# TAKING COSTS INTO ACCOUNT: MAPPING THE BOUNDARIES OF JUDICIAL AND AGENCY DISCRETION

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*The Supreme Court's recent decision in* Michigan v. EPA *is only one of a long line of cases struggling with the same problem: when can—or must—a decision-maker consider costs? Agencies face the problem in rulemaking; courts face it in statutory injunctions. The law has developed independently in these two contexts, and cases are marked by heated judicial disagreement. Yet a deeper analysis reveals that, to a surprising extent, the same principles govern the legal relevance of costs in both areas. The areas differ, however, in terms of how to consider legally relevant costs: courts must use a balancing test for injunctions (*eBay*) while agencies have other choices (*Michigan v. EPA*). This difference should be resolved in favor of using the* Michigan v. EPA *approach in both settings.*

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## Introduction

When do statutes require courts or agencies to consider costs? When is consideration of costs prohibited? These seem like simple questions. Yet, these seemingly simple questions have given rise to a chaotic body of case law, with the most recent installment arriving only last year in *Michigan v. EPA*.[1] Some impassioned dissents in these cases accuse the majority of trampling on the separation of powers by elevating their own policies over congressional mandates.[2] Other passionate dissents accuse majorities of embracing mindless rigid-

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1. 135 S. Ct. 2699 (2015).
2. Consider Justice Scalia's dissent in *EPA v. EME Homer City Generation, L.P.*, which he began by lambasting the majority for approving an "undemocratic revision" of the statute and reaching "its result (Look Ma, no hands!) without benefit of text." 134 S. Ct. 1584, 1610 (2014). Justice Scalia ended this dissent by accusing the majority of violating the "fundamen-

ity at the expense of common sense and fidelity to the law.[3] Some opinions contain paeans to the virtues of discretion[4] rivaling Portia's praise of the virtue of mercy;[5] others denounce discretion as an enemy of the rule of law.[6] Efforts to distinguish precedents are often clumsy, and relevant precedents are sometimes simply ignored.[7] In short, at least on the surface, the doctrine is in chaos.

Indeed, the courts have developed two entirely separate lines of precedent to deal with this issue without taking note of the fact that they involve the same question. One line of precedent involves judicial discretion in statutory cases; the other involves administrative discretion under statutes (often the same statutes). The scholarship on these questions is similarly disconnected. Admittedly, the roles of the judiciary and of agencies are distinct in many respects. Perhaps for this reason, the possibility that their roles in enforcing statutes might have similarities seems to have been entirely overlooked by the courts and is rarely mentioned by commentators.[8]

As a leading administrative law scholar said, "[i]t is hard to imagine any administrative law issue more basic than identifying the factors that an agency must, can, and cannot consider in making a decision."[9] Of similar significance in remedies law are the factors that a court can consider in issuing a statutory

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tal principle of popular government" that agencies cannot act contrary to their statutory authority. *Id.* at 1621.

3. Contrast Justice Scalia's dissent in *EME Homer*, *id.*, with his dissent in *Massachusetts v. EPA*. There he says that the agency's prudential reasons for declining to regulate greenhouse gases were "surely considerations executive agencies regularly take into account (and ought to take into account)." Massachuetts v. EPA, 549 U.S. 497, 552 (2007). He then closed by saying that "Congress has passed a broad statute" and that the Court "has no business substituting its own desired outcome for the reasoned judgment of the responsible agency." *Id.* at 560.

4. For instance, in *Weinberger v. Romero-Barcelo*, the Court extolled the virtues of equitable discretion to "arrive at a 'nice adjustment and reconciliation' between the competing claims," balancing the interests of the parties. 456 U.S. 305, 312 (1982). "The essence of equity jurisdiction," the Court continued, "has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Id.* (citation omitted).

5. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1 ("The quality of mercy is not strain'd, / It droppeth as the gentle rain from heaven / Upon the place beneath . . . .").

6. Consider Justice Stevens's dissent in *Romero-Barcelo*, which accuses the majority of "grant[ing] an open-ended license to federal judges to carve gaping holes in a reticulated statutory scheme" and of "unnecessarily and casually substitut[ing] the chancellor's clumsy foot for the rule of law." 456 U.S. at 305, 335.

7. For instance, consider these pairings of cases: *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008) (extolling equitable discretion), fails to cite *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (emphasizing the primary duty of respecting congressional policy judgments), while *EME Homer*, 134 S. Ct. 1584 (upholding an agency's "sensible" consideration of costs), does not cite *Massachusetts v. EPA*, 549 U.S. 497 (rebuking the same agency for relying on prudential considerations at the expense of a congressional mandate). Even more tellingly, Justice Scalia's dissent in *EME Homer* (rejecting consideration of cost) does not cite his own previous opinion in *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009) (upholding consideration of cost by Environmental Protection Agency ("EPA")). More puzzlingly, the majority in *EME Homer* does not cite *Entergy* either.

8. For one of the rare exceptions, see Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 537–38 (2010), which used the *Chevron* doctrine to critique equitable balancing in statutory cases.

9. Richard J. Pierce, *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67, 67 (emphasis omitted).

injunction. In both cases, a core question—central to what some have celebrated as an emerging "cost-benefit" state[10]—is whether the costs (financial and otherwise) of achieving a statutory policy are permissible considerations.

This Article examines the seemingly disorderly bodies of case law dealing with judicial and agency discretion to consider costs in implementing statutes. It concludes that some simple principles run through all of the variety and conflict of judicial views. First, consideration of costs is normally precluded when a statute designates other criteria to consider in decisionmaking, such as basing regulation on the level of risk. Second, when a statute does not preclude consideration of cost (as by designating other factors), taking costs into account is normally required. Note that the decisionmaker's leeway is limited in both situations: there is a presumption against cost consideration when other specific factors are designated, and a presumption in favor of it otherwise. Things become more complicated, however, when a statute expresses ambivalence about considering cost. This ambivalence provides decisionmakers room to maneuver under the third standard: when statutory policies are in conflict, the decisionmaker has discretion to identify the most reasonable way to resolve the conflict. The same principles determine what factors are relevant to a rulemaking or to issuing a statutory injunction.

It is not customary to consider judicial discretion and agency discretion together because of the way the legal world is conventionally carved into separate domains.[11] Remedies law and administrative law are two entirely different fields, with very distinctive mindsets and almost no overlap. One field concerns the tools available to a court in both common law and statutory cases, including injunctions, damages, and declaratory judgments. This is a subject that stretches far back into the history of the law. The other field deals with the exercise by administrative agencies of the powers delegated to them by Congress, with an emphasis on agencies' use of rulemaking to regulate private conduct. Scholars who study one field rarely study the other. The fields have developed quite independently. Although they follow similar principles in terms of allowing discretion to decisionmakers, they arrive there by very different routes and express the principles in different language.

Conceptually, judicial discretion begins as very broad but is then reduced by the imperative of fidelity to the expressed congressional purpose, whereas agency discretion begins with the expressed congressional purpose and moves outward.[12] It is necessary to find some statutory reason to prevent a court from

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10. *See generally* CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION (2003).

11. Another reason is that judicial opinions often place outsized emphasis either on discretion or on adherence to statutory mandates, leading dissenters or commentators to accuse them of abandoning the other pole. This judicial rhetoric makes the case law seem more chaotic than it really is.

12. Courts have had reason to discuss equitable discretion for much longer than they have had reasons to worry about whether an agency can consider costs. Opinions dealing with judicial enforcement find the basis for discretion in a long history (or supposed history) of equity practice; opinions dealing with agency implementation find it in the *Chevron* doctrine (which itself is a culmination of the development of administrative law since mid-century).

considering a seemingly relevant factor whereas an agency must identify affirmative statutory authority in order to consider any factor. Although the endpoints of legal evolution are similar,[13] their different pathways obscure the closeness of the final destinations.[14] Whatever the reason for the failure to identify these broad unifying principles, the fact remains that they have not been clearly identified before now. This Article attempts to remedy that situation.

Parts I and II of this Article work through the complex and often conflicting rulings about discretion to consider costs. It requires considerable work to identify the governing principles amidst the tangle of judicial opinions. Part I examines agency discretion over consideration of regulatory costs, either in determining whether to begin a rulemaking at all or when designing a final rule. Part II considers similar issues that arise in the judicial context. Issues of judicial discretion arise both in judicial review of agency regulations (vacate or simply remand?) and in enforcement actions (enjoin every statutory violation or balance the equities?). As Part II shows, individual cases are often hotly disputed and the resulting case law regarding judicial discretion is not easy to parse.

Part III begins with further doctrinal analysis to show the underlying coherence of these bodies of law. The rules regarding discretion to consider costs turn out to be strikingly similar and fairly clearly defined in both cases. There is, however, a disparity in terms of discretion over *how* to consider costs, which seems unjustified. Part III shows how the doctrine can be unified and simplified.

Part III also argues for more unified conceptualization of agency and judicial discretion. As will be seen repeatedly in Parts I and II, the conventional view is that agency discretion derives from Congress, but judicial discretion is an innate quality of courts that Congress occasionally chooses to limit. In other words, agency discretion is piped in from Congress but courts draw on their own reservoir. Part III argues that it would be better to consider statutory and judicial discretion to implement statutes in more similar terms. The Article ends with brief thoughts about the difficulties inherent in such discretionary decisions.

A note about terminology is important at the outset. As the Supreme Court made clear in *Michigan v. EPA*,[15] the term "cost" extends well beyond

13. But not *quite* identical. Under current doctrine, as Parts I and II show, courts and agencies have the same discretion to consider costs, but agencies have greater discretion to decline to do so. This is an unjustified discrepancy, as discussed in Part III.

14. A final reason for the confusion is that, although the principles themselves are simple, applying them is another matter. It is easy enough to suspect that in some cases judges are merely paying lip service to the principles and are pursuing their own policy agendas instead. That may or may not be true in some cases, but at least taking the Court's interpretation of the underlying statute as a given, the Court's willingness to allow or limit discretion is consistently exercised. Thus, this Article does not argue that the Court's approach to statutory interpretation is itself invariably consistent or free from ideology, merely that it does have a consistent view that a clear congressional purpose must be shown before imposing limits on agency or judicial consideration of costs.

15. 135 S. Ct. 2699 (2015).

financial outlays by the agency or the regulated industry.[16] It includes all of the negative repercussions of an action, whether economic or otherwise.[17] Moreover, consideration of costs does not necessarily take the form of a quantitative cost-benefit analysis or even of a qualitative balancing test. For instance, costs might be considered only when grossly disproportionate to benefits.[18] Moreover, some costs might be considered while other types of costs are excluded for the analysis. Thus, this Article considers in broad terms the question of judicial and agency discretion to consider possible harmful effects of their decisions in statutory cases.[19]

## I. Agency Rulemaking

Given the role of agency rulemaking in the modern administrative state, the stakes can be high in deciding whether an agency can or cannot consider costs.[20] This issue can arise in several contexts. Section A considers agency discretion to avoid even conducting a rulemaking because of the potential downsides of regulating.[21] Section B examines consideration of costs when the agency does engage in a rulemaking and issues a final rule. Section C considers the special issues that arise when multiple provisions provide conflicting signals.

### *A. The Decision to Conduct a Rulemaking*

Under the Administrative Procedure Act ("APA"), each agency must give "an interested person the right to petition for the issuance, amendment, or re-

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16. *Id.* at 2711.

17. *Id.*

18. In *Entergy Corp. v. Riverkeeper, Inc.*, for instance, the Court upheld an EPA decision in which EPA "sought only to avoid extreme disparities between costs and benefits." 556 U.S. 208, 224 (2009).

19. It is also important to note that there are two different types of discretion involved in these situations. One is discretion in formulating the test to be used to make a decision. For instance, should economic or environmental costs be considered in making the decision, and if so, how much weight should they have? For a classification of different statutory approaches to risk and cost, see Sidney A. Shapiro & Robert L. Glicksman, Risk Regulation at Risk 31–45 (2003). The other is discretion in applying the test, given that difficult judgments may need to be made in comparing different kinds of costs and benefits or in resolving uncertainty.

20. For example, in *Entergy*, EPA rejected an option that was somewhat environmentally superior because the cost was nearly ten times as high as the option it selected ($3.5 billion versus $389 million annually). 556 U.S. at 224. It was able to do so only because the Supreme Court upheld EPA's view that cost was a relevant consideration. *Id.*

21. Congress may mandate that only certain factors be considered during a rulemaking if the agency does initiate one, but the agency may want to take additional factors into account when deciding whether to initiate such a rulemaking. A good recent discussion of this issue can be found in Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 Geo. L.J. 157 (2014). Background on the petition process and the statutory and regulatory framework for petitions is presented in William V. Luneburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Approval*, 1988 Wisc. L. Rev. 1.

peal of a rule."[22] Review of an agency's refusal to conduct a rulemaking under some statutory provision presents difficulties. Statutes may contain multiple provisions dealing with the same problem, leaving the agency to decide which to use. Alternatively, the agency may not have the resources to carry out all of its responsibilities at the same time, or Congress may not have been clear about when or even whether some provisions should be invoked. Thus, there seems to be room for considerable agency discretion. On the other hand, the agency's decision against regulation may have been based on a misreading of the statute or on nothing beyond partisan political considerations. As this section shows, courts have struggled with how to review an agency's decision to forego regulation. Part I considers this issue before considering the role of cost in crafting a regulation, since the decision whether to regulate at all logically precedes the decision regarding how strict the regulation should be.[23]

The Supreme Court reviewed agency refusal to regulate in *Massachusetts v. EPA*,[24] a historic case in which the Supreme Court first encountered the issue of global climate change. One key issue in the case was whether an agency can forego regulation because it has doubts about the benefits of regulation and considers it better to approach the problem without utilizing the statute. A group of state and local governments, joined by thirteen leading environmental organizations, petitioned the Environmental Protection Agency ("EPA") to regulate greenhouse gases under section 202(a)(1) of the Clean Air Act.[25] That provision requires the Administrator of EPA to issue emissions standards for new motor vehicles for air pollutants "which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[26] It is worth taking a moment to unpack this provision. The trigger (the so-called endangerment finding) is highly precautionary ("may reasonably be anticipated to endanger").[27] The statute says EPA "shall by regulation prescribe" such standards,[28] suggesting a lack of agency discretion. Yet, regulation is required only if "in his judgment" the air pollutant poses a risk,[29] which arguably introduces an element of discretion.

After considering the matter for almost four years, EPA denied the rulemaking petition on two grounds. First, it contended that it lacked regulatory authority over greenhouse gases because they are not air pollutants within

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22. 5 U.S.C. § 553(e) (2012).

23. For instance, in *Industrial Union Department v. American Petroleum Institute*, the Court held that the Occupational Safety and Health Administration ("OSHA") cannot regulate a toxic chemical in the workplace until it finds that current exposure levels create a significant risk. 448 U.S. 607 (1980). After such a determination is made, the level of regulation is determined based on feasibility (the level of risk is no longer relevant) under *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490 (1981).

24. 549 U.S. 497 (2007).

25. *Id.* at 505.

26. 42 U.S.C. § 7521(a)(1) (2012). For background on the Clean Air Act, see JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 111–40 (4th ed.).

27. 42 U.S.C. § 7521(a)(1).

28. *Id.*

29. *Id.*

the meaning of the statute.[30] Second, it stated that even if it did have authority to regulate greenhouse gases, it would exercise its discretion and decline to exercise that authority for two reasons: residual uncertainty over whether these gases cause global climate change and the advantages of using other approaches to addressing climate change, such as international negotiation.[31] Note that these considerations related to the desirability of regulating greenhouse gases, not to the possible costs or difficulties of conducting a rulemaking to determine endangerment.

