognizing [an] exemption.”<sup>76</sup> A contemporary scholar stated that the publication section referred to “an agency ‘rule’ which results in permitting or authorizing a person to do something which he would otherwise be prohibited from doing by a statute or by some other rule,”<sup>77</sup> indicating that the APA drafters’ definition of an exemption was likely quite similar to the current understanding.

Federal courts have also concluded that agencies may grant exemptions through rulemaking. For example, in *Hou Ching Chow v. Attorney General*,<sup>78</sup> the court held that a rule granted an exemption under the publication subsection.<sup>79</sup> In *Capitol Airways, Inc. v. Civil Aeronautics Board*,<sup>80</sup> the D.C. Circuit recognized agencies’ authority to issue “blanket exemptions” from existing regulations through rulemaking.<sup>81</sup> The Civil Aeronautics Board even promulgated rules for granting exemptions that said, “Proceedings for the issuance of exemptions by regulation shall remain subject to the provisions governing rule making.”<sup>82</sup>

The cases and provisions show that some exemptions may be and have been granted through rulemaking. Current regulations also include some exemptions issued by rule, such as broad exemptions from the NRC’s otherwise-applicable fee rules for regulated entities.<sup>83</sup>

By contrast, many exemptions are granted outside of rulemaking. For example, the NRC found that where existing regulations explicitly authorized exemptions, any exemptions granted pursuant to that scheme were not new, particularized rulemakings, but were rather part of the

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construction of the statutes and rules which it administers,” and “statements of policy” that “advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.” *Id.*

75. See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1108–09 (D.C. Cir. 1993).

76. ATTORNEY GENERAL’S MANUAL, *supra* note 24, at 35–36.

77. Ginnane, *supra* note 50, at 634.

78. 362 F. Supp. 1288 (D.D.C. 1973).

79. *Id.* at 1292.

80. 292 F.2d 755 (D.C. Cir. 1961).

81. *Id.* at 757–58.

82. See 14 C.F.R. § 302.400 (1964).

83. 10 C.F.R. §§ 170.11(a) (2010).

existing regulatory scheme.<sup>84</sup> In another case, the Eighth Circuit held that an agency's issuance of a minor exemption from regulatory requirements was explicitly not an exercise of rulemaking authority.<sup>85</sup>

The minor exemption language ties back to the special circumstances terminology used by the Supreme Court when it authorized regulatory exemptions.<sup>86</sup> Perhaps an agency that issues numerous exemptions from its regulations, absent special circumstances, may be engaging in rulemaking or at the least risking a suit alleging that it has unlawfully "consciously and expressly adopted a general policy" that is so extreme as to amount to an abdication of its statutory responsibilities.<sup>87</sup>

As the NRC noted, generally "regulatory policy . . . is developed through the rulemaking process without expecting a need for large numbers of exemptions," and it would "exercise its discretion to limit exemptions in any particular area if the 'exceptions' to the rule threaten to erode the rule itself."<sup>88</sup> Exemptions should be based on a "need for *unusual* relief from a rule due to a situation not contemplated when that rule was promulgated."<sup>89</sup> Limited numbers of exemptions issued in unusual circumstances should not require rulemaking.

In some cases, however, large numbers of "exemptions can serve as warning signals that a particular rule may need to be revised" through rulemaking.<sup>90</sup> While "[t]he grant of limited exemptions to a limited number of [applicants] . . . does not pose any special problems," the "repeated issuance of a large number of exemptions which, considered

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84. See *Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2)*, 51 N.R.C. 90, 97 n.8 (2000) ("Both the provision authorizing the exemption and the regulation from which the exemption has been granted are part of the same regulatory scheme . . . referred to in the facility license and which [the licensee and exemption applicant] continues to have a duty to follow. Thus, the license and the regulations anticipate exemptions—which may be granted without amending the license or modifying the regulations.").

85. *W. Neb. Res. Council v. EPA*, 943 F.2d 867, 872 (8th Cir. 1991) (citing *W. Neb. Res. Council v. EPA*, 793 F.2d 194, 199–200 (8th Cir. 1986)).

86. See *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972).

87. *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985). But see *Block v. SEC*, 50 F.3d 1078, 1084 (D.C. Cir. 1995) (suggesting that an agency's decision to grant exemptions from regulations rather than take enforcement actions in response to noncompliance is not an abdication of responsibility where interested parties may submit written comments advising the agency to deny exemption requests, and where the agency has recently denied at least one exemption request).

88. *Specific Exemptions; Clarification of Standards*, 50 Fed. Reg. 50,764, 50,765 (Dec. 12, 1985) (codified at 10 C.F.R. pt. 50).

89. *U.S. Dep't of Energy (Clinch River Breeder Reactor Plant)*, 17 N.R.C. 1, 4 (1983) (emphasis added).

90. *Specific Exemptions; Clarification of Standards*, 50 Fed. Reg. at 50,765.

together, represent a fundamental alteration of the conceptual nature of the licensing basis, to more than a limited number of plants essentially constitutes a generic change to the regulatory requirements.”<sup>91</sup> These “generic changes should be adopted through rulemaking, rather than the case-by-case approach inherent in the regulatory approach embodied in the issuance of exemptions.”<sup>92</sup> Likewise, “the granting of a large number of exemptions to a single plant, should not be so extensive that the validity of the original license is called into question.”<sup>93</sup>

In at least one case, a federal court has found that excessive use of exemptions amounts to rulemaking; in *Delta Air Lines*, the court confronted a situation where the Federal Aviation Administration granted about 35% of between 800 and 900 yearly applications for an exemption from a specific set of regulatory requirements.<sup>94</sup> The court reasoned, “Under 5 U.S.C. § 553(b), any proposed change in the Regulations must be published in the Federal Register so that the public can be given the opportunity to comment on the proposed change.”<sup>95</sup> The court warned that agencies may not attempt to “effectively amend[ ] the Regulations by issuing *pro forma* exemptions.”<sup>96</sup> Likewise, the D.C. Circuit recognized a difference between issuing targeted individual exemptions through adjudicatory orders and blanket exemptions from existing regulations through rulemaking.<sup>97</sup> In the latter cases, where an agency issues numerous, permanent, or unusually broad exemptions, it crosses the line into rulemaking.

Scholars have agreed that problems arise when exemptions are used to devise law or policy instead of simply creating an exception to existing law.<sup>98</sup> In these cases, “the rule making process is subverted by ad hoc agency decisions.”<sup>99</sup> After all, “The Administrative Procedure Act was adopted to provide . . . that administrative policies affecting individual

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91. U.S. NUCLEAR REGULATORY COMM’N, SECY-98-300, OPTIONS FOR RISK-INFORMED REVISIONS TO 10 CFR PART 50, at 7 (1998), <http://pbadupws.nrc.gov/docs/ML9928/ML992870048.pdf>.

92. *Id.*

93. *Id.*

94. *Delta Air Lines, Inc. v. United States*, 490 F. Supp. 907, 912–13 (N.D. Ga. 1980).

95. *Id.* at 919.

96. *Id.*

97. *Capitol Airways, Inc. v. Civil Aeronautics Bd.*, 292 F.2d 755, 758 (D.C. Cir. 1961).

98. See, e.g., Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277, 320–21 n.186 (citing, *inter alia*, William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103).

99. *Id.* (quoting *Department of Energy Gasoline Allocation Program: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 96th Cong., 2d Sess. 153–54 (1980) (statement of William T. Mayton, Professor, Emory University)).

rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations.”<sup>100</sup> Thus, scholars have suggested that when agencies issue “exceptions . . . to a class or to a large number of applicants for more than an experimental period of time (for example, six months),”<sup>101</sup> or need to grant “substantial or numerous”<sup>102</sup> exemptions, they should use rulemaking.

In other words, if a child is allowed to stay up late past bedtime on most nights, it is not a special permission anymore—it is a new bedtime. In these cases, where the exemption has swallowed the rule, the “parent” agency should announce the new bedtime as a new rule rather than simply granting permission each night.

#### V. ARE EXEMPTIONS “LICENSES”?

Although some large or frequently granted exemptions are best classified as rules, this does not necessarily mean that more infrequent exemptions must be characterized the same way. The APA generally divides agency action into rulemaking or adjudication, so presumably these other exemptions are issued through some form of adjudication. In a recent report forwarded to Congress, the Chair of the American Bar Association’s Governmental Affairs Office assumed without discussion that “[a]n agency’s grant of exemption from a rule to a particular person would be an adjudication.”<sup>103</sup> But what type of adjudication would it be?

Following Professor Davis’s suggestion,<sup>104</sup> perhaps these exemptions are licenses, a special type of adjudication under the APA. Recall that a license is “the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.”<sup>105</sup>

Many exemptions are similar to licenses in that they are case-specific and allow the recipient to do something it could not have done without the

100. *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

101. *Aman*, *supra* note 98, at 322.

102. *See Sellers*, *supra* note 6, at 945 (citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (holding that “rules of general application” should be generated through rulemaking and not adjudication)).

103. *The 60th Anniversary of the Administrative Procedure Act; Where Do We Go from Here: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 109th Cong. 23 (2006) (report of the American Bar Association (ABA) that accompanied Recommendation 114, adopted by the ABA House of Delegates on Feb. 14, 2005).

104. *See DAVIS*, *supra* note 38, § 5.02 (noting that exemptions defy classification and may resemble rulemaking or licensing).

