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Agencies, Courts, and the Limits of Balancing

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AGENCIES, COURTS, AND THE LIMITS OF BALANCING

Daniel A. Farber

ABSTRACT. Courts have struggled in several very different contexts to determine when a decision maker can consider costs that are not explicitly addressed in the governing statute. This issue arises when agencies decide whether to conduct a rulemaking or what rule to issue after a rulemaking. It also arises when courts decide whether to enjoin a violation of a statute or whether to vacate an administrative rule rather than simply remanding. Judicial opinions point in different directions and often ignore each other.

This Article contends that the same principles should govern judicial and agency discretion to consider costs across all these categories. It articulates three such guiding principles. Finally, it argues that the one area of disparity between agencies and courts under current law should be resolved by bringing doctrines governing judicial discretion more in line with those governing agency discretion.

I. Introduction

It seems a simple enough question: when can statutory implementation take costs into account? And yet this apparently simple question has given rise to a chaotic body of case law. Impassioned dissents accuse the majority of trampling on the separation of powers by elevating their own policies over congressional mandates. Other passionate dissents accuse majorities of embracing mindless

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1 Sho Sato Professor of Law, University of California, Berkeley. Eric Biber, Andrew Bradt, Mark Gergen, Lisa Heinzerling, and Anne Joseph O’Connell provided helpful comments on earlier drafts.

2 Consider Justice Scalia’s dissent in EPA v. EME Homer, which begins by lambasting the majority for approving an “undemocratic revision” of the statute and “reaching its result (Look Ma, no hands!)
rigidity at the expense of common sense and fidelity to law.\(^3\) Some opinions contain
paeansto the virtues of discretion\(^4\) rivaling Portia’s praise of the virtue of mercy;\(^5\) others denounce discretion as an enemy of the rule of law.\(^6\) Errors to distinguish precedents are often clumsy, and relevant precedents are sometimes simply ignored.\(^7\) In short, the doctrine seems to be in a state of disarray.

Perhaps even more surprisingly, the courts have developed two entirely separate bodies of doctrine to deal with this issue, without ever taking note of the fact that they involve the same question. One body of doctrine involves judicial discretion in statutory cases, the other involves administrative discretion under

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

\(^{4}\) For instance, in \textit{Weinberger v. Romero-Barcelo}, 456 U.S. 305 (1982), the Court extolled the virtues of equitable discretion to “arrive at a ‘nice adjustment and reconciliation’ between the competing claims,” balancing the interests of the parties. \textit{id.} at 312. “The essence of equity jurisdiction,” the Court continued, “has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case.” \textit{id.} at 312.

\(^{5}\) William Shakespeare, \textit{The Merchant of Venice}, Act IV Scene I (“The quality of mercy is not strained; It droppeth as the gentle rain from heaven/ Upon the place beneath.”).

\(^{6}\) Consider Justice Stevens’ dissent in \textit{Weinberger v. Romero-Barcelo}, 456 U.S. 305 (1982), which accuses the majority of “grant[ing] an open-ended license to federal judges to carve gaping holes in a reticulated statutory scheme” \textit{(id.} at 305\textit{)} and of “unnecessarily and casually substitute[ing] the chancellor’s clumsy foot for the rule of law” \textit{(id.} 335\textit{)}.

statutes (often the same statutes). The bodies of scholarship on these questions are similarly disconnected. Admittedly, the role of the judiciary and the role of agencies are distinct in many respects. But the possibility that their roles in enforcing statutes might have similarities seems to have been entirely overlooked by the courts and is rarely mentioned by commentators.\(^8\)

As a leading administrative law scholar has said, “[i]t is hard to imagine any administrative law issue more basic than identifying the factors that an agency must, can, and cannot consider in making a decision.”\(^9\) Of similar significance in remedies law pertains to the factors that a court can consider in issuing a statutory injunction. In both cases, a core question – central to what some have celebrated as an emerging “cost-benefit” state\(^10\) – is whether the costs (financial and otherwise) of achieving a statutory policy are permissible considerations.

This Article examines the disorderly body of case law dealing with judicial and agency discretion to consider costs in implementing statutes. It concludes that three broad principles run through all the seeming variety and conflict of judicial views. The first principle is simply that judicial and agency policy views are subservient to statutory mandates.\(^11\) The second is that both judges and administrators presumptively have discretion to consider costs in implementing statutes, unless doing so is clearly precluded by the statute. Discretion must,

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\(^8\) For one of the rare exceptions, see Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 Va. L. Rev. 485, 537-538 (2010) (brief passage using the *Chevron* doctrine to critique equitable balancing in statutory cases).


\(^11\) This assumes, of course, that the statute is constitutional.
However, be exercised with respect for congressional purpose. The final principle is that discretion is particularly significant when a statute embodies conflicting policies or when more than one statute bears on the decision.

If the underlying principles are so simple (and so commonsensical), the reader is entitled to ask, why the confusion and conflict within the case law? Why haven’t judges and commentators identified the underlying doctrinal unity long ago? One reason is that judicial opinions often place outsized emphasis either on discretion or on adherence to statutory mandates, leading dissenters or commentators to accuse them of abandoning the other pole. This judicial rhetoric makes the case law seem more chaotic than it really is.

Another reason simply relates to the way we conventionally carve up the legal world. Remedies law and administrative law are two entirely different fields, with very distinctive mindsets and almost no overlap. Scholars who study one rarely study the other. The fields have developed quite independently. Although they follow similar principles in terms of allowing discretion to decision makers, they arrive there by very different routes and express the principles in different language.

Moreover, courts have had reason to discuss equitable discretion for much longer than they have had reasons to worry about whether an agency can consider costs. Opinions dealing with judicial enforcement find the basis for discretion in a long history (or supposed history) of equity practice; opinions dealing with agency implementation find it in the \textit{Chevron} doctrine (which itself is a culmination of the development of administrative law since mid-century).
Conceptually, judicial discretion begins as very broad but is then reduced by the imperative of fidelity to expressed congressional purpose, whereas agency discretion begins with the expressed congressional purpose and moves outward. This difference leads to different language and perhaps somewhat different mindsets, but the two trajectories end in more or less the same place. But their different pathways obscure the closeness of the final destinations.

It is important to emphasize that in this article, the term cost extends well beyond financial outlays by the agency or the regulated industry. Rather, it includes all the negative repercussions of an action, whether economic or otherwise. Moreover, consideration of costs does not necessarily take the form of a quantitative cost-benefit analysis or even of a qualitative balancing test. For instance, costs might be considered only when grossly disproportionate to benefits. Moreover, some costs might be considered while other types of costs are excluded for the analysis. Thus, this Article considers in broad terms the question of whether courts or agencies can take into account prudential factors when Congress has not expressly authorized them to do so.

It is also important to note that there are two different types of discretion involved in these situations. One is discretion in formulating the test to be used to
make a decision. For instance, should economic or environmental costs be considered in making the decision, and if so, how much weight should they have?\textsuperscript{14} The other is discretion in applying the test, given that difficult judgments may need to be made in comparing different kinds of costs and benefits or in resolving uncertainty.

Whatever the reason for the failure to identify these broad unifying principles, the fact remains that they have not been clearly identified before now. This Article attempts to remedy that situation. The two parts of the Article following the introduction work through the complex and often conflicted rulings about discretion to consider costs. Part II of the Article examines agency discretion to consider regulatory costs, either in determining whether to begin a rulemaking at all or when crafting a final rule. Part III considers similar issues that arise in the judicial context. Issues of judicial discretion arise both in judicial review of agency regulations (vacate or simply remand?) and in enforcement actions (enjoin all violations or balance the equities?). As we will see, individual cases are often hotly disputed and the resulting case law is not easy to parse.

Part IV begins with purely doctrinal analysis to show the underlying coherence of these bodies of law. The rules regarding discretion to consideration of costs turn out to be strikingly similar and fairly clearly defined in both cases. (There is, however, a disparity in terms of discretion to avoid consideration of costs, which seems unjustified.) Resolving the doctrinal puzzle raises a deeper puzzle. Given the

\textsuperscript{14} For a classification of different statutory approaches to risk and cost, see Sidney A. Shapiro and Robert L. Glicksman, Risk Regulation at Risk: Restoring a Pragmatic Approach 29 (2003).
striking similarities between the legal principles governing agency judicial consideration of costs, why do we think about agency and judicial discretion in such different ways? As will be seen repeatedly in Parts II and III, we think of agency discretion as bequeathed by Congress, but we think of judicial discretion as an innate quality of courts that Congress occasionally chooses to limit. In other words, agency discretion is piped in from Congress but courts draw on their own reservoir.

Part IV argues that this difference in perspectives is unjustified. It would be better to consider statutory and judicial discretion to implement statutes in more similar terms. This might mean a somewhat less grudging attitude toward agency discretion regarding costs and a more cautious one toward judicial discretion. Discretion in both cases must be exercised in the service of congressional policies, but both courts and agencies should presumptively have discretion to design sensible ways of doing so. The Article ends in Part V with some brief concluding thoughts about the difficulties inherent in such discretionary decisions.

II. Agency Rulemaking

Given the role of agency rulemaking in the modern administrative state, the stakes can be high in deciding whether an agency can or cannot take costs into account. Whether or not the agency can consider costs when it does issue a regulation, however, it may argue that it can forego regulation entirely on the basis of costs. Section A considers agency discretion to avoid a rulemaking in the first
place. Section B examines the issue of costs can be considered when the agency has decided to go ahead with a rulemaking.

A. The Decision to Conduct a Rulemaking

Under the Administrative Procedure Act, each agency must give “an interested person the right to petition for the issuance, amendment, or repeal of a rule.” Review of an agency’s decision to conduct a rulemaking under some statutory provision presents difficulties. Statutes may contain multiple provisions dealing with the same problem, leaving the agency to decide which to use. Alternatively, the agency may not have the resources to carry out all of its responsibilities at the same time, or Congress may not have been clear about when or even whether some provisions should be invoked. Thus, there seems to be room for considerable agency discretion. On the other hand, the agency’s decision against regulation may have been based on a misreading of the statute or on nothing but partisan political considerations. As we will see, courts have struggled with how to review an agency’s decision to forego regulation. We consider this issue before considering the role of cost in crafting a regulation, since the decision whether to regulate at all is logically prior to the decision of how strict the regulation should be.