Much of the Court's opinion was devoted to the issue of whether any of the petitioners had standing to challenge EPA's decision.[32] Having found that at least one of the petitioners did have standing, it also concluded that the statute plainly covered greenhouse gases.[33] This brought the Court to the question of the agency's discretion not to exercise its jurisdiction, which it disposed of in short order.[34] According to the Court, "[w]hile the statute does condition the exercise of EPA's authority on its formation of a 'judgment,' . . . that judgment must relate to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger pubic health or welfare.'"[35] Or, "[p]ut another way, the use of the word 'judgment' is not a roving license to ignore the statutory text," but merely "a direction to exercise discretion within defined statutory limits."[36] Hence, EPA could refrain from taking regulatory action only if it found that "greenhouse gases do not contribute to climate change" or if EPA "provide[d] some reasonable explanation as to why it [could not] or [would] not exercise its discretion to determine whether they do."[37] Thus, the agency could not consider uncertainty (short of the point where it made any decision about endangerment impossible) or the potential desirability of using approaches to the problem other than the Clean Air Act.[38] These statements made it clear that EPA can only consider the strength of the scien-

30. *Massachusetts*, 549 U.S. at 513.
31. *Id.*
32. *Id.* at 516–28.
33. *Id.* at 528–32.
34. *Id.* at 532–35.
35. *Id.* at 532–33 (quoting 42 U.S.C. § 7521(a)(1)).
36. *Id.* at 533.
37. *Id.* Professor Richard Pierce expresses concern that this decision is—or at least can easily be read as—a sharp departure from past judicial practice and as holding that "congressional silence with respect to a decisional factor should be interpreted as congressional rejection of that factor and as a prohibition on agency consideration of that factor in making decisions." Pierce, *supra* note 9, at 81 (emphasis omitted). It seems clear from the statutory text, however, that when the agency is actually issuing a regulation under this section, the judgment in question is supposed to be about a pollutant's risk, not some global determination about the best approach to the problem. The more difficult issue in the case was whether the decision to commence a rulemaking at all was similarly limited, but the Court seemed to feel clear on that point as well.
38. In discussing EPA's explanation of its reasons for declining to regulate, the Court said they had nothing to do with whether greenhouse gases cause climate change, and "[s]till less do they amount to a reasoned justification for declining to form a scientific judgment." *Massachusetts*, 549 U.S. at 533–34. Nor was the existence of residual uncertainty a valid justification, unless the uncertainty was so great that it prevented EPA from making a reasoned judgment. *Id.* at 534. This seems correct: the statute itself plainly presumes that some uncer-

tific evidence in deciding whether to initiate a regulatory proceeding. Thus, it had no discretion to consider any other factor, including any possible concern that compliance costs would be too high, since it was allowed to consider only the question of endangerment.

The ultimate question in *Massachusetts v. EPA* was whether Congress intended to allow EPA to ignore potentially harmful air pollutants for policy reasons not discussed in the statute. As explained in the preceding paragraph, the Court precluded EPA from considering these additional policies once it had begun a rulemaking and was making a decision on the merits. One might well ask what difference it should make that EPA had not yet begun the proceeding. In practical terms, the only distinction between the two situations was that the cost of the proceeding had not yet been incurred. EPA did not, however, phrase its refusal to form a judgment about the risks of greenhouse gases in terms of resource priorities. Indeed, given the exceptional strength of the scientific consensus on the subject, declining to form a judgment about the realities of climate change would seem less like an exercise of discretion by EPA than a case of willful blindness.

It is important to note that the Court did not entirely strip EPA of discretion. According to the Court, it "no doubt has significant latitude as to the manner, timing, content, and coordination of its regulation with those of other agencies."[39] Moreover, EPA could "avoid taking further action" by providing "some reasonable explanation as to why it cannot or will not exercise its discretion" to form a judgment about climate change.[40] In particular, EPA could determine that "the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming."[41] Still, it seems clear that any remaining discretion must relate

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tainty might exist when it keys regulation to whether a pollutant "may be reasonably anticipated to endanger public health." *Id.* at 549 (quoting 42 U.S.C. § 7521(a)(1)).

39. *Id.* at 533. In dissent, Justice Scalia argued that the Court had mistaken the issue before it. He agreed that, if EPA makes a judgment under this section, the judgment must relate purely to public health risks. "But," he said, "the statute says *nothing at all* about the reasons for which the Administrator may *defer* making a judgment—the permissible reasons for deciding not to grapple with the issue at the present time." *Id.* at 552 (Scalia, J., dissenting). Indeed, he said, "[t]he reasons EPA gave are surely consideration executive agencies *regularly* take into account (and *ought* to take into account) when deciding whether to consider entering a new field: the impact such entry would have on other Executive Branch programs and on foreign policy." *Id.*

40. *Id.* at 533 (majority opinion).

41. *Id.* at 534. In a more recent case, the D.C. Circuit upheld EPA's refusal to conduct a rulemaking to modify an existing standard, even though it conceded that the existing standard was inadequate, because "profound" scientific uncertainty prevented EPA from selecting a new, more appropriate standard:

> Here, EPA explained at length that the uncertainty it faced was unusually profound . . . [D]ata gaps were "of such a significant nature and degree" that any rule promulgated would not have been based on "reasoned judgment." Petitioners question that conclusion, but as between petitioners' critique and EPA's scientific analysis, EPA's judgment prevails. Because the Act requires a reasoned judgment, and because EPA found it could not form one, EPA's explanation "conform[ed] to the authorizing statute."

to the process of forming a judgment, not to extrinsic reasons why EPA might prefer not to regulate.

Parsing the Court's decision has posed difficulty for lower court judges,[42] as illustrated by the Second Circuit's recent decision in *Natural Resources Defense Council, Inc. v. FDA*.[43] The history leading up to the court's decision was long and complex, but it can be summarized briefly as follows: in 1997, the Food and Drug Administration ("FDA") issued notices that the use of antibiotics in animal feeds may cause health risks to human beings by increasing resistance to antibiotics, and therefore may not satisfy the statutory drug safety requirements.[44] For reasons that may have been substantive or may have been purely political,[45] the notices were left in place but the agency failed to follow up until after it was finally sued in 2011. At that time, the FDA finally denied various petitions urging it to initiate rulemakings to withdraw approval of antibiotics in animal feed.[46] It argued that withdrawal proceedings would be resource-intensive and cumbersome, and that voluntary programs to prevent overuse of antibiotics were a better approach.[47]

Thus, as in *Massachusetts v. EPA*, the agency declined to regulate because it had a preferred approach to the problem. Yet, the statutes were at least superficially very similar. The FDA Act provides that "the Secretary shall, after due notice and opportunity for hearing to the applicants, issue an order withdraw-

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Ctr. for Biological Diversity v. EPA, 749 F.3d 1079, 1090 (D.C. Cir. 2014) (citation omitted). The court also observed that EPA had begun a program to collect the necessary data, and that "EPA has not argued, and we do not hold, that after finding its existing standards inadequate, EPA was at liberty simply to leave them in place and take no action at all." *Id.; see also* Gulf Restoration Network v. McCarthy, 783 F.3d 227, 244 (5th Cir. 2015) ("[T]he district court's review is limited to determining whether the EPA has 'provide[d] some reasonable explanation as to why it cannot or will not exercise its discretion' to make a necessity determination."

42. Indeed, some lower courts have ignored the Court's ruling or played only lip service to it. *See* Sunstein & Vermeule, *supra* note 21, at 160 n.10.
43. Natural Res. Def. Council, Inc. v. FDA, 760 F.3d 151 (2d Cir. 2014).
44. *Id.* at 154.
45. Political interference with the FDA's decision is not unknown. *See* Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 102 Geo. L.J. 927, 929–58 (2014) (detailing covert political interference with FDA handling of approval for emergency contraceptive). In the case of animal antibiotics, political resistance was fierce when FDA Commissioner Donald Kennedy first attempted to prevent overuse of tetracycline in 1977:

> Kennedy's proposal ran into a wall of opposition. The Texas Farm Bureau warned of a "devastating effect on animal agriculture." The Mississippi Pork Producers Association said it would cause "a tremendous economic blow to our industry." The National Broiler said it would set an "ultimately disastrous precedent." The National Turkey Federation said it was based on "flimsy scientific evidence."
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> Then came the final verdict: Congress told Kennedy to stand down. His proposal was shelved, largely at the behest of the farmers and their powerful champion in the House, Rep. Jamie L. Whitten (D-Miss.).

David E. Hoffman, *FDA, Farmers Still Debate the Use of Antibiotics in Animals*, Wash. Post (Oct. 12, 2014), http://perma.cc/52BG-VFBX. The problem of agency paralysis due to agency capture is discussed more extensively in Michael A. Livermore & Richard J. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 Geo. L.J. 1337, 1377–90 (2013).

46. *Natural Res. Def. Council*, 760 F.3d at 156.
47. *Id.* at 156–57.

ing approval [of a drug] if the Secretary finds . . . that new evidence . . . shows such drug is not shown to be safe."[48] The issue before the court was whether the FDA could decide for policy reasons not to make a finding about safety, even in the face of considerable evidence (recognized in its 1997 notices) that the antibiotics actually were unsafe.

The majority of the court sided with the FDA, finding *Massachusetts v. EPA* distinguishable. The court distinguished *Massachusetts* on the ground that the Supreme Court had "read the Clean Air Act not to grant the EPA discretion to choose to regulate only those pollutants that it deemed feasible or wise to regulate."[49] In contrast, "the provision . . . at issue in this case requires the FDA to take a specific remedial step when, after a hearing, it has made certain findings, without imposing any absolute requirement that the agency investigate the need for withdrawing approval of animal drugs under any particular circumstance."[50] The court found the FDA's reasons for choosing another course of action not to be arbitrary or capricious.[51]

Chief Judge Katzmann's dissent exposed the analytic difficulties involved in this issue. He protested that "[t]oday's decision allows the FDA to openly declare that a particular animal drug is unsafe, but then refuse to withdraw approval of that drug."[52] Katzmann found *Massachusetts v. EPA* indistinguish-

48. 21 U.S.C. § 360b(e)(1) (2012). In relevant part, subsection 3(1) provides:

> The Secretary shall, after due notice and opportunity for hearing to the applicant, issue an order withdrawing approval of an application . . . with respect to any new animal drug if the Secretary finds—
> (A) that experience or scientific data show that such drug is unsafe for use under the conditions of use upon the basis of which the application was approved or the condition of use authorized . . . ;
> (B) that new evidence not contained in such application or not available to the Secretary until after such application was approved . . . shows that such drug is not shown to be safe for use under the conditions of use upon the basis of which the application was approved . . . .

Note that the Secretary can act only following "notice and opportunity for hearing." Under the APA, 5 U.S.C. § 553(c) (2012), formal, adjudication-like proceedings rather than informal rulemaking is required when rules are "required by statute to be made on the record after opportunity for an agency hearing." The same standard triggers formal adjudicatory hearings when they are required by law. 5 U.S.C. § 554(a)(1). The magic words "on the record" are missing here. For a guide to the procedures, see *Process for Withdrawal of Approval of a New Animal Drug Application*, U.S. FOOD & DRUG ADMIN., http://perma.cc/4LX9-6FHH. These cumbersome procedural requirements may have something to do with the agency's reluctance to proceed. Arguably, however, the agency could have streamlined the procedures, as argued by Lisa Heinzerling, *Undue Process at the FDA: Antibiotics, Animal Feed, and Agency Intransigence*, 37 VT. L. REV. 1007, 1027–38 (2013). As Heinzerling points out, however, the Natural Resources Defense Council did not make this argument in the district court, so it would have been waived on appeal. *Id.* at 1007.

49. *Natural Res. Def. Council*, 760 F.3d at 174.

50. *Id.* Compare this with *New York Public Interest Research Group v. Whitman*, which involved a statute that required EPA to take specified actions whenever it had made a "determination" that a state permitting program was inadequate; the court held that EPA had unreviewable discretion whether or not to make the necessary determination. 21 F.3d 316, 331–32 (2d Cir. 2003).

51. *Natural Res. Def. Council*, 760 F.3d at 174–76.

52. *Id.* at 177 (Katzmann, J., dissenting).

able, because in both cases the statute designated the existence of a risk to the public as the only factor for the agency to consider.[53] There is force to Judge Katzmann's observation about the similarity of the two cases. The majority's response is unsatisfactory to the extent that it asserts the existence of an "absolute duty" under one statute but not the other, without explaining what difference in the statutes leads to this conclusion. Thus, it remains unclear when an agency can decline to begin a rulemaking for reasons (such as cost) that it could not legally consider within the rulemaking itself.

As the Second Circuit decision and the Katzmann dissent indicate, the lesson of *Massachusetts v. EPA* in terms of rulemaking petitions is less than crystal clear. Eric Biber's resource-allocation theory about judicial review of agency "inaction" provides one possible way of reconciling these decisions.[54] For instance, the D.C. Circuit has upheld denial of a rulemaking petition relating to protection of whales where "[t]he agency made a policy decision to focus its resources on a comprehensive strategy, which in light of the information before the agency at the time, was reasoned and adequately supported by the record."[55] In a similar, more recent case concerning refusal to regulate emissions from coal mines, the D.C. Circuit relied on similar reasoning to uphold EPA's decision about rulemaking priorities.[56]

EPA resource limitations were not a factor in the greenhouse gas case. In contrast, the Second Circuit majority concluded that it was not arbitrary or capricious for the FDA to seek to address options other than "a protracted administrative process and likely litigation."[57] Earlier, the court characterized

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53. As Judge Katzmann explained:

> [T]he question presented in *Massachusetts v. EPA* was whether the statute implicitly limited the agency's judgment to the scientific question, by specifying only that question for the agency's consideration. The Court held that it did . . . . Exactly the same logic applies here: the FDA's "reasons for action or inaction" must conform to the authorizing statute, meaning that they must rest on the statutory question of whether the drugs have been "shown to be safe," . . . . Like the EPA with air pollutants, the FDA cannot "choose to regulate only those [drugs] that it deem[s] feasible or wise to regulate."

*Id.* at 192 (citations omitted).

54. Professor Biber persuasively criticizes the action-inaction distinction as a basis for determining the scope of judicial review and argues instead that a court's decision should emphasize whether the agency's decision involved substantial resource issues, as courts often do in inaction cases. *See* Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Action and Inaction*, 26 VA. ENVTL. L.J. 461 (2008); Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1 (2008). Professors Cass Sunstein and Adrian Vermule endorse the resource-constraint theory. *See supra* note 21, at 178–81.

55. Defs. of Wildlife v. Gutierrez, 532 F.3d 913, 920 (D.C. Cir. 2008); *see also* WildEarth Guardians v. EPA, 751 F.3d 649, 655 (D.C. Cir. 2014) (upholding an agency's resource allocation decision because "the statute affords agency officials discretion to prioritize sources that are the most significant threats to public health to ensure effective administration of the agency's regulatory agenda").

56. Finding *Massachusetts v. EPA* distinguishable, the Court stressed that the governing statute provided EPA discretion (using the phrases "from time to time" and "in his judgment"), that another proceeding absorbing EPA effort involved much greater amounts of emissions, and that it already had 45 rulemakings underway. *WildEarth Guardians*, 751 F.3d at 653–56.

57. *Natural Res. Def. Council*, 760 F.3d at 175.

withdrawal of a drug as a type of "enforcement action" requiring the exercise of discretion, given that "[a]gencies have many responsibilities, and limited resources."[58] Thus, it is normal for agencies to have discretion to choose "when to deploy those resources in an arduous, contested adversarial process."[59] These considerations were absent in *Massachusetts v. EPA*.

Still, there is an additional factor in the FDA case that undermines the credibility of the FDA's decision to eschew rulemaking. As Judge Katzmann emphasized, the FDA waited for years without doing anything after it initially determined that overuse of animal antibiotics was a threat to public health. Only during the litigation did the agency finally take any action. This might shed doubt on the agency's assertion that it had chosen an alternative course of action on the basis of effectiveness and efficiency—factors that were presumably also present in past years. Thus, the FDA seems to have come at least perilously close to abdicating its statutory responsibility to protect public health.[60]

*Massachusetts v. EPA* does not fully settle the question of when an agency can consider a broader range of factors before initiating a rulemaking than it could consider in the rulemaking itself. In general, given scarce agency resources, the burden of issuing and enforcing a rule seems relevant. In deciding on priorities given such resource constraints, an agency would find it natural to consider the possible benefits that a rulemaking could produce, as compared to other activities, taking into account alternative ways of reaching the same goal and possible side-effects of the rulemaking.[61] Sometimes, however, the congressional decision to preclude consideration of costs in the ultimate rule may reflect the high priority Congress places on addressing an issue or a distrust of an agency's commitment to a statutory goal.[62] Presumably, the Court thought this

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58. *Id.* at 170.