105. 5 U.S.C. § 551(8) (2006).

exemption. In that sense, they are an agency-granted “form of permission.”<sup>106</sup> In fact, as noted previously, at least one court held that where an exemption is granted pursuant to a specific statutory authority, it is always a statutory exemption falling under the definition of a license.<sup>107</sup> And courts have also held that limited exemptions are “not consistent with the concept of a ‘rule’” when they are subject to conditions and do not change “the agency’s substantive interpretation or implementation” of its implementing statutes.<sup>108</sup>

There do not seem to be any reported cases where a court classified a standard regulatory exemption as a license, however. To the contrary, several courts have rejected the argument that exemptions are licenses. In one early case, for example the D.C. Circuit rejected an exemption applicant’s request for a licensing hearing on the grounds that the exemption was not a license.<sup>109</sup> Likewise, the Ninth Circuit contrasted an “exemption proceeding,” where “a hearing is not always required,” with a “licensing proceeding.”<sup>110</sup>

Perhaps “the grant of a license is a broader form of permission” than that granted by an exemption.<sup>111</sup> While licenses and exemptions generally say that specified conduct is lawful, laws and regulations also arguably spell out permissible conduct. On the other hand, licenses inform their recipients that specified conduct is presumptively lawful under the existing regulatory structure, while exemptions tell their recipients that their conduct is acceptable but would likely violate existing general rules and regulations.

But if many regulatory exemptions are not licenses, what exactly *are* they?

## VI. ARE EXEMPTIONS SIMPLY INFORMAL ADJUDICATORY “ORDERS”?

While on some level it makes intuitive sense to classify exemptions as licenses or site-specific, particular rules, the modern administrative state has largely adopted another approach. “Most agencies grant or deny exceptions by using either formal or informal adjudicatory procedures.”<sup>112</sup>

106. *Id.*

107. *Nuclear Data, Inc. v. Atomic Energy Comm’n*, 344 F. Supp. 719, 724 (N.D. Ill. 1972).

108. *Ass’n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1033 (D.C. Cir. 2007).

109. *Cook Cleland Catalina Airways, Inc. v. Civil Aeronautics Bd.*, 195 F.2d 206, 207 (D.C. Cir. 1952).

110. *Island Airlines, Inc. v. Civil Aeronautics Bd.*, 363 F.2d 120, 124 (9th Cir. 1966).

111. *Kelley v. Selin*, 42 F.3d 1501, 1518 (6th Cir. 1995) (comparing licenses to NRC design certifications for reactors, “a narrower procedure that approves designs in theory”).

112. *Aman*, *supra* note 98, at 321.

For example, one district court stated that where an agency's decision to issue an exemption "rest[s] on considerations peculiar to each individual case," the agency's "action in deciding whether to waive its [requirements] is more in the nature of an adjudication than of rule-making."<sup>113</sup>

The APA allows for two distinct types of adjudication—informal and formal.<sup>114</sup> As described by the Attorney General, informal adjudications "constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process."<sup>115</sup> In fact, informal action has been estimated to encompass over 90% of agency activities.<sup>116</sup> On the other hand, formal adjudications, which follow hearing-specific procedures set forth in the APA, only take place when "required by statute,"<sup>117</sup> and when exemptions are discussed in statute, these statutory exemptions are licenses under the APA. Therefore, standard regulatory exemptions do not need to "be adjudicated 'after opportunity for agency hearing'"<sup>118</sup> and are issued through informal procedures. The result of informal adjudications is a simple order,<sup>119</sup> which is not as specific a device as a license.

The Ninth Circuit hinted at this outcome when it stated that a hearing is not always required in an exemption proceeding.<sup>120</sup> The Seventh Circuit agreed that an exemption proceeding is an example of an informal situation where normally no hearing is required.<sup>121</sup> In these informal exemption cases, an agency is not required to "carry out extensive waiver

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113. *Nuclear Data, Inc. v. Atomic Energy Comm'n*, 344 F. Supp. 719, 723 (N.D. Ill. 1972); *see also* *Keller Commc'ns, Inc. v. FCC*, 130 F.3d 1073, 1076–77 (D.C. Cir. 1997); *Int'l Union v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 964 (D.C. Cir. 1990) (stating that agency's exercise of power to "exempt mines from . . . interim [safety] standards" was an example of "case-by-case adjudication"); *Basic Media, Ltd. v. FCC*, 559 F.2d 830, 833 (D.C. Cir. 1977) (finding that where there are "particular cases of hardship," agencies may make individual dispensations or grant exceptions through case-by-case adjudication); *Turro v. FCC*, 859 F.2d 1498, 1499–1500 (D.C. Cir. 1988) (noting only two uses of exemptions).

114. 5 U.S.C. § 554(a) (2006).

115. U.S. DEP'T OF JUSTICE, FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 35 (1941).

116. Warner W. Gardner, *The Informal Actions of the Federal Government*, 26 AM. U. L. REV. 799, 799 (1977).

117. 5 U.S.C. § 554(a).

118. *E. Airlines v. Civil Aeronautics Bd.*, 185 F.2d 426, 428 (D.C. Cir. 1950), *vacated as moot*, 341 U.S. 901 (1951) (per curiam).

119. *See Rombough v. FAA*, 594 F.2d 893, 895 n.4, 896 (2d Cir. 1979) (an agency's decision on an exemption is a final agency order because it "imposes an obligation, denies a right, or fixes some legal relationship" (citing *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 112–13 (1948))).

120. *Island Airlines, Inc. v. Civil Aeronautics Bd.*, 3 63 F.2d 120, 124 (9th Cir. 1966).

121. *Starr v. FAA*, 589 F.2d 307, 311 (7th Cir. 1978).

proceedings.”<sup>122</sup> In the absence of these more extensive procedures, agencies normally decide regulatory exemptions in “*ad hoc* waiver proceeding[s].”<sup>123</sup> Some scholars have also agreed that “[t]he quasi-judicial requirements of ‘formal adjudication’ . . . generally do not apply to exceptions processes.”<sup>124</sup>

Interestingly, when Congress added the Congressional Review Act<sup>125</sup> to Title 5 of the United States Code in 1996, its definition of rule,<sup>126</sup> for the purposes of that Act, incorporated most of the APA’s definition, excluding rules of particular applicability. But more importantly, the Act’s sponsors published a “detailed explanation and a legislative history,”<sup>127</sup> and one sentence near the end of that explanation indicated a belief that particularized rules were different from other agency actions outside the Act’s definition of *rule*.<sup>128</sup> The latter category included, separately, licenses and exemptions.<sup>129</sup> Although it did not directly interpret the APA, this brief statement of Congressional intent is additional evidence that regulatory exemptions could be considered something other than rules or licenses under the APA. The only remaining category is simple adjudicatory orders.

#### CONCLUSION: IT IS THE AGENCY’S CHOICE?

Shortly after its passage, Justice Robert Jackson noted that the APA “contains many compromises and generalities and, no doubt, some ambiguities.”<sup>130</sup> Unfortunately, ever since the Act’s passage, the status of regulatory exemptions was one of those ambiguities.

As noted previously, the APA’s definition of an adjudicatory order is a residual one, covering agency action other than rulemaking.<sup>131</sup> Applying this definition, agency functions should therefore generally be considered rulemaking if they fall within that broad category and adjudication only if they are not rulemaking.<sup>132</sup> And regulatory exemptions do seem to fit the APA’s definition of *rules* when that definition’s somewhat nebulous

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122. *Indus. Broad. Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970).

123. *Turro v. FCC*, 859 F.2d 1498, 1500 (D.C. Cir. 1988).

124. *Sellers*, *supra* note 6, at 941 n.12.

125. *See* 5 U.S.C. §§ 801–808 (2006).

126. *Id.* § 804(3).

127. 142 CONG. REC. S3683 (daily ed. Apr. 18, 1996) (statement of Sen. Nickles).

128. *Id.* at S3687.

129. *Id.*

130. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40–41 (1950).

131. *See supra* notes 24 & 27 and accompanying text.

132. *See supra* note 50 and accompanying text.



particular applicability criterion is taken seriously<sup>133</sup> But even when that term is ignored, as Justice Scalia advised, exemptions may still be classified as rules when a significant number are issued so that they take on the spirit of rulemaking.<sup>134</sup>

On the other hand, Justice Hugo Black explained that

so long as the matter involved can be dealt with in a way satisfying the definition of either ‘rule making’ or ‘adjudication’ under the Administrative Procedure Act, that Act . . . should be read as conferring upon the [agency] the authority to decide, within its informed discretion, whether to proceed by rule making or adjudication.<sup>135</sup>

Although regulatory exemptions may be classified as rules, they can and have also been issued as adjudicatory orders. And in accordance with “bedrock administrative law,” agencies can exercise “informed discretion” in choosing whether to resolve matters through rulemaking or adjudication.<sup>136</sup> According to the Supreme Court, agencies are allowed to choose whether to engage in rulemaking or adjudication.<sup>137</sup>

Thus, agencies are not precluded from exercising informed discretion and choosing to issue particularized exemptions through rulemaking. But most agencies issue regulatory exemptions by orders issued through the informal adjudication process rather than as rules following the APA rulemaking process. These adjudications are not procedurally distinct from many other routine federal agency decisions.

This fact would not surprise most parents, who would not consider special decisions on their child’s bedtime to be any different from the other general supervisory decisions they make each day. But to the extent that agencies issue broad and numerous regulatory exemptions, or parents constantly make special exceptions to their children’s normal bedtime, they creep closer to effectively exempting the old rules and times out of existence and making new rules. Thus, federal agencies should make these de facto rule changes using the regular notice-and-comment rulemaking process.

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133. See *supra* note 25 and accompanying text.

134. See *supra* note 63 and accompanying text.

135. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 772 (1969) (Black, J., concurring).

136. *Nat’l Cable & Telcomms. Ass’n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

137. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292–94 (1974).

# FLIP THE COIN TO THE FED:

## A COMMENT ON THE DYSFUNCTIONAL RELATIONSHIP AMONG THE FEDERAL RESERVE SYSTEM, CONGRESS, AND THE UNITED STATES MINT

KEELEY MCCARTY\*

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Among the many people who made this Recent Development possible, the Author thanks her mother for nurturing her love of writing, and the *Administrative Law Review* for humoring her obsession with the coin-bill debate and facilitating great personal growth throughout the process—as a writer, as a leader, and as a concerned U.S. citizen.

