EVALUATING REMAND WITHOUT VACATUR: A NEW JUDICIAL REMEDY FOR DEFECTIVE AGENCY RULEMAKINGS

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Once the D.C. Circuit has concluded that a rule promulgated by an agency is in some way arbitrary or capricious, the court has at least two options: It can either vacate the rule, or remand it to the agency without vacating it. In the latter case, the agency can continue to implement the challenged rule while revising its explanation to address the defects identified by the court. This Note analyzes the D.C. Circuit's application of the remand-without-vacatur (RWV) remedy during the decade since the court articulated a generic test for its use. This Note argues that RWV is most justified in cases where the costs of vacating agency rules are particularly high, and where the benefits in terms of improving the agency's decisionmaking process are minimal or nonexistent. Based on a survey of the rulemaking cases in which the court has applied RWV, this Note argues that while the test that the D.C. Circuit uses to determine the appropriateness of RWV is consistent with the theoretical underpinnings justifying the remedy, the court's application of that test is frequently flawed. This Note also documents a response to RWV that is less than ideal; agencies generally respond slowly to RWV judgments, and occasionally do not respond at all. The Note concludes that, while the D.C. Circuit possesses adequate tools to counteract agencies' tendency to ignore judicial decisions in individual cases, it has employed them too sparingly in recent years. This Note then develops a revised approach that would promote the remedy's beneficial aspects while limiting its negative effects.

INTRODUCTION

Until recently, when reviewing courts deemed rules promulgated by administrative agencies to be arbitrary and capricious, the courts generally vacated the rules before remanding them back to the agencies. The consequences of vacating agency rules, and thus voiding all or part of a regulatory framework, can be severe, particularly in the context of health and safety regulations. For example, the National Highway Traffic Safety Administration estimates that had the D.C. Circuit not vacated a rule requiring passive restraints in automobiles, "thousands of lives [would have been saved] and millions of serious injuries would have been prevented between 1972 and

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[1987]."[1] In another instance, a reviewing court's decision to vacate a rule promulgated by the Environmental Protection Agency (EPA) ten years earlier threatened to invalidate scores of criminal convictions and civil fines for polluters.[2]

Once a court vacates a rule, the agency may either reenact the same rule with an amended justification or replace the old rule with a new one that is substantively different; the agency also may abandon the rulemaking effort altogether. Reviewing courts make a point of remaining agnostic about which option the agencies should pursue.[3] Agencies' processes of "recovering" from vacatur frequently demand substantial investment of time and resources: One study found that post-remand proceedings at the agency level alone took seventeen months on average to complete.[4]

In a 1993 case, the D.C. Circuit articulated a generic test for a practice that it had used sporadically in the past: remanding rules to agencies *without* vacating them.[5] When a court remands a rule without vacating it, the agency can continue to implement the regulation while it addresses the defects in the regulation identified by the reviewing court. As when rules are vacated, the agency can cure the defects by repromulgating the same rule with a different rationale or by promulgating a different rule.[6]

Remand without vacatur (RWV)[7] is controversial in the academic literature, both in terms of its effects in individual cases and in its sys-

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[1] Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 295 (1987).

[2] Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 627 (1994) (discussing D.C. Circuit's decision in *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991)).

[3] *See, e.g.*, Am. Petroleum Inst. v. EPA, 216 F.3d 50, 58 (D.C. Cir. 2000) ("We do not suggest any particular result on remand, only a reasoned one . . . .").

[4] This calculation is based on an analysis of cases remanded by courts of appeal in the 1984–85 period. "Almost two-thirds of the remands were completed within a year, but one in ten was still pending almost *five years* after the court remanded to the agency." Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1050. Part of the explanation is that remands take place some time "after the rulemaking docket has been closed and agency staff has been reassigned." Mashaw & Harfst, *supra* note 1, at 295.

[5] *See* Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150–51 (D.C. Cir. 1993).

[6] *See, e.g.*, Fertilizer Inst. v. EPA, 935 F.2d 1303, 1312 (D.C. Cir. 1991) ("We emphasize . . . that, by leaving the EPA's exemptions in place, we are not relieving the EPA of its burden to conduct notice and comment rulemaking *ab initio*, *i.e.*, without giving preference to the exemptions left in place in the interim.").

[7] This remedy also has been referred to as "remand without reversal," *see* Frank H. Wu & Denisha S. Williams, *Remand Without Reversal: An Unfortunate Habit*, 30 ENVTL. L. REP. 10,193, 10,193 (2000), and "remand without vacation," *see* Ronald M. Levin,

temic effects.[8] At the individual case level, RWV can prevent the disruption of regulatory regimes that protect individuals against what can be serious risks to life and health.[9] Commentators also view RWV as having positive systemic effects in providing a means to crack agency "ossification." Ossification refers to agencies' reluctance to undertake major rulemaking out of fear that their efforts will be nullified upon judicial review.[10] By reducing the negative consequences of judicial review, RWV may help to encourage agencies to undertake comprehensive rulemaking in the first place.[11] Commentators also have noted, however, that the regular use of RWV by courts may reduce

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"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 DUKE L.J. 291, 291 (2003).

[8] Some critics also have argued that the remand without vacatur (RWV) remedy is illegal, although the D.C. Circuit has continued to apply it regularly for more than a decade. This Note does not engage the debate about the legality of RWV.

The D.C. Circuit opinion that most directly addressed the legality of remanding without vacating was *Checkosky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994), an agency adjudication case that challenged the Security Exchange Commission's (SEC) suspension of two accountants for improper professional conduct. The majority remanded the SEC's suspension without vacating. *Id.* at 462. Judge Randolph's dissent argued that RWV "rests on thin air," *id.* at 490, and is prohibited by § 706(2)(A) of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) (2000), which provides that "a 'reviewing court' faced with an arbitrary and capricious agency decision 'shall'—*not may*—'hold unlawful and set aside' the agency action. Setting aside means vacating; no other meaning is apparent," *id.* at 491 (citation omitted). Judge Randolph acknowledged that the D.C. Circuit had remanded without vacating in a significant number of cases, but considered these cases inconsequential for precedential purposes because none squarely addressed whether the APA permitted such a disposition. *Id.* at 492.

Other commentators argue that the remedy is likely to be legal. For a detailed doctrinal argument that defends RWV in the context of federal courts' tradition of remedial discretion, see Levin, *supra* note 7, at 309–44. Former Judge Wald likewise argues that "there are inherent powers in a reviewing court to postpone vacation until the agency has a chance to make things right." Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 236 (1996).

Meanwhile the D.C. Circuit has continued to apply RWV without directly addressing the remedy's legality. Nevertheless, the court has invited challenges to the practice of remanding without vacating. In *American Medical Ass'n v. Reno*, 57 F.3d 1129 (D.C. Cir. 1995) (Wald, J.), the court remanded without vacation but included a footnote that stated, "As the AMA does not challenge our longstanding practice of remanding rules without vacating them in certain circumstances, we do not reach the question raised and left undecided in *Checkosky* as to the validity of this precedent." *Id.* at 1135 n.4 (citations omitted); *see also* Milk Train, Inc. v. Veneman, 310 F.3d 747, 758 (D.C. Cir. 2002) (Sentelle, J., dissenting) ("Although I greatly respect the majority's attempt to save a well-intended relief program from possibly inefficient further proceedings, I do not think we can lawfully do so.").

[9] *See* Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 373 (1999).

[10] *See infra* notes 25–32 and accompanying text.

[11] *See infra* notes 46–48 and accompanying text.

the incentives for agencies to engage in carefully reasoned decisionmaking.[12]

This Note analyzes the D.C. Circuit's application of RWV during the decade since the court articulated a generic test for identifying when agency rules should be remanded but not vacated.[13] It argues that while there are situations in which this remedy is justified, the court's application of the remedy is flawed. Finally, this Note develops a revised approach that retains the remedy's beneficial aspects while limiting its negative effects both in individual cases and systemically.

Part I provides a background on the rationales and critiques of RWV and argues that RWV is most justified in cases where the costs of vacating agency rules are particularly high, while the benefits in terms of improving the agency's decisionmaking process are minimal or nonexistent.

Part II is based on a survey of rulemaking cases in which the D.C. Circuit has applied RWV. It analyzes how the D.C. Circuit makes the decision to remand without vacatur and the categories of cases in which it has decided to do so. The rulemaking case in which the D.C. Circuit first applied a generic test to determine whether to remand without vacatur was *Allied-Signal v. U.S. Nuclear Regulatory Commission*;[14] its two-pronged balancing test weighs "the seriousness of the . . . deficiencies" in the agency's action against the "disruptive consequences" of vacating the regulations promulgated by the agency.[15] Part II argues that while this test focuses the court's analysis on the right questions, the D.C. Circuit's application of the test fails to target the cases where RWV is most justified.

Part III focuses on the issue of agencies' disincentives to act in response to RWV and the tools available to the court to counteract these disincentives. While commentators have emphasized the troubling *systemic* incentives that RWV may create, empirical evidence of how agencies have responded to RWV highlights the problematic incentives in the *particular cases* in which RWV is applied.

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[12] *See infra* note 49 and accompanying text.

[13] Other circuits also have remanded agency actions without vacating them. *See, e.g.*, Chem. Mfrs. Ass'n v. EPA, 870 F.2d 177, 236 (5th Cir. 1989) ("We remand this issue to the EPA for notice-and-comment proceedings. In the interim, the limitations will be given effect . . . ."); W. Oil & Gas Ass'n v. EPA, 633 F.2d 803, 813 (9th Cir. 1980) ("Our hesitancy [to vacate the rules] springs from a desire to avoid thwarting in an unnecessary way the operation of the Clean Air Act . . . . [G]uided by authorities that recognize that a reviewing court has discretion to shape an equitable remedy, we leave the challenged designations in effect.").

[14] 988 F.2d 146 (D.C. Cir. 1993).

[15] *Id.* at 150–51 (internal quotation marks omitted).

Specifically, an agency may lack incentives to respond to the court's remand expeditiously, precisely because the agency can continue implementing the challenged rule. This Part argues that while the D.C. Circuit possesses tools to counteract these problematic incentives in these individual cases, it has employed them too sparingly in recent years.

Part IV proposes changes that would optimize the D.C. Circuit's application of the remedy. The *Allied-Signal* test should be retained because it targets the right questions. The decision to remand without vacatur, however, should be modified in three ways. First, courts should ensure that the decision to employ RWV is well-informed, if necessary by requiring a separate briefing or holding a separate hearing after the merits have been decided. Second, in applying the *Allied-Signal* test, courts should evaluate more stringently the likelihood that the agency will reenact the same policy upon remand. Finally, courts should tailor the remedy to the particular cases before them by adding "teeth" where they are needed to spur agency action.[16]

I
BACKGROUND

This Part sets out the framework that courts use for evaluating agency rulemaking, explores the theoretical intersection of this framework with the RWV remedy, and finally documents the emergence of RWV in the jurisprudence of the D.C. Circuit.

A. The Court's Role in Agency Rulemaking

A court's decision whether to vacate agency rules follows a determination that the agency's promulgation of those rules[17] was in some way arbitrary or capricious.[18] Because of the limited institutional capacity of the courts to evaluate the substance of often technical

[16] Courts can add teeth by, for example, giving agencies only a limited time to respond to their decisions. *See infra* notes 137–39 and accompanying text.