59. *Id.*

60. The argument for a general anti-abdication principle is made in Sunstein & Vermeule, *supra* note 21, at 185–89. In a case involving similar conduct by OSHA dealing with the hazards of hexavalent chromium, the Third Circuit said:

> [W]hen we view the rulemaking's progress over the past nine years, we reach the ineluctable conclusion that hexavalent chromium has progressively fallen by the wayside. This is unacceptable, for as the D.C. Circuit stated, "[w]here the Secretary deems a problem significant enough to warrant the initiation of the standard setting process, the Act requires that he had a plan to shepherd through the development of the standard—that he take pains, regardless of the press of other priorities, to ensure that the standard is not inadvertently lost in the process."

Pub. Citizen Health Research Grp. v. Chao, 314 F.3d 143, 157–58 (3d Cir. 2002). Although the FDA had not formally begun the process, it had issued notice that it considered the use of animal antibiotics a possible danger to human health, as the Second Circuit discussed. *Natural Res. Def. Council*, 760 F.3d at 154.

61. For instance, in *International Union v. Chao*, the court observed that the agency had identified three more pressing rulemaking priorities and had explained why regulating the substance at issue would require a huge resource commitment. 361 F.3d 249, 255 (3d Cir. 2004).

62. Thus, it is clear that a statute may compel agency action or rule out many or all extrastatutory factors as justifications for inaction. *See* Sunstein & Vermeule, *supra* note 21, at 176–77. For instance, Congress might use the term "shall," limit an agency to consideration of a specified

was true in *Massachusetts v. EPA*. The possibility that a rule would impose costs on the regulated parties, however, should be considered irrelevant even at the preliminary stage when Congress has decided to rule it out in the ultimate decision.[63]

### B. *Agency Consideration of Costs in Setting Standards*

Once an agency has decided to begin a rulemaking, it must determine what factors are relevant in setting the rule.[64] A particular question that has repeatedly arisen is whether agencies can consider costs when the governing statute does not refer to this factor. This issue is particularly important because, under a series of executive orders, agencies are required to base their decisions on cost-benefit analysis unless they are legally precluded from doing so.[65] Clearly, if an agency cannot consider cost at all, it is exempt from this executive mandate. Even if cost is a factor, however, the statute might limit the extent to which it can be considered, such as providing only a regulatory safety-valve for costs that would bankrupt the industry. Under this approach, the level of regulation would initially be based on only reaching a designated level of safety, but the level could then be adjusted in order to prevent destruction of the industry.

An example of the safety-valve approach is provided by *American Textile Manufacturers Institute, Inc. v. Donovan* (the *Cotton Dust* case).[66] The case in-

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list of factors, and provide a deadline for agency action. An unusually explicit restriction on discretion is found in the Clean Air Act's ("CAA") provision on regulation of toxic air pollutants. Under section 112(b)(3), when an agency receives a petition to list an additional substance as toxic, it "may not deny a petition solely on the basis of inadequate resources or time for review." This provision eliminates the agency's normal discretion to refrain from a rulemaking based entirely on those factors. 42 U.S.C. § 7412(b)(3) (2012).

63. There is, however, a counterargument to that position. Perhaps Congress merely meant to allow the agency to consider cost if it chose to do so, but wanted to ensure that it would not be forced to do so and that a court would not be able to review such a determination. This would put the agency in somewhat of the same position as a prosecutor in a case with a mandatory minimum sentence. Once the case is brought, the court cannot consider arguments for leniency but the prosecutor can do so in deciding whether to bring the case. The argument seems less plausible, however, when the decisionmaker is the same at both stages. Moreover, in the case of the prosecutor, it is not clear whether the legislature really approved of this type of prosecutorial clemency or whether the prosecutor is merely taking advantage of the non-reviewability of such decisions. Because denial of a rulemaking is reviewable, although under a deferential standard, the latter consideration does not apply. Still, one might imagine that Congress meant to give the FDA discretion to decide whether to initiate the proceeding but to prevent the drug company from litigating the question of cost. In *Massachusetts v. EPA*, however, it does not seem plausible to argue that Congress was merely trying to keep cost issues out of the rulemaking process but was willing to let EPA choose to tolerate hazardous pollution.
64. For example, in the setting of air pollution regulation, the Court in *Massachusetts v. EPA* considered that only evidence of risk was relevant to an endangerment finding.
65. *See* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1845–54 (2013). *See generally* Daniel A. Farber, *Rethinking the Role of Cost-Benefit Analysis*, 76 U. CHI. L. REV. 1355 (2009) (reviewing RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH (2008)).
66. 452 U.S. 490 (1981). The Court rejected agency use of cost-benefit analysis in establishing workplace regulation of toxic chemicals. *Id.* at 506–11.

volved a regulation by the Occupational Health and Safety Administration ("OSHA") under section 6(b)(5) of the Occupational Safety and Health Act.[67] That section directs the Secretary of Labor (via OSHA) to establish a workplace standard for any toxic material "which most adequately assures, to the extent feasible . . . that no employee will suffer material impairment of health or functional capacity."[68] In a previous case, the Court had held that OSHA must first find that a substance currently poses a significant risk before it can utilize this section.[69] It was then faced in the Cotton Dust case with the question of whether, having a significant risk, OSHA was required to balance that risk against the cost of its elimination.[70]

The Court rejected cost-benefit analysis as inconsistent with the statute. According to the Court, "Congress itself defined the basic relationship between costs and benefits, by placing the 'benefit' of worker health above all other considerations save those making attainment of this 'benefit' unachievable. Any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in § 6(b)(5)."[71] Consequently, "cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is."[72] Thus, OSHA was excluded from considering costs except to the extent that they were so high as to make it impossible for industry to comply.

That decision was by no means the last time the Court encountered efforts to make regulation more responsive to costs. Because of EPA's important role in regulatory matters, the cost issue has come up most frequently in EPA cases. The Supreme Court has decided four cases relating to EPA's consideration of costs under federal pollution statutes.

*Union Electric Co. v. EPA*[73] was the first case in this series. The issue in the case was whether EPA was required to consider the economic or technological feasibility of the state's plan to meet national air quality standards.[74] In an opinion by Justice Marshall, the Court had little difficulty in upholding EPA's refusal to do so.

Justice Marshall relied both on the general purposes of the Act and on the language of the provision. In terms of the statute's purposes, he stressed the seriousness with which Congress viewed the problem of air pollution and its desire to push industry beyond the bounds of existing pollution control technologies.[75] Justice Marshall found this approach to be "apparent" in the statutory

67. 29 U.S.C. § 655(b)(5) (2012).
68. *Id.*
69. Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607 (1980).
70. *Am. Textile Mfrs. Inst.*, 452 U.S. at 506.
71. *Id.* at 509.
72. *Id.*
73. 427 U.S. 246 (1976).
74. *Id.*
75. Justice Marshall stressed the stringency of the statute:

> As we have previously recognized, the 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution. The Amendments place the primary responsibility for

text, which sets out a list of provisions and "provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator [of EPA] 'shall approve' the proposed state plan."[76] The Court added that the "mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified, and none of the eight factors appears to permit consideration of technological or economic infeasibility."[77]

The next case was nearly twenty-five years later. *Whitman v. American Trucking Ass'ns, Inc.*[78] involved the question of whether EPA could consider cost at an earlier stage of the process—in setting the national air quality standards themselves, as opposed to the process of formulating the subsequent state plans. In an opinion by Justice Scalia, the Court upheld EPA's view that consideration of costs was precluded. At its heart, Justice Scalia found the issue straightforward. He began by recalling the relevant statutory test. "Section 109(b)(1) instructs the EPA to set primary ambient air quality standards 'the attainment and maintenance of which . . . are requisite to protect the public health' with 'an adequate margin of safety.'"[79] He found that language all but conclusive. "Were it not for the hundreds of pages of briefing respondents have submitted on the issue," he mused, "one would have thought it fairly clear that this text does not permit the EPA to consider costs in setting the standards," given that the language "is absolute."[80] EPA's assignment is to use technical information "to identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration to provide an 'adequate' margin of safety, and set the standard at that level."[81] Thus, "[n]owhere are the costs of achieving such a standard made part of that initial calculation."[82]

Justice Scalia also invoked some general principles in reading the Clean Air Act. Because the statute provides many explicit references to cost, "[w]e have therefore refused to find implicit in ambiguous sections of the [Clean Air Act] an authorization to consider costs that has elsewhere, and so often, been expressly granted."[83] Justice Scalia rebuffed industry efforts to extract some contrary implications about costs from the statutory language, commenting that

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> formulating pollution control strategies on the States, but nonetheless subject the States to strict minimum compliance requirements. These requirements are of a "technology-forcing character" and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.

*Id.* at 256–57 (citation omitted).

76. *Id.* at 257 (quoting 42 U.S.C. § 7410(k)(3) (2012)).
77. *Id.* (citation omitted).
78. 531 U.S. 457 (2001). For extensive background on the case, see Christopher H. Schroeder, *The Story of* American Trucking*: The Blockbuster That Misfired*, *in* ENVIRONMENTAL LAW STORIES 321 (Richard J. Lazarus & Oliver A. Houck eds., 2005).
79. *Am. Trucking*, 531 U.S. at 465.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 467.

"Congress does not hide elephants in mouseholes."[84] He argued that consideration of cost "is *both* so indirectly related to public health *and* so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned in [the text] had Congress meant it to be considered."[85]

In the aftermath of *American Trucking*, Professor Cass Sunstein expressed concerns that it might be read as repudiating a line of lower court decisions that adopted a presumption in favor of allowing agencies to consider costs when a statute is ambiguous.[86] He urged that the case be read instead as holding that "in view of the clarity of the main provision of the Clean Air Act, judges would be reluctant to find permission to consider costs [under that provision] elsewhere, since Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'"[87] Indeed, the Court's opinion can be plausibly read to find the statute unambiguous in light of the language of the provision and the overall thrust of the statute, without regard to any presumption about interpreting provisions that do not mention cost. The Court's next decision gave some support to Sunstein's hopes rather than reinforcing his fears.

*Entergy Corp. v. Riverkeeper, Inc.*[88] involved the Clean Water Act rather than the Clean Air Act. Although the statute is primarily about adding substances to water rather than removing them from water, section 316(b) is an exception. It requires that the "location, design, construction, and capacity of water intake structures reflect the best technology available for minimizing adverse environmental impact."[89] EPA had declined to require closed-system cooling for power plants, which would have minimized the need for plants to draw from water bodies, thereby lessening the damage caused to aquatic life by the intake systems. EPA's rationale was that closed systems were extremely ex-

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84. *Id.* at 468.

85. *Id.* at 469.

86. Cass R. Sunstein, *Regulating Risks After* ATA, 2001 Sup. Ct. Rev. 1, 27.

87. *Id.* at 28.

88. 556 U.S. 208 (2009).

89. Clean Water Act § 316(b), 33 U.S.C. § 1326(b) (2012). This provision, within a section entitled "Thermal Discharges," states that any standard established under two other sections (one dealing with pollution from new plants and the other with pollution from existing plants) "shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." The other two sections both set standards on best available technology, but are more informative about the applicable criteria. *See* Clean Water Act § 301(b), 33 U.S.C. § 1311(b) (cross referencing to the description of technological standards in Clean Water Act § 304(b), 33 U.S.C. § 1314(b)); Clean Water Act § 306(a)(1), 33 U.S.C. § 1316(a)(1) ("The term 'standard of performance' means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants."). For an introduction to the statute, see Salzman & Thompson, *supra* note 26, at 173–203.

pensive and that other forms of control "could approach" their environmental benefits.[90]

In an opinion by Justice Scalia, the *Entergy* Court upheld EPA's interpretation of the statute to permit such tradeoffs between costs and benefits. He found the phrase "best technology available for minimizing adverse environmental impacts" ambiguous, since "best technology" is a somewhat flexible term.[91] Moreover, the statute used more emphatic language elsewhere when Congress wanted to ensure attainment of an absolute minimum.[92] Justice Scalia also rejected efforts to analogize to other provisions of the statute mandating various levels of pollution control technologies, since they each provided more guidance than the simple reference to "best technology" and had a more drastic goal of eventually eliminating all pollution.[93]

Although Justice Stevens argued in dissent that *American Trucking* controlled,[94] Justice Scalia described that case as holding only that "the text of § 109 of the Clean Air Act, 'interpreted in its statutory and historical context . . . unambiguously bars cost considerations' in setting air quality standards under that provision."[95] As the relevant statutory context, he pointed to the fact that there were "other provisions in the Clean Air Act that expressly authorized consideration of costs, whereas § 109 did not."[96] He concluded that "*American Trucking* thus stands for the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion."[97]

The upshot was that, while *American Trucking* seemingly embraced a presumption that ambiguous provisions of the Clean Air Act should be read to preclude consideration of cost, *Entergy* allowed EPA to interpret an ambiguous provision of the Clean Water Act to preclude imposing disproportionate costs on industry. If *American Trucking* had meant to create a presumption against considering costs under federal pollution laws, the presumption was clearly short-lived.

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90. *Entergy*, 556 U.S. at 208.

91. Justice Scalia pointed out that the "best" technology is susceptible to several meanings:

> The "best" technology—that which is "most advantageous," Webster's New International Dictionary 258 (2d ed. 1953)—may well be the one that produces the most of some good, here a reduction in adverse environmental impact. But "best technology" may also describe the technology that *most efficiently* produces some good. In common parlance one could certainly use the phrase "best technology" to refer to that which produces a good at the lowest per-unit cost, even if it produces a lesser quantity of that good than other available technologies.

*Id.* at 218.

92. *Id.* at 219.

93. *Id.* at 222.

94. *Id.* at 239–40.

95. *Id.* at 223 (quoting Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 471 (2001)). For an argument that the plain language of the statute contradicted the government's position, see Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L.J. 1097 (2006).

96. *Entergy*, 556 U.S. at 223.

97. *Id.*

The Court also upheld EPA's discretion to consider costs, but with a very different alignment of Justices, in *EPA v. EME Homer City Generation, L.P.*[98] The case involved the "good neighbor" provision of the Clean Air Act, which deals with the problem of interstate air pollution.[99] The problem EPA faced was how to allocate emission cuts when multiple states contributed to a violation of air quality standards in a downwind state. EPA used a two-stage process to set each state's obligations. First, it determined whether a state significantly contributed to a specific downwind state's nonattainment, with significance defined as anything over one percent of the relevant air quality standard.[100] Then, at the second stage, EPA used a cost-based standard to determine how much each state could reduce its emissions at a given cost.[101] The D.C. Circuit overturned EPA's cost-based approach and required instead that reductions be proportional to the amount of emissions from each upwind state.[102]

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98. 134 S. Ct. 1584 (2014). The *EME Homer* facility was a major source of interstate air pollution in its own right:

> For more than 40 years, Homer City has spewed sulfur dioxide from two of its three units completely unchecked, and still does because it is largely exempt from federal air pollution laws passed years after it was built in 1969. Last year, the facility, released 114,245 tons of sulfur dioxide, more than all of the power plants in neighboring New York combined.
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> "It is an emblem, a poster child of the challenge of interstate air pollution," said Lem Srolovic, the head of the environmental protection bureau for the New York Attorney General's office, in an interview with The Associated Press.

Dina Cappielo & Kevin Begos, *After Decades, Dirty Power Plant To Get Clean*, ASSOCIATED PRESS (May 27, 2014), http://perma.cc/XQ82-Q44C. As the title of that article indicates, the plant was finally planning to install scrubbers, one of the last plants in the country to do so. *Id.*

99. The "good neighbor" provision requires each state implementation plan to:

> contain adequate provisions . . . prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard.

42 U.S.C. § 7410(a)(2)(D) (2012). In other words, each state has to prevent any source within its borders from "contributing significantly" to nonattainment in any other state.

100. *EME Homer*, 134 S. Ct. at 1596.

101. *Id.*

102. EME Homer City Generation L.P. v. EPA, 696 F.3d 7, 20–22 (D.C. Cir. 2012). The court provided an example of the methodology that EPA must use:

> Suppose the NAAQS is 100 units, but the downwind State's nonattainment area contains 150 units. Suppose further that the downwind State contributes 90 units, and three upwind States contribute 20 units each. Because the upwind States are responsible for the downwind State's exceeding the NAAQS by 50 units, the downwind State is entitled to at most 50 units of relief from the upwind States so that the downwind State can achieve attainment of the NAAQS. Distributing those obligations in a manner proportional to their contributions, each of the three upwind States' significant contribution would be, at most, 16 2/3 units. Or suppose instead that the three upwind States contribute 10, 20, and 30 units respectively. Distributing those obligations in a manner proportional to their contributions, those three States' significant contributions would be at most 8 1/3, 16 2/3, and 25 units, respectively, leading to the combined reduction of 50 units needed for the downwind State to reach attainment.