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## INTRODUCTION

The dollar coin serves important markets and returns quite a sum of money to Congress each year, with potential for more.<sup>1</sup> Even with the dollar bill and coin in co-circulation, Congress earns a profit on each coin minted in the amount of the difference between the cost of production and the face value of the coin.<sup>2</sup> The Government Accountability Office (GAO) estimates that switching to the exclusive use of the dollar coin would save American taxpayers around \$184 million every year, primarily as a result of this cost-value difference.<sup>3</sup> Previously, GAO estimated the savings as high as \$522 million per year, attributable not only to seigniorage but also to the significantly longer lifespan of a coin.<sup>4</sup> An average coin stays in circulation for thirty years, while the dollar bill only lasts about forty months.<sup>5</sup> The Bureau of Engraving and Printing (BEP) uses approximately eight and a half tons of ink every day, and 95% of bills produced replace old bills taken out of circulation.<sup>6</sup>

Despite the undisputed benefits of the dollar coin, it has never achieved popular acceptance and continues to be seen as more of a novelty than

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1. See, e.g., 133 CONG. REC. 3705 (1987) (statement of Sen. Udall) (requesting to redesign the dollar coin in response to criticisms of the Susan B. Anthony (SBA) dollar coin, rather than giving up on the coin altogether).

2. Michael Zielinski, *One Billion and Counting: The Mint Keeps Pumping Out \$1 Coins, but Few Are Buying In*, WASH. POST, Aug. 20, 2010, at A21, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/19/AR2010081905459.html>. This difference, called seigniorage, from dollar coins amounted to \$318.7 million in the 2009 fiscal year. *Id.*

3. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-281, U.S. COINS: REPLACING THE \$1 NOTE WITH A \$1 COIN WOULD PROVIDE A FINANCIAL BENEFIT TO THE GOVERNMENT 9 (2011) [hereinafter GAO 2011 REPORT].

4. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-B-284994, FINANCIAL IMPACT OF ISSUING THE NEW \$1 COIN 2 (2000). The GAO calculates its savings by subtracting the net benefit of using the dollar bill, \$225.3 million, from the net benefit of using the dollar coin, \$747.5 million. *Id.*

5. GAO 2011 REPORT, *supra* note 3, at 13.

6. *Annual Production Figures*, U.S. BUREAU OF ENGRAVING AND PRINTING, <http://www.moneyfactory.gov/uscurrency/annualproductionfigures.html> (last visited Feb. 8, 2012). In 2010, the Bureau of Engraving and Printing (BEP) printed 1.856 billion one-dollar bills, down from 2.6368 billion in 2009. The height of production in recent history was in 2000, when the BEP churned out 5.1904 billion one-dollar bills. *Id.*

spendable legal tender.<sup>7</sup> The Federal Reserve Banks (Reserve Banks) held a surplus of nearly one billion dollar coins as of May 31, 2010.<sup>8</sup> That number grew to 1.2 billion by June 28, 2011,<sup>9</sup> and is expected to grow to two billion by 2016, not including the surplus of coins retained at United States Mint (Mint) facilities around the country.<sup>10</sup> Over the years, Congress has revamped the dollar coin several times in efforts to persuade the public of its merits. In response to complaints about the oversized Eisenhower dollar coin, Congress introduced the smaller and lighter Susan B. Anthony (SBA) dollar coin.<sup>11</sup> When the SBA dollar coin was rejected because of its confusing similarity to the quarter, Congress passed the \$1 Coin Act of 1997 (1997 Act), unveiling a distinctive golden Sacagawea dollar with unreeded edges.<sup>12</sup>

Most recently, Congress passed the Presidential \$1 Coin Act of 2005 (2005 Act) with the intent to address the continued unpopularity of the Sacagawea dollar.<sup>13</sup> In light of the recently successful Fifty State Commemorative Coin Program for quarter dollars, Congress extrapolated that a similar educational commemorative design program could ignite public interest in the dollar coin and boost demand.<sup>14</sup> It has not.<sup>15</sup> Despite additional provisions in the 2005 Act to promote awareness and reduce

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7. See *The State of U.S. Coins and Currency: Hearing Before the Subcomm. on Domestic Monetary Policy and Technology of the H. Comm. on Fin. Servs.*, 111th Cong. 10 (2010) [hereinafter *2010 Hearing: Roseman*] (testimony of Louise L. Roseman, Director, Division of Reserve Bank Operations and Payment Systems) (“Transactional demand for dollar coins has not increased materially since the start of the Presidential \$1 Coin Program,” and overall demand continues to come primarily from collectors).

8. *Id.*

9. Robert Benincasa & David Kestenbaum, *\$1 Billion that Nobody Wants*, NPR (June 28, 2011), <http://www.npr.org/2011/06/28/137394348/-1-billion-that-nobody-wants>.

10. *Id.*

11. *Dollar Coins: Eisenhower Dollar Coin (1971–1978) Auctions*, US COINS COLLECTOR [hereinafter *Eisenhower Dollar*], <http://uscoinscollector.com/auctions/eisenhower-dollar-1971-78> (last visited Feb. 12, 2012).

12. Richard R. Holley III, Note, *Dueling Dollars: The Story of Sacagawea’s Journey*, 5 N.C. BANKING INST. 579, 585–86 (2001). The Act required that the new coin maintain the weight and electromagnetic properties of the SBA dollar coin to allow for an easy transition in the vending marketplace. *Id.*

13. See Presidential \$1 Coin Act of 2005, Pub. L. No. 109-145, sec. 101, § 2, 119 Stat. 2664, 2664 (codified as amended at 31 U.S.C. § 5112 (2006)) (acknowledging that the dollar coin has not been widely sought-after).

14. *Id.* §§ 3, 4. Congress also cited a study by the Government Accountability Office (GAO) showing that many Americans who currently reject the dollar coin might actively seek it if such a design program were instituted. *Id.* § 5.

15. See *2010 Hearing: Roseman*, *supra* note 7, at 10 (stating that demand has not increased materially since the start of the program).

barriers to circulation,<sup>16</sup> the coins keep piling up. While there are temporary spikes in demand at the release of each new presidential design, even those spikes are progressively shrinking with each successive release.<sup>17</sup> In addition to the presidential dollars, the 2005 Act also requires that the Mint continue producing a proportionate number of Sacagawea dollar coins.<sup>18</sup> However, the 2005 Act does not require the Federal Reserve Banks to purchase these coins, and the Federal Reserve Banks have decided not to, citing lack of demand.<sup>19</sup> Without a release valve for the considerable number of coins it is required to produce, the Mint has been forced to experiment with unorthodox channels to the public, resulting in little relief and unforeseen negative externalities.<sup>20</sup>

This Recent Development examines the reasons underlying the failure of the 2005 Act to achieve its stated goal of improving dollar coin circulation. Part I provides an overview of how currency and coins circulate through commerce. It includes an explanation of how the Federal Reserve Banks, Mint, and the BEP work together and independently to move money into the economy. Part II discusses how the dollar bill acts as a roadblock to the acceptance of the dollar coin, highlighting the political strings tethering Congress to both the dollar bill and coin. It also focuses on the economic waste created by the 2005 Act's Native American coin production requirement. It looks back at how the Mint handled similar situations of oversupply in the past and applies those lessons to the current problem. In Part III, this Recent Development concludes that currency and coin production decisions should synergize and both be handled by the Federal Reserve Board. Part IV suggests that the dollar bill should be removed from circulation to enable the dollar coin's acceptance, and Part V discusses what that transition might look like.

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16. Presidential \$1 Coin Act, sec. 104, 31 U.S.C. § 5112.

17. 2010 Hearing: Roseman, *supra* note 7, at 113, Chart 6. Initial demand is expected to be particularly high for certain future presidential designs, however. *Id.* at 108.

18. See Presidential \$1 Coin Act, sec. 102, § (n)(1)(B)(ii) (requiring that one-third of \$1 coins produced be of the Sacagawea design). The requirement was later reduced to 20% by the Native American \$1 Coin Act. Native American \$1 Coin Act, Pub. L. No. 110-82, sec. 2, § (r)(5), 121 Stat. 777, 777, 779 (2007) (codified at 31 U.S.C. § 5101 (Supp. III 2009)).

19. 2010 Hearing: Roseman, *supra* note 7, at 10–11.

20. Zielinski, *supra* note 2, at A21; see Scott McCartney, *Miles for Nothing: How the Government Helped Frequent Fliers Make a Mint*, WALL ST. J., Dec. 7, 2009, at A1 (detailing the abuse of the direct-ship program by consumers purchasing the coins and immediately depositing them into depository institutions, circumventing the program's intent of increasing everyday use in commercial transactions).

## I. BACKGROUND

The U.S. dollar is unique as the only denomination of U.S. money that exists in both paper and coin form.<sup>21</sup> Although the dollar coin and dollar bill can be used interchangeably in commerce,<sup>22</sup> their paths from production to consumer are quite different. The United States' money is divided into two principle categories: currency and coin.<sup>23</sup> The BEP prints all forms of paper currency and the Mint is responsible for coins.<sup>24</sup> This division of responsibilities is rooted in American history. Shortly after drafting the Constitution, the U.S. government delegated the newly articulated congressional power to coin money to the Mint in 1792.<sup>25</sup> Initially, the Mint produced copper cents and silver and gold coins.<sup>26</sup> Coinage then had an intrinsic value—value based on its raw metal content—closer to the face value assigned by the government.<sup>27</sup> Due to the rising market value of gold and eventually silver, the metal composition of coins shifted over the years to greatly diminish the intrinsic value of coins in relation to the face value, at least for larger denominations.<sup>28</sup> Congress determines coin composition, design, and ratio of one design to another for coins of equal value.<sup>29</sup> Paper money did not exist until nearly seventy years after the establishment of the Mint, and Congress only officially recognized the BEP in 1874.<sup>30</sup> In the years between the first paper money and the

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21. Holley, *supra* note 12, at 579.