16 Administrative Procedure Act (APA) § 4(e), 5 U.S.C. § 553(e).

17 For instance, in Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607 (1980) [the Benzene Case], the Court held that OSHA cannot regulate a toxic chemical in the workplace until it finds that current exposure levels create a significant risk. After such a determination is made, the
The Supreme Court reviewed agency refusal to regulate in *Massachusetts v. EPA*,\(^{18}\) a historic case in which the Supreme Court first encountered the issue of global climate change. A group of state and local governments, joined by thirteen leading environmental organizations, petitioned EPA to regulate greenhouse gases under section 202(a)(1) of the Clean Air Act.\(^{19}\) That provision requires the Administrator of EPA to issue emissions standards for new motor vehicles for air pollutants “which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”\(^{20}\) It is worth taking a moment to unpack this provision. The trigger (the so-called endangerment finding) is highly precautionary (“may reasonably be anticipated to endanger”). The statute says EPA “shall by regulation prescribe” such standards, indicating a lack of discretion. But regulation is required only if “in his judgment” the air pollutant poses a risk, which arguably introduces an element of discretion.

After considering the matter for almost four years, EPA denied the rulemaking petition on two grounds. First, it contended that it lacked regulatory authority over greenhouse gases because they are not air pollutants within the meaning of the statute.\(^{21}\) Second, it stated that even if it had authority to regulate greenhouse gases, it would exercise its discretion not to exercise that authority.

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\(^{19}\) *Id.* at 505.


\(^{21}\) 549 U.S. at 511.
because of residual authority over whether these gases cause global climate change and because other approaches to addressing climate change, such as international negotiation, were preferable.\textsuperscript{22}

Much of the Court’s opinion is devoted to the issue of whether any of the petitioners had standing to challenge EPA’s decision.\textsuperscript{23} Having found that at least one of the petitioners did have standing, it also concluded that the statute plainly covered greenhouse gases.\textsuperscript{24} This brought it to the question of the agency’s discretion not to exercise its jurisdiction, which it disposed of in short order.\textsuperscript{25} According to the Court, “[w]hile the statute does condition the exercise of EPA’s authority on its formation of a ‘judgment’, that judgment must relate to whether an air pollutant “cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.”\textsuperscript{26} Or, “[p]ut another way, the use of the word ‘judgment’ is not a roving license to ignore the statutory text,” but merely “a direction to exercise discretion within defined statutory limits.”\textsuperscript{27} Hence, it could avoid regulation only if it found that “greenhouse gases do not contribute to climate change or it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.”\textsuperscript{28}

\textsuperscript{22}\textit{Id.} at 513.
\textsuperscript{23}\textit{Id.} at 516-528.
\textsuperscript{24}\textit{Id.} at 528-532.
\textsuperscript{25}\textit{Id.} at 532-535.
\textsuperscript{26}\textit{Id.} at 533.
\textsuperscript{27}\textit{Id.}
\textsuperscript{28} Professor Richard Pierce expresses concern that this decision is – or at least can easily be read – as a sharp departure from past judicial practice and as holding that “congressional silence with respect to a decisional factor should be interpreted as congressional rejection of that factor and as a prohibition on agency consideration of that factor in making decisions.” Richard J. Pierce, Jr., \textit{What
Turning to EPA’s explanation of its reasons for declining to regulate, the Court said they had nothing to do with whether greenhouse gases cause climate change, and “[s]till less do they amount to a principled reason for declining to form a scientific judgment.” Nor was the existence of residual uncertainty a valid justification, unless the uncertainty was so great that it prevented EPA from making a reasoned judgment. After all, the Court might have added, the statute itself plainly presumes that some uncertainty might exist when it keys regulation to whether a pollutant “may be reasonably anticipated” to endanger public health.

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

Factors Can An Agency Consider in Making a Decision?, MICH. ST. L.J. 67, 81 (2009). It does seem clear from the statutory text, however, that when the agency is actually issuing a regulation under this section, the judgment in question is supposed to be about a pollutant’s risk, not some global determination about the best approach to the problem. The more difficult issue in the case was whether the decision to commence a rulemaking at all was similarly limited, but the Court seemed to feel clear on that point as well.

29 549 U.S. at 533-534.
30 Id. at 534.
31 Id. at 552 (emphasis in original).
32 Id. (emphasis in original).
The ultimate question in *Massachusetts v. EPA* was whether Congress intended to allow EPA to ignore potentially harmful air pollutants for policy reasons not discussed in the statute. Clearly, once it actually began a rulemaking proceeding on the subject, it would not be allowed to consider those policy reasons. One might well ask what difference it should make that EPA had not yet begun the proceeding. The only distinction between the two situations is that the cost of the proceeding has not yet been incurred, so EPA had to decide if this is a wise use of its resources. EPA did not, however, phrase its refusal to form a judgment about the risks of greenhouse gases in terms of other resource priorities. Indeed, given the exceptional strength of the scientific consensus on the subject, declining to form a judgment about the realities of climate change would seem less like an exercise of discretion by EPA than a case of willful blindness. EPA’s objections to regulating were all essentially arguments that it would have been better for Congress to have written the Clean Air Act more narrowly rather than claims that other matters had higher priority.

It is important to note that the Court did not entirely strip EPA of discretion. According to the Court, it “no doubt has significant latitude as to the manner, timing, content, and coordination of its regulation with those of other agencies.”

Moreover, EPA could “avoid taking further action” by providing “some reasonable explanation as to why it cannot or will not exercise its discretion” to form a judgment about climate change. In particular, it might determine that “the

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33 *Id.* at 533.

34 *Id.*
scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming.”\footnote{Id. In a recent case, the court upheld EPA’s refusal to conduct a rulemaking to modify an existing standard, even though it conceded that the existing standard was inadequate, because “profound” scientific uncertainty prevented EPA from selecting a new, more appropriate standard. Ctr. for Biological Diversity v. E.P.A., 749 F.3d 1079, 1090 (D.C. Cir. 2014):}

Still, it seems clear that any remaining discretion must relate to the problem of forming a judgment, not extrinsic reasons why EPA might prefer not to regulate.

Parsing the Court’s decision has posed difficulty for lower court judges,\footnote{See Sunstein and Vermeule, supra note 15, at 160 n.10.} as is illustrated by the Second Circuit’s recent decision in NRDC v. FDA.\footnote{760 F.3d 151 (2nd Cir. 2014).} The history leading up to the court’s decision was long and complex, but it can be summarized briefly as follows: In 1997, FDA issued notices that the use of antibiotics in animal feeds may cause health risks to human beings by increasing resistance to antibiotics, and therefore may not satisfy the statutory drug safety requirements.\footnote{Id. at 154.} For reasons that may have been substantive or may have been purely political,\footnote{Political interference with the FDA’s decision is not unknown. See Lisa Heinzerling, The FDA’s Plan B Fiasco – Lessons for Administrative Law, 102 Geo. L.J. 927, 929-958 (2014) (detailing covert political interference with FDA handling of approval for emergency contraceptive). In the case of animal antibiotics, political resistance was fierce when FDA Commissioner Donald Kennedy first attempted to prevent overuse of tetracycline in 1977: Kennedy’s proposal ran into a wall of opposition. The Texas Farm Bureau warned of a “devastating effect on animal agriculture.” The Mississippi Pork Producers Association said} the notices
were left in place but the agency failed to follow up until after it was finally sued in 2011. At that time, it finally denied various petitions that it follow up on the notices with rulemakings to withdraw approval of antibiotics in animal feed.\footnote{760 F.3d at 156.} It argued that withdrawal proceedings would be resource-intensive and cumbersome, and that voluntary programs to prevent overuse of antibiotics were a better approach.\footnote{Id.}

Thus, as in \textit{Massachusetts v. EPA}, the agency declined to regulate because it had a preferred approach to the problem. But the statutes were at least superficially very similar. The FDA Act provides that “the Secretary \textit{shall,} after due notice and opportunity for hearing to the applicants, issue an order withdrawing approval [of a drug] if the Secretary finds . . . that new evidence . . . shows such drug is not shown to be safe.”\footnote{231 U.S.C. § 360b(e)(1) (emphasis added).} The issue before the court was whether FDA could decide for policy

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it would cause “a tremendous economic blow to our industry.” The National Broiler said it would set an “ultimately disastrous precedent.” The National Turkey Federation said it was based on “flimsy scientific evidence.”
\end{quote}

Then came the final verdict: Congress told Kennedy to stand down. His proposal was shelved, largely at the behest of the farmers and their powerful champion in the House, Rep. Jamie L. Whitten (D-Miss.).

reasons not to make a finding about safety, even in the face of considerable evidence (recognized in its 1997 notices) that the antibiotics actually were unsafe.

The majority of the court sided with FDA, finding *Massachusetts v. EPA* distinguishable. The court distinguished *Massachusetts* on the ground that the Supreme Court had “read the Clean Air Act not to grant the EPA discretion to choose to regulate only those pollutants that it deemed feasible or wise to regulate.”\(^{43}\) In contrast, “the provision . . . at issue in this case requires the FDA to take a specific remedial step when, after a hearing, it has made certain findings, without imposing any absolute requirement that the agency investigate the need for withdrawing approval of animal drugs under any particular circumstance.”\(^{44}\) The court found FDA’s reasons for choosing another course of action not to be arbitrary or capricious.\(^{45}\)

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Note that the Secretary can act only following “notice and opportunity for hearing.” Under the Administrative Procedure Act, 5 U.S.C. § 553(c), formal, adjudication-like proceedings rather than informal rulemaking is required when rules are “required by statute to be made on the record after opportunity for an agency hearing.” The same standard triggers formal adjudicatory hearings when they are required by law. 5 U.S.C. §554(a). For a guide to the procedures, see [http://www.fda.gov/AnimalVeterinary/SafetyHealth/RecallsWithdrawals/ucm055268.htm](http://www.fda.gov/AnimalVeterinary/SafetyHealth/RecallsWithdrawals/ucm055268.htm). These cumbersome procedural requirements may have something to do with the agency’s reluctance to proceed. Arguably, however, the agency could have streamlined the procedures, as argued by Lisa Heinzerling, *Undue Process at the FDA: Antibiotics, Animal Feed, and Agency Intransigence*, 37 Vt. L. Rev. 1007, 1027-1038 (2013). As Heinzerling points out, however, NRDC did not make this argument in the district court, *id.* at 1007, so it would have been waived on appeal.