[17] Because agencies have engaged in formal rulemaking only rarely after the Supreme Court's decision in *United States v. Florida East Coast Railway*, 410 U.S. 224 (1973), *see* Neil D. McFeeley, Note, *Judicial Review of Informal Administrative Rulemaking*, 1984 DUKE L.J. 347, 347 & n.3, the analysis in this Note focuses on notice-and-comment rulemaking. The requirements for such rulemaking are set out in § 553 of the APA. These statutory requirements are straightforward: They require the agency to publish a general notice of proposed rulemaking in the Federal Register; to give interested parties "an opportunity to participate in the rulemaking through submission of written data, views, or arguments . . . , [and to] incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553 (2000).

[18] Section 706(2)(A) of the APA prescribes the "arbitrary and capricious" test as the standard of review of notice-and-comment rulemaking. 5 U.S.C. § 706(2)(A) (2000).

agency rules, courts tend to focus on the process by which agencies arrive at their conclusions. In *Motor Vehicle Manufacturers Ass'n v. State Farm*,[19] the Court explained that

> [n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[20]

The D.C. Circuit typically applies RWV to cases where an agency's rules are arbitrary and capricious on account of "inadequate explanation," and occasionally does so where the rules' enactment is procedurally flawed.[21] The D.C. Circuit does not apply RWV where it finds that the agency's rules violate the statute that the agency is administering.[22] In this category of cases, new legislation would be a prerequisite for reenacting the same rule. When the flaw identified by the court is an inadequate explanation or a procedural defect, however, the agency is free to adopt the same substantive rule.[23]

In reviewing agency action, the Supreme Court has stressed that courts' proper focus is the administrative record compiled by the agency in the process of promulgating a rule, rather than evidence adduced at a judicial trial challenging a promulgated regulation.[24]

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[19] 463 U.S. 29 (1983).

[20] *Id.* at 43 (citations omitted); *see also* Wald, *supra* note 8, at 233–34 (describing "arbitrary and capricious" as "the catch-all label for attacks on the agency's rationale, its completeness or logic, in cases where no misinterpretation of the statute, constitutional issues or lack of evidence in the record to support key findings is alleged").

[21] There are a number of cases involving procedural flaws. *See, e.g.*, Louisiana Fed. Land Bank Ass'n v. Farm Credit Admin., 336 F.3d 1075, 1080 (D.C. Cir. 2003) (identifying agency's failure to respond to comment); Sugar Cane Growers Coop. v. Veneman, 289 F.3d 89, 97 (D.C. Cir. 2002) (identifying agency's failure to comply with APA); Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1133 (D.C. Cir. 1995) (identifying agency's failure to provide adequate notice or explanation of costs and scope of program); *see also infra* note 60. These two categories often target similar flaws in agency behavior. For example, in *American Medical Ass'n*, the agency's failure to "provide any data underlying the budget of the diversion control program or its basis for attributing particular costs to that program" constituted both inadequate explanation and inadequate notice. 57 F.3d at 1133. Likewise, in *Louisiana Federal Land Bank Ass'n*, the agency's lack of response to a particular comment could be recharacterized as an inadequate explanation of the final rule. 336 F.3d at 1080–81 (noting that while agency is not required to respond to every comment, response is mandatory where comments implicate validity of proposed rules).

[22] That is, RWV cases are not among those cases that failed the two-step inquiry articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984).

[23] *See supra* note 6 and accompanying text.

[24] *See* Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

Anticipating judicial scrutiny, agencies have devoted more and more resources to building comprehensive records.[25] As it became clear that exhaustive records would not insulate agencies from losing legal challenges, some agencies have turned away from undertaking major notice-and-comment rulemaking.[26] Instead they have engaged more frequently in policymaking through adjudication and through "nonrule rulemaking" in the form of policy statements, interpretive rules, manuals, and other informal devices[27] that are exempt from the notice-and-comment requirements articulated in the Administrative Procedure Act (APA).[28] This turn away from rulemaking has been termed "ossification,"[29] and it troubles scholars who view rulemaking

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[25] *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387 (1992) (observing that explanations for rules are "far more lengthy and intricate than they were in the 1960s and early 1970s," and that "agencies also take much longer to write the lengthy preambles and technical support documents and to address public comments on proposed rules").

[26] Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 61 (1995) (citing CARNEGIE COMM'N, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 109 (1993)). Pierce notes that "[o]ssification has been identified as a problem only with respect to major rules predicated on assumptions concerning complicated factual and scientific relationships. Agencies continue to issue hundreds of rules annually in other contexts expeditiously and at a relatively low cost." *Id.* at 62. Schuck and Elliott's empirical study of judicial review of agency actions suggests "that agencies may be less likely to be affirmed in cases that involve broad policy questions and multiple parties—characteristics generally associated with rulemakings—as opposed to cases that involve only individual litigants, which tend to be confined to narrower issues." Schuck & Elliott, *supra* note 4, at 1022–23.

[27] McGarity, *supra* note 25, at 1393. For a case study that documents the decline of rulemaking by the National Highway Traffic Safety Administration, see generally Mashaw & Harfst, *supra* note 1. One scholar notes, however, that overall "[t]he empirical evidence for a retreat from rulemaking in the face of stringent judicial review is not nearly as clear as has been generally supposed." Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1127.

[28] 5 U.S.C. § 553(b)(3)(A) (2000) (establishing that requirement for general notice of proposed rulemaking does not apply "to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice"); *see also* Fertilizer Inst. v. EPA, 935 F.2d 1303, 1308 (D.C. Cir. 1991) ("[A]s a general rule, an agency can declare its understanding of what a statute requires without providing notice and comment, but an agency cannot go beyond the text of a statute and exercise its delegated powers without first providing adequate notice and comment."); *id.* at 1307–08 ("An interpretive rule simply states what the administrative agency thinks the statute means, and only reminds affected parties of existing duties. On the other hand, if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule.") (citations and internal quotation marks omitted).

[29] The judicial branch is not the only source of "ossification" of rulemaking; the executive and legislative branches also play a role. The executive branch adds another layer to the process of approving rules by requiring clearance from the Office of Management and Budget. *See id.* at 1405–07. "Congress occasionally requires that agencies engage in particular analytical exercises to form the underlying basis for their rules. . . . Congress has also enacted statutes specifying broad analytical requirements for all agency rulemaking" in addition to those required by the APA. *Id.* at 1403–04.

as superior to other forms of agency action. Rulemaking provides regulated entities and regulatory beneficiaries the opportunity to participate in the decisionmaking process,[30] gives clear notice to the public of both agencies' intent to make policy decisions and the final decisions themselves,[31] and allows agencies to resolve issues comprehensively.[32] As detailed in Part I.B, the availability of RWV may help to offset the pressures that cause agencies to favor policymaking through less formal means.

B. Rationales for and Criticisms of RWV

RWV is an attractive remedy because it allows courts to reduce the disproportionality that can exist between defect and remedy when agency action is vacated. The disruption caused by vacating agency action is greatest when the court strikes down rules that played an integral role in a particular regulatory regime, and both regulated entities and regulatory beneficiaries have developed a reliance on them.[33] The reliance arguments are strongest when the agency has already started enforcing the rule and it is clear that the agency will retain the same rule upon remand: In those cases, parties need not change their behavior at all from the status quo while the agency addresses the issues on remand. A significantly weaker version of the reliance argument is also present when the agency changes the rule as a result of reconsidering its explanation upon remand.[34] In those cases, parties will have to adjust their behavior to conform to the new

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[30] *See* McGarity, *supra* note 25, at 1393 ("Although informal guidance documents and technical manuals are a necessary part of a complex administrative regime, they are promulgated without the benefit of comments by an interested public."); *see also* Pierce, *supra* note 26, at 59 (noting that "rulemaking enhances fairness by allowing all potentially affected members of the public to participate in the decisionmaking process that determines rules that apply to their conduct").

[31] Pierce, *supra* note 26, at 59 (observing that "rules enhance fairness by providing affected members of the public easily accessible, clear notice of the demarcation between permissible and impermissible conduct and by insuring like treatment of similarly situated individuals and firms").

[32] *Id.* (noting that "rulemaking enhances efficiency by allowing an agency to resolve recurring issues of legislative fact once instead of relitigating such issues in numerous cases").

[33] *See* Levin, *supra* note 7, at 300 ("Frequently, when a rule is held invalid after it has already gone into effect, private citizens will already have arranged their expectations around it. Companies may have entered into contracts, made capital investments, and shifted business operations in light of the rule."); Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599, 623 (2004) ("Protecting the legitimate expectations of those subject to administrative law rules and, therefore, those most vulnerable to the perturbations of judicial processes, is a sound justification for designing pragmatic administrative law techniques.").

[34] Agencies sometimes enact different rules in response to RWV. *See supra* text accompanying note 6; *infra* note 86 and accompanying text.

rule once it is enacted, but RWV allows them to avoid an intermediate step: Vacating the rule upon remand would require parties first to change their behavior in response to the regulatory vacuum and then to change it again once the new rule has been enacted.

The disruption caused by vacating a rule upon remand can vastly exceed the flaw in the agency's explanation of its policy choice because almost any agency action is vulnerable to attack for inadequate explanation. It is "impossible for any agency to identify and to discuss explicitly and comprehensively each of the myriad issues, alternatives, and data disputes relevant to a major rulemaking."[35] Some commentators have concluded that "finding a gap, or many gaps, in any regulation should be child's play."[36] While this characterization overstates the argument, it is true that gaps identified during judicial review do not necessarily reflect genuine shortcomings in the agency's reasoning process. For example, Judge Patricia Wald, formerly of the D.C. Circuit, has noted that most remands for inadequate explanation are "caused by the agency's failure to communicate or explain to generalist judges what they are doing, not by the agency's failure to do enough research or garner sufficient expert opinions for the record."[37] Thus, sometimes the flaw identified by the reviewing court is an insignificant one, so that the benefits derived from a more thoroughly reasoned decision are small. On the other hand, the costs of vacatur—which may include disruption of a comprehensive regulatory regime protecting health, safety, or welfare—are large.[38] The case for RWV is strongest in this situation.

A concern about this disproportionality seems implicit in Judge Silberman's opinion in *Checkosky v. SEC*,[39] which notes that RWV allows "courts to [avoid] decid[ing] that the agency's action is either unlawful or lawful on the first pass," especially in cases where "the judges are unsure as to the answer because they are not confident that they have discerned the agency's full rationale."[40] While caution is appropriate, it is the courts' role to determine whether agency actions

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[35] Pierce, *supra* note 26, at 69.

[36] Mashaw & Harfst, *supra* note 1, at 283.

[37] Patricia M. Wald, *Judicial Review in the Time of Cholera*, 49 ADMIN. L. REV. 659, 665–66 (1997).

[38] *See* Wald, *supra* note 8, at 236 ("In many cases the agency, following the compass points of the court's opinion, can fill in the needed rationale on the second go-round and automatic vacation would be disruptive and wasteful in the meantime.").

[39] 23 F.3d 452 (D.C. Cir. 1994).