22. See BLACK'S LAW DICTIONARY 979 (9th ed. 2009) (defining *legal tender* as the currency or coins in a country that act as units of exchange).

23. See generally HARRY D. HUTCHINSON, MONEY, BANKING, AND THE UNITED STATES ECONOMY (4th ed. 1980).

24. See *Bureaus*, U.S. DEP'T OF THE TREASURY, <http://www.treasury.gov/about/organizational-structure/bureaus> (last visited Feb. 11, 2011) (providing a list of bureaus and their descriptions, briefly, within the Treasury Department, and linking to their individual websites). In addition to currency, the BEP also printed postage stamps until 2006. Bureau of Engraving & Printing, DEP'T OF THE TREASURY, CHIEF FINANCIAL OFFICER PERFORMANCE AND ACCOUNTABILITY REPORT 26 (2006) [hereinafter 2006 BEP CFO REP.].

25. See *History of the Mint*, U.S. MINT, [http://www.usmint.gov/about\\_the\\_mint/historianscorner/?action=history](http://www.usmint.gov/about_the_mint/historianscorner/?action=history) (last visited Feb. 11, 2012) (identifying the Mint's constitutional link and giving the history of its founding); see also U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . to Coin Money.").

26. *History of the Mint*, *supra* note 25.

27. Cf. HUTCHINSON, *supra* note 23, at 19 (noting that coins' metal value has been far below their face value for many years).

28. See *id.* ("U.S. coins . . . are now virtually silverless as a result of the rising market value of silver.").

29. 31 U.S.C. § 5132 (2006).

30. The first paper currency, Demand Notes printed by the Treasury Department in 1861, actually functioned as Government IOUs for coins. HISTORICAL RES. CTR., BUREAU

creation of the BEP, Congress had currency notes produced by private entities.<sup>31</sup>

#### A. *The Federal Reserve System and Its Agency Interactions*

Paper money as we know it today, Federal Reserve Notes, was first authorized by the Federal Reserve Act of 1913.<sup>32</sup> Congress created the Federal Reserve System, comprised of five governmental and private components, to function as the nation's central bank.<sup>33</sup> The Federal Reserve System currently functions to (i) conduct the nation's monetary policy by influencing the monetary and credit conditions in the economy; (ii) supervise and regulate banking institutions to ensure the safety and soundness of the nation's banking and financial system and to protect the credit rights of consumers; (iii) maintain the stability of the financial system and contain systematic risk that may arise in financial markets; and (iv) provide financial services to depository institutions, the U.S. government, and foreign officials, including playing a major role in the nation's payment system.<sup>34</sup> The Board of Governors of the Federal Reserve (Board) is the governing body and an independent government agency.<sup>35</sup> Its powers and responsibilities include, among others, supervising the issue and retirement of Federal Reserve Notes through the Secretary of the Treasury.<sup>36</sup> On the Federal Reserve's books, these notes are calculated as a liability collateralized by the Federal Reserve's assets.<sup>37</sup> The U.S. government also backs the notes.<sup>38</sup>

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OF ENGRAVING AND PRINTING, BEP HISTORY 2 (2004), [http://www.moneyfactory.gov/images/BEP\\_History\\_Sec508\\_web.pdf](http://www.moneyfactory.gov/images/BEP_History_Sec508_web.pdf).

31. *Id.* at 3. This currency was called the U.S. Note and was issued by the Department of the Treasury directly. See *History of the Federal Reserve*, FED. RESERVE EDUC., <http://www.federalreserveeducation.org/about-the-fed/history/> (last visited Feb. 12, 2012) (giving the history of U.S. notes).

32. BEP HISTORY, *supra* note 31, at 3; *History of the Federal Reserve*, *supra* note 31.

33. The five components are the Board of Governors of the Federal Reserve System, the Federal Open Market Committee, the Federal Advisory Council, twelve Federal Reserve Banks, and about 6,000 commercial bank members. Sharon A. Sweeney & Jane Anne Schmoker, *Federal Reserve Bank and the Payment System: Regulation J, Regulation CC, Operating Circulars, and Other Deposit Account Issues*, 51 CONSUMER FIN. L. Q. REP. 204, 204 (1997).

34. U.S. FED. RESERVE SYS., THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS 1 (2005), [http://www.federalreserve.gov/pf/pdf/pf\\_complete.pdf](http://www.federalreserve.gov/pf/pdf/pf_complete.pdf).

35. *Id.* at 3.

36. 12 U.S.C. § 248(d) (2006).

37. Federal Reserve Notes comprise 99% of circulating U.S. paper currency and are legally issued by the Reserve Banks, not the Treasury Department. *Currency and Coin Services*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., [www.federalreserve.gov/paymentsystems/coin\\_about.htm](http://www.federalreserve.gov/paymentsystems/coin_about.htm) (last visited Feb. 12, 2011).

38. *Id.* Federal Reserve Notes used to be backed by gold or silver, meaning that a note-

The BEP functions almost like a wholesale printer for the Federal Reserve.<sup>39</sup> Economists at the Federal Reserve determine how much paper currency should be produced to meet public demand and replace old or damaged currency in circulation, and the Federal Reserve pays the costs of printing and shipping the bills.<sup>40</sup> The BEP prints only enough bills to fill yearly orders placed by the Federal Reserve Bank, thus preventing waste.<sup>41</sup>

In contrast, the Mint determines production volume for coins itself, with some guidance from demand forecasts and orders by the Federal Reserve.<sup>42</sup> While these forecasts and orders influence production, the converse is not true. In other words, the Federal Reserve is under no obligation to buy what the Mint is selling. There is an exception for some coins for which legislation mandates that the Reserve Banks purchase enough coins to meet public demand.<sup>43</sup> Not only is the supply and demand system different, but so are the costs. The Federal Reserve purchases coins from the Mint at face value, generating an immediate profit for the Mint and, ultimately, the government.<sup>44</sup> Because they have been purchased from the Mint, coins show up as assets on the Federal Reserve accounting books.<sup>45</sup> The Mint is responsible for delivering the coins to the Reserve Banks and the Reserve Banks distribute them to other depository institutions around the country.<sup>46</sup> To this end, the Reserve Banks utilize armored carriers and coin terminals.<sup>47</sup>

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holder could take one to the Treasury and receive the value in whichever metal it was secured by. This system ended in 1964. HUTCHINSON, *supra* note 23, at 4 & n.1.

39. See *Currency and Coin Services*, *supra* note 37 (limiting what the Federal Reserve pays the BEP for its service to the costs of printing and shipping, not the face value of the currency).

40. *Id.*

41. See *id.* (outlining briefly the order and supply process). The Treasury Department issues less than 3% of the nation's money, which consists mostly of coins. HUTCHINSON, *supra* note 23, at 17–19.

42. *Currency and Coin Services*, *supra* note 37.

43. See, e.g., Presidential \$1 Coin Act of 2005, sec. 104, § (p)(3), 31 U.S.C. § 5112 (2006).

44. United States Mint Public Enterprise Fund, 31 U.S.C. § 5136 (2006); see *Frequently Asked Questions*, U.S. MINT, [https://answers.usmint.gov/app/answers/detail/a\\_id/10](https://answers.usmint.gov/app/answers/detail/a_id/10) (last visited Feb. 12, 2011) (explaining that net income comes from sales of circulating coins and numismatic items, and helps reduce the government's deficit).

45. *Currency and Coin Services*, *supra* note 37.

46. *Id.* Depository institutions include banks, savings and loans, and credit unions. The District Reserve Banks serve 9,500 of these institutions around the United States. BD. OF GOVERNORS OF THE FED. RESERVE SYS., ANNUAL REPORT TO THE CONGRESS ON THE PRESIDENTIAL \$1 COIN PROGRAM 5 (2007) [hereinafter 2007 FRB REPORT], <http://www.federalreserve.gov/boarddocs/RptCongress/dollarcoin/dollarcoin.pdf>.

47. *Currency and Coin Services*, *supra* note 37.



### B. Coins and Currency to Commerce

There is no statutory requirement that coins enter commerce through the Federal Reserve System.<sup>48</sup> The Mint makes most coins available directly to the public at a markup.<sup>49</sup> In recent years, the Mint has found other channels to commerce, primarily for the dollar coin, as an extra boost to achieve regular circulation.<sup>50</sup> These channels have taken shape as an online order site, partnerships with retail chains, and even ATM dispensers, to name a few.<sup>51</sup> The creation of some of these channels met with objections by banks and smaller retailers who felt slighted or uneasy about such untraditional distribution methods.<sup>52</sup>

Once coins and currency reach everyday commerce they can be spent, saved, or deposited. Saving can become an obstacle to circulation, which is something the Federal Reserve and the Mint must take into account when deciding production volume.<sup>53</sup> Often when notes and coins of equal face value are co-circulated the public will hoard the coins, which are inherently more valuable.<sup>54</sup> Individual depository institutions disseminate deposited currency and coins to other customers as needed, and when deposits fill their supply they send the surplus back to the Reserve Banks.<sup>55</sup> Older coins

48. See Philip N. Diehl, *Why Don't the Banks Pass the Buck?*, WASH. POST, Sept. 2, 2000, at A25 (noting that banks do not have exclusive rights to new coins).