\(^{43}\) 760 F.3d at 174.

\(^{44}\) *Id.* Compare, *New York Public Interest Research v. Whitman*, 321 F.3d 316 (2nd Cir. 2003), which involved a statute that required EPA to take specified actions whenever it had made a “determination” that a state permitting program was inadequate; the court held that EPA had unreviewable discretion whether or not to make the necessary determination. *Id.* at 331-332.

\(^{45}\) 760 F.3d. at 174-176.
Chief Judge Katzmann protested in dissent that “[t]oday’s decision allows FDA to openly declare that a particular animal drug is unsafe, but then refuse to withdraw approval of that drug.”46 He found *Massachusetts v. EPA* indistinguishable:

[T]he question presented in *Massachusetts v. EPA* was whether the statute implicitly limited the agency’s judgment to the scientific question, by specifying only that question for the agency’s consideration. The Court held that it did. . . Exactly the same logic applies here: the FDA’s “reasons for action or inaction” must conform to the authorizing statute, meaning that they must rest on the statutory question of whether the drugs have been “shown to be safe.” Like the EPA with air pollutants, the FDA cannot “choose to regulate only those [drugs] that it deem [s] feasible or wise to regulate.”47

There is certainly force to Judge Katzmann’s observation about the similarity of the two cases. The majority’s response is unsatisfactory to the extent that it asserts the existence of an “absolute duty” under one statute but not the other, without explaining what difference in the statutes leads to this conclusion.

As the Second Circuit decision indicates, the lesson of *Massachusetts v. EPA* in terms of rulemaking petitions is less than crystal clear. A possible way of reconciling these decisions may be provided by Eric Biber’s resource-allocation theory about judicial review of agency “inaction.”48 Indeed, the D.C. Circuit has upheld denial of a

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46 Id. at 176 (Katzmann, J., dissenting).
47 Id. at 191-192.
48 Professor Biber persuasively criticizes the action-inaction distinction as a basis for determining the scope of judicial review and argues instead that the emphasis should be on whether the agency’s decision involved substantial resource issues, as it often does in inaction cases. See Eric Biber, *Two Sides of Same Coin: Judicial Review of Administrative Action and Inaction*, 26 VA. ENV. L. REV. 461
rulemaking petition relating to protection of whales where “[t]he agency made a policy decision to focus its resources on a comprehensive strategy, which in light of the information before the agency at the time, was reasoned and adequately supported by the record.” In a similar, more recent case involving refusal to regulate emissions from coal mines, the D.C. Circuit more recently relied on similar reasoning to uphold EPA’s decision about rulemaking priorities.

EPA resources seem unmentioned in the greenhouse gas case. In contrast, the Second Circuit majority concluded that it was not arbitrary or capricious for the FDA to seek to address options other than “a protracted administrative process and likely litigation.” Earlier, the court characterized withdrawal of a drug as a type of “enforcement action” requiring the exercise of discretion, given that “[a]gencies have many responsibilities, and limited resources.” Thus, it is normal for agencies to have discretion to choose “when to deploy those resources in an arduous, contested adversarial process.” These considerations were absent in *Massachusetts v. EPA.*

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49 Defenders of Wildlife v. Gutierrez, 532 F.3d 913, 921 (D.C. Cir. 2008). See also WildEarth Guardians v. U.S. E.P.A., 751 F.3d 649, 655 (D.C. Cir. 2014) (upholding an agency’s resource allocation decision because “the statute affords agency officials discretion to prioritize sources that are the most significant threats to public health to ensure effective administration of the agency’s regulatory agenda.”)

50 Finding *Massachusetts v. EPA* distinguishable, the court stressed that the governing statute provided EPA discretion (using the phrases “from time to time” and “in his judgment”), another proceeding absorbing EPA effort involved much greater amounts of emissions, and that it already had 45 rulemakings underway. Wildearth Guardians v. U.S. EPA, 751 F.3d 649, 653-656 (D.C. Cir. 2014).

51 NRDC v. FDA, 760 F.3d at 175.

52 Id. at 170.

53 Id.
Still, there is an additional factor in the FDA case that undermines the credibility of FDA’s decision to eschew rulemaking. As Judge Katzman emphasized, the FDA waited years without doing anything after it initially determined that overuse of animal antibiotics was a threat to public health. Only during the litigation did the agency finally take any action at all. This might shed doubt on its assertion that it had chosen an alternative course of action on the basis of effectiveness and efficiency – factors that were presumably also present in past years. Thus, the FDA seems to have come at least perilously close to abdicating its statutory responsibility to protect public health.54

*Massachusetts v. EPA* does not fully settle the question of when an agency can consider a broader range of factors before initiating a rulemaking than it could consider in the rulemaking itself. In general, given scarce agency resources, the burden of issuing and enforcing a rule seem relevant. In deciding on priorities given such resource constraints, an agency would find it natural to consider the possible benefits that might be produced by a rulemaking versus other activities, taking into account alternative ways of reaching the same goal and possible side-effects of the

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54 The argument for a general anti-abdication principle is made in Sunstein and Vermeule, *supra* note 15, at 185-189. In a case involving similar conduct by OSHA dealing with the hazards of hexavalent chromium, the Third Circuit said:

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

Public Citizen Health Research Group v. Chou, 314 F.3d 143,157-158 (3rd Cir. 2002). Although FDA had not formally begun the process, it had issued notice that it considered the use of animal antibiotics a possible danger to human health, as the Second Circuit discussed.
Sometimes, however, the congressional decision to preclude consideration of costs in the ultimate rule may reflect the high priority Congress places on addressing an issue or a distrust of the agency’s commitment to the statutory goal. The possibility that a rule would impose costs on the regulated parties, however, should probably be considered irrelevant even at the preliminary stage when Congress has decided to rule it out in the ultimate decision.

B. Agency Consideration of Costs In Setting Standards

Once the agency has decided to begin a rulemaking, it must determine what factors are relevant in setting the rule. A particular question that has repeatedly arisen is whether the agency can consider cost when the governing statute does not refer to this factor. This issue is particularly important because, under a series of executive orders, agencies are required to base their decisions on cost-benefit

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

56 Thus, it is clear that a statute may compel agency action or rule out many or all extrastatutory factors as justifications for inaction. See Sunstein and Vermeule, supra note 15, at 176-177. For instance, Congress might use the term “shall,” limit the agency to consider a specified list of factors, and provide a deadline for agency action.

57 There is, however, a counter-argument against that position. Perhaps Congress merely meant to allow the agency to consider cost if it chose to do so, but wanted to ensure that it would not be forced to do so and that a court would not be able to review such a determination. This would put the agency in something of the same position as a prosecutor in a case with a mandatory minimum sentence. Once the case is brought, the court cannot consider arguments for leniency but the prosecutor can do so in deciding whether to bring the case. The argument seems less plausible when the decision maker is the same at both stages, however. Moreover, in the case of the prosecutor, it is not clear whether the legislature really approved of this type of prosecutorial clemency or whether the prosecutor is merely taking advantage of the non-reviewability of such decisions. Because denial of a rulemaking is reviewable, although under a deferential standard, the latter consideration does not apply. Still, one might imagine that Congress meant to give the FDA discretion to decide whether to initiate the proceeding but to prevent the drug company from litigating the question of cost. In Massachusetts v. EPA, it does not seem plausible to argue that Congress was merely trying to keep cost issues out of the rulemaking process but was willing to let EPA choose to tolerate hazardous pollution.

58 Obviously, in the setting of air pollution regulation, the Court in Massachusetts v. EPA considered that only evidence of risk was relevant to an endangerment finding.
analysis unless they are legally precluded from doing so.\textsuperscript{59} Clearly, if the agency cannot consider cost at all, it is exempt from this executive mandate. Even if cost is a factor, the statute might limit the extent to which it can be considered, such as providing only a regulatory escape-hatch for costs that would bankrupt the industry.

The modern Supreme Court first encountered this issue in \textit{American Textile Manufacturers Institute, Inc. v. Donovan} [the Cotton Dust case].\textsuperscript{60} The case involved a regulation by the Occupational Health and Safety Administration (OSHA) under section 6(b)(5) of the Occupational Safety and Health Act.\textsuperscript{61} That section directs the Secretary of Labor (via OSHA) to establish a workplace standard for any toxic material “which most adequately assures, to the extent feasible, that no employee will suffer material impairment of health or functional capacity.”\textsuperscript{62} In a previous case, the Court had held that OSHA must first find that a substance currently poses a significant risk before it can utilize this section.\textsuperscript{63} It was then faced in the Cotton Dust case with the question of whether, having a significant risk, OSHA was required to balance the risk against the cost of eliminating the risk.

The Court rejected cost-benefit analysis as inconsistent with the statute. According to the Court, “Congress itself defined the basic relationship between costs

\begin{footnotesize}
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\item \textsuperscript{60} 452 U.S. 490 (1981) (also known as the “cotton dust” case). The Court rejected agency use of cost-benefit analysis in establishing workplace regulation of toxic chemicals.
\item \textsuperscript{61} 29 U.S.C. § 655(b)(5).
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980).
\end{itemize}
\end{footnotesize}
and benefits, by placing the “benefit” of worker health above all other considerations save those making attainment of this “benefit” unachievable. Any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in § 6(b)(5).”\textsuperscript{64} Consequently, “cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is.”\textsuperscript{65} Thus, OSHA was excluded from considering costs except to the extent that they were so high as to make it impossible for industry to comply.