[40] *Id.* at 462. *Checkosky* concerned agency adjudication, but this rationale has been cited in subsequent rulemaking cases. *See, e.g.*, Am. Lung Ass'n v. EPA, 134 F.3d 388, 392–93 (D.C. Cir. 1998) (noting that while the Administrator's substantive choice was permissible, "unless she describes the standard under which she has arrived at this conclusion, supported by a plausible explanation," the court has "no basis for exercising [its] responsi-

are arbitrary and capricious, and doctrinally inadequate explanation is a sufficient reason to hold agency action arbitrary and capricious.[41] The argument that courts should remand without vacatur because they are unable to determine whether agencies acted arbitrarily and capriciously by itself is unpersuasive.

The importance of RWV as a means to avoid disruption and instability has increased in the wake of the Supreme Court's decision in *Bowen v. Georgetown University Hospital*,[42] which held that the statute enacting the Medicare program did not give the Secretary of Health and Human Services the authority to promulgate a retroactive regulation to reimburse hospitals for certain costs.[43] This holding significantly restricts the ability of agencies to eliminate regulatory gaps caused by vacating agency rules.

> Before *Georgetown*, an agency whose rule had been vacated could decide on the best way to respond to the court's concerns, promulgate a new rule (or the old one with a new justification), and make this rule retroactive to the date of the court's action, thus ensuring that *some* rule would be in place throughout the affected period. *Georgetown* renders this strategy unworkable, except in those rare situations in which Congress has specified that the agency's rules may be retroactive.[44]

The crucial implication of *Georgetown University Hospital* is that "[f]or the potentially lengthy period between the statutorily mandated effective date of the new regulatory requirement and the issuance of a new rule on remand, there is . . . [no] effective rule governing the area of conduct at issue."[45]

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bility to determine whether her decision is arbitrary . . . [and] capricious") (citations, internal quotation marks, and brackets omitted).

41 *See Checkosky*, 23 F.3d at 491 (noting that "[d]ozens of our opinions have stated this fundamental proposition of administrative law") (Randolph, J., dissenting); *see also, e.g.*, Am. Petroleum Inst. v. EPA, 216 F.3d 50, 58 (D.C. Cir. 2000) (noting Environmental Protection Agency's (EPA) failure to explain certain aspects of rule, and concluding that "because the agency has failed to provide a rational explanation for its decision, we hold the decision to be arbitrary and capricious").

42 488 U.S. 204 (1988).

43 The Secretary of Health and Human Services had adopted a cost-limit schedule in 1981 that was challenged and found invalid by the D.C. Circuit in 1983 for failure to provide notice and opportunity for public comment before issuance of the rule. In 1984, after seeking public comment, the Secretary promulgated rules that reissued retroactively the 1981 rules. *Id.* at 206–07. "[T]he net result was as if the original rule had never been set aside." *Id.* at 207. The court held that the 1984 rule was invalid and that an agency cannot adopt a rule that applies retroactively to completed transactions unless Congress has explicitly conferred such authority. *Id.* at 208–09.

44 Ronald M. Levin, *"Vacation" at Sea: Judicial Remands and the APA*, ADMIN. & REG. L. NEWS, Spring 1996, at 4–5.

45 Pierce, *supra* note 26, at 77.

Another rationale for permitting, and perhaps encouraging, RWV is as a means of "deossifying"[46] rulemaking by administrative agencies.[47] When RWV is part of the menu of options before a reviewing court,

> [a]gencies will know in advance that a rule can remain in effect in its entirety in most cases even if the agency is held to have violated the duty to engage in reasoned decisionmaking. That knowledge will encourage agencies to devote less time and fewer resources to their efforts to comply with that duty. The resulting reduction in the time and resources required to issue a rule, coupled with the dramatic reduction in the risk of vacation of a rule at the end of the rulemaking process, will encourage agencies to make greater use of notice and comment rulemaking.[48]

The regular application of RWV thus lowers the costs to agencies of acting arbitrarily or capriciously.

Opponents of RWV have two responses to this argument. First, while these lower costs may cause agencies to initiate major rulemaking more frequently, they simultaneously will create troubling ex ante incentives for administrators to act sloppily.[49] The evaluation

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[46] "Any reduction in the expected time and resources required to conduct a rulemaking and any increase in the expected probability of judicial affirmance of the resulting rule will increase the relative attractiveness of the rulemaking process." *Id.* at 67.

[47] While the focus of this Note is RWV in the rulemaking context, courts have applied the remedy to other types of agency action including, most prominently, adjudication. Different types of agency actions share a number of common features, so it makes sense that they are treated similarly by the courts in some respects. However, important differences exist as well, and in some cases carrying over an analysis or argument from rulemaking to adjudication is more problematic because there may be factors that are, for example, prominent in one but more attenuated, or even nonexistent, in the other.

The existing academic literature on RWV—both supportive and critical—also does not distinguish between the relative appropriateness of the remedy in adjudication versus rulemaking contexts. Proponents praise RWV in the rulemaking context. *See* Pierce, *supra* note 26, at 75–78; Sunstein, *supra* note 9, at 372–74 (endorsing RWV as "especially sensible" for regulation that prevents serious risks to life and health and as positive example of minimalist administrative law technique that does no more than is necessary to resolve case). Among critics, Prestes believes that vacating without remanding is illegal, but his argument does not distinguish between rulemaking and adjudication. Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 SETON HALL L. REV. 108 (2001). Wu and Williams note that "[i]ncidentally, though the different procedural posture of all these cases might be regarded as significant, as some arise out of adjudication of contested cases, others from agency decisions to not hold hearings, and others from rulemaking, these distinctions do not appear to have been important to the outcomes." Wu & Williams, *supra* note 7, at 10,194. While some of the rationales for remanding without vacatur in the rulemaking context do not carry over to the adjudication context, RWV may well be appropriate in that context. However, its appropriateness should be evaluated independently.

[48] Pierce, *supra* note 26, at 78.

[49] *See* Prestes, *supra* note 47, at 124 ("[R]emanding without vacating gives agencies an incentive frequently to engage in insufficient reasoning, saving costs on the front-end,

of this trade-off depends in part on an assessment of the effectiveness of judicial review in ensuring that agencies are living up to their obligation to use their expertise to make reasoned decisions.[50] Furthermore, opponents might argue, if deossification is the goal, a more direct way to accomplish it would be to make it more difficult to establish that agency action is arbitrary or capricious so that challenges to rulemaking are less likely to be successful. Selective application of RWV can counter both concerns, however, because realistically agencies cannot be expected to adjust their efforts to reflect the precise probability that courts will apply RWV in a given case.[51] Thus, RWV may be a superior option compared to an across-the-board change in the stringency of the standard because it does not erode to the same degree agencies' ex ante incentives to engage in reasoned decisionmaking.

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knowing that they will have to repay only a fraction of those costs when a portion of those regulations are sent back by the courts for another try."). Prestes clarifies that "remanding without vacating encourages sloppy agency reasoning if the resources saved from shirking in the decision-making process outweigh the resources expended from defending the more legally vulnerable regulations from increased legal challenges." *Id.* at 124 n.110.

At least one proposed alternative to RWV, interim rulemaking, *see id.* at 127–28, would be subject to the same troubling ex ante incentives. Interim rulemaking allows agencies to promulgate rules relatively quickly because they can become effective without prior notice and comment. *See* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 704 (1999). At the same time, interim rulemaking "implicitly tolerates less detailed agency analysis of the many peripheral and subsidiary issues that arise in rulemakings. . . . [It may also introduce] agency delay in the post-remand process of completing a rulemaking and issuing a final rule that will satisfy a reviewing court." Pierce, *supra* note 26, at 74.

[50] *See* Mashaw & Harfst, *supra* note 1, at 294 (noting that procedural focus of judicial review "invites courts to invalidate reasonable judgments that are badly explained or perhaps inexplicable in straightforward logical fashion" because they are products of incremental learning, "a process that may entail tentative commitments, revised technical and interpretive perspectives, false starts, lucky guesses, new information, or an evolving technological, economic and political environment"); Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 522–25 (identifying benefits of judicial review to include: (1) legality, or ensuring that regulatory agencies comply with congressional commands; (2) efficient resource allocation, i.e., ensuring that agency action is not arbitrary or capricious; and (3) legitimacy by providing ex ante deterrent and ex post check "against domination of administrative processes by irrelevant or illegitimate considerations"). One commentator notes that even if the benefits of judicial review may be substantial, they are outweighed by other considerations. *See* Pierce, *supra* note 26, at 78 ("Since I perceive greater benefits in deossifying the rulemaking process than in enforcing the duty to engage in reasoned decisionmaking, I am comfortable with the trade-off implicit in adoption of the remand without vacation remedy.").

[51] *See* Levin, *supra* note 7, at 376 (noting that probability of failure under hard look review is unpredictable in any given case; thus "[i]t does not seem realistic to expect an agency to make a further calibration of its efforts (or of its sense of self-restraint) by taking into account not only the likelihood of reversal, but also the kind of relief a court is likely to grant if it does reverse").

Another criticism of RWV is that by denying meaningful relief to a litigant who has demonstrated that an agency action is unlawful, RWV could reduce the public's incentive to challenge agency mistakes.[52] Peter Schuck and Donald Elliott undertook an empirical study of challenges to agency actions over a time period before RWV became a prominent remedy. They noted that, "in general, parties and their lawyers perceive the benefits from successfully challenging agency action in court as large and the costs as small."[53] The question is whether the availability of RWV as a remedy reduces too drastically the benefits of challenging agency action, and no empirical studies provide evidence one way or another yet. Furthermore, although RWV may reduce the incentives to bring some kinds of challenges, it may increase the incentives to bring others. Specifically, RWV may help to correct an existing imbalance in incentives that favors antiregulatory challenges over proregulatory challenges: If a court vacates a regulatory framework that it has found arbitrary and capricious for being insufficiently stringent, the result can be no regulatory framework at all, an outcome that leaves the proregulatory challenger worse off (at least temporarily) having won its case.[54]

Finally, one opponent of RWV argues that "[p]erhaps the simplicity . . . [of showing that an agency acted arbitrarily], if it is indeed simple, reflects a democratic decision about the hurdles we want to erect before an agency can exert control over people's lives."[55] This critique of RWV ignores the possibility that the ease of demonstrating the arbitrariness of an agency rulemaking might channel agency action into more informal, and therefore less desirable, types of agency action.[56] This argument does highlight, however, that it can be difficult to extricate one's conclusion about the benefits of RWV from one's opinions about the desirability of regulation in general.

C. Emergence of RWV

The D.C. Circuit started applying RWV in the 1970s,[57] long before the 1993 *Allied-Signal* decision in which the court first applied

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[52] *See* Levin, *supra* note 44, at 5.

[53] Schuck & Elliott, *supra* note 4, at 1011–12.

[54] *See* Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. CHI. L. REV. 1763, 1821–22 (2002).

[55] Prestes, *supra* note 47, at 123 n.109.

[56] *See supra* notes 29–32 and accompanying text.