The Supreme Court reversed, upholding EPA's approach in an opinion by Justice Ginsburg (who had dissented in *Entergy*). "Lacking a dispositive statutory instruction to guide it, EPA's decision, we conclude, is a 'reasonable' way of filling the 'gap left open by Congress.'"[103] In the Court's view, EPA's choice "makes good sense," providing "an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address."[104] This approach was "[e]fficient because EPA can achieve the levels of attainment, *i.e.*, of emission reductions, the proportional approach aims to achieve, but at a much lower overall cost."[105] The Court added that EPA's approach was also fair because "[u]pwind States that have not yet implemented pollution controls of the same stringency as their neighbors will be stopped from free riding on their neighbors' efforts to reduce pollution."[106]

In dissent, Justice Scalia sharply rejected the relevance of cost under the statute.[107] This dissent is particularly significant because it exposes the divisions surrounding the meaning of *American Trucking*. Justice Scalia argued that the majority was in effect overruling *American Trucking*. Given that many provisions of the statute explicitly allow costs to be taken into account, *American Trucking* required "a textual commitment of authority to the EPA to consider costs" but "[t]oday's opinion turns its back upon that case and is incompatible with that opinion."[108] One indication of the judicial confusion surrounding this topic is that Justice Scalia adopted a reading of *American Trucking* in this dissent that he had rejected in his majority opinion in *Entergy*. Because he did not refer to Entergy in the later *EME Homer* dissent, the reasons for this change in interpretation remain a mystery.

The majority responded that *American Trucking* was distinguishable (without, however, mentioning *Entergy*). According to the Court, the provision in *American Trucking* created an "absolute" mandate based on public health and precluded any other factor, whereas the good-neighbor provision "grants EPA discretion to eliminate 'amounts [of pollution that] . . . contribute significantly to nonattainment' downwind," but "fails to provide any metric by which EPA can differentiate among the contributions of multiple upwind States."[109] Scalia rejected this effort to distinguish *American Trucking*, arguing that the good neighbor provision was just as "absolute" as the provision at issue in the earlier case.[110]

*Id.* at 21.

103. *EME Homer*, 134 S. Ct. at 1607 (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984)).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1611 (Scalia, J., dissenting). "It would be extraordinary," he wrote, "for Congress, by use of the single word 'significantly,' to transmogrify a statute that assigns responsibility on the basis of amounts of pollutants emitted into a statute authorizing EPA to reduce interstate pollution in the manner that it believes most efficient." *Id.*

108. *Id.* at 1616.

109. *Id.* at 1607 n.21 (majority opinion).

110. *Id.* at 1616 n.3 (Scalia, J., dissenting).

After *Entergy* and *EME Homer*, it seems clear that EPA has discretion to consider costs when statutory provisions are ambiguous, notwithstanding any contrary presumption that might otherwise be gleaned from *American Trucking*.[111] This line of cases did not, however, address the question of whether an agency must consider costs when a statute is ambiguous.

The Court was faced with that question in *Michigan v. EPA*.[112] This case involved a provision dealing with toxic emissions from power plants, section 112(n)(1)(A).[113] Although toxic emissions from other categories of sources are covered under section 112 based on health considerations,[114] this section provides different treatment for electrical-power generators. It requires EPA to conduct several studies and reports to Congress, and then to determine whether it is "necessary and appropriate" to regulate power plants, taking into consideration a study focused on health effects. EPA viewed the statute as ambiguous but concluded that it should not consider cost in making this threshold determination for power plants, in part because Congress did not make cost a factor in determining whether to regulate toxics from other industries.[115]

A closely divided Supreme Court held that the agency's interpretation was unreasonable.[116] Indeed, Justice Scalia said in his opinion for the Court, "[o]ne would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."[117] He also noted that in this setting, "cost" includes more than the expense of compliance, it also includes "any disadvantage" from a regulation, including environmental and health impacts.[118] EPA's interpretation precludes the Agency from considering any type of cost—including, for instance, harms that regulation might do to human health or the environment.

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111. For instance, in *Natural Resources Defense Council v. EPA*, the court upheld EPA's interpretation of the Clean Air Act to allow consideration of cost-effectiveness in implementing a provision requiring the "maximum degree of emissions reductions" that are "achievable." 749 F.3d 1055, 1060–61 (D.C. Cir. 2014). The court concluded that "[e]ven if the statute does not compel EPA's approach, and even if EPA's reading is not the better reading, we conclude that it is still at least a reasonable reading given the various potential meanings of 'cost' in this context." *Id.*

112. 135 S. Ct. 2699 (2015).

113. 42 U.S.C. § 7412(n)(1)(A) (2012). This subsection requires EPA to "perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units" from toxic pollutants despite additional controls already required by other provisions of the statute. *Id.* EPA is then instructed to report on the study to Congress, along with a discussion of "alternative control strategies for emissions." *Id.* Finally, and most importantly, EPA "shall regulate electric utility steam generating units under this section, if [it] finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph." *Id.*

114. *Michigan*, 135 S. Ct. at 2704, 2707 (citing 42 U.S.C. §§ 7412(b), (c)(3)).

115. *Id.* at 2709–10.

116. Justice Scalia wrote the majority opinion. The four dissenters, led by Justice Kagan, contended that EPA had made adequate provision for cost considerations at later points of the regulatory process. *Id.* at 2717–19 (Kagan, J., dissenting). Justice Thomas wrote a separate concurrence to reiterate his argument for overruling *Chevron*, although he also agreed that the interpretation was unreasonable. *Id.* at 2712–14 (Thomas, J., concurring).

117. *Id.* at 2707.

118. *Id.*

Justice Scalia continued that "[t]here are undoubtedly settings in which the phrase 'appropriate and necessary' does not encompass cost."[119] "But," he said, "this is not one of them."[120]

The Court relied on some additional factors to bolster its decision. One is that agencies "have long treated cost as a centrally relevant factor when deciding whether to regulate."[121] "Against the backdrop of this established administrative practice," Justice Scalia said, "it is unreasonable to read an instruction to an administrative agency to determine whether 'regulation is appropriate and necessary' as an invitation to ignore cost."[122] The Court also relied on the statutory requirement that EPA conduct two additional studies (beyond the study of health effects) as a "further indication of the relevance of cost to the decision to regulate."[123]

Although *Michigan v. EPA* makes it clear that EPA was required to consider costs, it does not specify how EPA must do so. The Court emphasized that it was not requiring EPA to conduct a formal cost-benefit analysis. Rather, "[i]t will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost."[124] The Court also did not reach a question raised by industry over which benefits EPA could consider. The quantifiable health benefits of reducing the specific toxin (mercury) involved in the case were limited, but EPA found that regulation would also have tremendous health benefits by reducing emissions of dangerous particulates. Industry argued that those ancillary health benefits were irrelevant, but the Court found that this issue was not properly before it.[125]

Although *Michigan v. EPA* was a 5–4 decision, there was consensus on some important points. Notably, the four dissenters all seemed to agree with the majority about the presumptive relevance of cost, though they disagreed with the way the majority applied that principle in the specific case. According to Justice Kagan, whose dissent was joined by Justices Breyer, Ginsburg, and Sotomayor, if the agency had not had the opportunity to consider cost at a later stage in the proceeding, she "would agree with the majority's conclusion that EPA failed to adequately consider cost" in making the threshold finding of

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 2708.

123. *Id.*

124. *Id.* at 2711.

125. Thus, the Court left this to EPA on remand, so long as EPA's resolution of the issue is reasonable. Unless something in a specific statute precludes consideration of co-benefits, however, the logic of the opinion requires considering them. First, if costs are defined as broadly as the Court suggests, it is hard to see why benefits should be defined more narrowly. Second, the Court relies in part on administrative practice, and cost-benefit guidelines have required consideration of co-benefits for many years. Third, to borrow some language from the Court (*see id.* at 2707), "one would not say that it is even rational, never mind 'appropriate,'" to reject a rule where the benefits vastly exceed the costs simply because they are the "wrong kind" of benefits. The "capaciousness" of the word *appropriate* again would seem to call for consideration for all factors that have policy significance.

appropriateness.[126] Justice Kagan made it clear that she, too, would adopt a presumption in favor of taking costs into consideration in some way or another.[127] She argued that the agency had in fact given adequate consideration of costs during later parts of the regulatory process, but she clearly adopted the same presumption in favor of cost consideration as the majority. Thus, the Court seems to be unanimous on that score.

The Justices seemed to find the relevance of cost to be merely a matter of common sense, requiring no explanation. Yet, it is not necessarily irrational to prioritize public health over compliance costs, and as EPA had pointed out, Congress had adopted that stance in other portions of the same section of the statute. So, some further discussion of the basis for the Court's ruling might well have been in order. In any event, whatever its basis, all of the Justices seemed to agree on this principle, although only the majority went further and seemingly required not only a consideration of economic feasibility but also some type of comparison of the magnitude of costs and benefits.

*Michigan v. EPA* also shed some light on the issue of when an agency is barred from considering cost. In response to the agency's invocation of *American Trucking*, the Court explained its understanding of that case.[128] According to Justice Scalia, *American Trucking* stands for "the modest principle [that where] the Clean Air Act expressly directs EPA to regulate on the basis of a discrete factor that [on its face] does not include cost, the Act [normally] should not be read as implicitly allowing consideration of cost anyway."[129] As discussed earlier, the language in *American Trucking* itself seems quite a bit broader,[130] but Justice Scalia, the author of both opinions, seems to have retreated from its broader implication.

Thus, at least for now, the Court seems to have settled on a reasonably coherent approach to cost considerations. First, an agency presumptively may not consider costs in making a regulatory decision when a statute explicitly calls instead for a non-cost factor. Second, there is also a presumption requiring consideration of costs when a statute provides broad discretion such as using the term "appropriate." However, the agency has discretion over how to take costs into account, although the majority does seem to insist that costs not be too disproportionate with benefits.

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126. *Id.* at 2716.

127. As Justice Kagan explained:

> Cost is almost always a relevant—and usually, a highly important—factor in regulation. Unless Congress provides otherwise, an agency acts unreasonably in establishing "a standard-setting process that ignore[s] economic considerations." . . . As the Court notes, that does not require an agency to conduct a formal cost-benefit analysis of every administrative action. [Nevertheless,] (absent contrary indication from Congress) an agency must take costs into account in some manner before imposing significant regulatory burdens.

*Id.* at 2716–17.

128. *Id.* at 2709.

129. *Id.*

130. *See supra*, notes 78–82 and accompanying text.

### C. Agency Reconciliation of Competing Statutory Goals

Sometimes costs involve interests that are protected elsewhere within the same statute or in other laws. The role of administrative agencies in resolving conflicting statutory policies is well established. Indeed, in perhaps the most widely known administrative law case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[131] the Court held that judicial deference is warranted when, among other relevant factors, the agency's decision "represents a reasonable accommodation of manifestly competing interests" and "involves reconciling conflicting policies."[132] The Court added that "Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases."[133]

In *Chevron*, the conflicting policies were found within a single statute, but the Court has also deferred to an agency's reconciliation of conflicting policies among multiple statutes. In *National Ass'n of Home Builders v. Defenders of Wildlife*,[134] the conflict was between the Endangered Species Act ("ESA") and many other federal statutes that imposed mandatory duties without references to the ESA. Reading the ESA "against the statutory backdrop of the many mandatory agency directives whose operation it would implicitly abrogate or repeal" under the lower court's interpretation, the Court found itself "left with a fundamental ambiguity that is not resolved by the statutory text."[135] The Court found it "appropriate to look to the implementing agency's expert interpretation," which "harmonizes the statutes by applying [the relevant ESA provision] to guide agencies' discretionary authority, but not reading it to override express statutory mandates."[136] The Court then applied the *Chevron* doctrine and found that the agency's interpretation was entitled to deference.[137]

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131. 467 U.S. 837 (1984). *Chevron* arose in a complicated regulatory setting that is described in detail in Jody Freeman, *The Story of* Chevron*: Environmental Law and Administrative Discretion*, in ENVIRONMENTAL LAW STORIES, *supra* note 78, at 171. Regarding the complexities of implementing *Chevron*, see Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 188 YALE L.J. 64 (2008).

132. *Chevron*, 467 U.S. at 865.

133. *Id.*

134. 551 U.S. 644 (2007).

135. *Id.* at 666. Professor Pierce criticizes the Court for failing to give EPA discretion to consider the ESA factor. *See* Pierce, *supra* note 9, at 84–85. But the Court evidently found it more appropriate to defer to the agencies with authority over implementation of the ESA itself, as discussed in the text above.

136. *Home Builders*, 551 U.S. at 666. Surely, there must be some limits on the statute's application to nondiscretionary actions: the ESA surely does not require the Treasury Department to condition income tax refunds on a showing that the recipient will not use the money for activities harmful to endangered species. Of course, EPA's decision to approve a state's permitting program was not "non-discretionary" in the same sense, and the Court's failure to consider this difference more fully can be reasonably criticized.

137. *Id.* at 666–68. The Court pointed out that *Tennessee Valley Authority v. Hill* did not involve such a nondiscretionary decision: "Central to the Court's decision was the conclusion that Congress did not *mandate* that the TVA put the dam into operation; there was no statutory command to that effect; and there was therefore no basis for contending that applying the ESA's no-jeopardy requirement would implicitly repeal another affirmative congressional directive." *Id.* at 670. Thus, the Court read *Hill* to hold "that the ESA's no-jeopardy man-

Although agencies clearly have some leeway in reconciling conflicting policies, the situation with respect to directly contradictory statutory language in a single statute is less clear. This issue divided the Justices in *Scialabba v. Cuellar de Osorio*,[138] which involved a complicated question relating to the priority of immigrant visa applications. The lead opinion was written by Justice Kagan and joined by Justices Kennedy and Ginsburg. Justice Kagan stated that *Chevron* deference was warranted because the "two faces of the statute do not easily cohere with each other: Read either most naturally, and the other appears to mean not what it says."[139] "That internal tension," in her view, "makes possible alternative reasonable constructions, bringing into correspondence in one way or another the section's different parts," thereby requiring judicial deference to the agency's choice under *Chevron*.[140]

Concurring in the judgment, Chief Justice Roberts, joined by Justice Scalia, contended that *Chevron* and *Home Builders* did not apply when a statute's provisions are directly contradictory, but found that the statute before the Court did not have this flaw, making deference appropriate.[141] In dissent, Justice Alito endorsed Roberts's view on the general issue but had a different interpretation of the visa provision.[142] Justice Sotomayor also dissented, joined by Justice Breyer and by Justice Thomas (who did not, however, join one footnote). She argued that the statute was not truly self-contradictory,[143] and she referred to *Home Builders* as a situation involving "the kind of conflict that can make deference appropriate to an agency's decision to override unambiguous statutory text."[144]

The upshot is that three Justices thought that self-contradictory language in a statute triggered *Chevron* (Kagan, Kennedy, Ginsburg), while three did not (Roberts, Scalia, Alito). The views of the remaining two (Sotomayor and Breyer) are unclear. With the possible exceptions of Justices Alito and Thomas, however, all of the Justices believed that *Home Builders* presented a type of *inter*-statutory textual conflict where deference was appropriate. And *Chevron*

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date applies to every *discretionary* agency action—regardless of the expense or burden its application might impose." *Id.* at 671.

138. 134 S. Ct. 2191 (2014).

139. *Id.* at 2203.

140. *Id.*

141. *Id.* at 2214. Chief Justice Roberts found *Home Builders* distinguishable:

> *National Assn. of Home Builders v. Defenders of Wildlife* is not to the contrary. There the Court confronted two different statutes, enacted to address different problems, that presented "seemingly categorical—and, at first glance, irreconcilable—legislative commands." We deferred to an agency's reasonable interpretation, which "harmonize[d] the statutes," in large part because of our strong presumption that one statute does not impliedly repeal another. *Home Builders* did not address the consequences of a single statutory provision that appears to give divergent commands.

*Id.* at 2214 n.1 (citations omitted).

142. *Id.* at 2216 (Alito, J., dissenting).

143. *Id.* at 2220 (Sotomayor, J., dissenting).