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

\textit{Union Electric v. EPA}\textsuperscript{66} was the first case in this series. The issue in the case was whether EPA was required to consider the economic or technological feasibility of state’s plan to meet national air quality standards. In an opinion by Justice Marshall, the Court had little difficulty in upholding EPA’s refusal to do so.

Justice Marshall relied both on the general purposes of the Act and on the language of the provision. In terms of the statute’s purposes, he said:

\begin{quote}
As we have previously recognized, the 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise
\end{quote}

\begin{footnotes}
\item[64]452 U.S. at 490.
\item[65]\textit{Id.}
\item[66]Union Electric v. EPA, 427 U.S. 246 (1976).
\end{footnotes}
uncheckable problem of air pollution. The Amendments place the primary responsibility for formulating pollution control strategies on the States, but nonetheless subject the States to strict minimum compliance requirements. These requirements are of a “technology-forcing character” and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.  

Justice Marshall found this approach to be “apparent” in the statutory text, which sets out a list of provisions and “provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator [of EPA] ‘shall approve’ the proposed state plan.” The Court added that the “mandatory ‘shall’ makes it quite clear that the Administrator is not to be concerned with factors other than those specified, and none of the eight factors appears to permit consideration of technological or economic infeasibility.”

The next case was nearly twenty-five years later. Whitman v. American Trucking Ass’ns, Inc., involved the question of whether EPA could consider cost at an earlier stage of the process—in setting the national air quality standards themselves, as opposed to the formulation of the subsequent state plans. In an opinion by Justice Scalia, the Court upheld EPA’s view that consideration of costs was precluded. At heart, Justice Scalia found the issue straightforward. He began by

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67 Id. at 256-257.
68 Id. at 257.
69 Id.
recalling the relevant statutory test. “Section 109(b)(1) instructs the EPA to set
primary ambient air quality standards ‘the attainment and maintenance of which ... are requisite to protect the public health’ with “an adequate margin of safety.””

He found that language all but conclusive. “Were it not for the hundreds of pages of briefing respondents have submitted on the issue,” he mused, “one would have thought it fairly clear that this text does not permit the EPA to consider costs in setting the standards,” given that the language “is absolute.”

EPA’s assignment is to use technical information “to identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration to provide an “adequate” margin of safety, and set the standard at that level.” Thus, “[n]owhere are the costs of achieving such a standard made part of that initial calculation.”

Justice Scalia also invoked some general principles in reading the Clean Air Act. Because the statute provides many explicit references to cost, “[w]e have therefore refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted.”

Because section 109 is the “engine” that drives so much of the statute, he added, the textual references to cost must be clear in this setting. Scalia rebuffed industry efforts to extract some contrary implications about costs from the statutory

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71 531 U.S. at 465.
72 Id.
73 Id.
74 Id.
75 Id. at 468.
76 Id.
language, commenting that “Congress does not add elephants in mouseholes.” He argued that consideration of cost “is both so indirectly related to public health and so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned in [the text] had Congress meant it to be considered.”

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

Entergy Corp. v. Riverkeeper, Inc., involved the Clean Water Act rather than the Clean Air Act. Although the statute is primarily about adding substances to

77 Id. at 469.
78 Id.
80 Id. at 28.
water rather than removal, section 316(b) is an exception. It requires that the
“location, design, construction, and capacity of water intake structures reflect the
best technology available for minimizing adverse environmental impact.” EPA had
deprecated to require closed-system cooling for power plants, which would have
minimized the need for plants to draw from water bodies and thereby would have
minimized the damage caused to aquatic life by the intake systems. EPA’s rationale
was that closed-systems were extremely expensive and that other forms of control
“could approach” their environmental benefits.

In an opinion by Justice Scalia, the Entergy Court upheld EPA’s interpretation
of the statute to permit such tradeoffs between costs and benefits. He found the
phrase “best technology to minimize environmental impacts” ambiguous, since
“best” is a somewhat flexible term. Moreover, the statute used more emphatic
language elsewhere (such as “drastically minimize”) when Congress wanted to
ensure attainment of an absolute minimum. Justice Scalia also rejected efforts to
analogize to other provisions of the statute mandating various levels of pollution
control technologies, since they each provided more guidance than the simple

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82 Clean Water Act § 316(b), 33 U.S.C. § 1326(b). This provision, a section of a section entitled
“Thermal Discharges” states that any standard established under two other sections (one dealing
with pollution from new plants and the other with pollution from existing plants) “shall require that
the location, design, construction, and capacity of cooling water intake structures reflect the best
technology available for minimizing adverse environmental impact.” The other two sections both set
standards on best available technology, but are more informative about the applicable criteria. See
CWA § 301(b), 33 U.S.C. § 1311(b) (cross referencing to the description of technological standards in
CWA § 304(b), 33 U.S.C. § 1214(b)), and CWA § 306(a)(1), 33 U.S.C. § 1316(a)(1) (“greatest degree
of effluent reduction which the Administrator determines to be achievable through application of the
best available demonstrated control technology, processes, operating methods, or other alternatives,
including, where practicable, a standard permitting no discharge of pollutants.”) For an introduction
to the statute, see SALZMAN AND THOMPSON, supra note 20, at 173-203.

83 556 U.S. at 216.

84 Id. at 219,
reference to “best technology” and had a more drastic goal of eventually eliminating all pollution.\textsuperscript{85}

Although Justice Stevens argued in dissent that \textit{American Trucking} was controlling,\textsuperscript{86} Justice Scalia found it readily distinguishable:

In \textit{American Trucking}, we held that the text of § 109 of the Clean Air Act, “interpreted in its statutory and historical context ... unambiguously bars cost considerations” in setting air quality standards under that provision. The relevant “statutory context” included other provisions in the Clean Air Act that expressly authorized consideration of costs, whereas § 109 did not. \textit{American Trucking} thus stands for the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion. For the reasons discussed earlier, [§ 316’s] silence cannot bear that interpretation.\textsuperscript{87}

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

\textsuperscript{85} \textit{Id.} at 222.

\textsuperscript{86} \textit{Id.} at 239-240.

\textsuperscript{87} \textit{Id.} at 223. For an argument that the plain language of the statute contradicted the government’s position, see Lisa Heinzerling, \textit{Statutory Interpretation in the Era of OIRA}, 1102 \textit{Fordham Urb. L.J.} 1097 (2006).
The Court also upheld EPA’s discretion to consider costs, but with a very different alignment of Justices, in *EPA v. EME Homer City Generator, L.P.* The case involved the “good neighbor” provision of the Clean Air Act, which deals with the problem of interstate air pollution. The problem faced by EPA was how to allocate emission cuts when multiple states contributed to a violation of air quality standards in a downwind state. EPA used a two-stage process to set each state’s obligations. First, it determined whether a state significantly contributed to a specific downwind state’s nonattainment, with significance defined as being anything over one percent of the relevant air quality standard. Then, at the second stage, EPA used a cost-based standard to determine how much each state could reduce its emissions at a given cost. The D.C. Circuit overturned the regulation on

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88 134 S. Ct. 1584. The *EME Homer* facility was a major source of interstate air pollution in its own right:

For more than 40 years, Homer City has spewed sulfur dioxide from two of its three units completely unchecked, and still does because it is largely exempt from federal air pollution laws passed years after it was built in 1969. Last year, the facility, released 114,245 tons of sulfur dioxide, more than all of the power plants in neighboring New York combined.

"It is an emblem, a poster child of the challenge of interstate air pollution," said Lem Srolovic, the head of the environmental protection bureau for the New York Attorney General’s office, in an interview with The Associated Press.

Dina Cappielo and Kevin Befos, *After Decades, Dirty Power Plant to get Clean* (May 2014), available at [http://bigstory.ap.org/article/after-decades-dirty-power-plant-get-clean](http://bigstory.ap.org/article/after-decades-dirty-power-plant-get-clean). As the title of that article indicates, the plant was finally planning to install scrubbers, one of the last plants in the country to do so. *Id.*

89 The “good neighbor” provision requires each state implementation plan to:

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

In other words, each state has to prevent any source within its borders from “contributing significantly” to nonattainment in any other state.

90 *Id.*

91 *Id.* at 17.
that the ground that the statute required reductions to be made in proportion to the amount of emissions from each upwind state.\textsuperscript{92}

The Supreme Court reversed, upholding the EPA’s approach in an opinion by Justice Ginsburg (who had dissented in \textit{Entergy}). “Lacking a dispositive statutory instruction to guide it, EPA’s decision, we conclude, is a ‘reasonable’ way of filling the ‘gap left open by Congress.’”\textsuperscript{93} In the Court’s view, EPA’s choice “makes good sense,” providing “an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address.”\textsuperscript{94} This approach was”\textit{[e]fficient} because EPA can achieve the levels of attainment, \textit{i.e.}, of emission reductions, the proportional approach aims to achieve, but at a much lower overall cost.”\textsuperscript{95} The Court added that EPA’s approach was also fair because “[u]pwind States that have not yet implemented pollution controls of the same stringency as their neighbors will be stopped from free riding on their neighbors’ efforts to reduce pollution.”\textsuperscript{96}

In dissent, Justice Scalia sharply rejected the relevance of cost under the statute. “It would be extraordinary, he wrote, “for Congress, by use of the single word ‘significantly,’ to transmogrify a statute that assigns responsibility on the basis of amounts of pollutants emitted into a statute authorizing EPA to reduce interstate

\begin{footnotes}
\item[92] EME Homer City Generation L.P. v. EPA. 696 F.3d 7, 20-22 (D.C. Cir. 2012).
\item[93] EME Homer, 134 S. Ct. at 1607.
\item[94] \textit{Id}.
\item[95] \textit{Id}.
\item[96] \textit{Id}.
\end{footnotes}
pollution in the manner that it believes most efficient.\textsuperscript{97} He also argued that the majority was in effect overruling\textit{ American Trucking}. Given that many provisions of the statute explicitly allow costs to be taken into account,\textit{ American Trucking} required “a textual commitment of authority to the EPA to consider costs”; but “[t]oday’s opinion turns its back upon that case and is incompatible with that opinion.”\textsuperscript{98} Given that his opinion in\textit{ Entergy} declined to read\textit{ American Trucking} as creating such a rule, his reversal of position in\textit{ EME Homer} is puzzling. Since he did not refer to\textit{ Entergy} in the later opinion, the reasons for the change must remain a mystery.