49. See *How Are United States Mint's Two-Roll Coin Sets Priced?*, U.S. MINT, [https://answers.usmint.gov/app/answers/detail/a\\_id/204](https://answers.usmint.gov/app/answers/detail/a_id/204) (last visited Feb. 12, 2011) (itemizing the price of coin rolls to include the face value of coins, packaging, transportation, storage, and other administrative costs). Dollar coins were excepted from this mark-up if ordered through the Circulating \$1 Coin Direct Ship Program, which ended on November 15, 2011. Consumers could get up to four boxes of 250 coins each every ten days, free of shipping fees. The Mint ended the free program to address fiscal concerns. See *U.S. Mint Online Product Catalog*, U.S. MINT, <http://www.usmint.gov> (follow "Shop Online" hyperlink; then follow "\$1 Coin Direct Ship" hyperlink; then follow "Circulating \$1 Coin Direct Ship Rolls—2011 Native American Dollar(N05)" hyperlink) (last visited Feb. 12, 2011) (listing the available products and order limit).

50. See Holley, *supra* note 12, at 591 (describing the Mint's partnerships with large nationwide retail institutions as a strategy to supplement normal bank distribution).

51. *Id.* at 592–600.

52. See *id.* at 597–98, 603–04 (including bankers, the National Federation of Independent Business, the National Grocers Association, and the Community Bankers Association among the groups bothered by the Mint's alternative distribution methods).

53. See *id.* at 602 (citing hoarding as the primary reason that few Sacagawea dollar coins could be found in circulation, despite the incredible number produced).

54. *Id.* Gresham's Law explains this tendency to hoard based on differences in intrinsic value of co-circulating money of equal face value. See *id.* at 602 nn.129–30.

55. See *The Structure of the Federal Reserve System*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., <http://www.federalreserve.gov/pubs/frseries/frseri3.htm> (last updated April 17, 2009) (explaining that during seasons of decreased cash demand by the public, institutions deposit the excess cash in their accounts with Reserve Banks).

and bills that were returned to the Reserve Banks are used to fill the next outgoing shipments unless determined unfit for circulation.<sup>56</sup> Careful ordering is required to prevent shortages or surpluses of coins; the Federal Reserve is still honing this skill for most coins.<sup>57</sup> After disposing of unfit coins and currency, the Federal Reserve orders replacements and any additional coins and currency necessary from the Mint.<sup>58</sup> Commemorative coins create difficulty for the Reserve Banks that paper currency does not. Note that in everyday transactions, depository institutions have no preference for a bill from one year over a bill from another year, or one coin design over another.<sup>59</sup> However, much of the demand banks see for commemorative coins, particularly dollar coins, comes from collectors, to whom the particular design is paramount.<sup>60</sup> Due to such particularized demand, the Federal Reserve uses special inventory and distribution procedures for commemorative coins.<sup>61</sup>

## II. THE PRESIDENTIAL \$1 COIN ACT OF 2005

The Presidential \$1 Coin Act of 2005 was passed to increase circulation of dollar coins without removing the dollar bill from co-circulation.<sup>62</sup> To this end, Congress included an entire section of the Bill entitled “Removal of Barriers to Circulation.”<sup>63</sup> The Section is divided into subsections, “Acceptance by Agencies and Instrumentalities,” “Publicity,” and “Coordination,” each of which requires agencies and federally funded entities to take steps to increase public awareness and acceptance of the dollar coin.<sup>64</sup> The extensive nature of these provisions is likely a result of

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56. *See id.* (noting that the Federal Reserve Banks sort and count, then remove unfit currency and coin from circulation).

57. *See 2010 Hearing: Roseman, supra* note 7, at 105–06 (crediting improved management and a 31% decrease in orders to the Mint with the lowest inventory levels since 2000). On May 31, 2010, the Federal Reserve vaults held 1.5 billion pennies, 343 million nickels, and 546 million dimes. *Id.* at 106 & n.11.

58. *The Structure of the Federal Reserve System, supra* note 55.

59. *See 2007 FRB REPORT, supra* note 46, at 6 (distinguishing typical transactional demand for coins of any design from collector demand of particular commemorative coin designs).

60. *Id.*

61. *See id.* (identifying special introductory periods in which the Federal Reserve suspends its normal distribution practices and only ships out the new design as one of the mechanisms for handling the challenges presented by commemorative coins).

62. *See Presidential \$1 Coin Act of 2005, Pub. L. No. 109-145, sec. 105, § 1, 119 Stat. 2664, 2671* (codified as amended at 31 U.S.C. § 5112 (2006)) (delineating Congress’s intent for the legislation would increase use of dollar coins and circulation of the Sacagawea dollars).

63. *Id.* sec. 104 (codified as amended at 31 U.S.C. § 5112(p)).

64. The statute includes requirements for the acceptance of the coin by all agencies and

the many prior failures of the dollar coin to succeed in meaningful circulation.<sup>65</sup>

The dollar coin has a long history of struggles and failures. Five years after the Coinage Act of 1965 eliminated silver from U.S. circulating coins, Congress authorized the minting of the first modern dollar coin.<sup>66</sup> The Eisenhower Dollar coin was meant to honor the recently deceased ex-President, and the Mint continued issuance from 1971 to 1978.<sup>67</sup> The coin was heavier than any previous dollar coin and was unpopular in everyday circulation as a result.<sup>68</sup> The dollar bill remained the public's first choice for transactions.<sup>69</sup>

The Mint attempted to address the size and weight concerns with the SBA dollar coin, first issued in 1979.<sup>70</sup> Designers reduced the coin to about the size of a quarter, with reeded edges also like the quarter. This spurred complaints from consumers who felt the SBA dollar coin was too similar to the quarter and therefore easily confused.<sup>71</sup> The Federal Reserve and Mint overshot demand expectations and initially had significant backed stock of the coin.<sup>72</sup> Regardless of its design flaws, the government recognized early that the primary roadblock to success of the dollar coin was the continued co-circulation of the dollar bill.<sup>73</sup> Countries like Canada proved that

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instrumentalities of the government, a publicity campaign by the Director of the Mint to ensure the public knows about the coin, and coordination by the Federal Reserve to guarantee an adequate supply of the Presidential dollar coins to meet public demand. *Id.* § (p)(1)–(3).

65. *See generally id.* sec. 101 (finding that the Sacagawea dollar has not achieved popularity, but that people might be more receptive to a commemorative Presidential design).

66. *See Eisenhower Dollar*, *supra* note 11 (naming the Eisenhower Dollar as the first dollar coin minted after the Coinage Act of 1965). It was composed of 75% copper and 25% nickel. *Id.*

67. *See id.* (describing the Eisenhower dollar as honoring both President Dwight D. Eisenhower, who died in 1969, and the first landing on the moon by Apollo 11).

68. *See id.* (noting that the 22.68 gram weight of the coin makes it not “as friendly to be carried around . . . in your pant wallet”). The Eisenhower Dollar’s size and weight have made it one of the most popular coins among collectors, on the other hand. *Id.*

69. *Id.*

70. *See id.* (noting that after nine years, the unpopular Eisenhower dollar coin was replaced by the smaller, but equally unpopular dollar coin honoring Susan B. Anthony).

71. *See A Dollar Coin Could Save Millions: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 104th Cong. 3 (1995) [hereinafter *1995 Hearing: Stevens*] (statement of L. Nye Stevens, Director, Federal Management and Workforce Issues General Government Division) (citing close similarity to the quarter, the continued co-circulation of the dollar bill, and a lack of effective promotion efforts as the causes for failure of the SBA dollar coin).

72. Holley, *supra* note 12, at 584.

73. *See 1995 Hearing: Stevens*, *supra* note 71, at 3 (including co-circulation of the dollar bill as one of the three primary impediments to success of the SBA coin). Looking at other

although initially difficult, a quick flip of coin for bill was an effective method of transition.<sup>74</sup> However, even with clear sight of the problem and solution, the Treasury hesitated to push Congress for the change due to potential backlash from the public.<sup>75</sup> Instead, Congress kept the SBA dollar coin until 2000, when it passed new legislation attempting to address the superficial problems with the SBA dollar coin, while ignoring the most important factor in its failure: the dollar bill's co-circulation.<sup>76</sup>

To be fair, the SBA dollar coin has been and continues to be embraced by a small subset of the population: the vending industry and mass transit systems.<sup>77</sup> The vending industry has spent hundreds of millions in the last few decades to equip machines with apparatus to accept bills.<sup>78</sup> Even billions in investment cannot help the simple problem of a crumpled one-dollar bill. Vending machine operators estimate up to 30% in lost profits each year due to crumpled bills.<sup>79</sup> This loss could be nearly eliminated by a switch to dollar coins, which move through vending machines more easily and take up less space inside, allowing for fewer collections.<sup>80</sup> Perhaps it

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countries who had successfully transitioned to dollar coin equivalents, the GAO identified five essential elements for a successful conversion in the United States: (1) elimination of the dollar bill; (2) a reasonable transition period; (3) a well-designed and readily distinguishable dollar coin; (4) adequate public awareness; and (5) continuing administration and congressional support to handle a potentially negative reaction from the public. *Id.* at 4.

74. Five years after Canada's switch, public disapproval of the coin was only 18%. *Id.* at 5.

75. *See id.* at 4 (stating that Treasury officials from the past two administrations expressed reluctance to support the dollar coin because of a belief that Congress would eventually cave in to negative pressure from the public that would result from elimination of the dollar bill).

76. *See* Holley, *supra* note 12, at 585 (recognizing Sacagawea's design in 2000 was in deliberate response to the complaints about the SBA dollar coin's physical characteristics).