144. *Id.* at 2220 n.3.

remains applicable when statutory provisions are in tension but not flatly contradictory, as exemplified by *EME Homer*.[145]

The Court's decisions regarding agency discretion to consider costs do not trace a straight path, as indicated by the frequent disagreements of the Justices about the meanings of prior decisions. Still, taken as a whole, the cases do provide a somewhat manageable standard. The upshot of the cases seems to be that an agency has discretion to consider costs (in the broad sense) except when Congress has specified other factors as the basis for decision. The question then is what factors suffice to create an ambiguity, something that the Court has found harder to articulate. Nevertheless, it would appear that such ambiguities can arise from the language of a specific provision or from tensions between different provisions (but perhaps not flat contradictions), either in the same statute or between different statutes. The next section examines how courts have resolved these issues in the context of judicial enforcement of statutes.

## II. Judicial Discretion in Statutory Cases

Judicial discretion is normally considered a completely different topic from agency discretion. Agency discretion is a core concern of administrative law, while judicial discretion is the subject of remedies law. Moreover, the judiciary long predates the modern administrative state, and its powers derive from different constitutional provisions. As discussed below, however, there are some striking similarities between the governing principles in both areas.

A famous constitutional scholar once said that a Supreme Court ruling "asked of the laity an understanding of which lawyers are scarcely capable—an understanding that something could be unlawful, while it was nevertheless lawful to continue it for an indefinite time."[146] In the cases discussed in this section, the Court has attempted to deflect this concern through several arguments: that other remedies for the continuing illegality remain available, that the continuation of the unlawful action is only temporary, and that the statutory purpose will not be disserved by the delay in compliance. Nevertheless, dissenters, and not a few legal scholars, have remained dissatisfied.

Section A begins the analysis with a discussion of the complex case law on the subject of judicial discretion in issuing injunctions against statutory violations. Section B turns to a question in the overlap between administrative and remedies law: when can a court decline to vacate a regulation even though the rulemaking was defective?

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145. In *King v. Burwell*, the statute before the Court contained an arguable inconsistency regarding the equivalence of federal health insurance exchanges and state exchanges, but the Court did not apply *Chevron* deference because the Court considered it improbable that Congress would have delegated the resolution of such a major issue of national health policy to the agency promulgating the regulations, the Internal Revenue Service. 135 S. Ct. 2480, 2488–89 (2015).

146. Charles Black, *The Unfinished Business of the Warren Court*, 45 Wash. L. Rev. 3, 22 (1970).

The courts seem to have had particular problems in articulating a coherent approach in this area. Accordingly, understanding the doctrine takes a painstaking review of the sometimes-tortuous case law. In the end, however, some basic principles governing judicial discretion emerge, and they are largely the same as the principles discussed in Part I that govern agency discretion.

### *A. Statutory Injunctions*

The Supreme Court's general approach to injunctions is now encapsulated in the *eBay*[147] test. The *eBay* decision requires the application of a four-factor test, under which a plaintiff must demonstrate irreparable injury, lack of adequate remedies at law such as damages, the "balance of hardships between the plaintiff and defendant," and that "the public interest would not be disserved by a permanent injunction."[148] Issuance of an injunction is "an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion."[149] It is not clear whether this four-factor formulation was, as the Court thought, simply a description of "the long tradition of equity practice,"[150] or whether the Court's framework was more rigid than traditional equity practice.[151] The idea of "balancing the equities" is a familiar one from nuisance law, although even there it may have a shorter pedigree than is sometimes assumed.[152] It has been

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

148. *Id.*

149. *Id.*

150. *Id.* It was already clear that irreparable injury is a requirement for all injunctions. *See* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 65 (1975) (granting no injunction for a breach of securities law absent irreparable injury); Animal Welfare Inst. v. Martin, 623 F.3d 19, 27 (1st Cir. 2010) (granting no injunction under the ESA absent a showing of harm to any members of the species); *cf.* Brown v. Colegio de Abogados de Puerto Rico, 613 F.3d 44, 49 (1st Cir. 2010) (holding that an injunction was warranted despite adequacy of damages in order to avoid the burden of repetitive litigation).

151. For critiques of the Court's formulation, see Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203 (2012); Doug Rendleman, *The Trial Judge's Equitable Discretion Following* eBay v. MercExchange, 27 REVIEW OF LITIGATION 1, 63 (2007). A recent article argues that, despite its "infelicities and redundancies," the Court's test did have roots in traditional equity practice, though it had never played the central role the Court seemed to assume. Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1029 (2015). On applications of *eBay* in the lower courts, see James M. Fischer, *What Hath* eBay v. MercExchange *Wrought?*, 14 LEWIS & CLARK L. REV. 555 (2010) (identifying confusion in lower court applications of *eBay* in patent cases); Daniel Mach, *Rules Without Reasons: The Diminishing Role of Statutory Policy and Equitable Discretion in the Law of NEPA Remedies*, 35 HARV. ENVTL. L. REV. 205 (2011) (emphasizing difficulties of applying *eBay* in administrative law cases).

152. Professor Jared Goldstein traces the balancing back to *Richard's Appeal*, 57 Pa. 105 (1868), but finds that it was not universally accepted until over a century later. *See* Jared A. Goldstein, *supra* note 8, at 490–505. Until *Boomer v. Atlantic Cement Co.*, 247 N.E.2d 870 (1970), New York was a clear holdout from the balancing approach. For discussion of the problem of balancing the equities in common-law environmental cases, see Daniel A. Farber, *The Story of* Boomer*: Pollution and the Common Law*, in ENVIRONMENTAL LAW STORIES, *supra* note 78, at 7.

much less clear, however, whether "balancing the equities" is also appropriate in public law cases where the defendant is violating a federal statute.[153]

As shown below, the Court has sometimes sharply limited judicial discretion to balance the interests involved in a statutory case, while in other cases it has spoken broadly about the appropriateness of balancing. The discussion will begin with the first set of cases, which stress the obligation of courts to use their injunctive power to carry out congressional policies. The discussion then turns to the other line of cases stressing equitable discretion.[154]

### 1. *The Judicial Duty to Enforce*

When faced with a violation of a federal statute, the court is then faced with the question of whether to issue an injunction. On the one hand, the tradition of equitable discretion encapsulated in the *eBay* test seems to call for a balancing of the equities, with the cost of the injunction to the defendant playing a major role. On the other hand, it seems incongruous for the court to excuse a continuing violation of federal law because obeying the law would be too burdensome for the defendant. The cases in this section resolve the issue in favor of enforcement without consideration of hardship, thereby limiting or precluding balancing of the equities. Under these cases, a trial judge does not have discretion to consider costs or is at least precluded from considering certain kinds of costs.

*Tennessee Valley Authority v. Hill*[155] is the best-known case in which the Supreme Court limited the use of balancing and excluded cost considerations in

153. This question has attracted a substantial interest from scholars. *See*, *e.g.*, Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 512 (1984); Goldstein, *supra* note 8; Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524 (1982); David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627 (1988).

154. There is an extensive literature about public law remedies focusing on how broadly a court may go in remedying a violation, particularly a constitutional violation. *See*, *e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Susan P. Sturm, *A Normative Theory of Public Law Remedies,* 79 GEO. L.J. 1355 (1991). Some of this literature (exemplified by Professors Fiss and Sturm) compares the judges' task in these institutional-reform cases as resembling the task of administrative agencies. However, prohibitory injunctions of the kind discussed here are portrayed as much more straightforward. *See, e.g.*, Sturm, *supra*, at 1361. Without minimizing the special problems presented by the institutional-reform cases, the similarities with prohibitory injunctions in public law cases are also significant. Consider, for example, Sturm's observation that in institutional-reform cases, "liability norms provide only the goals and boundaries for the remedial decision" and that "[t]he choice of remedy is likely to be driven by goals that do not directly relate to the liability norm." *Id.* at 1363–64. As this Article shows, much the same may be true even when a court is asked to enjoin a statutory violation.

155. 437 U.S. 153 (1978). For a fuller discussion of *Hill* and of the underlying statute, see Holly Doremus, *The Story of* TVA v. Hill*: A Narrow Escape for a Broad New Law*, *in* ENVIRONMENTAL LAW STORIES, *supra* note 78, at 109. As Doremus explains, the Justices initially voted to reverse the court of appeals summarily and vacate the judgment (leaving the trial court decision in place), but the draft dissents from Justices Stewart and Stevens persuaded the Court to hear the case. *Id.* at 124–25, 127–28.

issuing a public law injunction. It does not stand alone, however. In addition to *Hill*, it is worth considering one earlier case and another later one that adopt the same basic approach.

In *United States v. San Francisco*,[156] a federal statute granted the city the right to use federal lands to transport water and electricity from Hetch-Hetchy Dam, while prohibiting the city from transferring the electricity to any private utility.[157] The city cleverly decided to sell the land "on consignment" via a private utility, a ruse that the Court somewhat indignantly rejected: "Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law."[158] Having lost on the merits, the city argued that the Government should be denied relief upon a balancing of the equities, particularly the fact that government officials had initially failed to disapprove of the arrangement.[159] The Court rejected this effort by the city and held that balancing of the equities was unnecessary—in language that forms an odd counterpoint to *Michigan v. EPA*'s interpretation of the same phrase—and an injunction was "both appropriate and necessary.[160]

*United States v. San Francisco* is complemented by another case from the same era, *Hecht Co. v. Bowles*.[161] In this case, the Court actually ruled against injunctive relief, but read as a whole, the opinion reaffirms the overriding duty of judges to ensure compliance with statutes. *Hecht* involved violations of wartime price controls.[162] In that case, the federal district court found that the defendant had engaged in repeated violations of the price-control regulations.[163] These violations had occurred despite the defendant's exercise of exceptional diligence in attempting to comply. Once mistakes were discovered, they were immediately corrected and vigorous steps were taken to prevent further mistakes.[164] There appeared to be no likelihood of repetition. Critically, the district court concluded that the issuance of an injunction would have "no effect by way of insuring better compliance in the future."[165] The court of appeals, however, believed that issuance of an injunction was mandatory once violations were found, regardless of whether an injunction would have any effect in improving compliance.[166]

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156. 310 U.S. 16 (1940).
157. *Id.* at 18–19.
158. *Id.* at 28.
159. *Id.* at 30–31.
160. *Id.* at 31. Limitations on the role of judicial discretion in statutory cases are also stressed in *United Steelworkers v. United States*, 361 U.S. 39, 41–42 (1959), (especially in the concurring opinion of Frankfurter and Harlan) and *Virginia Railway Co. v. System Federation No. 50*, 300 U.S. 515, 551–52 (1937).
161. 321 U.S. 321 (1944).
162. *See generally* Brown v. Hecht Co., 49 F.Supp. 528 (D.D.C. 1943).
163. *Id.* at 530–31 .
164. *Hecht*, 321 U.S. at 325–26.
165. *Id.* at 326.
166. *Id.*

Finding the statute ambiguous about whether it eliminated equitable discretion, the *Hecht* Court resolved the ambiguity "in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings under this emergency legislation in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect."[167] Thus, the *Hecht* Court refused to award an injunction, even though the price-control statute stated that an injunction "shall be granted" upon a showing of a violation of the statute.[168] The case is usually cited for its language about the flexibility of equitable remedies, the breadth of judicial discretion, and the presumption that Congress has not intended to make abrupt departures from the tradition of discretion.[169] However, the Court also emphasized the confined role of discretion. Lower courts, the Court admonished, should not administer the statute grudgingly, and their discretion "must be exercised in light of the large objectives of the Act."[170] The standard for issuing an injunction would be the public interest, not "the requirements of private litigation."[171] *Hecht* shows that the *United States v. San Francisco* rule requires an injunction to ensure compliance with law, but not when it serves little or no purpose. Thus, the focus remained on achieving compliance.[172]

This brings us to *Tennessee Valley Authority v. Hill*, which is commonly known as the "snail darter" case. Environmental plaintiffs sought an injunction against the completion of a multimillion-dollar dam that would have destroyed the only known habitat of the snail darter, an endangered species of fish. The Court's opinion primarily discussed whether completion of the Tellico Dam would violate the ESA.[173] The Court also considered whether an injunction should be issued once a violation was found. The statute provided little guidance about remedies, merely authorizing suits to enjoin violators of the act.[174] It was much more explicit in defining violations, demanding that agencies take "such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of [critical habitat] of such species."[175] The river in question was designated as critical

167. *Id.* at 330.
168. *See id.* at 321–22.
169. *See generally id.*
170. *Id.* at 330–31.
171. *Id.* at 331.
172. For more detailed discussion of *Hecht*, see Platter, *supra* note 153, at 546–53.
173. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 171–93 (1978).
174. 16 U.S.C. § 1540(g)(1) (1976) provided in relevant part that

> any person may commence a civil suit on his own behalf—
> (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof . . . .
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation . . . .

175. 7 C.F.R. § 650.22 (2015).

habitat for the snail darter.[176] Thus, Tennessee Valley Authority was required by law to take whatever action was necessary to ensure that the dam project did not harm the fish's habitat—which in this case meant not completing the dam. However, could a court have balanced the equities and declined to issue an injunction to enforce the law?

The Court began its discussion of the injunction issue with the premise that a federal judge "is not mechanically obligated to grant an injunction for every violation of law."[177] This statement suggests that it is appropriate for judges to balance the equities. The Court, however, refused to do so in the case before it. The Court emphasized that "it is . . . the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation."[178] Given the primacy of congressional policy determinations, "[o]nce Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought."[179]

Consequently, the Court rejected the invitation to shape a "reasonable" remedy.[180] Congress had spoken "in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities."[181] It was not the judicial function to reappraise the balance set by Congress.

The Court emphasized that its approach was deeply rooted in the separation of powers and in the requirements of the rule of law. "Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end"; nor does the Court "sit as a committee of review, nor are we vested with the power of veto."[182] To stress the seriousness with which it regarded its duty to resist the temptation to balance these interests, the Court quoted extensively from a play about Sir Thomas More emphasizing the imperatives of the rule of law.[183] Thus, the Court said, "in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-

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176. *Hill*, 437 U.S. at 162.

177. *Id.* at 193.

178. *Id.* at 194. According to Professor Jared Goldstein, the Court "rejected equitable balancing for essentially the same substantive and institutional reasons that convinced some common law courts to reject balancing." Goldstein, *supra* note 8, at 509.

179. *Hill*, 437 U.S. at 194.

180. *Id.*

181. *Id.*

182. *Id.*

183. The Court quotes More as saying:

> I know what's legal, not what's right. And I'll stick to what's legal. . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would below then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.

*Id.* at 194–95 (second and third alterations in original) (quoting ROBERT BOLT, *A Man for All Seasons*, *in* THREE PLAYS 87, 146–47 (Heinemann ed., 1967).

empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'"[184]

In another case from the same era, the Court held that an injunction against continued violation of Title VII should issue as a matter of course when the government has proved the existence of a pattern or practice of discrimination.[185] If an employer fails to rebut the inference that arises from the government's prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy. Without any further evidence from the government, a court's finding of a pattern or practice justifies an award of prospective relief. Such relief might take the form of an injunctive order against continuation of the discriminatory practice, an order that the employer keep records of its future employment decisions and file periodic reports with the court, or any other order "necessary to ensure the full enjoyment of the rights" protected by Title VII.[186]

Even in awarding affirmative relief, judicial discretion is limited in Title VII cases. For instance, in terms of awards of back-pay for injured employees, the Court said back-pay should "be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating dis-

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184. *Id.* at 195. Justice Rehnquist argued in dissent that the Court had failed to apply the principle of equitable discretion established in *Hecht*. *Id.* at 211–21 (Rehnquist, C.J., dissenting). Despite its language about equitable discretion, however, *Hecht* offers little support for Justice Rehnquist's dissent. In *Hecht*, an injunction was denied because it would not have improved compliance with the relevant statute. In *Hill*, the injunction ensured full compliance with the ESA, and there was no other way of doing so. The defendants in *Hill* were not seeking to be released from an unnecessary injunction; rather, they sought judicial release from the duties imposed by Congress. Nothing in the *Hecht* decision authorized courts to excuse compliance with statutes. On the contrary, the *Hecht* Court explicitly ruled that achievement of the congressional goal was the primary standard for the issuance of an injunction. As the *Hecht* Court said:

> We do not mean to imply that courts should administer [the statute] grudgingly . . . . Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action . . . . The Administrator does not carry the sole burden of the war against inflation. The courts also have been entrusted with a share of that responsibility. And their discretion under [the statute] must be exercised in light of the large objectives of the Act. For the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief in these cases.