The majority responded that\textit{ American Trucking} was distinguishable (without, however, mentioning\textit{ Entergy}). According to the Court, the provision in\textit{ American Trucking} created an “absolute” mandate based on public health and precluded any other factor, whereas the good neighbor provision “grants EPA discretion to eliminating ‘amounts [of pollution that] . . . contribute significantly to nonattainment’ downwind,” but “fails to provide any metric by which EPA can differentiate among the contributions of multiple upwind States.”\textsuperscript{99} Scalia rejected this effort to distinguish\textit{ American Trucking}, arguing that the good neighbor provision was just as “absolute” as the provision at issue in the earlier case.\textsuperscript{100}

After\textit{ Entergy} and\textit{ EME Homer}, it seems clear that EPA does have discretion to consider costs when statutory provisions are ambiguous, not withstanding any

\textsuperscript{97} Id. at 1611 (Scalia, J., dissenting).
\textsuperscript{98} Id. at 1616.
\textsuperscript{99} Id. at 1607 n.21.
\textsuperscript{100} Id. at 1616 n.3.
contrary presumption that might otherwise be gleaned from *American Trucking*. But nothing in these cases indicates that EPA *must* do so unless it can show that the statute precludes consideration of costs. The D.C. Circuit held squarely to the contrary in a recent case, *White Stallion Energy Center, LLC v. EPA*. EPA concluded that costs were relevant at a later stage of the proceeding in setting the appropriate degree of regulation, but not for the initial step of determining whether the industry's toxic emissions required regulation. Thus, although in the face of statutory ambiguity, the agency had discretion to consider cost, but also discretion not to do so. A dissenter argued that it is inherently unreasonable for EPA to exclude consideration of costs when Congress has not required it to do so, but that seems to reflect the strength of the dissenter's policy commitments as much as the standard view of agency discretion. Of course, even if EPA did have discretion to consider or ignore costs, *Chevron* requires that EPA's interpretation of the statute must be reasonable.

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101 For instance, in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014), the court upheld EPA's interpretation of the Clean Air Act to allow consideration of cost-effectiveness in implementing a provision requiring the "maximum degree of emissions reductions" that are "achievable." *Id.* at 1060. The court concluded that "[e]ven if the statute does not compel EPA's approach, and even if EPA's reading is not the better reading, we conclude that it is still at least a reasonable reading given the various potential meanings of 'cost' in this context." *Id.* at 1061.

102 748 F.3d 1222 (D.C. Cir. 2013).

103 *Id.* at 1239-1240

104 See *id.* at 1259-1256. (Kavanaugh, J., dissenting).

105 As the majority noted, the dissenter not only made his own policy determination but his own estimate of costs, which was much different than the agency's. *Id.* at 140. In addition, the dissenter focused on the congressional mandate to consider whether regulation was "appropriate" as if that were a completely isolated requirement, rather than being keyed to the agency's consideration of an independent study of health risks (not costs). *Id.* at 1239. In short, the dissenter's view about what constitutes appropriate regulation may (or may not) be correct, but there is no reason to assume that it was shared by Congress.
Chevron seemingly has the effect of giving the agency discretion to consider costs, or to limit such consideration, unless the statute is read to settle the matter clearly – in other words, unless exclusion of costs is unreasonable given other statutory policies. Despite the furor in some of the opinions and an apparent false start in American Trucking, the cases dealing specifically with cost are all consistent with this basic principle. Given the Supreme Court’s recent decision to review White Stallion,\(^\text{106}\) it is at least possible that the rules on agency discretion may shift. Perhaps, contrary to the D.C. Circuit, the Supreme Court will find that it is unreasonable to read this particular statute to preclude all consideration of cost, in effect finding that the agency abused its discretion in adopting a contrary view of the statute. Or perhaps it will uphold the D.C. Circuit in the end. It is also possible that the Court will adopt a presumption that some consideration of costs if required when a statute is ambiguous, or even that cost-benefit analysis is required unless clearly precluded by statute. These more audacious holdings seem less likely, but if the Court does make such a move, agency discretion to proceed without considering costs would clearly be more restricted. In the meantime, however, current law does seem to support broad agency discretion on whether, and how much, to consider costs when a statute does not speak clearly on the issue.

C. Agency Reconciliation of Competing Statutory Goals

\(^{106}\)The Court granted cert. in three cases, formulating the issues presented as “[w]hether the Environmental Protection Agency unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities.” See Michigan v. EPA, No. 14-46, Utility Air Regulatory Group v. EPA, No. 14-47, and National Mining Federation v. EPA, No. 14-49.
Sometimes costs involve interests that are protected elsewhere within the same statute or in other laws. The role of administrative agencies in resolving conflicting statutory policies is well established. Indeed, in perhaps the most widely known case in all of administrative law, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*,\(^\text{107}\) the Court held that judicial deference was warranted when “the Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.”\(^\text{108}\) The Court added that “Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases.”\(^\text{109}\)

In *Chevron*, the conflicting policies were found within a single statute, but the Court has also deferred to an agency’s reconciliation of conflicting policies between multiple statutes. In *National Association of Home Builders v. Defenders of Wildlife*,\(^\text{110}\) the conflict was between the Endangered Species Act and many other federal statutes that imposed mandatory duties without references to the Endangered Species Act. Reading the ESA “against the statutory backdrop of the many mandatory agency directives whose operation it would implicitly abrogate or


\(^{108}\) 467 U.S. at 865.

\(^{109}\) Id.

repeal” under the lower court’s interpretation, the Court found itself “left with a fundamental ambiguity that is not resolved by the statutory text.” That being so, the Court found it “appropriate to look to the implementing agency’s expert interpretation”, which “harmonizes the statutes by applying [the relevant ESA provision] to guide agencies’ discretionary authority, but not reading it to override express statutory mandates.” It then applied the Chevron doctrine and found that the agency’s interpretation was entitled to deference.

Although agencies clearly have some leeway in reconciling conflicting policies, the situation with respect to contradictory statutory language in a single statute is less clear. This issue divided the Justices in Scialabba v. Cuellar de Osorio, which involved a complicated question relating to the priority of immigrant visas. The lead opinion was written by Justice Kagan and joined by Justices Kennedy and Ginsburg. Justice Kagan contended that two clauses were in tension, triggering Chevron deference:

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111 Id. at 666. Professor Pierce criticizes the Court for failing to give EPA discretion to consider the ESA factor. See Pierce, supra note 28, at 84-85. But the Court evidently found it more appropriate to defer to the agencies having authority over implementation of the ESA itself, as discussed in the text above.

112 Id. Surely, there must be some limits on the statute’s application to nondiscretionary actions: the ESA surely does not require the Treasury Department to condition income tax refunds on a showing that the recipient will not use the money for activities harmful to endangered species! Of course, EPA’s decision to approve a state’s permitting program was not “non-discretionary” in the same sense, and the Court’s failure to consider this difference more fully can be reasonably criticized.

113 Id. at 666-668. The Court pointed out that TVA v. Hill did not involve such a nondiscretionary decision: “Central to the Court’s decision was the conclusion that Congress did not mandate that the TVA put the dam into operation; there was no statutory command to that effect; and there was therefore no basis for contending that applying the ESA’s no-jeopardy requirement would implicitly repeal another affirmative congressional directive.” Id. at 670. Thus, the Court read TVA v. Hill to hold “that the ESA’s no-jeopardy mandate applies to every discretionary agency action – regardless of the expense or burden its application might impose.” Id. at 671.

The two faces of the statute do not easily cohere with each other: Read either most naturally, and the other appears to mean not what it says. That internal tension makes possible alternative reasonable constructions, bringing into correspondence in one way or another the section's different parts. And when that is so, Chevron dictates that a court defer to the agency's choice—here, to the Board's expert judgment about which interpretation fits best with, and makes most sense of, the statutory scheme.\textsuperscript{115}

Concurring in the judgment, Chief Justice Roberts, joined by Justice Scalia, contended that Chevron and Home Builders did not apply when a statute's provisions are directly contradictory, but found that the statute before the Court did not have this flaw.\textsuperscript{116} In dissent, Justice Alito endorsed Roberts' view on the general issue but had a different interpretation of the visa provision.\textsuperscript{117} Justice Sotomayor also dissented, joined by Justice Breyer and by Justice Thomas (who did not, however, join on footnotes). According to Justice Sotomayor, "[i]n rushing to find a conflict within the statute, the plurality neglects a fundamental tenet of statutory interpretation: We do not lightly presume that Congress has legislated in self-

\textsuperscript{115} \textit{Id.} at 2203.

\textsuperscript{116} \textit{Id.} at 2214. Chief Justice Roberts found Home Builders distinguishable:

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

\textit{Id.} n.1.

\textsuperscript{117} \textit{Id.} at 2216.
contradicting terms.”\footnote{Id. at 2220.} In a footnote joined only by Breyer, Sotomayor referred to \textit{Homer Builders} as a situation involving “the kind of conflict that can make deference appropriate to an agency’s decision to override unambiguous statutory text.”\footnote{Id. at 2220 n.3.}

The upshot is that three Justices thought that self-contradictory language in a statute triggered \textit{Chevron} (Kagan, Kennedy, Ginsburg), three did not (Roberts, Scalia, Alito). With the possible exceptions of Justices Alito and Thomas, all of the Justices believed that \textit{Home Builders} presented a type of inter-statutory textual conflict where deference was appropriate. Counting heads, it appears that there are five Justices who think that \textit{Chevron} can at least sometimes apply in cases of intra-statutory textual contradiction, and probably four who do not think so when unambiguous language within a single statute is self-contradictory.