[57] *See* Rodway v. USDA, 514 F.2d 809, 817 (D.C. Cir. 1975) (remanding food stamp allotments without vacatur because of "critical importance of the allotment regulations to the functioning of the entire food stamp system"); Kennecott Copper Corp. v. EPA, 462

a generic test for RWV.[58] Most cases in which the D.C. Circuit applied RWV in the years prior to *Allied-Signal* involved defects in an agency's substantive explanation for its policy choice, including failure to consider significant alternatives or respond to criticisms,[59] but the D.C. Circuit also applied RWV in two cases where it identified procedural defects in an agency's rulemaking.[60] The factors that the D.C. Circuit considered in determining whether to vacate in these cases were consistent with the disproportionality rationale articulated above, in the sense that the court focused on cases where costs of vacating the rules were high, while the benefits were likely to be minor or nonexistent.

F.2d 846, 850 (D.C. Cir. 1972) (applying RWV so that EPA Administrator could explain basis for air quality standard).

[58] The "*Allied-Signal* test" was originally formulated in *United Mine Workers v. Federal Mine Safety & Health Administration*, 920 F.2d 960, 966–67 (D.C. Cir. 1990). *Allied-Signal* is the first rulemaking case to which this test was applied, however, as *United Mine Workers* concerned agency adjudication. In the latter case, a union challenged an exemption from regulations governing the flow of air to underground coal mines that had been granted through an agency adjudication process. *Id.* at 961. By not vacating the agency's order, the D.C. Circuit allowed the mine to continue operating under the exemption while the agency explained its decision for granting it more fully.

In justifying its decision not to vacate the exemption, the court noted that it had "commonly remanded without vacating an agency's rule or order where the failure lay in lack of reasoned decisionmaking," *id.* at 966, and asserted that "[r]elevant to the choice [to vacate] are the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed," *id.* at 967.

[59] *See, e.g.*, UAW v. OSHA, 938 F.2d 1310, 1322–24 (D.C. Cir. 1991) (finding that agency failed to explain its failure to disaggregate injury data by industry even though variations in injury rates were great and failed to consider certain costs and benefits); United Mine Workers v. Dole, 870 F.2d 662, 674 (D.C. Cir. 1989) (noting that statute required new regulations to provide no less protection than previous regulations, but agency "neither explored for itself nor elicited comments from all interested parties focused on the comparative level of protection afforded miners under the old and new regulations"); Nat'l Treasury Employees Union v. Horner, 854 F.2d 490, 499 (D.C. Cir. 1988) (finding Office of Personnel Management (OPM) "[u]nable to point . . . to any data of the sort it would have considered if it had considered cost in any meaningful way"); Indep. U.S. Tanker Owners Comm. v. Dole, 809 F.2d 847, 852 (D.C. Cir. 1987) ("The Secretary's statement of basis and purpose fails to give an adequate account of how the payback rule serves these objectives and why alternative measures were rejected in light of them."); *Kennecott Copper Corp.*, 462 F.2d at 848–49 (finding that agency failed to explain basis for annual air quality standard).

[60] *See* Fertilizer Inst. v. EPA, 935 F.2d 1303, 1311–12 (D.C. Cir. 1991) (finding failure to undertake notice and comment because proposed rule published by EPA made no mention of possible creation of administrative exemptions to Comprehensive Environmental Response, Compensation, and Liability Act's reporting requirement, and those exemptions could not be considered "logical outgrowth" of proposed rule that would relieve EPA of obligation to undertake separate round of notice and comment); *Rodway*, 514 F.2d at 814 (finding agency action flawed because notice that agency intended to revise regulations governing operation of food stamp program was insufficient to communicate that changes to allotment system would be considered).

The interruption of benefits flowing from regulation figured prominently in the D.C. Circuit's decisions to remand with vacatur prior to the articulation of the generic test in *Allied-Signal*. For example, in a case concerning an OSHA regulation requiring employers to isolate industrial equipment that could suddenly move or crush maintenance workers, the court noted that "[t]here appear to be segments of the standard . . . that may well have genuine life-saving effects and are highly likely to survive re-examination. Vacating the rule would interrupt the continued flow of those advantages if employers responded to vacation of the rule by eliminating the safety practices."[61] In a case that involved the food stamp program, the court's opinion emphasized that it was "mindful of the critical importance of the allotment regulations to the functioning of the entire food stamp program, on which over ten million American families are now dependent to supplement their food budgets. Thus [the court did] not order the regulations vacated pending the rule-making proceedings."[62] In addition to considering impacts on regulatory beneficiaries, the D.C. Circuit's decision to vacate in some cases rested, at least in part, on a desire to minimize disruption to regulated entities.[63]

Another set of cases where the court chose to remand without vacating involved situations where returning to the status quo ante was either impossible or pointless. In one case, a previous lawsuit concluded by a consent decree prevented a return to the status quo ante.[64] In another case, the relevant agency action was set to expire within three months, and the court declined to vacate it because the negative impact on the regulation's beneficiaries was "not likely to be especially severe" and vacatur in the interim might have done "more harm than good."[65]

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61 *UAW*, 938 F.2d at 1325.

62 *Rodway*, 514 F.2d at 817.

63 *See, e.g.*, *United Mine Workers*, 870 F.2d at 674 ("[T]o minimize disruption to the mining industry . . . we are requesting supplementary briefs on . . . whether the existing regulations should be vacated . . . or whether they should remain in place until the Secretary has acted . . . to correct the deficiencies . . . .").

64 In *National Treasury Employees Union*, the federal employees' unions sued the Director of the OPM regarding the decision to recategorize certain federal jobs. 854 F.2d at 492. The court concluded that because of a preexisting consent decree, it could not "return to the *status quo ante*; nor would [it], even if asked, prohibit the government from continuing to hire new employees until OPM has either supported its decision or changed it." *Id.* at 499–500.

65 Maryland People's Counsel v. Fed. Energy Regulatory Comm'n, 768 F.2d 450, 455 (D.C. Cir. 1985).

II
RWV AFTER *ALLIED-SIGNAL*

The two-pronged *Allied-Signal* balancing test evaluates "the seriousness of the . . . deficiencies" in the agency's action (the deficiency prong), and the "disruptive consequences" of vacating the regulations promulgated by the agency (the disruption prong).[66] By focusing on deficiency and disruption, the test considers the right factors for identifying the cases where RWV is appropriate because the costs of vacatur would significantly exceed the benefits in terms of improving the quality of agency decisionmaking.[67] In spite of the sound theoretical underpinning of this test, the D.C. Circuit's process of deciding whether to remand without vacatur has produced results that leave RWV (as currently applied) without sufficient justification.

A. How Do Courts Decide Whether to Vacate?

A survey of the D.C. Circuit's RWV cases over the last decade reveals two reasons for the inconsistent and overinclusive application of the remedy.[68] First, the deficiency prong of the *Allied-Signal* test is

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[66] Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (internal quotation marks omitted).

[67] *United Mine Workers v. Federal Mine Safety & Health Administration* notes that these factors are analogous to those considered in deciding whether to grant preliminary injunctions. 920 F.2d 960, 967 (1990) (citing Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977)). In *Washington Metropolitan Area Transit Commission*, the court stated: "One moving for a preliminary injunction assumes the burden of demonstrating either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor." 559 F.2d at 844 (citation omitted).

[68] Because of the inconsistency in the D.C. Circuit's methodology in deciding when to apply RWV, the survey of cases in this section may be incomplete. The starting point for compiling the list of cases was a search for all D.C. Circuit cases that cited either *Allied-Signal* or any of the RWV cases that preceded *Allied-Signal*. This search was repeated for all RWV cases that the first search retrieved, and repeated again with the cases that the second search retrieved. These searches were supplemented by additional text searches that used RWV language. This group of cases was then limited to include only rulemaking cases that were flawed either because of inadequate explanation of the final rules or because of a procedural flaw. A number of cases where the D.C. Circuit applied RWV were excluded, including adjudication and ratemaking cases, as well as cases involving agency action targeted to a particular actor. *See supra* note 47; *see also, e.g.*, Sprint Communications Co. v. FCC, 274 F.3d 549, 556 (D.C. Cir. 2001) (appealing Federal Communications Commission (FCC) order approving application of particular long distance service provider); MCI Telecomms. Corp. v. FCC, 143 F.3d 606, 609 (D.C. Cir. 1998) (remanding FCC's rate calculation for further explanation without vacating it); A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1492 (D.C. Cir. 1995) (addressing FDA's approval of particular new drug). One case that involved inadequate explanation of interpretive (rather than notice-and-comment) rulemaking was included: *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1023 (D.C. Cir. 1999), a case that concerned an interpretive rule promulgated pursuant to the Medicare statute.

evaluated so leniently that it fails to serve as a meaningful screening device for the appropriateness of RWV in a particular case. Second, the D.C. Circuit selectively applies the *Allied-Signal* test when deciding whether to remand without vacatur.

The application of the *Allied-Signal* test in the *Allied-Signal* case itself suggests that almost all inadequately explained rules would qualify for RWV. The case involved a rule promulgated by the Nuclear Regulatory Commission to apportion fees "fairly and equitably" among licensees. The plaintiffs alleged that the Commission's actions did not satisfy the fair and equitable standard and were thus arbitrary and capricious. The court agreed, finding that the agency inadequately explained two aspects of its policy governing fee apportionment.[69]

Although the court asserted that the test involves "balancing,"[70] the court's actual application of the test effectively ignored the deficiency prong and gave the agency the benefit of significant doubt with respect to the correctness of its decision. In its analysis of the first defect, the court asserted that "[i]t is conceivable that the Commission may be able to explain" its decision.[71] In applying the balancing test to the second defect, the opinion acknowledged that the court "g[a]ve little weight to the possibility that the Commission could pull a reasonable explanation out of the hat."[72]

The analysis under the second prong—which focuses on the disruptive consequences of vacatur—relied quite heavily on the *Georgetown University Hospital* opinion[73] and stressed the disruptions to the regulating agency rather than to the regulated entities. The court noted that if it vacated the rules governing the Commission's fee collection, all collected fees would have to be returned to licensees, thus providing "a peculiar windfall."[74] The court did express some concern for disruption to the regulated entities: It contemplated that the Commission will provide refunds in future years to the extent that

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[69] First, the Commission did not take into account the ability of certain companies to pass through costs to their customers, although nonprofit educational institutions were exempted from payment of certain fees in part because those institutions have a limited ability to pass on costs to others. *Allied-Signal*, 988 F.2d at 150. The second flaw concerned the Commission's decision to collect flat fees from certain producers instead of apportioning those fees on the basis of waste output. *Id.* at 152.

[70] *Id.*

[71] *Id.* at 151.

[72] *Id.* at 152.

[73] *See supra* notes 42–45 and accompanying text.

[74] *Allied-Signal*, 988 F.2d at 152 ("[E]ven ones that benefited from the Commission's choice would presumably be entitled to a refund, and under *Georgetown University Hospital*, the . . . costs could be recovered from no one.").

upon remand the Commission discovers that it has overcharged those entities.[75]

The breadth of the *Allied-Signal* test has not escaped the notice of academic commentators. Richard Pierce has noted that "[t]he vast majority of agency rules that are held to be invalid under the arbitrary and capricious standard are likely to qualify for remand without vacation through application of the test announced in *Allied-Signal*."[76] The results of the ten rulemaking challenges where the D.C. Circuit found agency action arbitrary and capricious and then applied the *Allied-Signal* test confirm Pierce's prediction: Notably, the court vacated the agency action on only one occasion.[77] These findings sug-

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[75] *Id.* at 153 ("If on remand the Commission concludes that the apportionment must be in accordance with usage, then those firms whose burden is lower under a new, non-arbitrary, rule should be entitled to refunds of the difference.").