Hecht Co. v. Bowles, 321 U.S. 321, 330–31 (1944).

185. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 361 (1977).

186. *Id.* An accompanying footnote emphasizes equitable discretion but only insofar as courts have discretion to award even broader relief than an injunction against further violations: "The federal courts have freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of section 707(a) eliminate their discriminatory practices and the effects therefrom." *Id.* at 361 n.47. The Court concluded, however, that *City of Los Angeles Department of Water and Power v. Manhart* was one of the rare cases where the presumption for retroactive relief in Title VII cases was overcome. *See* 435 U.S. 702, 719 (1978) ("*Albermarle* presumption in favor of retroactive liability can seldom be overcome"); *id.* at 723 ("Without qualifying the force of the *Albermarle* presumption in favor of retroactive relief, we conclude that it was error to grant such relief in this case.").

crimination throughout the economy and making persons whole for injuries suffered through past discrimination."[187] The Court admonished that, although "[e]quity eschews mechanical rules . . . [and] depends on flexibility," a different approach is required "when Congress invokes the Chancellor's conscience to further transcend[e]nt legislative purposes," namely "the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.'"[188] A trial judge's discretion would frustrate national goals by producing different results in situations in the absence of any policy distinction.[189]

The Court also limited consideration of costs in a later important, though less well-known, case. The issue in *United States v. Oakland Cannabis Buyers' Cooperative*[190] was whether the government was entitled to an injunction to shut down a medical marijuana center established under the auspices of state law, but in violation of federal drug law.[191] The co-op first argued unsuccessfully that it was entitled to a necessity defense because the drug was needed to avoid extreme suffering by cancer patients and others.[192] The Court rejected this defense, finding that Congress had implicitly ruled out medical use by placing marijuana in a category of drugs that could never be available under prescription.[193] The Court then rejected the co-op's fallback argument that the injunction should exclude urgent medical uses based on a balancing of the equities. Although it found that equitable discretion was not entirely precluded by statute, "[c]ourts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute."[194] Absent contrary statutory language, a court's choice is "simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all."[195] In short, the court must take the desirability of the statute as a given and can consider only how the interests of the public and the parties are affected by the choice of enforcement mechanism.[196] In this case, because the statutory prohibition was designed to make medical needs irrelevant, the lower courts could not consider evidence of medical necessity.[197]

Some of the opinions discussed in this section mandate an injunction for violations of a particular statute, while others leave trial judges some discretion but preclude consideration of certain costs. Nevertheless, these opinions are all emphatic on one point: the primary duty of a judge in a statutory-injunction case is to ensure compliance with the statute. Equitable discretion, including

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187. Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).
188. *Id.* at 417.
189. *Id.*
190. 532 U.S. 483 (2001).
191. *Id.* at 486–89.
192. *Id.* at 487.
193. *Id.* at 491–94.
194. *Id.* at 497.
195. *Id.* at 497–98.
196. *Id.* at 498.
197. *Id.* at 499.

consideration of cost, comes into play only in the choice of methods for achieving this overriding goal. At least in terms of their rhetoric, however, the cases in the next section strike a very different note.

### 2. *Judicial Discretion to Deny Enforcement*

Soon after the Supreme Court's decision in the "snail darter" case limiting equitable discretion, the Court revisited the issue of equitable discretion in environmental enforcement. *Weinberger v. Romero-Barcelo*[198] involved a somewhat unusual application of the Clean Water Act.[199] The Navy conducted training exercises off the shores of Puerto Rico, during which bombs would sometimes fall into the sea, either due to deliberate targeting or misses of land targets.[200] After the Governor of Puerto Rico and others filed suit challenging these exercises, the District Court found that they violated the Clean Water Act because the resulting intrusions into coastal waters required a permit.[201] Under the statute, the discharge of any pollutant into navigable waters is unlawful without a permit, and both the terms "discharge" and "pollutant" are defined in broad terms that clearly cover the Navy's activities.[202] The district court ordered the Navy to apply for a permit but declined to enjoin the activities in the meantime, because of the importance of the area for training naval officers and its finding that the exercises did not in fact result in harm to the aquatic environment.[203] The court of appeals, however, held an injunction was required under *TVA v. Hill*, noting that the Navy could obtain a presidential exemption if the statutory requirement interfered unduly with national security.[204]

The Court began its analysis with something of an ode to equitable discretion. It emphasized that injunctions are not issued as a matter of course, and that equity seeks to "arrive at a 'nice adjustment and reconciliation' between the competing claims."[205] In exercising its discretion, the Court said, "courts of equity should pay particular regard for the public consequences in employing the

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198. 456 U.S. 305 (1982).
199. 33 U.S.C. § 1251 (2012).
200. *Romero-Barcelo*, 456 U.S. at 307.
201. *Id.* at 307–08. The statute is complicated but in the end unambiguous. Section 401(a) of the Clean Water Act, 33 U.S.C. § 1342, establishes a system of permitting for dischargers of pollutants. Section 301(a), 33 U.S.C. § 1311(a), provides that "[e]xcept as in compliance with this section and section[] . . . 1342 . . . of this title, the discharge of any pollutant by any person shall be unlawful." Finally, a trio of definitions leaves no doubt that the Navy's activities were covered. Under section 502(6), 33 U.S.C. § 1362(6), "pollutant" is defined to include munitions. Section 502(12), 33 U.S.C. § 1362(12), defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source," and section 502(14), 33 U.S.C. § 1362(14) defines point source to include "any discernable, confined and discrete conveyance." Thus, discharges of materials in navigable waters (defined by subsection (7) to include the territorial seas) from artillery or planes clearly requires a permit. Under section 301(a), every moment the Navy continued its exercises without a permit it was engaged in an unlawful act.
202. *Romero-Barcelo*, 456 U.S. at 308–09.
203. *Id.* at 310.
204. *Id.* at 310–11.
205. *Id.* at 311–12.

extraordinary remedy of injunction."[206] Thus, the Court said, "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law."[207] Given this background of several hundred years of equity practice, "we do not lightly assume that Congress has intended to depart from established principles."[208] Thus, the Court established a strong presumption in favor of equitable balancing.[209]

This language is strikingly at odds with the Supreme Court's emphasis, in *Hill* and the other cases discussed in the previous section, on the judiciary's powerful obligation to give effect to congressional enactments. Indeed, the difference in tone is somewhat breathtaking given *Hill*'s emphasis on the potential of well-intended exceptions from enforcement to destroy the very fabric of the rule of law. Rather than seeing *Hill* as exemplifying a broad principle of unflagging enforcement of statutes, *Romero-Barcelo* treats it as an extraordinary exception from normal practice. The *Romero-Barcelo* Court characterizes *Hill* as involving the rare exception where "Congress had foreclosed the exercise of the usual discretion possessed by a court of equity"[210] because the statute contained a "flat ban" on the destruction of critical habitats. Thus, in *Hill*, "only an injunction could vindicate the objectives of the Act."[211]

According to the majority, at least, *Romero-Barcelo* was at the other extreme. Given the availability of fines and criminal penalties, an injunction would not be the only way of ensuring compliance. The objective of the statute—improved water quality, not permitting for its own sake—would not be impaired.[212] The district only temporarily, not permanently, allowed the Navy to continue the exercises without a permit.[213] Moreover, the statute was much more flexible than in *Hill*, giving the president the power to grant exemptions on national security grounds and containing many provisions for phased compliance and considerations of feasibility (though none of them were directly applicable).[214] In closing, the Court said that it did not read the statute to require a court to "issue an injunction for any and all statutory violations" when other remedies could secure prompt compliance.[215]

The majority opinion has a common-sense basis: why halt these important naval exercises over a technical violation of the statute rather than simply requiring correction of the violation? Yet, Justice Stevens raised some troubling points in dissent. The Navy's discharge of material into navigable waters with-

206. *Id.* at 312.
207. *Id.* at 313.
208. *Id.*
209. *See* Goldstein, *supra* note 8, at 511 (reading the opinion to establish a "strong presumption" in favor of balancing).
210. *Romero-Barcelo*, 456 U.S. at 313.
211. *Id.* at 314.
212. *Id.*
213. *Id.* at 315.
214. *Id.* at 315–18.
215. *Id.* at 320.

out a permit was a continuing violation of the statute, and as Justice Stevens put it, "the Navy, like anyone else, must obey the law."[216] He feared that the Court's opinion cast doubt on the "strong presumption in favor of enforcing the law as Congress has written it."[217] In short, he said, the Court's decision "unnecessarily and casually substitutes the chancellor's clumsy foot for the rule of law."[218]

Although there are arguments for reading the opinion narrowly,[219] *Romero-Barcelo* paved the way for further decisions emphasizing equitable discretion in regulatory enforcement. In *Amoco Production Co. v. Village of Gambell*,[220] the Court went well out of its way to reinforce *Romero-Barcelo*'s message, despite ultimately finding no statutory violation to remedy. At issue was the application of a federal statute protecting Alaskan Native use of public lands for subsistence from the effects of offshore drilling.[221] The Court later held that the statute did not apply to coastal waters,[222] but first reproved the lower court for misapplying *Romero-Barcelo*.[223] The opinion largely limited itself to reprising *Romero-Barcelo*, but also pointed out that the countervailing policy in favor of oil leasing was itself endorsed by another federal statute.[224] Once again, *TVA v. Hill* (this time relegated to a footnote) is distinguished as a case involving a "flat ban."[225]

The most recent case in this series, and the one that perhaps goes furthest in endorsing equitable discretion, is *Winter v. Natural Resources Defense Council, Inc.*[226] Like *Romero-Barcelo*, it involved naval training exercises, this time off the West Coast to practice sonar detection of submarines.[227] Sonar, however, can have a potentially harmful effect on marine mammals in the area such as dolphins and whales, perhaps causing serious injury.[228] The Court accepted the government's assertion that the exercises were "of the utmost importance to the Navy and the Nation."[229] Hence, despite the Navy's failure to prepare an Environmental Impact Statement ("EIS"), the Court concluded that a preliminary injunction was plainly unwarranted because "the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy."[230]

Indeed, the Court found it appropriate to volunteer the view that it would be an abuse of discretion to enter a final permanent injunction even if a statu-

216. *Id.* at 323 (Stevens, J., dissenting).
217. *Id.* at 326.
218. *Id.* at 335.
219. *See* Farber, *supra* note 153, at 525–26.
220. 480 U.S. 531 (1987).
221. *Id.* at 534.
222. *Id.* at 546.
223. *Id.* at 544.
224. *Id.* at 545.
225. *Id.* at 543 n.9.
226. 555 U.S. 7 (2008).
227. *Id.* at 12.
228. *Id.* at 13.
229. *Id.* at 25.
230. *Id.* at 26.

tory violation was later proved: "Given that the ultimate legal claim is that the Navy must prepare an EIS, not that it must cease sonar training, there is no basis for enjoining such training in a manner credibly alleged to pose a serious threat to national security."[231] The Court viewed this as "particularly true in light of the fact that the training has been going on for 40 years with no documented episode of harm to marine mammals."[232] The Court also found that, if there had in fact been a violation of the National Environmental Policy Act ("NEPA"), the trial court would have "many remedial tools at its disposal, including declaratory relief or an injunction geared to the preparation of an EIS."[233] Notably, that last sentence seems to be the only place in the opinion where the Court mentions any concern about the fact that the Navy could well be violating the law. In any event, the Court had no difficulty weighing any possible environmental harm against the Navy's interest in proceeding without any constraints on the exercises: "the proper determination of where the public interest lies does not strike us as a close question."[234]

The language of the *Winter* opinion is troubling. The Court seemed quite unconcerned by the potential ongoing violation of the law, which it seemed to find relatively inconsequential compared with the importance of the government program. Indeed, it seemed willing to simply take the government's word that any additional restrictions on its activities would imperil national security. The Court stopped short of granting the government a permanent judicial waiver of the statute, but only just short of doing so. Some of the other cases discussed in this section show similar signs that the Court did not take the statutory duty as seriously as it might, but *Winter* is the most nonchalant about allowing an ongoing legal violation.

The difference in tone is obvious between the cases in this section and those in the preceding section. *Winter* can be read to require balancing in "all or nearly all injunctions issued by federal courts,"[235] whereas the cases in the previous section eschewed open-ended balancing. The intense concern in the first set of cases about ensuring compliance with the law is sidelined in the second set, where courts are willing to countenance continued violations of the law.[236]

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231. *Id.* at 32–33.

232. *Id.* at 33.

233. *Id.*

234. *Id.* at 26. It is worth noting that the governing statute does not explicitly make it unlawful for a project to proceed without an impact statement. It merely provides that "all agencies of the Federal Government shall . . . (C) include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official" on the environmental impacts and possible alternatives to the action. National Environmental Policy Act § 102(1)(C), 42 U.S.C. § 4332(2)(C) (2012). For further background on *Winter* and a thoughtful critique of the Court's approach, see Daniel Mach, *Rules Without Reasons: The Diminishing Role of Statutory Policy and Equitable Discretion in the Law of NEPA Remedies*, 35 HARV. ENVTL. L. REV. 205 (2011). On the operation of NEPA, see SALZMAN & THOMPSON, *supra* note 26, at 333–49.

235. Goldstein, *supra* note 8, at 514. Professor Jared Goldstein considers it less clear whether balancing is required when the government seeks an injunction against a private party. *See id.* at 515 n.130 (citing cases).

236. For another example of such side-lining, consider this statement in another NEPA case: "It is not enough for a court considering a request for injunctive relief to ask whether there is a

Rather than worrying that courts may make policy judgments outside of their appropriate domain, as in the first set of cases, courts instead blithely step forward to independently balance the interests. Rule of law and separation of powers dominate in one set of cases, but seem to be secondary concerns in the others. Moreover, after *Romero-Barcelo*, the cases in the second group first relegate to footnotes and then entirely ignore the other line of cases, even though some were supervening. Those decisions make no effort to distinguish *Oakland Cannabis Buyers' Cooperative*.

The evident tensions between these two lines of cases do not necessarily mean that they are impossible to reconcile. There are several possible distinguishing factors. First, the second set of cases all involve violations of procedural requirements in situations where the Court seemed convinced that the procedure would have made very little difference (and in one where it concluded that the procedure did not actually apply anyway). To that extent, the Court could believe that the purpose of the statute in question (achieving a substantive goal) had been respected even if the letter of the statute might not have been. Second, the cases in the second category involve conflicting federal policies (usually national security versus environment) rather than purely private interests.[237] The courts were then in the position of accommodating clashing statutory directives while limiting damage to either (something that could not be done in *TVA v. Hill* given the Endangered Species Act's inflexible mandate). Third, in many of the cases in the first category, the Court seemed convinced that it had received a clear signal about priorities from Congress, leaving no room for independent balancing. The cases in the second category do not involve such signals.

These distinctions cohere nicely with the discussion earlier about agency discretion. There the Court also seemed influenced by its perception of the core purpose of the statute in question, by whether the Court perceived conflicting federal policies that might need to be reconciled, and by whether Congress had given a clear signal of priorities. *American Trucking*, *Massachusetts v. EPA*, and *TVA v. Hill* are all cases—though in very different domains—where these factors weighed strongly against giving the decisionmaker authority to engage in a balancing of interests.[238] In all three cases, Congress prioritized public health or

good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test set out above." Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 158 (2010).

237. Goldstein emphasizes this point, although he views this as an unwarranted arrogation of legislative policymaking by the courts. Goldstein, *supra* note 8, at 521–22 ("Every statutory case in which the Court has addressed equitable balancing arose out of apparent conflicts between federal policies.").

238. Both *American Trucking* and *Massachusetts v. EPA* involved unequivocal statutory mandates for EPA to establish standard for all air pollutants based on public health. *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 465 (2001); Massachusetts v. EPA, 549 U.S. 497, 532–33 (2007). In *TVA v. Hill*, the Court said:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized, funded*, or

environmental quality over conflicting goals. At the other end of the spectrum, *EME Homer* and *Romero-Barcelo* were cases where allowing consideration of cost would involve little or no interference with the core goal of the governing statute, there were multiple federal policies involved, and Congress had not clearly made one policy dominant. As discussed in Part I.C, the Court has generally upheld agency discretion to resolve such policy conflicts.