The upshot of the cases discussed in Part II is that an agency has discretion to consider costs (in the broad sense) except when Congress has unambiguously decided otherwise. Such ambiguity can arise from the language of a specific provision or from tensions between different provisions, either in the same statute or between different statutes. The next section explores how such issues are handled in the context of judicial enforcement of statutes.

\textbf{III. Judicial Discretion in Statutory Cases}

We now shift to a subject that is normally considered completely different. Agency discretion is a core concern of administrative law, while judicial discretion is
the subject of remedies law. As we will see, however, there are some striking similarities between the governing principles in both areas.

A famous constitutional scholar once said that a Supreme Court ruling “asked of the laity an understanding of which lawyers are scarcely capable – an understanding that something could be unlawful, while it was nevertheless lawful to continue it for an indefinite time.” As we will see, the Court has attempted to diffuse this concern through several arguments: that other remedies for the continuing illegality remain available, that the continuation of the unlawful action is only temporary, and that the statutory purpose will not be disserved by the delay in compliance. But dissenters, and not a few observers, have remained dissatisfied.

We begin in section A with the subject of judicial discretion in issuing injunctions against statutory violations. In section B, we turn to a question in the overlap between administrative and remedies law: when can a court decline to vacate a regulation even though the rulemaking was defective?

A. Statutory Injunctions

The Supreme Court's approach to injunctions is now encapsulated in the eBay test. The eBay test calls for application of a four-factor test, under which a plaintiff must demonstrate irreparable injury, lack of adequate remedies at law such as damages, the “balance of hardships between the plaintiff and defendant”, and that “the public interest would not be disserved by a permanent injunction.” Issuance of an injunction is “an act of equitable discretion by the district court, reviewable on

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121 So called because it is set forth in *eBay Inc. v. Mercexchange, LLC*, 547 U.S. 388 (2006).

122 *Id.* at 391.
appeal for abuse of discretion.” 123 It is not clear whether this four-factor formulation was, as the Court thought, simply a description of “the long tradition of equity practice,” 124 or whether the Court’s framework was more rigid than traditional equity practice. 125 But the idea of “balancing the equities” is a familiar one from nuisance law, although even there it may have a shorter pedigree than is sometimes assumed. 126 It has been much less clear, however, whether “balancing the equities” is appropriate in public law cases where the defendant is violating a federal statute. 127 As we will see below, the Court has sometimes sharply limited judicial discretion to balance the interests involved in a statutory case, while in other cases it has spoken broadly about the appropriateness of balancing. We begin with the first set of cases, which stress the obligation of courts to use their injunctive powers.

123 Id.

124 Id. at 391. It was already clear that irreparable injury is a requirement for all injunctions. See Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975) (no injunction for breach of securities law absent irreparable injury); Animal Welfare Inst. v. Martin, 623 F.3d 19 (1st Cir. 2010) (Endangered Species Act); cf. Brown v. Collegia De Abogados De Puerto Rico, 613 F.3d 44, 49 (1st Cir. 2010) (injunction warranted despite adequacy of damages in order to avoid burden of repetitive litigation).


126 Jared Goldstein traces the balancing back to Richard’s Appeal, 57 Pa. 105 (1968), but finds that it was not universally accepted until over a century later. See Jared A. Goldstein, Equitable Balancing in the Age of Statutes, 96 VA. L. REV. 485, 490-505 (2010). Until Boomer v. Atlantic Cement Co., 247 N.E.2d 870 (1970), New York was a clear holdout from the balancing approach. For discussion of the problem of balancing the equities in the common law environmental cases, see Daniel A. Farber, The Story of Boomer: Pollution and the Common Law, in LAZARUS AND HOUCK, supra note 70, at 7-42.

127 This question has attracted a substantial interest from scholars. See, e.g., Goldstein, supra note 8; David S. Schoenbrod, The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy, 72 MINN. L. REV. 627 (1988); Daniel A. Farber, Equitable Discretion, Legal Duties, and Environmental Injunctions, 45 U. PITT. L. REV. 512 (1984); Zygmunt J.B. Plater, Statutory Violations and Equitable Discretion, 70 CAL. L. REV. 524 (1982). The 1984 article has a much narrower scope and takes a different approach to equitable remedies than this Article.
power to carry out congressional policies. We then turn to the other line of cases stressing equitable discretion.\footnote{There is an extensive literature about public law remedies focusing on how broadly a court may go in remediating a violation, particularly a constitutional violation. See, e.g., Susan B. Sturm, A Normative Theory of Public Law Remedies, 79 Geo. L.J. 1355 (1991); Abram Chayes, The Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Owen Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1 (1979). Some of this literature (exemplified by Fiss and Sturm) compares the judges’ task in these institutional reform cases as resembling the task of administrative agencies. However, prohibitory injunctions of the kind discussed here are portrayed as much more straightforward. See, e.g., Sturm, supra, at 1361. Without minimizing the special problems presented by the institutional reform cases, the similarities with prohibitory injunctions in public law cases are also significant. Consider, for example, Sturm’s observation that in institutional reform cases, “liability norms provide only the goals and boundaries for the remedial decision” and that the “choice of remedy is likely to be driven by goals that do not directly relate to the liability norm.” Id. at 1363-1364. We will see that much the same may be true even when a court is asked to enjoin a statutory violation.}

1. The judicial duty to enforce.

*Tennessee Valley Authority v. Hill*\footnote{437 U.S. 153 (1978). For a fuller discussion of *TVA v. Hill* and of the underlying statute, see Holly Doremus, The Story of *TVA v. Hill*: A Narrow Escape for a Broad New Law, in Lazarus and Houck, supra note 70, at 109-140. As Doremus explains, the Justices initially voted to reverse the court of appeals summarily and vacate the judgment (leaving the trial court decision in place), but strong draft dissents from Justices Stewart and Stevens persuaded the Court to hear the case. *Id.* at 127-128.} is the best-known case in which the Supreme Court limited the use of balancing in issuing a public law injunction. It does not stand alone, however. In addition to *Hill*, it is worth considering one earlier case and another later one that adopt the same basic approach.

In *United States v. City and County of San Francisco*,\footnote{310 U.S. 16 (1940).} a federal statute granted the city the right to use federal lands to transport water and electricity from Hetch-Hetchy Dam, while prohibiting the city from transferring the electricity to any private utility.\footnote{Id. at 18-19.} The city cleverly designed to sell the sale “on consignment” via a private utility, whereupon the federal government filed suit for an injunction, a ruse that the Court somewhat indigently rejected: “Mere words and ingenuity of
contractual expression, whatever their effect between the parties, cannot by
description make permissible a course of conduct forbidden by law.” 132 Having lost
on the merits, the city argued that the government should be denied relief upon a
balancing of the equities, particularly the fact that government officials had initially
approved the arrangement. 133 The Court rejected this effort by the city:

However, after consideration of all these objections, we are satisfied that this
case does not call for a balancing of equities or for the invocation of the
generalities of judicial maxims in order to determine whether an injunction
should have issued. . . . The equitable doctrines relied on do not militate
against the capacity of a court of equity as a proper forum in which to make a
declared policy of Congress effective. Injunction to prohibit continued use –
in violation of that policy . . . is both appropriate and necessary. 134

City of San Francisco is complemented by another case from the same era,
Hecht Co. v. Bowle. 135 In this case, the Court actually ruled against injunctive relief,
but read as a whole, the opinion reaffirms the overriding duty of judges to ensure
compliance with statutes. Hecht involved violations of wartime price controls. In
that case, the federal district court found that the defendant had engaged in
repeated violations of the price-control regulations. 136 These violations had

132 Id. at 28.
133 Id. at 30-31.
134 Id. at 31. Limitations on the role of judicial discretion in statutory cases are also stressed in
Steelworkers v. United States, 361 U.S. 39, 41-42 (1959) (note especially the discussion in the
concurring opinion of Frankfurter and Harlan, id. at 55-509); and Virginia Railway Co. v. System
Federation No. 50, 300 U.S. 515, 551-552 (1937).
occurred despite the defendant’s exercise of exceptional diligence in attempting to comply. Once mistakes were discovered, they were immediately corrected and vigorous steps were taken to prevent further mistakes.\textsuperscript{137} There appeared to be no likelihood of repetition. Critically, the district court concluded that the issuance of an injunction would have “no effect by way of insuring better compliance in the future.”\textsuperscript{138} The court of appeals, however, believed that issuance of an injunction was mandatory once violations were found, apparently regardless of whether an injunction would have any effect in improving compliance.\textsuperscript{139}

Finding the statute ambiguous about whether it eliminated equitable discretion, the \textit{Hecht} Court resolved the ambiguity “in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings under this emergency legislation in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect.”\textsuperscript{140} Thus, the \textit{Hecht} Court refused to award an injunction, even though the price control statute stated that an injunction “shall be granted” upon a showing of a violation of the statute.\textsuperscript{141} The case is usually cited for its language about the flexibility of equitable remedies, the breadth of judicial discretion, and the presumption that Congress has not intended to make abrupt departures from the

\textsuperscript{137} 321 U.S. at 325-26.
\textsuperscript{138} \textit{Id.} at 326.
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.} at 330.
\textsuperscript{141} \textit{See id.} at 321-22.
tradition of discretion. Those parts of the opinion provided fodder for the judicial opinion discussed in the following subsection. But the Court also emphasized the confined role of discretion. Lower courts, the Court admonished, should not administer the statute grudgingly, and their discretion “must be exercised in light of the large objectives of the Act.” The standard for issuing an injunction would be the public interest, not ‘the requirements of private litigation.” Hecht shows that the City of San Francisco rule requires an injunction to ensure compliance with law, but not when it serves little or no purpose. Thus, the focus remained on achieving compliance.