[76] Pierce, *supra* note 26, at 75–76.

[77] *See* Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1053 (D.C. Cir. 2002) ("Because the probability that the Commission would be able to justify retaining the CBCO Rule is low and the disruption that vacatur will create is relatively insubstantial, we shall vacate the CBCO Rule."). A subsequent petition by intervenors to reconsider vacating the CBCO rule was denied. Fox Television Stations, Inc. v. FCC, 293 F.3d 537, 541 (D.C. Cir. 2002). There are ten rulemaking challenges where the court applied the *Allied-Signal* test and remanded without vacatur in the decade after the *Allied-Signal* decision. *See* Louisiana Fed. Land Bank Ass'n v. Farm Credit Admin., 336 F.3d 1075, 1085 (D.C. Cir. 2003) (concluding that "it is not unlikely that the FCA will be able to justify a future decision to retain the Rule, inasmuch as its only error was its failure to explain what seems to be a policy difference with the plaintiffs," and thus "vacatur is sure to be disruptive because it would preclude a set of voluntary transactions that both originating and participating System lenders find advantageous") (citation and internal quotation marks omitted); Milk Train, Inc. v. Veneman, 310 F.3d 747, 756 (D.C. Cir. 2002) ("In our view, there is at least a serious possibility that the Secretary on remand could explain her use of the 1999 funds in a manner that is consistent with the statute or choose an allocation method to correct the problem, a factor that favors remanding rather than vacating.") (internal quotation marks omitted); *Fox Television Stations*, 280 F.3d at 1049 ("Upon consideration of both the *Allied-Signal* factors, we conclude that, though the disruptive consequences of vacatur might not be great, the probability that the Commission will be able to justify retaining the NTSO Rule is sufficiently high that vacatur of the Rule is not inappropriate."); U.S. Telecom Ass'n v. FBI, 276 F.3d 620, 627 (D.C. Cir. 2002) ("Because it is not so clear as in the case of the Bureau's interpretation of 'expeditiously' that there are no defensible grounds for its conclusions . . . the district court should not vacate the FBI's resolutions of the 'number of/capacity' and 'simultaneously' issues."); Radio-Television News Dirs. Ass'n v. FCC, 184 F.3d 872, 888 (D.C. Cir. 1999) ("Whether the newly-defended rules would survive judicial review is an open question, but is sufficiently possible to justify remand rather than a more severe remedy."); Davis County Solid Waste Mgmt. v. EPA, 108 F.3d 1454, 1459 (D.C. Cir. 1997) ("[I]t seems likely that vacating the 1995 NSPS and emission guidelines for large units will result in significantly greater pollution emissions than would occur if these emission standards were not vacated"); Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1135 (D.C. Cir. 1995) (concluding that challenged rule should not be vacated in light of "the obvious hardship that vacating the rule would impose on the agency, the likelihood that the fees collected are not grossly out of line from what they would be if accompanied by the proper explanation, and the DEA's ability to make up through future adjustment any improper overcollection"); Am. Water Works Ass'n v. EPA,

gest that courts cite the *Allied-Signal* test only when they have already decided to apply RWV and do not use it to evaluate the appropriateness of RWV in a particular instance.

In a handful of cases, the court relied on the rationale articulated in *Checkosky* that RWV is appropriate when the court is unable to determine what the agency's rationale is, and thus whether the agency acted in a way that was arbitrary or capricious.[78] The court has cited similar language in at least one decision to vacate agency action, however.[79] Thus, this reasoning also fails to explain outcomes.

While the *Allied-Signal* test's application is often wanting, some analysis is better than no analysis: Sometimes the decision not to vacate has been declared without any discussion whatsoever. For example, in *Sinclair Broadcast Group, Inc. v. FCC*,[80] the majority opinion concluded that the FCC failed to justify inconsistencies among different cross-ownership rules and that this omission "require[d] that the rule be remanded to the Commission."[81] It is only clear that the rule was not in fact vacated because the dissenting opinion in the case argued that the majority's conclusion "compels

40 F.3d 1266, 1273 (D.C. Cir. 1994) ("Because the agency's error is apparently a technical one, and we think it more likely than not that the agency can justify its exemption decision when it gets down to trying, vacatur would be unnecessarily disruptive to the exempted industries."); Engine Mfrs. Ass'n v. EPA, 20 F.3d 1177, 1184 (D.C. Cir. 1994) ("We are willing to assume for now that the agency's error was one of form and not of substance, i.e., that it will be able to provide the information necessary to explain its cost allocation decisions. Therefore we reject the petitioner's request that we vacate the Compliance Program fees . . . ."). These ten challenges include only nine cases because *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, involved challenges to two different rules, and the court vacated one rule while applying RWV to another as described above. These nine cases, however, do not represent the entire universe of cases where the court applied RWV to a rulemaking case; these other cases will be described later in this Section. *See infra* text accompanying notes 78–83.

78 See *supra* notes 39–41 and accompanying text for a discussion of the *Checkosky* rationale. *See also, e.g.*, Appalachian Power Co. v. EPA, 249 F.3d 1032, 1055 (D.C. Cir. 2001) ("[W]e have no choice but to remand the EPA's EGU growth factor determinations so that the agency may fulfill its obligation to engage in *reasoned* decisionmaking on how to set EGU growth factors and explain why results that appear arbitrary on their face are, in fact, reasonable determinations."); Am. Lung Ass'n v. EPA, 134 F.3d 388, 392–93 (D.C. Cir. 1998) ("But unless [the Administrator] describes the standard under which she has arrived at this conclusion, supported by a plausible explanation, we have no basis for exercising our responsibility to determine whether her decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .") (citations and internal quotation marks omitted).

79 *American Lung Ass'n v. EPA* was cited in *Air Transport Ass'n v. FAA*, 254 F.3d 271, 279 (D.C. Cir. 2001), an opinion where the court decided to vacate the challenged agency rule. *Id.* The court later issued an order modifying its earlier order and applying RWV, although the order itself does not explain the decision to apply RWV. Air Transp. Ass'n v. FAA, 276 F.3d 599, 599 (D.C. Cir. 2001).

80 284 F.3d 148 (D.C. Cir. 2002).

81 *Id.* at 162.

vacatur."[82] Given the importance of the decision whether to vacate for the agency's response—and for the regulatory landscape—the lack of attention devoted to the decision in *Sinclair* and other cases[83] is surprising. The absence of discussion about whether to vacate in these cases obscures the D.C. Circuit's decisionmaking process; it also makes it more difficult to evaluate whether the courts are using RWV appropriately and effectively.

Overall, this section illustrates that judges exercise considerable discretion in deciding whether to remand without vacatur and that the existing legal doctrine is not applied rigorously enough to constrain this discretion. The result is a lack of transparency in the court's decisionmaking processes. Furthermore, the enervation of the deficiency prong of the *Allied-Signal* test severs the application of RWV from the reliance justification for the remedy:[84] The more likely it is that the agency will adopt a different policy as a result of remedying the inadequate explanation identified by the court, the less compelling is the argument for RWV. Because the new policy will require parties to change their behavior, RWV will delay but not avoid disruption. There is evidence that agencies sometimes change their policies in response to a remand without vacatur: A follow-up in the Federal Register of nine RWV cases examined in one study of remands in the D.C. Circuit between 1985 and 1995[85] indicates that the agency ultimately adopted a different policy in two cases.[86]

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[82] *Id.* at 170 (Sentelle, J., dissenting).

[83] One such case is *Appalachian Power Co. v. EPA*, 249 F.3d 1032 (D.C. Cir. 2001), where the court stated, "[W]e have no choice but to remand the EPA's EGU growth factor determinations so that the agency may fulfill its obligation to engage in *reasoned* decisionmaking on how to set EGU growth factors and explain why results that appear arbitrary on their face are, in fact, reasonable determinations." *Id.* at 1055; *see also* William S. Jordan, III, *Ossification Revisited: Does Arbitrary & Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 Nw. U. L. REV. 393, 410 & n.88 (2000). Jordan's analysis found that in twenty-eight of the sixty-one cases in his database, the court did not explicitly state whether it was vacating the rule at issue. *Id.*

[84] *See supra* note 33 and accompanying text.

[85] Jordan, *supra* note 83, at 407, 414 & n.80.

[86] These two cases are *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993), and *Timpinaro v. SEC*, 2 F.3d 453 (D.C. Cir. 1993). *See* Jordan, *supra* note 83, at 416 & n.117. Jordan noted that the agencies issued a reexplanation in three of the cases: *National Coalition Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875 (D.C. Cir. 1987), *National Treasury Employees Union v. Horner*, 854 F.2d 490 (D.C. Cir. 1988), and *City of Brookings Municipal Telephone Co. v. FCC*, 822 F.2d 1153 (D.C. Cir. 1987). Jordan, *supra* note 83, at 415. Supplementary explanation for *International Union, United Automobile Workers v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991), is provided in Control of Hazardous Energy Sources, 58 Fed. Reg. 16,612, 16,612–23 (Mar. 30, 1993) (to be codified at 29 C.F.R. pt. 1910); for *American Water Works Ass'n v. EPA*, 40 F.3d 1266 (D.C. Cir. 1994), in National Primary Drinking Water Regulations for Lead and

B. Cases Where the D.C. Circuit Has Applied RWV

Many rulemaking cases where the court applies RWV fall into one of three categories:[87] (1) cases that involve fee collection or payment distribution; (2) FCC challenges in the wake of the Telecommunications Act of 1996,[88] which the D.C. Circuit interpreted to require the FCC to show that certain regulations are justified on an ongoing basis; and (3) cases where the challenger aims to expand the scope of regulation. In general, all of these cases involve plausible arguments that disruption would be significant were the court to vacate the agency rule,[89] although those arguments are stronger in the second and third categories. Potential disruption alone, however, is insufficient to justify the application of RWV, as Part IV argues.

The cases that involve agency collection of fees or distribution of payments or subsidies cover a range of agencies, including the Department of Agriculture,[90] the Department of Health and Human Services,[91] the EPA,[92] and the Drug Enforcement Agency.[93] The decisions in these cases stress the disruption that would result from

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Copper, 65 Fed. Reg. 1950, 1954–57 (Jan. 12, 2000) (to be codified at 40 C.F.R. pts. 9, 141, & 142); and for *American Medical Ass'n v. Reno*, 57 F.3d 1129 (D.C. Cir. 1995), in Registration and Reregistration Application Fees, 67 Fed. Reg. 51,988, 51,988–52,007 (Aug. 9, 2002) (to be codified at 21 C.F.R. pt. 1301).