77. *See* Lorene Yue, *Furor Tamishes Dollar Coin Debut*, DET. FREE PRESS, Mar. 13, 2000, at 8F, *available at* 2000 WLNR 8100529 (statement of Philip Diehl attributing the eventual depletion of SBA dollar coin surplus to the increase in demand generated by the vending industry). The demand shot from fifteen million to sixty million sometime in the mid 1990s. *Id.*

78. *See* Paul Huggins, *Goodbye, Bill? Government Still Hopes \$1 Coins Will Catch On*, DECATUR DAILY (Decatur, Ala.), Nov. 11, 2008 (interviewing a vending company owner who said that switching to the dollar coin might render bill-accepting apparatus, which the industry has spent hundreds of millions installing over the last thirty years, obsolete).

79. This estimation is based on the statistics showing that the average vending machine has a 99% chance of accepting a coin, but only a 70% chance of accepting a bill, creating a potential 30% loss. *Id.*

80. Richard Miniter, Op-Ed, *Trust Your Pocket: Don't Fall for This Campaign for Change*, ADVOCATE (Newark, Ohio), Dec. 10, 2008.

was the recognition of this important market that encouraged Congress to give the dollar coin another shot, or perhaps there were other interests at play.<sup>81</sup>

#### A. *The Role of Congress in the Dollar Debate*

Certain politicians have been fervently pushing for and against a complete transition to the dollar coin since the 1990s.<sup>82</sup> The issue has heated up in recent months in the Joint Committee on Deficit Reduction, a special supercommittee formed in August of 2011 to address the politically divisive national deficit.<sup>83</sup> Congressional Representatives looking to reduce the \$1.5 trillion deficit have zeroed in on the dollar coin as a possible chunk of that change.<sup>84</sup> Over the years, representatives from Massachusetts have played key roles not only in keeping the dollar bill in circulation, but also in keeping the production process as close to home as possible.<sup>85</sup> Crane & Co., a paper manufacturer in Dalton, Massachusetts, has been supplying the Treasury with its currency paper since 1879.<sup>86</sup> While the Treasury

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81. See Presidential \$1 Coin Act of 2005, sec. 101, § 1, 31 U.S.C. § 5112 (2006) (“There are sectors of the United States economy, including public transportation, parking meters, vending machines, and low-dollar value transactions, in which the use of a \$1 coin is both useful and desirable for keeping costs and prices down.”). But see Zielinski, *supra* note 2, at A21 (discussing the profits the Mint generates, which go back to Congress for appropriation at the end of each fiscal year, from producing unnecessary dollar coins).

82. See, e.g., 137 CONG. REC. 32,982 (1991) (submission of an article from *The Columbia Dispatch* outlining the benefits of the dollar coin over the dollar bill by Rep. Kolbe to show that Americans support the dollar coin when given the facts). But see, e.g., 141 CONG. REC. 5891 (1995) (statement of Rep. Davis) (arguing that the dollar coin would be a burden to banks and businesses and that it is unwanted by the American people).

83. Gregory Korte, *Replacing \$1 Bill with Coin Could Save \$5.6 Billion*, USA TODAY (Oct. 25, 2011, 11:56 AM), <http://www.usatoday.com/news/washington/story/2011-10-24/dollar-enters-deficit-debate/50898164/1>.

84. *Id.*

85. See, e.g., 136 CONG. REC. 9640 (1990) (address by Representative Silvio O. Conte of Massachusetts urging the House to beware of a bill proposing a switch to the dollar coin, calling the dollar bill a “symbol of prosperity, the image of our country’s greatness, the emblem of American economic might,” and the dollar coin, “a giant penny”); see also 31 U.S.C. § 5114 note (2006) (requiring that all distinctive currency paper be manufactured in the United States and by companies owned by American citizens). The language in 31 U.S.C. § 5114 note, enacted in 1987, is often called the Conte Amendment, referencing Rep. Conte of Massachusetts. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/GGD-98-181, CURRENCY PAPER PROCUREMENT: MEANINGFUL COMPETITION UNLIKELY UNDER CURRENT CONDITIONS 5 (1998) [hereinafter PAPER PROCUREMENT] (acknowledging the limitation on paper procurement placed on the Treasury Secretary by 31 U.S.C. § 5114).

86. U.S. currency has the longest lifespan of any world currency. See *Currency & Security Papers*, CRANE & CO., <http://www.crane.com/about-us/currency-paper?RPL> (last visited Jan. 26, 2012) (giving the facts about Crane & Co.’s history producing currency paper for

Secretary has tried to encourage competition from other paper manufacturers, certain legislative limits on procurement, some of which were driven by Massachusetts Representatives, have made other companies wary of entering the market.<sup>87</sup> One-dollar bills comprise nearly half of all paper currency printed by the BEP each year,<sup>88</sup> which means that a similar proportion of the paper supplied by Crane & Co. is used for one-dollar bills. Crane & Co. estimates that the death of the dollar bill would mean the loss of 350 jobs for the company.<sup>89</sup> Crane & Co.'s government contract awards for paper in 2010 alone totaled over \$108 million.<sup>90</sup> The company continues to fight to keep its hold on the market by closely monitoring government requests for proposals.<sup>91</sup>

There are also staunch supporters of the dollar coin, including politicians and private trade and interest groups. Former Representative Jim Kolbe of Arizona played a large role in the 1990s in pushing for the elimination of the dollar bill and adoption of the dollar coin.<sup>92</sup> He now serves as chairman of the Dollar Coin Alliance, comprised mostly of vending and mass transit industry members, which also actively participates in the legislative process.<sup>93</sup> With all the push and pull, Congress has gotten caught up in the past with politics and lost sight of the goal of successful coinage and currency.<sup>94</sup> Recognizing potential political difficulties but also the

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the U.S. Treasury).

87. See PAPER PROCUREMENT, *supra* note 85, at 22 (naming the four-year contract limit and domestic manufacturing requirement as reasons given by other paper manufacturers for not competing for BEP paper contracts).

88. In 2009, the BEP printed 2,636,800,000 one-dollar bills, or 42.26% of overall production of 6,240,000,000 bills of all denominations. *Annual Production Figures*, *supra* note 6.

89. Janie Lorber, *Super Committee Members Square Off on Bills vs. Coins*, ROLL CALL (Sept. 27, 2011, 6:50 p.m.), [http://www.rollcall.com/news/super\\_committee\\_members\\_square\\_off\\_on\\_bills\\_vs\\_coins-209038-1.html](http://www.rollcall.com/news/super_committee_members_square_off_on_bills_vs_coins-209038-1.html).

90. See *Prime Award Spending Data*, USASPENDING.GOV, <http://usaspending.gov/search?query=&searchtype=&formFields=eyJ3ZWNpcGllbnROYWl1TGhlc2UiOlsiQ3JhbmUgQU1QLVJFUC1BTVAQ28uICBjbml119> (last visited Feb. 12, 2012) (calculating the total dollars awarded at \$108,803,330 for 124 individual contracts). Crane & Co. earned over \$176 million in 2008 for paper awards. See *id.* (listing the total award for 87 contracts at \$176,374,604).

91. *E.g.*, Crane & Co., Inc., B-297398, 2005 WL 3682359 (Comp. Gen. Jan. 18, 2006).

92. He was unsuccessful after nearly a decade of efforts. Greg Hassell, *Sacagawea Guides Americans Back to Dollar Coin*, HOUS. CHRON., Mar. 26, 2000, at 1D. Kolbe admits that his initial advocacy primarily supported mining interests in Arizona. Korte, *supra* note 83.

93. See Korte, *supra* note 83. The Dollar Coin Alliance was formerly known as the Dollar Coin Coalition. See Hassell, *supra* note 92 (including the vending machine industry, mass transit authorities, and mining interests as Dollar Coin Coalition members who backed the efforts by Representative Jim Kolbe in the dollar coin-dollar bill debate).

94. See Hassell, *supra* note 92 (quoting Philip Diehl, then-Director of the Mint, revealing that the SBA dollar coin had been tangled in political debate over feminism and the Equal

potential to profit from a successful dollar coin, Congress passed the power to design a new dollar coin to the Treasury in the 1997 Act, a dramatic change from the past.<sup>95</sup> That power remains with the Mint today.<sup>96</sup> Delegating the design responsibility allowed the legislation to pass in a matter of months.<sup>97</sup>

This advocacy continues in the new supercommittee.<sup>98</sup> In September, congressional Representatives introduced bills to both kill the dollar bill and save it.<sup>99</sup> Republican Representatives David Schweikert of Arizona and Jeb Hensarling of Texas back the proposal to phase out the dollar bill.<sup>100</sup> Democratic Representative John Kerry and Republican Representative Scott Brown, both of Massachusetts, introduced a bill to end production of the dollar coin.<sup>101</sup>

### B. *The Modern Golden Dollar Coin*

The Mint unveiled the new Sacagawea dollar coin in 2000—about the same size as the SBA dollar coin, but with a golden finish, unreeded edges, and a depiction of the iconic Native American, Sacagawea, holding her baby on the obverse face.<sup>102</sup> With the same electromagnetic properties and weight as the SBA dollar coin the Sacagawea dollar coin did not present an adaptation issue for vending machine operators.<sup>103</sup> The biggest problem at the time of release was that banks did not want the dollar coin.<sup>104</sup> The

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Rights Amendment during the 1970s, causing Congress to lose sight of the goal of successful coinage).

95. *See id.* (characterizing the new dollar coin law as written broadly and radically leaving the design up to the Treasury and the Mint).

96. *See* 31 U.S.C. § 5112(d)(1) (2006) (“The Secretary of the Treasury, in consultation with the Congress, shall select appropriate designs for the obverse and reverse sides of the dollar coin.”).

97. *See* Hassell, *supra* note 92 (contrasting the near decade it took to get Congress on board to redesign the SBA coin with the few months it took for the Dollar Coin Act of 1997 to pass). The biggest boost in speed might have come from the potential profit Congress would make from the seigniorage. *See id.* (attributing the fast-tracked legislative process to the lure of easy money for Congress).

98. *See* Korte, *supra* note 83.