In effect, *Winter* and similar decisions give the courts the ability to engage in reconciliations when statutory policies are in tension. Such a reconciliation must give effect to both statutory policies, not simply prioritize one over the other. In each case, the Court has assured itself that limiting injunctive relief would not prevent ultimate compliance with the underlying statute, while it would prevent critical interference with other congressional policies. Still, in cases where the governing statute lacks such flexibility, other policies must give way.

If viewed as efforts to balance conflicting legal duties, cases like *Winter* raise fewer issues of legitimacy than if they are viewed as offering a de facto license to continue violating the law for extralegal reasons. Yet this does not mean that these cases are entirely unproblematic. *Winter*, in particular, seems impatient of arguments that stand in the way of national security and too willing to brush aside the statutory requirement for avoiding harm to whales, rather than truly seeking an accommodation. The opinion conveys a sense that it is driven as much by the Court's view of policy priorities as by the statutes in question. It would be unfortunate if lower courts took the opinion as carte blanche for implementing their own policy views over those of Congress. Even when a statute allows courts to consider costs in deciding whether to issue an injunction, all of the decisions from *Hecht* during World War II to *Winter* in this century affirm that costs are relevant only in devising a strategy for meeting the statute's goals, not as a justification for overriding those goals.[239]

### B. *The Problem of Vacatur*

A special remedial issue is presented when a court is engaged in judicial review of rulemaking. The issue is what action a court should take after it finds a rule invalid. The rule might be invalid because of some remediable defect, such as failure to provide a sufficiently clear explanation of the agency's posi-

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> *carried out* by them do not *jeopardize* the continued existence" of an endangered species or "*result* in the destruction or modification of habitat of such species . . . ."

Tenn. Valley Auth. v. Hill, 437 U.S. 153, 173 (1978).

239. Even in *Winter*, the case that perhaps devotes the least attention to this issue, the Court was careful to state that "[a] court concluding that the Navy is required to prepare an EIS has many remedial tools at its disposal, including declaratory relief or an injunction tailored to the preparation of an EIS rather than the Navy's training in the interim." 555 U.S. at 33. The Court also seemed to think that the statute's ultimate goal of preserving environmental quality was not at significant risk given the long history of the conduct in question and the absence of direct evidence of harm. *Id.*

tion. Must the court vacate the rule, or may it leave the rule in place pending a response from the agency?[240]

Although there are a substantial number of refusals to vacate,[241] the vacatur issue has been controversial.[242] It was prominently aired in a D.C. Circuit case, *Checkosky v. SEC*.[243] The case involved the suspension of two accountants by the Securities and Exchange Commission ("SEC") for improper professional practices. Judge Silberman argued for a remand without vacating the SEC decision, saying that he could not make a substantive decision about the validity of the SEC's action until the SEC explained its standard for professional misconduct by accountants.[244] Judge Reynolds, sitting by designation, was prepared to affirm the SEC's decision, but said that if the case was remanded, the decision should not be vacated pending review.[245] Judge Randolph wrote a lengthy opinion, arguing that the SEC's action was invalid because of the lack of a reasoned explanation and that the court lacked discretion to remand without vacating.[246]

Despite Judge Randolph's objections, however, the "remand without vacatur" practice has become firmly ensconced in the D.C. Circuit, and has now been adopted by several other circuits.[247] The standard test is found in *Allied-*

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240. The latter response might be considered akin to a court's discretion to issue a declaratory judgment rather than an injunction. For a discussion of that option, see Andrew Bradt, *"Much to Gain and Nothing to Lose": Implications of the History of the Declaratory Judgment for the (b)(2) Class Action*, 58 ARK. L. REV. 767, 784 (2006).

241. A recent survey by the Administrative Conference of the United States found seventy-three cases remanding without vacatur from 1972 to 2013 in the D.C. Circuit. *See* STEPHANIE J. TATHAM, THE UNUSUAL REMEDY OF REMAND WITHOUT VACATUR 21 (2014). This report provides an extensive discussion and complete listing of the cases. *Id.* at 21–26, 54, app. A.

242. For conflicting views by commentators, see, e.g., Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003); Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 SETON HALL L. REV. 108 (2001). For a more recent review of the case law and scholarship, see Benjamin W. Tettlebaum, *"Vacation" at the Farm: Why Courts Should Not Extend "Remand Without Vacation" to Environmental Deregulation*, 97 CORNELL L. REV. 405, 410–17 (2012). One reason for courts to avoid vacatur is that a subsequent agency rule would generally lack retroactive effect, creating a regulatory gap. *See* Daniel H. Conrad, *Filling the Gap: The Retroactive Effect of Vacating Agency Regulations*, 29 PACE ENVTL. L. REV. 1 (2011) (arguing that vacatur should be retroactive even when parties have relied on the now-vacated rule to legalize their conduct).

243. 23 F.3d 452 (D.C. Cir. 1994).

244. *Id.* at 462–64.

245. *Id.* at 496 (Reynolds, J., concurring in part and dissenting in part).

246. For Judge Randolph's discussion of the vacatur issue, see *id.* at 490–93 (Randolph, J., concurring).

247. *See, e.g.*, NACS v. Bd. of Governors of Fed. Reserve Sys., 746 F.3d 474, 493 (D.C. Cir. 2014); Nazareth Hosp. v. Sec'y U.S. Dep't of Health & Human Servs., 747 F.3d 172, 185 (3d Cir. 2014) ("general remedy for failure to adequately respond to rulemaking comments is not complete vacatur of an agency rule, but rather remand for additional consideration"); Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin., 429 F.3d 1136, 1151 (D.C. Cir. 2005), Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1380 (Fed. Cir. 2001). According to a report to the Administrative Conference, "the literature and some basic case law research identified at least one opinion employing the remedy in each of the First, Third, Fifth, Eighth, Ninth, Tenth, and Federal Circuits." TATHAM, *supra* note 241, at 17.

*Signal, Inc. v. U.S. Nuclear Regulatory Commission*,[248] which focuses on the seriousness of the defects in the rule and the disruptive consequences of vacating (and possibly later reinstating) the rule.[249]

The argument that vacating a defective rule is mandatory rests heavily on the text of the APA.[250] Section 706 provides that the "the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[251] For a textualist, there is obviously strong appeal in the argument that the use of "shall" rather than "may" indicates that the action is mandatory. Non-textualists respond that Congress apparently had given no thought to the matter, that review of agency actions before the APA had involved judicial discretion, and that the statute must be construed in light of the strong tradition of equitable discretion discussed in *Hecht* and other cases.[252]

Some textual counterarguments might also be available. Section 706 does instruct courts to have "due regard for the rule of prejudicial error," which seems to suggest the existence of discretion. Paying "due regard" to something is hardly significant if one has no discretion anyway. Perhaps due regard means that, when the prejudicial effect is unclear, the court can request clarification from the agency. The "rule of prejudicial error" is a vague phrase that could include remanding for further explanation rather than vacating, where it is possible that the lack of a sufficient explanation was not "prejudicial" because a stronger explanation was in fact available. Finally, note that section 706 authorizes the court to set aside not only "actions" but also "conclusions" and "findings." This language might suggest that the court has discretion to leave the action intact and merely set aside part of the explanation while awaiting further clarification. Even if these arguments are not considered fully persuasive, they might introduce enough textual ambiguity to allow a textualist to turn to the canon favoring equitable discretion.

In addition to their textual arguments, advocates of remand without vacatur argue that vacating the agency's order because its explanation is unclear can cause substantial, unnecessary damage to the public interest.[253] Vacatur seems like a particularly perverse remedy when the party challenging an order argues that it should have been more stringent and is "rewarded" by an order taking away even the less stringent order. On the other side, advocates of vacatur argue that if rules remain in effect pending adequate justification, the agency has no incentive to give an adequate justification in the first place.[254]

These arguments must be considered in light of the developments in administrative law since the APA was passed. For instance, the term "arbitrary

248. 988 F.2d 146 (D.C. Cir. 1992).

249. *Id.* at 150–51. The test was first announced in *United Mine Workers v. Federal Mine Safety & Health Administration*, 920 F.2d 960, 966–67 (D.C. Cir. 1990).

250. *See, e.g.*, Prestes, *supra* note 242, at 129–36.

251. 5 U.S.C. § 706(2)(A) (2012).

252. Levin, *supra* note 242, at 309–15.

253. For discussion of the relevant policies, see *id.* at 376–85.

254. *See* Prestes, *supra* note 242, at 124–25.

and capricious" may have meant something like "utterly irrational" at the time, but now encompasses probing inquiry into the details of the agency's justification. Congress may have assumed that any agency action failing the "arbitrary and capricious" test would be irremediably flawed, but that is no longer true. Unless the Supreme Court is prepared to reconsider the expansion of the test in *Overton Park*[255] and *State Farm*,[256] there is a mismatch between the legal test and the sanction of automatic vacatur.

Putting aside the textual issue, the policy arguments against "remand without vacatur" have some force. The problem is that they are exactly the same policy arguments that could be made against the Court's rulings in *Romero-Barcelo*, *Amoco*, and *Winter*. The Court has not found those arguments persuasive elsewhere. Notably, even those who oppose "remand without vacatur" are open to alternative routes to achieving the same result such as allowing the court to stay the mandate in the case, leaving the order vacating the agency action hanging in limbo.[257] Thus, opposition to "remand without vacatur" seems to rest on the formal distinction between issuing a vacation order and issuing the mandate to make the order effective.

In short, the word "shall" in the regulatory text provides an argument for limiting judicial discretion. Use of that word seems insufficient, taken alone, to justify a departure from the general principle of equitable discretion in the absence of any other evidence of congressional intent.

Remands without vacatur may, however, create a practical problem. In essence, after the remand without vacatur, a court is left in the same position as it would be if faced with a rulemaking petition (as in the cases discussed in Part I.A). Remand without vacatur imposes a duty on the agency to engage in further rulemaking. However, the agency has no strong incentive to do so, since its original rule remains in effect until it gets around to further consideration. If the agency does balk, the court finds itself in the same position it is when it is asked to order an agency to conduct a new rulemaking. It may be condemning itself to long delays and the need for repeated efforts to force the agency's hand, only to result in a final rule that looks much the same as the initial rule.[258] Thus, in the case of remand without vacatur, the court might be well advised to set a deadline after which the rule will be vacated absent a response from the agency.

The arguments for mandatory vacatur are ultimately unconvincing. They take formalism to extremes by staking everything on a single word in the governing statute and on the difference in nomenclature between issuing a vacatur

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255. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

256. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut., 463 U.S. 29 (1983).

257. For instance, in the opinion where he protests vehemently against remand without vacatur, Judge Randolph opined that the SEC could apply for a stay of the court's mandate, which he considered the "usual and appropriate method of handling such matters." Checkosky v. SEC, 23 F.3d 452, 493 n.37 (D.C. Cir. 1994) (Randolph J., concurring).

258. Emily Meazell provides some illuminating case histories of agency resistance to orders to engage in rulemaking or to fix a rule remanded without vacatur. *See* Emily Meazell, *Deference and Dialogue in Administrative Law*, 111 Colum. L. Rev. 1722–72 (2011). On the general question of how agencies respond to remands, see Peter Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984.

order and issuing the court's mandate (since they allow the court to delay vacatur by delaying the mandate). Perhaps it is unwise for courts to remand without vacatur in many cases. Arguably, if a flaw in a regulation is not severe enough to justify vacating a rule it should not be considered important enough to invalidate the rule. Nevertheless, a court's authority to vacate without remanding seems on balance clear.

Part II demonstrates that courts have had difficulty in delineating the role of equitable discretion in statutory cases. Nevertheless, it is possible to extract some fairly consistent principles from the opinions. This is not to say that every opinion has persuasively applied those principles. The principles themselves are more coherent, however, than one might think from a casual reading of the opinions.

## III. Mapping the Scope of Discretion to Consider Costs

The premise of this Article is that there are deep connections between the law governing judicial discretion to consider costs and the law governing agency discretion. Up to this point in the Article, the two domains have been considered separately. The first two sections of this Part reanalyze the doctrinal questions raised earlier. Section A seeks to integrate the principles governing courts with those governing agencies, in terms of discretion to take costs into consideration or ignore them. By and large, those principles align neatly. Section B turns to the question of how to take costs into account. Here a disparity exists, with agencies having more discretion than courts. Section B argues for equalizing the powers of courts and agencies by recognizing similar discretion in both cases. Finally, section C considers whether deeper insights can be gained from the similarities between agency and judicial discretion. Because the two branches of government have been generally conceptualized in such different terms, juxtaposing them generates new ways of thinking about each one.

### *A. Discretion to Consider Costs: Toward a Doctrinal Synthesis*

One principle governing statutory implementation is legislative supremacy. Congress has ultimate control of both agency and judicial discretion in implementing statutes. The *Chevron* test indicates that an agency has no discretion in considering costs when the statute is clear. *American Trucking* reaffirms this principle in the context of regulatory standards, and *Massachusetts v. EPA* does so in the context of the decision to begin a rulemaking. On the judicial side, *TVA v. Hill* demonstrates that Congress may exclude costs by designating another factor (jeopardy to an endangered species) as paramount.[259]

259. The *TVA v. Hill* opinion raises doubt that the Court would have halted construction of the dam if it had been free to balance the equities. *See* 437 U.S. 153, 172 (1978). Its analysis opens with the sentence: "It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more

The Supreme Court has made it clear, however, in the absence of clear directives from Congress, that both judges and administrators presumptively must consider costs in implementing statutes. The Court is quite explicit about its clear-statement rule in the injunction setting—discretion to consider costs exists unless Congress has clearly spoken otherwise.[260] The Court has not announced such a clear statement rule in the agency context, but *Michigan v. EPA* makes it clear that costs are relevant except when Congress has provided for consideration of only non-cost factors, as in *American Trucking*. Thus, the bottom line is much the same for courts and for agencies.

Finally, as *EME Homer*, *Home Builders*, and *Chevron* demonstrate, agency discretion is perhaps at its broadest when a statute embodies conflicting policies, or when more than one statute bears on the decision. In contrast, the Court has not explicitly relied on this argument in the setting of injunctive relief. Yet, it is notable that cases denying statutory injunctions have at least arguably involved a conflict between an agency's own statutory mission and environmental restrictions stemming from a separate statute.[261] The Court has not questioned that the environmental statute ultimately must prevail, but the tension between these congressional purposes offers support for allowing some flexibility in timing and method for coming into compliance.

In short, the standards that determine whether an agency has discretion to consider costs seem very similar to the standards for determining judicial discretion, although the two sets of standards have developed independently. This may seem surprising, but perhaps it should not be. Both situations involve the question of how much discretion another branch of government has when Congress has charged it with responsibility for implementing statutory mandates. That similarity may largely overwhelm differences due to distinctions between the executive and the judicial roles.

As *Michigan v. EPA* reminds us, to say that a decisionmaker has discretion is not to say that it has complete freedom of action: the exercise of discretion must not be unreasonable. At least in the context of statutes providing very open-ended regulatory standards, *Michigan v. EPA* indicates that at least some

than $100 million." *Id.* Instead, the Court emphasizes strongly that its hands are simply tied. *Id.* at 194–95.

260. For instance, the Court has repeatedly quoted statements that judges retain their full equitable discretion "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity." Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 542 (1987) (quoting Weinberger v. Romeo-Barcleo, 456 U.S. 305, 313 (1982)). Both cases in turn cited *Porter v. Warner Holding Co.*, where the language was used in support of the availability of broad equitable relief. 328 U.S. 395, 398 (1946). *Porter* in turn relied on a statement in a previous case that "[t]he great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction," *id.* (quoting Brown v. Swann, 10 Pet. 497, 503 (1836)), where the statement was used to uphold a court's power to order discovery despite a seemingly limiting statute. It seems plain that the original language in *Porter* referred to statutes that might bar certain kinds of equitable relief, not to statutes that might require it.

261. In *Weinberger* and *Winter*, the conflict was between an environmental mandate and the military's national security mission. In *Amoco*, the conflict was internal to the statute, between the goal of exploiting offshore oil reserves and that of respecting the interests of Alaskan Natives. *See* 480 U.S. at 545–46.

consideration of negative consequences is required. That holding also seems consistent with the injunction cases, all of which require cost considerations in the absence of contrary indications by Congress.