This brings us to TVA v. Hill, also sometimes called the “snail darter” case. Environmental plaintiffs sought an injunction against the completion of a multimillion-dollar dam that would have destroyed the only known habitat of an endangered species of fish known as the snail darter. The main discussion in the Court’s opinion concerns whether completion of the Tellico Dam would violate the Endangered Species Act. The Court also considered whether an injunction should be issued. The statute provided little guidance about remedies, merely authorizing suits to enjoin violators of the act. It was much more explicit in defining

142 Id.
143 Id. at 331.
144 Id.
145 For more detailed discussion of Hecht, see Plater, supra note 127, at 546-553.
146 Id. at 171-93.
147 16 U.S.C. 1540(g)(1) provides in relevant part that
   “any person . . . may commence a civil suit on his own behalf –
violations, demanding that agencies take “such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of [critical habitat] of such species.”

The river in question was designed as critical habitat for the snail darter. Thus, TVA was required by law to take whatever action was necessary to ensure that the dam project did not harm the fish’s habitat – or more simply, completing the dam was illegal. But could a court balance the equities and decline to issue an injunction to enforce the law?

The Court began its discussion of the injunction issue with the premise that a federal judge ‘is not mechanically obligated to grant an injunction for every violation of law.’ This statement suggests that it is appropriate for judges to balance the equities. The Court, however, refused to do so in the case before it.

But these principles take a court only so far. Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution . . . [I]t is . . . the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under its authority . . .

The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation . . .

149 437 U.S. at 161.
150 Id. at 193.
Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.\footnote{\textit{Id.} at 194. According to Goldstein, the Court “rejected equitable balancing for essentially the same substantive and institutional reasons that convinced some common law courts to reject balancing.” Goldstein, \textit{supra} note 8, at 509.}

Consequently, the Court rejected the invitation to shape a “reasonable” remedy.\footnote{437 U.S. at 194.} Congress had spoken “in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities.”\footnote{\textit{Id.}} It was not the judicial function to reappraise the balance set by Congress.

The Court emphasized that its approach was deeply rooted in the separation of powers and in the requirements of the rule of law. “Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end,” nor does the Court “sit as a committee of review, nor are we vested with the power of veto.”\footnote{Id. at 194–195. The quotation from Bolt contains ellipses in the Court’s opinion, and further deletions have been made here in the interest of brevity.} To stress the seriousness with which it regarded its duty to resist the temptation to balance the interest, the Court quoted a play about St. Thomas Moore, in which he is quoted as saying:

\begin{quote}
I know what's legal, not what's right. And I'll stick to what's legal. . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit
\end{quote}
of law, for my own safety's sake.\textsuperscript{155}

Thus, the Court said, “in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.’”\textsuperscript{156}

Then-Justice Rehnquist argued in dissent that the Court had failed to apply the principle of equitable discretion established in \textit{Hecht}. Despite its language about equitable discretion, however, \textit{Hecht} offers little support for Justice Rehnquist's dissent. In \textit{Hecht}, an injunction was denied because it would not have improved compliance with the relevant statute. In \textit{TVA v. Hill}, the injunction ensured full compliance with the Endangered Species Act, and there was no other way of doing so. The defendants in \textit{TVA v. Hill} were not seeking to be released from an unnecessary injunction; rather, they hoped to avoid the duties imposed by Congress. Nothing in the \textit{Hecht} decision authorized courts to excuse compliance with statutes. On the contrary, the \textit{Hecht} Court explicitly ruled that achievement of the congressional goal was the primary standard for the issuance of an injunction.\textsuperscript{157}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{155} \textit{Id.}
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} As the \textit{Hecht} Court said,
\begin{quote}
We do not mean to imply that courts should administer [the statute] grudgingly . . . . Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain the end through coordinated action . . . . The Administrator does not carry the sole burden of the war against inflation. The courts also have been entrusted with a share of that responsibility. And their discretion under [the statute] must be exercised in light of the large objectives of the Act. For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases.
\end{quote}
\end{enumerate}
\end{footnotesize}

321 U.S. at 330-31. In similar circumstances, the modern Court has favored the use of declaratory judgments rather than the injunction remedy. \textit{See} Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975).
In another case from the same era, the Court held that an injunction against continued violation of Title VII should issue as a matter of course when the government has proved the existence of a pattern or practice of discrimination. If an employer fails to rebut the inference that arises from the Government's prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy. Without any further evidence from the Government, a court's finding of a pattern or practice justifies an award of prospective relief. Such relief might take the form of an injunctive order against continuation of the discriminatory practice, an order that the employer keep records of its future employment decisions and file periodic reports with the court, or any other order “necessary to ensure the full enjoyment of the rights” protected by Title VII.\textsuperscript{158}

Even in awarding affirmative relief, judicial discretion is limited in Title VII cases. For instance, in terms of awards of back pay for injured employees, the Court said back pay should “be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.”\textsuperscript{159} The Court admonished that:

\textsuperscript{158} Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 361 (1977). An accompanying footnote emphasizes equitable discretion but only insofar as courts have discretion to award even broader relief than an injunction against further violations: “The federal courts have freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of section 707(a) eliminate their discriminatory practices and the effects therefrom.” \textit{id.} at 361 n. 47. The Court concluded, however, that \textit{City of Los Angeles Department of Water and Power v. Manhart}, 435 U.S. 702 (1978), was one of the rare cases where the presumption for retroactive relief in Title VII cases was overcome. \textit{See id.} at 702 (“\textit{Albermarle} presumption in favor of retroactive liability can seldom be overcome”); \textit{id.} at 702 (“Without qualifying the force of the \textit{Albermarle} presumption in favor of retroactive relief, we conclude that it was error to grant such relief in this case.”)

\textsuperscript{159} \textit{Albermarle Paper Co. v. Moody}, 422 U.S. 405, 436 (1975).
It is true that “(e)quity eschews mechanical rules . . . (and) depends on flexibility.” But when Congress invokes the Chancellor’s conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not “equity (which) varies like the Chancellor’s foot.” Important national goals would be frustrated by a regime of discretion that “produce(d) different results for breaches of duty in situations that cannot be differentiated in policy.”

The Court also limited consideration of costs in a later important, though less well-known, case. The issue in United States v. Oakland Cannabis Buyers’ Cooperative was whether the government was entitled to an injunction to shut down a medical marijuana center established under the auspices of state law, but in violation of federal drug law. The co-op first argued unsuccessfully that it was entitled to a necessity defense because the drug was needed to avoid extreme suffering by cancer patients and others. The Court rejected this defense, finding that Congress had implicitly ruled out medical use by placing marijuana in a category of drugs that could never be available under prescription. The Court then rejected the co-op’s fallback argument that the injunction should exclude urgent medical uses based on a balancing of the equities. Although it found that equitable discretion was not entirely precluded by statute, “[c]ourts of equity

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160 Id. at 417.
162 Id. at 486-489.
163 Id. at 487.
164 Id. at 491-494.
cannot, in their discretion, reject the balance that Congress has struck in a statute.”\textsuperscript{165} Absent contrary statutory language, the court’s choice is “simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all.”\textsuperscript{166} In short, the court must take the desirability of the statute as a given and can consider only how the interests of the public and the parties are affected by the choice of enforcement mechanism.\textsuperscript{167} In this case, because the statutory prohibition was designed to make medical needs irrelevant, the lower courts could not consider evidence of medical necessity.\textsuperscript{168}

There are differences in the outcomes of cases and in the degree of discretion they allowed to courts. But they are all emphatic on one point: the primary duty of a judge in a statutory injunction case is to ensure compliance with the statute. Equitable discretion, including consideration of cost, comes into play only in the choice of methods for achieving this overriding goal. At least in terms of their rhetoric, however, the cases in the next subsection strike a very different note.

\textit{2. Judicial discretion to deny enforcement.}

Soon after the Supreme Court’s decision in the “snail darter” case limiting equitable discretion, the Court revisited the issue of equitable discretion in environmental enforcement. \textit{Weinberger v. Romero-Barcelo}\textsuperscript{169} involved a somewhat

\textsuperscript{165} \textit{Id.} at 497.
\textsuperscript{166} \textit{Id.} at 497-498.
\textsuperscript{167} \textit{Id.} at 498.
\textsuperscript{168} \textit{Id.} at 499.
\textsuperscript{169} 456 U.S. 305 (1982).
unusual application of the Clean Water Act. The Navy conducted training
exercises off the shores of Puerto Rico, during which bombs would sometimes fall
into the sea, either due to deliberate targeting or misses of land targets. After the
Governor of Puerto Rico and others filed suit challenging these exercises, the
District Court found that they violated the Clean Water Act because the resulting
intrusions into coastal waters required a permit. Under the statute, the discharge
of any pollutant into navigable waters is unlawful without a permit, and both the
terms “discharge” and “pollutant” are defined in broad terms that clearly cover the
Navy’s activities. The district court ordered the Navy to apply for a permit but
deprecated to enjoin the activities in the meantime, because of the importance of the
area for training naval officers and its finding that the exercises did not in fact result
in harm to the aquatic environment. The court of appeals, however, held an
injunction was required under TVA v. Hill, noting that the Navy could obtain a

170 33 U.S.C. § 1251 et seq.
171 456 U.S. at 305.
172 Id. at 305-306. The statute is complicated but in the end unambiguous. Section 401(a) of the
Section 301(a), 33 U.S.C. § 1311(a), provides that “Except as in compliance with this section and
section[s] . . . 1342 . . . of this title, the discharge of any pollutant by any person shall be unlawful.”
Finally, a trio of definitions leaves no doubt that the Navy’s activities were covered. Under section
502(6) of the Act, 33 U.S.C. § 1362(6), “pollutant” is defined to include munitions. Section 502(12),
33 U.S.C. § 1362(12), defines “discharge” to include “any addition of any pollutant to navigable
waters from any point source,” and 502(14), 33 U.S.C. § 1362(14) defines point source to include
“any discernable, confined and discrete conveyance.” Thus, discharges of materials in navigable
waters (defined by subsection (8) to include the territorial seas) from artillery or planes clearly
requires a permit. Under section 301(a), every moment the Navy continued its exercises without a
permit it was engaged in an unlawful act.