99. Lorber, *supra* note 89.

100. *Id.*

101. *Id.*

102. *See* Holley, *supra* note 12, at 585–89 (describing the visual appearance of the Sacagawea coin); *see also* *Coin Image Detail Sacagawea Golden Dollar—2000*, U.S. MINT, <http://www.usmint.gov/historianscorner/?action=coinDetail&id=29346> (last visited Feb. 12, 2012) (depicting a photo of the obverse of the Sacagawea dollar coin).

103. Holley, *supra* note 12, at 585–86.

104. *See id.* at 589–90 (noting resistance by both the banking and retail sectors to accept the new Sacagawea dollar coin).

dollar bill was still in circulation and, after the unpopularity of the SBA dollar coin, most banks did not foresee much demand for the golden dollars.<sup>105</sup> As a result, the Federal Reserve placed very minimal orders.<sup>106</sup> From a circulation standpoint, this impeded the success of the Sacagawea dollar from the outset. The Mint would have preferred not just an average number of coins put into circulation, but an oversaturation to overcome the initial hoarding instinct of people who had never seen such a golden coin.<sup>107</sup> The idea would have been to show people that the dollar coin was not just a commemorative collector's item but also money to be spent freely.

Without the traditional distribution pathways, the Mint initiated several programs designed to utilize unconventional channels to commerce. The 1997 Act authorized the Mint to run an advertising and awareness campaign to promote the new coin.<sup>108</sup> The Mint spent \$40 million on such efforts.<sup>109</sup> This involved, among other measures, experimental partnerships with Wal-Mart, General Mills, and several smaller banks willing to take a risk.<sup>110</sup> The surprising outcome was that public demand far exceeded the banks' expectations. By the time banks realized how much people really wanted the coin, it was a slow scramble to place orders with the Federal Reserve for their piece of the action. The Mint offered a direct-ship program to banks to circumvent the sluggish Federal Reserve process, shipping the banks free orders within five to ten business days. This program was minimally utilized and the supply eventually overtook the demand again, creating a constant backed inventory of dollar coins at Federal Reserve Banks.<sup>111</sup>

When the Sacagawea dollar coin stopped moving, Congress delivered another shot of life into the dollar coin with the Presidential \$1 Coin Act of

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105. *Id.* at 589 & n.56.

106. *Id.* at 589.

107. *See id.* (describing the challenge as changing the way the American public viewed the dollar coin from a collectible to legal tender).

108. United States \$1 Coin Act of 1997, Pub. L. No. 105-124, sec. 4, § (f)(1), 111 Stat. 2534, 2537.

109. *See* Holley, *supra* note 12, at 590 (citing a statement by then-Director of the Mint, John P. Mitchell).

110. *See id.* at 592-601 (explaining, in depth, the various efforts made by the Mint to popularize and circulate the Sacagawea dollar coin).

111. *Id.* In June, 2006, the Federal Reserve Banks and Mint held enough dollar coins to meet transactional demand for three and one-half years. The Federal Reserve Banks had approximately ninety-four million dollar coins, and the Mint had 115 million Sacagawea coins alone in inventory. *Coin and Currency Issues Facing Congress: Can We Still Afford Money?: Hearing Before the Subcomm. on Domestic and Int'l Monetary Policy, Trade, and Tech. of the H. Comm. on Fin. Servs.*, 109th Cong. 11-13 (2006) (testimony of Louise L. Roseman, Director, Division of Reserve Bank Operations and Payment Systems).



2005. Satisfied with the physical properties of the coin, the legislation focused on creating an interesting, educational coin-face design, increasing publicity without too much cost to the taxpayers and opening more markets to acceptance of the dollar coin.<sup>112</sup> Modeled after the successful Fifty State Quarters Program, the presidential dollar was to feature four deceased presidents on the coin's obverse each year.<sup>113</sup> This time the legislation was a bit more conservative in its advertising authorization, calling only for the Mint's "publicity" of the new coin.<sup>114</sup> The 2005 Act also mandated the concurrent minting of the former Sacagawea dollar coin, largely in response to objections by interest groups in Congress.<sup>115</sup> While the 2005 Act requires that the Federal Reserve purchase enough presidential dollar coins to meet public demand, it does not require that the Federal Reserve purchase the Sacagawea dollars.<sup>116</sup> With a majority of demand for the presidential dollar coins seeming to come from coin collectors—and a plentiful surplus of older Sacagawea dollar coins in its vaults—the Federal Reserve has openly opted not to purchase the new Sacagawea coins.<sup>117</sup> In fact, the Federal Reserve Board has expressed concern over the unwanted

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112. See Presidential \$1 Coin Act of 2005, Pub. L. No. 109-145, sec. 104, § (p), 119 Stat. 2664, 2669 (codified as amended at 31 U.S.C. § 5112 (2006)) (attempting to remove various barriers to circulation).

113. See *id.* sec. 101, §§ (3)–(4) (acknowledging the success of the Fifty State Commemorative Coin Program both as an educational tool and a catalyst for increased quarter-dollar demand); *id.* sec. 102, §§ (n)(1)–(4) (detailing the requirements for the Presidential dollar coins).

114. See *id.* sec. 104, § (p)(2) (framing the promotion of the new coin as publicity, not expressly advertising, but including cooperation with the media as one aspect of publicity). However, the Mint spent about \$12 million just on advertising targeted at environmentally conscious consumers. See Barbara Hagenbaugh, *U.S. Mint Tries to Get Consumers to Use Dollar Coins*, USA TODAY (Oct. 20, 2008, 11:58 AM), [http://www.usatoday.com/money/advertising/2008-10-19-dollar-coins-mint-ads\\_N.htm](http://www.usatoday.com/money/advertising/2008-10-19-dollar-coins-mint-ads_N.htm) (calling the pilot program an effort to convince consumers that dollar coins are greener than dollar bills).

115. See Presidential \$1 Coin Act, sec. 102, § (n)(1)(B)(ii) (requiring that Sacagawea dollars constitute one-third of all dollar coins minted under the Act). Cf. *id.* sec. 101, § 7 ("Sacagawea, as currently represented on the new \$1 coin, is an important symbol of American history."). The Native American \$1 Coin Act of 2007 changed the production requirement for Sacagawea and future Native American dollar coins to 20% of dollar coin production. Native American \$1 Coin Act of 2007, Pub. L. No. 110-82, sec. 2, § (r)(5), 121 Stat. 777, 779 (to be codified as 31 U.S.C. 5101).

116. See Native American \$1 Coin Act, sec. 104, § (p)(3)(D) (mandating the Federal Reserve System to ensure adequate supply of Presidential dollar coins and First Spouse bullion coins, also included under the Act, in unmixed quantities, to meet initial public demand).

117. See 2010 Hearing: Roseman, *supra* note 7, at 10 (comparing the demand for dollar notes to the demand for dollar coins).

Sacagawea coins and advised Congress to eliminate the production requirement, to little avail.<sup>118</sup>

### III. THE FEDERAL RESERVE AND COINAGE RESPONSIBILITIES

The Federal Reserve should absorb responsibilities for determining the production volume of dollar coins. The dollar coin dilemma is the clearest evidence of the disconnect between the Federal Reserve System, Congress, and the Mint. While the Federal Reserve is busy determining broad monetary policy and avoiding major crises, and Congress is pulled from both sides by interest groups demanding opposite results, the Mint is left to take what it can get from both. When required by statute to mint coins that the Federal Reserve does not want, the Mint is either stuck stockpiling coins it just wasted time and resources making or forced to find alternate paths to commerce at its own expense. At least in the case of the dollar coin, Congress is effectively setting the Mint up for failure while possibly motivated by the lure of easy seigniorage revenue.

#### A. *Centralization for Efficiency and Better Choices*

The authority to decide whether the paper dollar or dollar coin is better for the United States, or if both should continue to co-circulate, should be centralized. Although Congress holds the Constitutional power to coin money, it long ago delegated that authority to the Mint. With the development of paper currency, the BEP, and the Federal Reserve System, responsibilities for the nation's monetary supply have been scattered among several groups. Now, Congress has authorized and aggressively pushed the co-circulation of two forms of the same tender value, forcing U.S. currency into competition with U.S. coins. This is costing everyone more money. The Mint is spending \$40 million here and \$12 million there on advertising campaigns for its circulating product. Congressional representatives have debated the issue for over twenty years, all the while recognizing that co-circulation is a poor choice but afraid to make a definitive move in the direction of either the coin or bill. By giving the Federal Reserve, or even the Treasury, the authority to decide the best course of action, the United States might actually get what is best for it practically and economically.

#### B. *One Money, One Method*

Production volume for circulating coins should be determined by the

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118. See, e.g., 2007 FRB REPORT, *supra* note 46, at 24 (advising that requiring continued production of Sacagawea dollar coins will result in increased costs to the taxpayer with no offsetting benefits).

same method as volume of currency by the Federal Reserve. U.S. coins may only account for 3% of the nation's money supply, but the resources that go into those 3% add up to hundreds of millions of government dollars every year.<sup>119</sup> Because the Mint decides how many coins to produce each year with only minimal help from the Federal Reserve Banks in the form of orders and demand forecasts, coins are often produced unnecessarily and must be stored until the Federal Reserve needs them. For most coins, this is not a problem because they can be used to fill Federal Reserve orders after only brief storage; the Mint can also adjust its next cycle of production to compensate. Dollar coins do not fall into this model, in part because of their commemorative nature. Each time a new design is issued, the Federal Reserve is required to purchase a sufficient quantity to meet demand, regardless of how many dollar coins of other designs it might already hold, often creating overstock.<sup>120</sup> This problem may seem inherent to commemorative coins, but the quarter dollar provides a clear example of how easily the issue can be worked out with independently circulating coins. Commemorative quarters, which have similar ordering requirements to the presidential dollar coins, may present the initial hardship of creating overstock when each new design is issued, but that overstock is almost guaranteed to be depleted eventually. The quarter dollar is consistently used in everyday cash transactions, so even after collector demand wears off consumers still consistently demand the quarter over time. The dollar coin has not achieved such transactional fluency, so when collector demand drops off, whatever supply of coins is left does not move much. The Federal Reserve then is stuck with what it ordered, and the Mint cannot move any amount it overproduced, except through alternative channels to the public. Thus, even commemorative coins must become part of standard cash transactions to be a useful addition to the U.S. money supply.