Unifying the analysis of judicial and agency consideration of costs also provides insights into an important issue that was left unresolved in *Michigan v. EPA*: can the agency consider ancillary benefits as well as those directly addressed by Congress? Recall the Court's discussion of equitable discretion in *Romero-Barcelo*. There, the Court emphasized that equity seeks to "arrive at a 'nice adjustment and reconciliation' between the competing claims"[262] and that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."[263] If courts are entrusted with this responsibility for broad consideration of competing public interests, it is hard to see why agencies should be more limited in their ability to take into account the public interest. As Justice Kagan pointed out, the agency had found that the regulation in question would "save many, many lives."[264] Surely a court would not ignore this fact in deciding whether to issue an injunction against violations of a regulation. It would make no more sense to bar the agency from considering the same fact in deciding whether to issue a regulation in the first place.

### *B. Balancing and Other Methods for Considering Costs*

As shown in section A above, similar standards are used to determine whether a court or an agency can (or must) consider costs. There is a clear asymmetry, however, in terms of how costs are to be considered. Consideration of costs can range from even-handed balancing of costs and benefits to a presumption in favor of acting unless costs are shown to be grossly disproportionate to the use of costs only as a safety valve to avoid economic disaster. In *Michigan v. EPA*, the Court said that EPA had broad discretion to determine how to consider costs, so long as its decision was reasonable. In contrast, in the statutory injunction cases, the Court has directed a balancing of interests that seems to give equal weight to regulatory costs and benefits. It is unclear why agencies should have more discretion than judges when deciding whether to engage in formal cost balancing or informally considering cost in some other way.

On behalf of a preference for judicial over agency discretion, one might argue that judicial balancing is so valuable because it allows remedies to be tailored to the individual circumstances of each case, which Congress could not very well anticipate in advance. On the other hand, in the regulatory setting, it could be argued, the agency is inherently making determinations across a broad range of cases, so it is less likely that there are unique circumstances never

262. *Romero-Barcelo*, 456 U.S. at 311–12 (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944)).
263. *Id.* at 312.
264. Michigan v. EPA, 135 S. Ct. 2699, 2726 (Kagan, J., dissenting).

considered by Congress. Furthermore, the court's balancing may be more principled and less swayed by political considerations.

Yet counterarguments seem equally valid: the greater political accountability of agencies as opposed to federal judges might suggest that open-ended balancing is more appropriate for agencies because of their greater democratic legitimacy. Also, in the injunction case, the defendant has already been found to be in violation of law, which might seem to argue for a strong presumption in favor of requiring an end to the unlawful behavior rather than balancing. These arguments suggest that judicial balancing is actually less desirable than agency balancing, not more so.

The Court in *eBay* relied on what it supposed to be a firmly established judicial practice in favor of balancing that Congress presumably accepts unless it says otherwise. That history may not be as clear as the Court supposed.[265] In any event, the same history might also be viewed as establishing that, in the absence of statutory restrictions, courts have exercised the power to determine for themselves the rules to govern injunctions (which might in appropriate cases modify the role of costs). In other words, the same history could support an inference that the rules governing the issuance of injunctions are federal common law, subject to modification by the courts rather than limited by history to a single approach.

In the end, given the holding in *Michigan v. EPA* that agencies can sometimes justifiably opt against balancing in favor of some alternative way of taking costs into account, it is hard to see why judges should not be able to take similar approaches in deciding whether to issue an injunction. If agencies and courts are to be treated the same, there are two choices about how to achieve equality. On the one hand, agencies could be required to engage in open-ended balancing whenever they are allowed to consider costs at all. On the other hand, parallel treatment could be achieved by holding that *eBay* is wrong, or at least too rigid, in precluding consideration of whether balancing is the best approach to considering costs in some categories of injunction cases.[266]

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265. *See* Goldstein, *supra* note 8, at 490–505.

266. Arguably, the Court misunderstood the tradition of equitable discretion on which it sought to rely:

> Notably, when balance-of-hardships concerns enter through the undue-hardship defense, the right violator bears a considerable burden of production from the start, a situation that contrasts with that under an *eBay* test unsupplemented by any presumptions in favor of the right holder. The traditional undue-hardship defense acts not as a no-injunction default but instead as a form of safety valve, enabling courts to deny injunctive relief under circumstances where such relief appears very unlikely to serve the public interest or, perhaps more specifically, a goal of maximizing net private interests. Even this safety valve can be closed. A presumption of irreparable injury can be supplemented by a rule—or at least a strong further presumption—making the undue-hardship defense unavailable where the rights violation has been willful. For example, undue hardship generally is not a ground to decline to order the removal of an encroaching structure from land if the encroachment is not the result of a reasonable accident. An owner of property backed by such a rule can truly be said to have something close to absolute dominion over the property's use. At least against willful infringers, courts will back the owner's right to extract whatever payment it can for permission to use the property.

The first option, applying *eBay* to agencies, seems undesirable. In terms of agency decisionmaking, Congress has provided a variety of mechanisms for considering costs. A presumption of open-ended balancing would ignore this much more nuanced congressional approach to agency consideration of costs. For instance, in various different settings, the Clean Air Act calls for the use of:

- *Reasonably Available Control Technology* for existing sources in areas that violate national air quality standards;[267]
- *Best Demonstrated Available Technology* for categories of new sources, based on cost and other factors;[268]
- *Best Available Control Technology* for new sources in areas that exceed required national air quality standards, based on the maximum feasible pollution reductions;[269]
- *Maximum Achievable Control Technology* for major sources of hazardous air pollutants, requiring existing sources to match the best twelve percent of the industry and requiring new sources to match the best-controlled existing source;[270] and
- *Lowest Achievable Emissions Reduction* for new or modified stationary sources in nonattainment areas, requiring the most stringent existing emissions limits achieved in practice by the industry or included in any state implementation plan even if not achieved in practice.[271]

These provisions often seem to give a restricted role to consideration of costs, although all of them take costs into account in one way or another. Requiring open-ended balancing by EPA seems to impose a value judgment—that health and environmental benefits should get equal weight with industry costs—that Congress itself has not embraced.

Just as *eBay* seems too rigid for agencies, it also seems to overlook some valid reasons why a court might give compliance costs more limited weight.[272] Sometimes, although a statute is not crystal clear, giving greater weight to regu-

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Gergen, Golden & Smith, *supra* note 151, at 227–28 (showing that equity courts historically applied a more nuanced approach than the *eBay* test).

267. *See* 42 U.S.C. § 7502(c)(1) (2012).

268. *See id.* § 7475(a)–(b).

269. *See id.* § 7475(a).

270. *See id.* § 7412(g). EPA views this provision as excluding consideration of risk levels, with apparent support from the courts. *See* Patricia Ross McCubbin, *The Risk of Technology-Based Standards*, 16 DUKE ENVTL. L. & POL'Y F. 1, 42–44 (2005) (suggesting that EPA does covertly consider risk).

271. *See* 42 U.S.C. § 7412(d). For a listing of the similar set of standards under the Clean Water Act, see DANIEL A. FARBER & ANN E. CARLSON, CASES AND MATERIALS ON ENVIRONMENTAL LAW 606 (9th ed. 2014) (organizing the Clean Water Act's technology-based standards by their increasingly stringent demands, from "Best Management Practices" to "Best Practicable Technology" to "Best Available Technology").

272. Besides the reasons discussed in the text, another possible reason is that in some category of cases, it might be unusually difficult to ascertain that cost or to balance it against the statutory goals or the interests of third parties. As a variant on that rationale, the court might believe that it would be difficult to ascertain costs reliably before defendants attempted to comply and that a contempt proceeding would be a more appropriate time to take hardship to the defendant into account.

latory benefits is a more reasonable interpretation of a statute.[273] Moreover, although a court might think that judges should accept a contemporary consensus that a statutory goal has greater priority than costs. For instance, a court might conclude that current norms require immediate cessation of civil-rights violations unless costs are wholly disproportionate to benefits. Or the court might think that willful violations, at least, should presumptively be met with injunctions. In other types of cases, a court might conclude that statute suggested a different weighing of costs and benefits rather than even-handed balancing. In any given case, these arguments might or might not be persuasive, but there is no reason why judges should be stripped of authority to consider them.

Of course, an individual trial judge could take all of these arguments for an injunction into account when balancing the equities in a particular case. Judges may differ, though, in how much weight they give statutory goals versus costs. If there are strong arguments for giving compliance costs less of a role than regulatory benefits, recognizing a presumption in favor of an injunction would have several benefits. It would provide more uniformity between decisions by different judges. Recognizing such a presumption under a particular law, either as a matter of statutory interpretation or the federal common law of remedies, would also provide more transparency, rather than simply throwing all considerations together and announcing that on balance they favored an injunction.

Thus, it seems better to bring *eBay*'s requirement of open-ended balancing into alignment with *Michigan v. EPA*'s greater flexibility about how to consider costs, rather than vice versa. This would leave us with two basic principles governing both statutory injunctions and agency rulemaking. First, there is a presumption in favor of considering costs except when a statute articulates a non-cost standard for decisions, when the presumption is reversed. Second, determining how much weight to give costs is a matter of reasonable statutory interpretation, rather than necessarily mandating even-handed balancing of costs and benefits. A final subsidiary principle is that particular flexibility in devising a solution is required in cases where conflicting policies within a single statute or between statutes.

### C. *Rethinking the Sources of Discretion*

There is an essential similarity between agency and administrative discretion, despite the very different institutional settings. After all, "a remedial decree is the judicial analogue to administrative or executive action—the

273. For instance, section 112(d) requires that certain categories of sources emitting hazardous substances utilize the "maximum reduction in emissions" achievable "taking into consideration the cost of achieving such emissions reduction, and any non-air quality health and environmental impacts and energy requirements," which cannot be less stringent than the highest degree of control attained at any existing source. 42 U.S.C. § 7412(d)(2), (d)(3). It would be peculiar to read this mandate as an instruction to impose the degree of emission controls that best balances costs and benefits. Such a reading would be inconsistent with the "maximum achievable" language and with the requirement that new plants achieve at least as much emissions reduction as any existing source.

implementation of a general command in a particular setting."[274] This is not to say that the difference in institutional settings is insignificant. Clearly, the greater expertise and political accountability of agencies shapes views about the legitimate exercise of agency discretion, while judicial independence (and the judiciary's corresponding lack of political accountability) shapes our view of judicial discretion. Nevertheless, understanding the similarities as well as the differences can result in a better understanding of the roots of discretion.

The Court seems to have thought about agency and judicial discretion in quite different terms. *Chevron* grounds agency discretion in enforcing statutes in two ways—as a consequence of an implicit delegation from Congress and as a consequence of the political accountability of the executive branch. These justifications are not only different but in tension, since one portrays agencies as agents of Congress and the other as agents of the President. The Court seems to have given less thought to the reasons why courts should have discretion in enforcing statutes. Perhaps this is not surprising: as Judge Fletcher has observed, "[d]iscretion occupies an oddly neglected place in Anglo-American legal thought."[275] In part, the court's theory seems to be that such discretion is an inherent part of the courts' equity powers, which remain unless Congress affirmatively takes it away. In part, the theory seems to be based on the benefits of individuation of remedies, but as demonstrated earlier, that argument rests on shaky foundations.

The difference in theories might inspire some deeper thinking on both issues. On the agency side, it is possible to imagine a very different argument for discretion: that discretion is an inherent part of the administrative role.[276] Administrators have had to interpret statutes and exercise discretion as long as administrators and statutes have existed. This discretion can even be understood as having some roots in the grant of the executive power, as Justice Scalia has sometimes hinted.[277] Thus, an argument for agency discretion could be made along much the same lines as that the Court currently uses to defend judicial discretion in enforcement. As Judge Fletcher observed over thirty years ago, "there comes a point when certain governmental tasks, whether undertaken by the political branches or the judiciary, simply cannot be performed effectively without a substantial amount of discretion."[278] Because of this similarity in the roots of discretion, experience with the exercise of judicial discretion may have more relevance to agencies than meets the eye.

On the judicial side, there may also be a stimulus for new thinking. An analogy to *Chevron* suggests some interesting questions about judicial discretion: Are there reasons to think that Congress meant to delegate to courts the

274. William A. Fletcher, *The Discretionary Constitution Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 644 (1982).

275. *Id.* at 641. Administrative law may be an exception. Consider Dean Magill's statement that "[d]iscretion is at the heart of most accounts of bureaucracy." Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 859 (2009).

276. For a useful typology of situations involving discretion, see Martin Shapiro, *Administrative Discretion: The Next State*, 92 YALE L.J. 1487 (1983).

277. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992).

278. Fletcher, *supra* note 274, at 636.

power to allow statutory violations to continue at least during an interim period? Did Congress implicitly delegate to courts the power to set appropriate standards for injunctions rather than requiring them to stick with a fixed test like *eBay*?

In short, although courts are conventionally seen as having inherent remedial discretion while agency discretion is delegated, it may also be useful to consider the opposite set of sources. There may be insights to be gained by thinking of equitable discretion as delegated and agency discretion as innate. Or in a more comprehensive vision, the discretion of both branches could be conceptualized as having roots both in the innate nature of these institutions and in their interactions over time with each other and with the legislature. Ultimately, agencies and courts are subject to similar norms stemming from the rule of law, the separation of powers (and the special role it gives to the legislature in making policy), and the need for sensible implementation strategies. Given these similarities, it is not surprising that both institutions turn out to be subject to roughly similar rules regarding the exercise of their discretion in statutory cases. The analysis has been obscured, however, by the efforts to root judicial discretion solely in the judiciary's innate institutional qualities and agency discretion solely in legislative delegations.

In short, pairing agency discretion and judicial discretion might lead us to think more deeply about each of them. Given the importance of the issues involved that can hardly be considered a bad thing.

## Conclusion

This Article has taken an extensive tour of several areas of case law, in subjects ranging from the role of costs in the decision to conduct a rulemaking and in issuing final regulations, to the power of courts to withhold injunctions against statutory violations, to the judicial power to leave agency regulations in place while the agency reconsiders or clarifies their rationale. Strikingly, similar standards have evolved in all of these areas. Essentially, courts retain discretion to consider costs in devising strategies to force statutory compliance unless Congress has clearly designated other factors instead. Agencies have similar discretion in implementing statutes. Discretion seems to be at its height when the court or agency is faced with conflicting statutory policies.

Efforts to synthesize confusing areas of legal doctrine have a long history in legal scholarship. Because such a synthesis is largely supportive of existing case law by its nature, it is not out of place to consider the benefits of such an activity. There is a certain satisfaction in bringing order to unruly bodies of case law, more so when doing so allows a unified theory covering more than one area of law. Yet, more than aesthetics is at stake.

Clear principles provide less of an invitation for error and provide greater predictability. Moreover, articulating clear principles enhances legitimacy by making the bases for decisions more understandable to stakeholders and the public. Furthermore, because the applicable principles provide a better understanding of how discretion meshes with statutory purposes, they may decrease

the risk that either side of the equation will be overemphasized in a particular case. More importantly, clarifying the applicable principles allows disputes to focus more productively on how to apply the principles in particular cases. That may itself be a difficult and contentious undertaking, but at least providing a framework for the analysis should be helpful. In too many cases, the judges seem to have thought they were quarreling over basic principles, when it was really only the application of those principles that was in dispute.

Although much of the Article is devoted to harmonizing the case law, it does have critical bite as well. The symmetry between the principles of judicial discretion and agency discretion also raises a red flag over the one area of difference—the unwillingness of the *eBay* Court to give courts the same leeway as agencies in deciding the method to use to consider costs. The result is that courts impose uniformity in enforcing different statutes rather than taking into account differences in regulatory schemes. It is difficult, however, to see why a court must use balancing while an agency can choose from a broader menu of ways to take cost into effect.

Finally, juxtaposing these two seemingly different areas should make us ask deeper questions about the bases for discretion. Judicial efforts to justify agency discretion over statutory interpretation under *Chevron* and judicial discretion over equitable relief have been a bit facile. The contrast between the different theories in the two areas may be a prod to deeper thinking.

Courts issuing equitable relief and agencies issuing regulations are engaged in parallel tasks: finding sensible mechanisms for implementing statutory mandates. Although the basic legal principles that now govern judicial discretion and agency discretion may be straightforward, their application is not necessarily self-evident. Ultimately, an act of judgment is involved in applying the principles, and reasonable judges (not to mention unreasonable ones) will sometimes disagree. These disagreements might be more fruitful, however, if both sides understood that the dispute is over the application of shared principles, not over the principles themselves.