87 Several cases eluded this categorization effort. *See* U.S. Telecom Ass'n v. FBI, 276 F.3d 620, 622, 627 (D.C. Cir. 2002) (challenging implementation of rules setting forth requirements relating to capability and capacity of telephone service providers to intercept communications); *Appalachian Power Co.*, 249 F.3d at 1051, 1055 (challenging explanation of emission projections on which emissions limits for nitrogen oxide are based); United Distrib. Cos. v. Fed. Energy Regulatory Comm'n, 88 F.3d 1105, 1191 (D.C. Cir. 1996) (challenging several aspects of regulations governing natural gas industry restructuring).

88 Telecommunications Act of 1996, Pub. L. No. 104-404, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

89 The disruption is relevant because of the Supreme Court's decision in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), prohibiting retroactive rulemaking unless Congress has explicitly allowed it. *See supra* notes 42–45 and accompanying text.

90 *See* Milk Train, Inc. v. Veneman, 310 F.3d 747, 748, 756 (D.C. Cir. 2002) (challenging Secretary of Agriculture's implementation of 1999 subsidy program for milk producers); Sugar Cane Growers Coop. v. Veneman, 289 F.3d 89, 91, 97–98 (D.C. Cir. 2002) (challenging Secretary of Agriculture's implementation of payment-in-kind program for 2001 sugar crop under Food Security Act).

91 *See* County of Los Angeles v. Shalala, 192 F.3d 1005, 1008, 1023 (D.C. Cir. 1999) (challenging data on which Secretary of Health and Human Services based Medicare reimbursement rates).

92 *See, e.g.*, Engine Mfrs. Ass'n v. EPA, 20 F.3d 1177, 1178, 1184 (D.C. Cir. 1994) (challenging final rule assessing engine manufacturers for full cost of agency's Motor Vehicle and Engine Compliance Program). *Davis County Solid Waste Management v. EPA*, 108 F.3d 1454 (D.C. Cir. 1997), arose when the EPA petitioned for a rehearing on remedy and seems to be about correcting the scope of vacatur in the previous decision by severing the challenged provision from the rest of the regulations. *Id.* at 1456, 1460; *see also* Levin, *supra* note 7, at 329–31 (discussing severability doctrine in general and *Davis County Solid Waste Management* as example in administrative law context).

vacating the rule because of the difficulty of redistributing fees or subsidies. The two Department of Agriculture cases involved one-time payments; in both cases the court stressed the impossibility of returning to the status quo ante once the payments had been made. In *Milk Train, Inc. v. Veneman*, the court stated that "the Secretary here has already disbursed the 1999 program moneys to numerous dairy producers throughout the country, and those moneys may not be recoverable three years later. Here . . . the egg has been scrambled and there is no apparent way to restore the status quo ante."[94] While this is technically true, however, the government could use a different source of funds to provide additional funds to entities that had been underpaid by the government, or to reimburse those who had overpaid fees collected by the government.[95] Nevertheless, as the court in *Allied-Signal* noted, this process would result in windfalls to certain parties.[96]

In these cases, the regulatory beneficiaries who received subsidies had significant reliance interests in the rules in the sense that they expended the distributed funds. On the other hand, because the programs involved one-year disbursements rather than comprehensive regulatory programs around which private actors had arranged their activities, the reliance interests may have been less significant. Thus, the benefits from RWV in the form of more reasoned decisionmaking in particular cases are unlikely to be significant unless the one-time disbursements involve issues that are likely to recur or have implications for other types of decisions that agencies have made. Furthermore, one case in this category involved interpretive rather than notice-and-comment rulemaking,[97] so the deossification rationale does not apply.

The FCC cases in which the D.C. Circuit remanded without vacatur took place in an atypical context in that most of them were brought under the Telecommunications Act of 1996, which the D.C. Circuit interpreted to create a statutory presumption in favor of

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[93] *See* Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1130, 1135 (D.C. Cir. 1995) (challenging registration fees under Controlled Substances Act for failure to provide explanation of costs and scope of diversion control program to be funded through those fees).

[94] 310 F.3d at 756 (quoting Sugar Cane Growers Coop. v. Veneman, 289 F.3d 89, 97 (D.C. Cir. 2002)).

[95] *See, e.g.*, Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 153 (D.C. Cir. 1993) ("If on remand the Commission concludes that the apportionment must be in accordance with usage, then those firms whose burden is lower under a new, non-arbitrary, rule should be entitled to refunds of the difference.").

[96] *See supra* note 74 and accompanying text.

[97] County of Los Angeles v. Shalala, 192 F.3d 1005, 1009 (D.C. Cir. 1999); *see also supra* note 28.

repealing or modifying ownership rules.[98] *Radio-Television News Directors Ass'n v. FCC*[99] did not arise under the Telecommunications Act of 1996, but likewise involved a presumption that the challenged regulations should be repealed.[100] The reliance interests in these cases were likely to be substantial because some of these regulations had existed for decades.

In each of the three "proregulatory" cases, public interest organizations sought to expand the scope or stringency of regulations promulgated by the EPA.[101] In one of these cases, the challenging organization, the Sierra Club, "expressly requested that [the court] leave the current regulations in place during any remand."[102] RWV is appropriate in these cases because vacating the insufficiently strict rule would be perverse: The remedy for successfully challenging a rule as insufficiently stringent should not be no regulation at all.[103] As Part III explains, however, RWV is an inadequate solution to this problem unless the court takes additional steps to spur agency action. This is because the agencies have the least incentive to revisit the challenged regulation in this type of case.

III
RWV AND AGENCIES' INCENTIVES

For RWV to be applied optimally, not only should the disruption costs of vacatur exceed the benefits, but the troubling incentives that agencies might face must be minimized. While commentators have focused on the systemic incentives of RWV,[104] this section focuses on the issue of agencies' disincentives to act in response to RWV in par-

98 *See* Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 152 (D.C. Cir. 2002) (challenging agency's inadequate explanation of inconsistent treatment of "alternative voices" in cross-ownership rules); Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1033, 1048 (D.C. Cir. 2002) (challenging FCC's decision not to repeal or modify national television station ownership and cable/broadcast cross-ownership rules).

99 184 F.3d 872 (D.C. Cir. 1999).

100 The case concerns the FCC's decision not to repeal the personal attack and political editorial rules. These rules were initially derived, at least in part, from the fairness doctrine, which had been abrogated. But, "while the challenged rules do not necessarily persist after the fairness doctrine, they need not share its fate." *Id.* at 879.

101 Sierra Club v. EPA, 167 F.3d 658, 660, 666 (D.C. Cir. 1999) (challenging as insufficiently stringent EPA's performance standards for new and existing medical waste incinerators); Am. Lung Ass'n v. EPA, 134 F.3d 388, 388 (D.C. Cir. 1998) (challenging EPA's "refusal to revise primary national ambient air quality standards for sulfur dioxide"); Am. Water Works Ass'n v. EPA, 40 F.3d 1266, 1272–73 (D.C. Cir. 1994) (challenging EPA's failure to explain its decision to exclude transient, noncommunity water systems from national drinking water standards for lead).

102 *Sierra Club*, 167 F.3d at 664.

103 *See supra* note 54 and accompanying text.

104 *See supra* notes 46–54 and accompanying text.

ticular cases and the tools available to the court to counteract these disincentives. This analysis indicates that the incentives in individual cases are cause for particular concern. Part III.A documents how agencies have responded to RWV in different types of cases. While the number of cases examined is not large enough to draw firm conclusions, this analysis identifies proregulatory challenges as the cases where agencies appear least likely to respond expeditiously. This section also suggests that adding teeth to the RWV remedy, for example by giving the agency only a limited time to respond to the court's decision, can be effective in spurring agencies to act.

Part III.B undertakes a comparison of the cases that preceded *Allied-Signal* with the cases that followed it, and concludes that as RWV has become a more common remedy, the D.C. Circuit has grown less reasoned and less cautious in its application of the remedy. In particular, in the cases that followed *Allied-Signal*, the court generally declined to seek additional information to ensure the appropriateness of RWV as it had in previous years. Likewise, in the more recent set of cases, the court was much less likely to ensure the agency's response by adding teeth to RWV. Reintegrating some of these tools and approaches would help the court to tailor its application of RWV to the circumstances of the particular case before it and generally to improve the application of the RWV remedy.[105]

A. Agency Response to RWV

In responding to judicial decisions, agencies behave strategically; their resources are limited, and they are conscious of the costs and benefits of choosing particular courses of action.[106] In some RWV cases, an agency may rationally respond as though the court had affirmed the challenged rule instead of finding it flawed. Agencies do not gain very much from revising inadequate explanations because they already have the authority to continue implementing the challenged rules. While the benefits to the agency of revising its rationale for a particular rule may be small, the costs can be significant. Allocating resources to address the court's remand may not be a trivial matter: "The idea that an agency can or will quickly turn to remedying the factual or analytic defects in its remanded rule is surely naïve, however minor those problems might appear in the abstract."[107] Furthermore, agencies can secure additional staff or

105 *See infra* Part IV.

106 *See, e.g.*, James F. Spriggs, *The Supreme Court and Federal Administrative Agencies: A Resource-Based Theory and Analysis of Judicial Impact*, 40 AM. J. POL. SCI. 1122, 1122–23 (1996).

107 Mashaw & Harfst, *supra* note 1, at 295.

funds from Congress to comply with court decisions only rarely,[108] so devoting resources to the remand requires pulling them away from other priorities.

In this context, it is unsurprising that agencies do not tend to prioritize responding to RWV decisions. One study undertook a review of all remands of rulemaking cases in the D.C. Circuit between 1985 and 1995, and identified nine cases that involved RWV.[109] A follow-up search in the Federal Register indicates that in one-third of the examined cases, agency action in response to the remand was extremely delayed (taking longer than five years).[110] One such case was *Engine Manufacturers Ass'n v. EPA*,[111] which involved a challenge to an EPA rule that imposed fees on engine manufacturers to support the EPA's engine-compliance-testing program, and illustrates the disincentives agencies face in revisiting a remanded rule. The court remanded the rule without vacating it in April 1994.[112] The EPA's lawyers had drafted a new explanation, but as of April 1998 had not set a deadline for completion.[113] The agency lacked an incentive to act "[b]ecause the fees [were] still in place and still being charged, and the challenger [was] not pressing the agency or the court for resolution."[114] Ten years after the D.C. Circuit issued its opinion, the EPA completed its response to the remand (although without explicitly discussing it) when it issued a final rule updating and revising its compliance fees.[115]

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[108] For example, a study that examined every case in which the EPA was a plaintiff or defendant between 1970 and 1988 found that the EPA received additional resources to enable it to comply with a court decision in only one instance. Rosemary O'Leary, *The Impact of Federal Court Decisions on the Policies and Administration of the U.S. Environmental Protection Agency*, 41 ADMIN. L. REV. 549, 553, 563 (1989).

[109] Jordan, *supra* note 83, at 414.

[110] The agency took six years in *American Water Works Ass'n* and seven years in *American Medical Ass'n*. *See supra* note 86 (providing dates of cases and agency responses). Such delays are sometimes present even when the court vacates the challenged rules. While the empirical analysis in Schuck and Elliot's study suggests extreme delays are less common when rules are vacated, *see supra* note 4, it is not possible to draw a firm conclusion.

[111] 20 F.3d 1177 (D.C. Cir. 1994).