The Federal Reserve does not see this problem with paper currency; the BEP prints only as much as the Federal Reserve requests, and that amount is carefully determined by economists based on the currency as tender, not

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119. See U.S. MINT, 2010 ANNUAL REPORT: CONNECTING AMERICA THROUGH COINS 28, [http://www.usmint.gov/downloads/about/annual\\_report/2010AnnualReport.pdf](http://www.usmint.gov/downloads/about/annual_report/2010AnnualReport.pdf) (calculating the cost of coins shipped to the Federal Reserve Banks in 2010 at \$317.4 million).

120. Before the Presidential \$1 Coin Act, the Federal Reserve already held a large surplus of dollar coins. See Presidential \$1 Coin Act, sec. 104, § (p)(1)–(3) (requiring the Federal Reserve to purchase enough of each Presidential design to meet public demand); 2007 FRB REPORT, *supra* note 46, at 7 (reporting a twelve-month inventory in the Federal Reserve Banks alone at the start of the Presidential \$1 Coin Program).

as a collector's item.<sup>121</sup> There is no reason for currency to be treated differently than coins in the ordering process. It is true that the Mint produces coins not only for circulation but also for numismatic and bullion functions—numismatic and bullion production volume should be left to the Mint as a matter of commercial business. For circulating coinage, however, the Federal Reserve should decide coin production volume as an element of its greater considerations in overall money supply for the nation.

#### IV. NO MORE DOLLAR BILL

The most prevalent argument for keeping the dollar bill seems to come from people who do not want to carry a heavy coin around in their wallets. The first Americans forced to put license plates on their cars probably also felt burdened, but when greater policy concerns are at stake, citizens must sometimes sacrifice personal preference for the benefit of all.

##### A. *The Bottom Line*

The true bottom line is that either the bill or the coin must go. Their co-circulation is wasting resources and costing taxpayers, and even killing the dollar coin is better than that. But switching to dollar coins would save American taxpayers \$5.5 billion over the next thirty years. With over a billion dollar coins in storage, Congress is in a position to turn a wasteful legislative mistake into a head start for the transition to dollar coins. The surplus of dollar coins would allow the Mint a smoother increase in production, minimizing the challenges that would face any manufacturer suddenly forced to assume a new responsibility in the market. The dollar bills currently in circulation can be removed as they wear out over the next few years. If Congress voted instead to stop production of dollar coins, the billion-dollar mistake would have to be disposed of somehow—the Mint would have to transport the coins to a facility that could melt them down, thereby wasting more taxpayer money. And while the decrease in dollar bill production would certainly cost jobs in the paper and ink industry, many jobs would be created in the coin industry.

##### B. *The Environmental Argument*

Aside from the budget incentives, the dollar coin is also a more environmentally friendly option than the dollar bill. Metal coins can be used for decades before wearing out, and even after they are removed from

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121. *Currency and Coin Services*, *supra* note 37.

circulation, the raw metal content is melted down and reused repeatedly.<sup>122</sup> In contrast, dollar bills must be printed on entirely new cotton paper, and once unfit for circulation, 90% of each bill goes to landfills.<sup>123</sup> The other 10% is recycled in roofing shingles.<sup>124</sup>

Surprisingly, there is very little mainstream public commentary in the United States on the environmental implications of dollar bills. However, Australia and recently Canada have switched to money made from a polymer-like plastic in light of both environmental and counterfeit security concerns.<sup>125</sup> Plastic money lasts four to five times longer than cotton paper money like that currently used in the United States.<sup>126</sup> They not only resist tearing, soiling, and water damage, the plastic notes are also recyclable at the end of their lifespan.<sup>127</sup> So while other countries are addressing environmental concerns from paper money by creating new technology and replacing their entire spread of currency, the U.S. Congress is passively refusing to take the small step of eliminating one portion of the paper currency currently produced. Even more alarming is that Congress is willing to continue this wasteful expenditure despite a reasonable alternative already in existence.

## V. THE TRANSITION

With a few strategic moves, the government could make the transition to dollar coins relatively painless. Congress has recognized in the past that the dollar coin serves important markets, and this might be key in making the coin more appealing to Americans. If these markets could be expanded, making the coin more useful to more people, there would likely be less backlash against the change. Congress took some steps in this direction

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122. See *Coins & Medals*, U.S. MINT, [http://www.usmint.gov/faqs/circulating\\_coins/index.cfm#anchor7](http://www.usmint.gov/faqs/circulating_coins/index.cfm#anchor7) (last visited Feb. 12, 2012) (estimating the lifespan of a coin at twenty-five years and explaining that uncurrent and mutilated coins are melted down, shipped to a fabricator, and made into new coinage strips). Uncurrent coins are those that are worn but still recognizable for denomination and genuineness, while mutilated coins are chipped, fused, or not machine-countable. Uncurrent coins are forwarded to the Mint by the Federal Reserve Banks, but mutilated coins are only accepted directly by the Mint. *Id.*

123. Michael J. Claus et al., *Life Cycle Assessment of Environmental Impact of United States Dollar Note and Coin* (undated) (unpublished undergraduate report, Mich. State Univ.), available at [https://www.msu.edu/~alocilja/undergrad/BE230/dollar\\_vs\\_coin.pdf](https://www.msu.edu/~alocilja/undergrad/BE230/dollar_vs_coin.pdf).

124. *Id.*

125. See Michael Lauzon & Kate Tilley, *Canada Switching to Polymer Money*, PLASTICS NEWS (Akron, Ohio), Mar. 15, 2010, at 5 (listing both enhanced security and longer circulation as reasons for Canada's switch to polymer money, and indicating Australia as a possible source of polymer).

126. *Id.*

127. *Id.*

with the 2005 Act by requiring all agencies and instrumentalities of the government to accept the coin, including federally funded transit systems.<sup>128</sup> Although not included in this group, some cities are unilaterally converting parking meters to accept dollar coins,<sup>129</sup> which is something the government might consider endorsing on a wider scale to increase the utility of a dollar coin. The Federal Reserve, acting for the government, could offer subsidies to cities or parking meter companies to update their machines to accept dollar coins as an interim step to killing the dollar bill altogether.

Absent such an interim measure, even a swift shift to the dollar coin would not be unreasonably difficult. Given the stockpile of coins housed by Federal Reserve Banks, the GAO estimates that supply of one-dollar currency would exceed demand during the first two years of a transition.<sup>130</sup> Countries like Canada have shown that while some Americans' initial reaction to the switch might be negative, those sentiments should die down quite quickly.<sup>131</sup> Another factor to consider is that Americans are using credit and debit cards more and cash less. Even the same parking meters that have been outfitted to accept dollar coins can also accept credit or debit cards.<sup>132</sup> With the convenience of carrying just one card that can be used to pay for anything, people are generally using cash less<sup>133</sup> and therefore should be less impacted by the switch than they would have been ten years ago. Once the BEP ceased production of the one-dollar bill, the Federal Reserve Banks could gradually pull the bills from circulation. Thus, the transition to dollar coins should not be as difficult as some make it out to be.

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128. Presidential \$1 Coin Act of 2005, Pub. L. No. 109-145, sec. 104, § (p)(1)–(3), 119 Stat. 2664, 2669 (codified at 31 U.S.C. § 5112 (2006)).

129. Among these are Minneapolis and Chicago. See James Lileks, *A New Era Dawns: Solar Parking Meters*, STAR TRIB. (Minneapolis St. Paul), Dec. 5, 2010, at 5B, available at 2010 WLNR 24263066 (introducing Minneapolis's new parking meters, which accept credit and debit cards, quarters, and dollar coins); Joe Smydo, *City Looks to Chicago for Privatized Parking Ideas*, PITT. POST-GAZETTE, Mar. 14, 2010, at A1 (describing Chicago's experience with new, more expensive parking meters as a potential lesson for Pittsburgh).

130. See GAO 2011 REPORT, *supra* note 3, at 11 (explaining that to come to its conclusions, GAO reviewed other countries' transition from dollar notes to coins and the impact of such a transition).

131. See *supra* note 73 and accompanying text.

132. See *supra* note 129.

133. Cf. *Annual Production Figures*, *supra* note 6 (showing an overall decrease in currency production since 2000).

## CONCLUSION

If the Federal Reserve System is meant to play a significant role in U.S. payment systems and to control monetary policy, it should have the sole power to make decisions about U.S. coin and currency production. With one centralized agency weighing the interests of the BEP, Mint, and American taxpayers, decisions would more likely reflect objective reasonableness, rather than the conflicts of interest necessarily influencing Congress. Therefore, Congress should delegate its authority and the authority of the Mint regarding circulating coins to the Federal Reserve Board. As demonstrated by the Federal Reserve's relationship with the BEP, according production levels with what is actually needed is the most economically efficient option.

Regardless of whether Congress delegates its authority to the Federal Reserve, it should eliminate the dollar bill from circulation to save the government money and other resources. Other countries have not only been using dollar coin equivalents for years, some are now going a step further and developing new currency technology, leaving the United States in the environmentally taxing dust. A little discomfort and public backlash at the transition should not be a reason to ignore the clear sensibility of the switch to dollar coins. While it is important that American policies reflect what the people want, the United States did not become a great nation by maintaining the status quo. It is time to make the responsible choice for our country's coins and currency.