[112] *Id.* at 1184 ("We are willing to assume for now that the agency's error was one of form and not of substance, i.e., that it will be able to provide the information necessary to explain its cost allocation decisions. Therefore we reject the petitioner's request that we vacate the Compliance Program fees . . . .").

[113] Jordan, *supra* note 83, at 415 & n.116.

[114] *Id.*

[115] Motor Vehicle and Engine Compliance Program Fees for: Light-Duty Vehicles; Light-Duty Trucks; Heavy-Duty Vehicles and Engines; Nonroad Engines; and Motorcycles, 69 Fed. Reg. 26,222 (May 11, 2004) (to be codified at 40 C.F.R. pts. 85–86).

American Lung Ass'n v. EPA[116] is another case in which the agency has not yet satisfied the court's remand and request for further explanation. In that case, the American Lung Association (ALA) challenged the EPA's refusal to revise certain air quality standards governing sulfur dioxide concentrations. Specifically, the ALA alleged that the EPA had violated its statutory responsibility under the Clean Air Act to establish air quality standards "requisite to protect the public health."[117] The D.C. Circuit agreed. It concluded that "the Administrator has failed adequately to explain her conclusion that no public health threat exists,"[118] and remanded to the agency "to permit the Administrator to explain her conclusions more fully."[119] Had the court vacated the initial sulfur dioxide standard that the ALA sought to revise, the ALA's successful challenge would have resulted in a significant step backwards from the ALA's perspective.

The D.C. Circuit decided the ALA case in January 1998. In May of that year, the EPA published a schedule for responding to the remand that called for a final response by December 2000.[120] The EPA failed to meet this deadline. On several occasions between December 2001 and June 2004, the EPA repeated that it "continued to work on the proposed response to the remand by reviewing additional . . . air quality information."[121] As of the end of 2004—more than six years after the initial remand—the EPA had not responded to the remand or published any new deadlines indicating when it intends to do so.

The court did not press the agency to act, but neither did the ALA. This highlights another factor that helps to explain how expeditiously the agency responds: whether the challenging party aggressively pressures the agency. On a few occasions, the ALA agreed to extensions for the EPA and agreed not to pursue any mandatory duty or unreasonable delay claims.[122] The ALA's actions in this example

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116 134 F.3d 388 (D.C. Cir. 1998).

117 *Id.* at 389 (citations omitted).

118 *Id.* at 393.

119 *Id.*

120 National Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide); Intervention Level Program, 63 Fed. Reg. 24,782, 24,783–84 (May 5, 1998).

121 NAAQS: Sulfur Dioxide (Response to Remand), 69 Fed. Reg. 38,230, 38,230 (June 28, 2004) (to be codified at 40 C.F.R. pts. 50.4–.5); NAAQS: Sulfur Dioxide (Response to Remand), 67 Fed. Reg. 75,198, 75,199 (Dec. 9, 2002) (to be codified at 40 C.F.R. pts. 50.4–.5); NAAQS: Sulfur Dioxide (Response to Remand), 67 Fed. Reg. 33,799, 33,800 (May 13, 2002) (to be codified at 40 C.F.R. pts. 50.4–.5); NAAQS: Sulfur Dioxide (Response to Remand), 66 Fed. Reg. 61,269, 61,270 (Dec. 3, 2001) (to be codified at 40 C.F.R. pts. 50.4–.5).

122 *See* National Ambient Air Quality Standards for Sulfur Oxides, 66 Fed. Reg. 1665, 1666 (Jan. 9, 2001); Notice of Settlement Extension: National Ambient Air Quality

raise the question of the extent to which the burden for ensuring an agency response should fall on the court versus the challenging party. On the one hand, the challenging party has prevailed in proving that the agency failed to live up to its legal obligations. Therefore the challenging party's job is done, and it should not be required to baby-sit the agency as it responds. On the other hand, given courts' limited resources and arguments favoring judicial economy, it is not clear why courts should be insistent if the challenging parties are not.

In some instances, courts have taken additional steps to ensure that agencies do not ignore remands that ask for further explanation but do not vacate rules. For example, *Appalachian Power Co. v. EPA*[123] concerned the validity of certain emission projections made by the EPA. The court remanded the EPA's decision for further explanation,[124] and later temporarily suspended the compliance date for the regulated entities until the EPA responded to the remand.[125] The EPA provided the requisite explanation within eight months of the revised deadline.[126] This outcome suggests that courts do have the capacity to spur agencies to prioritize responding to remands. While the supporting analysis in this Note is only anecdotal, political science literature supports the contention that judicial sanctions can be effective in overcoming inertia in bureaucratic organizations.[127]

Finally, the previous section noted that in some instances it is unclear from the text of the opinion whether the court vacated the agency action upon remand. The result of this uncertainty is problematic for agencies. For example, Jordan's study documents an interview with an EPA agency official in which the official indicated that the agency interpreted the court's failure to vacate to mean that the rule

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Standard; Sulfur Dioxides Remand, 65 Fed. Reg. 77,025, 77,025 (Dec. 8, 2000); Notice of Settlement Extension: National Ambient Air Quality Standards for Sulfur Oxides Remand, 64 Fed. Reg. 73,045, 73,045 (Dec. 29, 1999). The American Lung Association initially agreed to an extension because the Supreme Court was reviewing the D.C. Circuit's decision in *American Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *rev'd sub nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001), and the Court's decision in that case was believed to have significant implications for how the EPA set air quality standards. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 510 (4th ed. 2003).

123 249 F.3d 1032 (D.C. Cir. 2001).

124 *See id.* at 1051.

125 *See* Rulemaking on Section 126 Petitions from New York and Connecticut Regarding Sources in Michigan; Revision of Definition of Applicable Requirement for Title V Operating Permit Programs, 67 Fed. Reg. 8386, 8388 (Feb. 22, 2002) (to be codified at 40 C.F.R. pts. 52, 70, & 71).

126 *See* Section 126 Rule: Revised Deadlines, 67 Fed. Reg. 21,522, 21,522–29 (Apr. 30, 2002) (to be codified at 40 C.F.R. pt. 97).

127 *See, e.g.*, CHARLES A. JOHNSON & BRADLEY C. CANON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT 216 (1984).

remained in effect.[128] Nevertheless, "the uncertain legal status of the rule . . . might have caused some hesitation in taking enforcement action" with respect to the subject of the rule.[129]

B. *Erosion in the Application of RWV*

This section compares the application of RWV before *Allied-Signal* with its application afterwards. There are two ways in which the D.C. Circuit was more cautious in its application of the remedy in the cases that preceded *Allied-Signal* than in the cases that followed it. First, before *Allied-Signal*, the court was likely to ask for additional information that specifically addressed the question of whether vacating upon remand was appropriate. Second, the court was likely to include provisions in the opinion that gave the remand teeth. In the cases that followed *Allied-Signal*, the use of both of these tools declined, signaling the opposite of a transition problem: Instead of the D.C. Circuit becoming better at applying RWV as it accumulates more experience with it, the care with which the D.C. Circuit applies the remedy has eroded, thus making the remedy less effective and less justified from a functional perspective.

Earlier cases illustrate the D.C. Circuit's previous willingness to seek additional information before applying RWV.[130] For example, in *United Mine Workers v. Dole*,[131] after finding that the challenged rule needed to be remanded to address an inadequate explanation, the court

> request[ed] supplementary briefs on the most appropriate form of relief in this case, *i.e.*, whether the existing regulations should be vacated pending action by the Secretary in compliance with our opinion or whether they should remain in place until the Secretary

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128 Jordan, *supra* note 83, at 426–27 (discussing Solite Corp. v. EPA, 952 F.2d 473 (D.C. Cir. 1991)).

129 *Id.* at 427.

130 One exception from the past decade is *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1057 (D.C. Cir. 1999) ("As to the fine particulate matter standards, we invite briefing on the question of remedy: possibilities include but are not limited to vacatur, non-vacatur subject to application to vacate, and non-vacatur."). A footnote adds: "Briefing should address the possibility that the previous particulate matter standard will spring back to life in response to our decision to vacate the new coarse particulate matter standard." *Id.* at 1057 n.8. The court also retained jurisdiction over the cases following remand. *Id.* at 1057. This case is atypical, however, in that the court's analysis of the challenge to the fine particulate standards was dependent upon a separate nondelegation challenge evaluated in the same case. *See id.* at 1034–40, 1056. The Supreme Court later overturned the D.C. Circuit's nondelegation analysis in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001). *See supra* note 122.

131 870 F.2d 662 (D.C. Cir. 1989).

> has acted within a reasonable time to correct the deficiencies in the original proceedings.[132]

Likewise, in a case that challenged an OSHA regulation, the court noted that while there "appear to be segments of the standard . . . that may well have genuine life-saving effects and are highly likely to survive re-examination[,]. . . industries that ultimately may prove exempt will in the meantime have to incur substantial costs for little or no safety gain."[133] The court asked for a separate briefing on whether to vacate.[134] In *National Treasury Employees Union v. Horner*,[135] the court acknowledged that it did not have information sufficient to determine how long corrective action by the agency would take, and thus remanded to the district court to establish a timetable in consultation with the parties.[136]

Second, the D.C. Circuit was likely to include provisions in the opinion that gave the remand teeth. For example, in *Rodway v. USDA*,[137] the court ordered the agency to complete the new rulemaking process within 120 days of the opinion's issuance.[138] In other cases, the court required the agency to submit regular reports detailing its progress in responding to the remand.[139]

In contrast, in more recent cases, courts only rarely have considered whether they need more information to determine whether RWV is appropriate, and whether additional provisions are needed to tailor the remedy to the particular circumstances.[140] Notably,

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132 *Id.* at 674.

133 UAW v. OSHA, 938 F.2d 1310, 1325 (D.C. Cir. 1991) (citations omitted).

134 *Id.* at 1325–26.

135 854 F.2d 590 (D.C. Cir. 1988).

136 *Id.* at 501.

137 514 F.2d 809 (D.C. Cir. 1975).

138 *Id.* at 818.

139 *See, e.g.*, Pub. Citizen Health Research Group v. Brock, 823 F.2d 626, 629 (D.C. Cir. 1987) ("[G]iven OSHA's apparent reluctance to keep petitioners informed as to the progress of the STEL rulemaking, we order OSHA to submit to the court a concise progress report every 90 days from the order's date of issuance until the final rule is in place."); Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 81 (D.C. Cir. 1984) (requiring agency to submit reports to court every sixty days until agency issues final orders).

140 In one case subsequent to *Allied-Signal*, the court retained jurisdiction pending the agency's response, thereby facilitating the challenging party's ability to return to court if the agency does not act upon the remand. *See In re* United Mine Workers Int'l Union, 190 F.3d 545, 556 (D.C. Cir. 1999) ("[C]ourt will retain jurisdiction over this case until there is a final agency disposition . . . ."); 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3937.1, at 697 (2d ed. 1996) ("Appeal jurisdiction may be extended in time by . . . retaining jurisdiction pending completion of some act by trial court or agency . . . . Power to deal with the issues presented on appeal inherently includes authority to enforce the court's decision . . . ."); *id.* at 701 ("Absent an express retention of jurisdiction, a new notice of appeal must be filed to secure review of proceedings on remand.").

including provisions to spur agency action brings the RWV remedy closer in line with an alternative proposed by critics of RWV: vacating the agency rules upon remand, but delaying issuance of the mandate for a limited period of time.[141] When teeth are added, application of RWV is functionally similar to the extent that courts play a role in ensuring that the agency responds to the courts' orders in a timely fashion.[142]

IV

REFINING THE DECISION TO REMAND WITHOUT VACATUR: SUBSTANTIVE AND PROCEDURAL RECOMMENDATIONS

Taking into account the rationales for and criticisms of RWV described in Part I, the D.C. Circuit's experience in applying the remedy as described in Part II, and agencies' responses to RWV as analyzed in Part III, this Part recommends a revised approach to RWV that facilitates the remedy's beneficial aspects and limits its negative effects.

The previous discussion of the *Allied-Signal* balancing test concluded that while the test asks the right questions—it considers the seriousness of the deficiencies in the agency's action (and thus the likelihood that the agency will reenact the same policy upon remand) and the disruptive consequences of vacatur[143]—the D.C. Circuit's application of the test is lacking.[144] This section argues that when deciding whether to remand without vacatur, courts should retain the

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[141] Checkosky v. SEC, 23 F.3d 452, 493 n.37 (D.C. Cir. 1994) (Randolph, J., concurring) ("If the agency believes that vacating its . . . rule would cause difficulties, it has the option of applying for a stay of the mandate, at which point it may make its arguments regarding irreparable harm and other considerations. This is the usual and appropriate method of handling such matters . . . ."); *see also* Cement Kiln Recycling Coalition v. EPA, 255 F.3d 855, 872 (D.C. Cir. 2001) ("Because this decision leaves EPA without standards regulating HWC emissions, EPA . . . may file a motion to delay issuance of the mandate to request either that the current standards remain in place or that EPA be allowed reasonable time to develop interim standards."); Columbia Falls Aluminum Co. v. EPA, 139 F.3d 914, 924 (D.C. Cir. 1998) ("If EPA wishes to promulgate an interim treatment standard, the Agency may file a motion in this court to delay issuance of this mandate in order to allow it a reasonable time to develop such a standard."); Prestes, *supra* note 47, at 128 ("[A]gencies may apply for a stay of a vacation order, again preventing the 'nightmare' regulatory vacuum scenerio [sic].").

One commentator notes, however, that delaying the issuance of the court's mandate may be ineffective "in connection with rules that create cumulative liability over time, such as rules that impose user fees or regulate ongoing conduct. A regulated party who knows that the rule will become void in the near future has little incentive to come into compliance with it." Levin, *supra* note 7, at 303 n.41.

[142] The changes proposed in this Note would not address the charges made that the RWV remedy is illegal. *See supra* note 8.

[143] *See id.*

[144] *See supra* Part II.A.

Allied-Signal test but modify its application. In particular, courts should apply a more stringent standard to the deficiency prong of the *Allied-Signal* test.

Finally, this section argues for a procedural change: Courts should ensure that the process of deciding whether to remand without vacatur is both adequately informed and explicitly addressed during the judicial proceedings. In some cases, a separate briefing or hearing on the remedy may help the court to tailor its application of the RWV remedy to the particular circumstances of a given case. As part of this process, courts should evaluate carefully the advantages of adding teeth to the RWV remedy.

A. Modifying the Allied-Signal *Test*

In their application of the *Allied-Signal* test, courts should evaluate more stringently the likelihood that the agency will make the same policy choice upon remand. When courts are fairly certain that the process of correcting the defect they identified will not change the agency's rulemaking choice, the arguments for RWV are most compelling. Reliance arguments are strongest in those cases,[145] and there is a greater likelihood that vacatur is unattractive because it would cause disruption without yielding countervailing benefits.

In fashioning the RWV remedy, courts should be more sensitive to the incentives agencies will face in addressing the deficiencies identified by the court. The analysis of proregulatory challenges described in Part III.A (in which the plaintiffs sought to expand the scope or stringency of regulatory action) indicates that including measures to spur agency response to the court's opinion would be particularly appropriate, as these are the cases in which agencies have the least incentive to revisit the challenged rule.[146]

B. Systematically Evaluating the Appropriateness of RWV

Courts ought to ensure that their application of RWV is carefully and systematically considered. There are a number of steps that courts could take to accomplish this. First, and most basically, courts should ensure that they discuss in their opinions the decision to remand agency action without vacating it.[147] Doing so would facilitate better decisionmaking and improve both the transparency of and accountability for courts' choices to apply RWV.

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[145] *See supra* notes 33–34 and accompanying text.

[146] *See, e.g.*, *supra* notes 116–21 and accompanying text.

[147] *See, e.g.*, *supra* notes 81–83 and accompanying text.

In many cases, having decided the merits of a particular case, courts may find themselves without enough information to assess the appropriateness of RWV. In these cases, courts could bifurcate their decision on the remedy from their decision on the merits and request a separate briefing,[148] and if necessary hold a separate hearing,[149] on whether to vacate agency rules after they have determined that those rules are in some way flawed. This separate consideration of the remedy would give the agency an opportunity to make arguments that address directly the factors in the *Allied-Signal* test, as well as steps the agency would take to remedy the flaws identified by the court. The agency also could demonstrate how likely these steps are to change the ultimate outcome, and to communicate the agency's level of commitment to a particular substantive policy.[150]

Directly addressing the steps that the agency would have to take to remedy the flaws identified by reviewing courts could also improve courts' institutional capacity to handle the complicated and technical issues that arise in administrative law. Such an approach would allow courts to directly obtain information (and to avoid speculating)[151] about what the agencies would need to do to cure the flaws identified by the reviewing courts, and would facilitate a more robust analysis of the deficiency prong of the *Allied-Signal* test.

This procedural change also would force the agency to identify the relevant staff and information necessary to address the reviewing court's remand, which typically occurs "long after the rulemaking docket has been closed and the staff has been reassigned."[152] Having taken these steps in order to convince the court to remand without vacatur, the costs to the agency of acting upon the remand to correct the flaws identified by the reviewing court may be lowered, and agencies may be able to respond to the remands more quickly.

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148 *See supra* notes 130–36 and accompanying text.

149 The D.C. Circuit has done essentially this in at least one RWV case: In *Gas Appliance Manufacturers Ass'n v. DOE*, 998 F.2d 1041 (D.C. Cir. 1993), a case that involved "standby loss" rules to limit energy losses from water heaters installed in new federal construction projects promulgated by the Department of Energy, the D.C. Circuit remanded to the district court to determine whether to vacate "under the principles governing interim relief when an agency rule is found wanting." *Id.* at 1051 (citation omitted).

150 The bifurcated hearing on remedy would *not* be a substitute for revising the administrative record. *See supra* text accompanying note 24.

151 *See* Prestes, *supra* note 47, at 126.

152 Mashaw & Harfst, *supra* note 1, at 295; *see also* McGarity, *supra* note 25, at 1401 ("[A] trip back to the drawing board . . . can consign [the project] to oblivion as the agency's limited staff resources are committed to other projects, institutional memory fades, and more immediate priorities press old rulemaking initiatives to the bottom of the agenda.").

Bifurcating the court's decisions on the merits and the remedy would have the additional advantage of eliminating a bind in which agencies may find themselves if they must argue the merits and the remedy simultaneously: Agencies arguing that their promulgated rules are not arbitrary and capricious may not be able to address the remedy effectively because their arguments against vacating a rule may undercut their arguments on the merits. The *Allied-Signal* test weighs the "seriousness of the order's deficiencies";[153] to show that an alleged deficiency is not serious, and thus that the rule should not be vacated, the agency must demonstrate that it can relatively easily undertake whatever additional analysis is necessary. However, if it is easy to undertake additional analysis that has at least a potential impact on the agency's substantive decision, then it may appear to the court that the agency was acting in an arbitrary and capricious way by not undertaking that additional analysis in the first place.[154] Agencies' inability to predict which aspect of a given rule the court is likely to find problematic heightens the difficulty of successfully arguing both merits and remedy.[155]

Finally, the additional information generated by undertaking this process also would help the court evaluate the appropriateness of adding time limits or other forms of teeth to the RWV remedy. Adding teeth may seem unequivocally positive as a way to spur agencies to action, but teeth also may interfere with agencies' ability to choose the best allocations of their scarce resources.[156] Requiring the agency to address directly its plans for responding to the RWV would provide the agency with an opportunity to communicate to the court

153 Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150 (D.C. Cir. 1993).

154 *See supra* note 20.

155 *See supra* text accompanying notes 35–36.

156 *See* Heckler v. Chaney, 470 U.S. 821, 831–32 (1985) ("The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."); Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171, 192 (1987) ("To the extent that deadlines induce an agency to forego dealing with such previously unanticipated, and potentially more important problems, regulatory resources are misallocated and social welfare is diminished."). This concern is one factor that underlies the D.C. Circuit's response to lawsuits challenging an agency's refusal to initiate rulemaking. *See* Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 4 (D.C. Cir. 1987) (noting applicability of feature that "such decisions require a high level of agency expertise and coordination in setting priorities" to rulemaking context). The D.C. Circuit has stated that remedies requiring agencies to institute rulemaking procedures are appropriate "only in the rarest and most compelling of circumstances." *Id.* at 7 (citations omitted). *But see Heckler*, 470 U.S. at 851 (Marshall, J., concurring in judgment) ("[O]ne of the very purposes fueling the birth of administrative agencies was the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action.").

how high a priority curing the deficiencies in the rule is, thus mitigating the concern that adding teeth would force agencies to reallocate their resources in an unproductive way. Alternatively, an additional briefing may be sufficient in place of an additional hearing.

While a separate remedy briefing or hearing would have its own costs in money spent and time delayed, these additional costs would be worthwhile to the extent that subsequent legal action is avoided, and to the extent that making additional information available to the court reduces errors in applying or tailoring remedies. Courts should take care to minimize the delay created by using these additional procedures. The possibility of long delays could create incentives for parties to act strategically by prolonging the final disposition of the case. It also could raise new questions about the status of the challenged rule in the interim.

CONCLUSION

Courts exercise enormous discretion in deciding whether or not to allow a regulation to remain in place while an agency corrects the defects in its decisionmaking process. These regulations may provide significant health and safety protection to regulatory beneficiaries while also causing regulated entities to incur substantial costs; for both parties the presence or absence of these regulations has significant consequences that may be counted in lives saved or dollars expended. This Note argues that courts should exercise that discretion in a way that is more transparent, and in a way that accounts for how agencies are likely to respond to RWV in particular cases.

Setting aside the systemic improvements or deteriorations that RWV may cause in the ex ante quality of agency decisionmaking, this analysis highlights the need to take into account the incentives that shape agency behavior in the immediate cases before the court. Unless they consider carefully how agencies are likely to respond to the remand, courts are unlikely to make effective use of RWV. This Note recommends a framework for that inquiry that links the application of RWV more closely with the key justifications for the remedy's existence: providing a pragmatic solution in cases where the costs of vacating agency rules are particularly high, while the benefits in terms of improving the agency's decisionmaking process are minimal or nonexistent because the flaw in the agency's action is trivial.