173 456 U.S. at 308-309.
174 Id. at 310.
presidential exemption if the statutory requirement interfered unduly with national security.\textsuperscript{175}

The Court began its analysis with something of an ode to equitable discretion. It emphasized the injunctions are not issued as a matter of course, and that equity seeks to “arrive at a ‘nice adjustment and reconciliation’ between the competing claims.”\textsuperscript{176} In exercising their discretion, the Court said, “courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.\textsuperscript{177} Thus, the Court said, “[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation.”\textsuperscript{178} Given this background of several hundred years of equity practice, “we do not lightly assume that Congress has intended to depart from established principles.”\textsuperscript{179} Thus, the Court established a strong presumption in favor of equitable balancing.\textsuperscript{180}

This language is rather strikingly at odds with the Supreme Court’s emphasis, in \textit{Hill} and the other cases discussed in the previous section, on the judiciary’s powerful obligation to give effect to congressional enactments. Indeed, the difference in tone is somewhat breathtaking from \textit{Hill}’s emphasis on the potential of

\textsuperscript{175} \textit{Id.} at 311.
\textsuperscript{176} \textit{Id.} at 311-312.
\textsuperscript{177} \textit{Id.} at 312.
\textsuperscript{178} \textit{Id.} at 313.
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} See Goldstein, \textit{supra} note 8, at 511 (reading the opinion to establish a “strong presumption” in favor of balancing).
well-intended exceptions from enforcement to destroy the very fabric of the rule of law. It now seems that courts can at least provide temporary variances from statutory duties based on their own view of the relevant interests involved.

Indeed, rather than seeing *Hill* as exemplifying a broad principle of unflagging enforcement of statutes, *Hill* treats it as an extraordinary exception from normal practice. The *Weinberger* Court characterizes *Hill* as involving the rare exception where “Congress had foreclosed the exercise of the usual discretion possessed by a court of equity”\(^\text{181}\) because the statute contained a “flat ban” on the destruction of critical habitats. Thus, in *Hill*, “only an injunction could vindicate the objectives of the Act.”\(^\text{182}\)

According to the majority, at least, *Weinberger* was at the other extreme. Given the availability of fines and criminal penalties, an injunction would not be the only way of ensuring compliance. The objective of the statute – improved water quality, not permitting for its own sake – would not be impaired.\(^\text{183}\) The district only temporarily, not permanently, allowed the Navy to continue the exercises without a permit.\(^\text{184}\) Moreover, the statute was much more flexible than in *Hill*, granting the president the power to grant exemptions on national security grounds and containing many provisions for phased compliance and considerations of feasibility (though none of them directly applicable.)\(^\text{185}\) In closing the Court said that it did not

\(^{181}\) *Id.*

\(^{182}\) *Id.*

\(^{183}\) *Id.*

\(^{184}\) *Id.* at 315.

\(^{185}\) *Id.* at 315-316.
read the statute to require a court to “issue an injunction for any and all statutory violations” when other remedies could secure prompt compliance.\textsuperscript{186}

The majority opinion seems to have a good deal of common sense behind it: why halt these important Naval exercises over a technical violation of the statute rather than simply require correction of the violation? Yet, Justice Stevens raises some troubling points in dissent. The Navy’s discharge of material into navigable waters without a permit was a continuing violation of the statute, and as Justice Stevens put it, “the Navy, like anyone else, must obey the law.”\textsuperscript{187} He feared that the Court’s opinion cast doubt on the “strong presumption in favor of enforcing the law as Congress has written it.”\textsuperscript{188} In short, he said, the Court’s decision “unnecessarily and casually substitutes the chancellor’s clumsy foot for the rule of law.”\textsuperscript{189}

Although there are arguments for reading the opinion narrowly,\textsuperscript{190} Weinberger paved the way for further decisions emphasizing equitable discretion in regulatory enforcement. In \textit{Amoco Production Co. v. Village of Gambell},\textsuperscript{191} the Court went well out of its way to reinforce Weinberger’s message, despite ultimately finding no statutory violation to remedy. At issue was the application of a federal statute protecting Alaskan Native use of public lands for subsistence from the effects of offshore drilling.\textsuperscript{192} The Court later held that the statute did not apply to coastal

\begin{footnotes}
\item[186] Id. at 320.
\item[187] Id. at 323 (Stevens, J., dissenting).
\item[188] Id. at 326.
\item[189] Id. at 335.
\item[190] See Farber, supra note 127, at 525-526.
\item[191] 480 U.S. 531.
\item[192] Id. at 534.
\end{footnotes}
waters,\textsuperscript{193} but first reproved the lower court for misapplying \textit{Weinberger}.	extsuperscript{194} The opinion largely limits itself to reprising \textit{Weinberger}, but also points out that the countervailing policy in favor of oil leasing was itself endorsed by another by federal statute.\textsuperscript{195} Once again, \textit{TVA v. Hill} (this time relegated to a footnote) is distinguished as a case involving a “flat ban.”\textsuperscript{196}

The most recent case in this series, and the one that perhaps goes furthest in endorsing equitable discretion, is \textit{Winter v. NRDC}.	extsuperscript{197} Like \textit{Weinberger}, it involved Naval training exercises, this time off the West Coast to practice sonar detection of submarines.\textsuperscript{198} The sonar, however, can have a potentially harmful effect on marine mammals in the area such as dolphins and whales, perhaps causing serious injury.\textsuperscript{199} The Court accepted the government’s assertion that the exercises were “of the utmost importance to the Navy and the Nation.”\textsuperscript{200} Hence, without questioning the seriousness of the interests raised by the plaintiffs, the Court concluded that a preliminary injunction was plainly warranted because “the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy.”\textsuperscript{201}

\begin{itemize}
\item \textsuperscript{193} \textit{Id.} at 546.
\item \textsuperscript{194} \textit{Id.} at 544.
\item \textsuperscript{195} \textit{Id.} at 545.
\item \textsuperscript{196} \textit{Id.} at 543 n. 531.
\item \textsuperscript{197} 129 S. Ct. 365 (2008).
\item \textsuperscript{198} \textit{Id.} at 370.
\item \textsuperscript{199} \textit{Id.} at 371.
\item \textsuperscript{200} \textit{Id.} at 377.
\item \textsuperscript{201} \textit{Id.} at 378.
\end{itemize}
Indeed, the Court found it appropriate to add a section to the opinion volunteering the view that it would be an abuse of discretion to enter a final permanent injunction even if a statutory violation was later proved: “Given that the ultimate legal claim is that the Navy must prepare an EIS [environmental impact statement], not that it must cease sonar training, there is no basis for enjoining such training in a manner credibly alleged to pose a serious threat to national security.”

The Court viewed this as “particularly true in light of the fact that the training has been going on for 40 years with no documented episode of harm to marine mammals.” The Court also found that, if there was in fact a violation of NEPA, courts would have “many remedial tools at its disposal, including declaratory relief or an injunction geared to the preparation of an EIS rather than the Navy’s training in the interim.” Notably, that last sentence seems to be the only place in the opinion where the Court mentions any concern about the fact that the Navy could well be violating the law. In any event, the Court had no difficulty weighing any possible environmental harm against the Navy’s interest in proceeding without any constraints on the exercises: “the proper determination of where the public interest lies does not strike us as a close question.”

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202 Id. at 381.
203 Id.
204 Id.
205 Id. at 378. It is worth noting that the governing statute does not explicitly make it unlawful for a project to proceed without an impact statement. It merely provides that “all agencies of the Federal Government shall . . . (C) include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official” on the environmental impacts and possible alternatives to the action. National Environmental Policy Act § 102(1)(C), 42 U.S.C. § 4332(2)(C). For further background on Winter and a thoughtful critique of the Court’s approach, see Daniel Mach, Rules Without Reasons: the Diminishing
The language of the *Winter* opinion is troubling. The Court seems quite unconcerned by the potential on-going violation of the law, which it seems to find relatively inconsequential compared with the importance of the government program. Indeed, it seems largely wiling to simply take the government’s word that any additional restrictions on its activities would imperil national security. The Court does stop short of granting the government a permanent judicial waiver of the statute, but only just short of doing so. Some of the other cases in this section show similar signs that the Court did not take the statutory duty as seriously as it might, but *Winter* is the most nonchalant about allowing an on-going legal violation.

The difference in tone is obvious between the cases in this section and those in the preceding. *Winter* can be read to require balancing in “all or nearly all injunctions issued by federal courts,”206 whereas the cases in the previous section eschewed open-ended balancing. The intense concern in the first set of cases about ensuring compliance with the law is side-lined in the second set, where courts are willing to countenance continued violations of the law.207 Rather than worrying that courts may make policy judgments outside of their appropriate domain, as in the first set of cases, courts instead blithely step forward to independently balance the interests. The rule of law and separation of powers

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

207 For another example of such side-lining, consider this statement in another NEPA case: “It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should not issue; rather, a court must determine that an injunction should issue under the traditional four-factor test set out above.” Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010).
dominate in one set of cases but seem secondary concerns in the others. Moreover, after Weinberger, the cases in the second group first relegate to footnotes and then entirely ignore the other line of cases, even though some were supervening. Those decisions make no effort to distinguish Oakland Cannabis Buyers’ Club.

The evident tensions between these two lines of cases do not necessarily mean that they are impossible to reconcile. There are several possible distinguishing factors. First, the second set of cases all involve violations of procedural requirements in situations where the Court seemed convinced that the procedure would have made very little difference (and in one where it concluded that the procedure did not actually apply anyway). To that extent, the Court could believe that the purpose of the statute in question (achieving a substantive goal) had been respected even if the letter of the statute might not have been. Second, the cases in the second category involve conflicting federal policies (usually national security versus environment) rather than purely private interests.208 The courts were then in the position of accommodating seemingly conflicting statutory directives while limiting damage to either (something that could not be done in TVA v. Hill given the Endangered Species Act’s inflexible mandate). Third, in many of the cases in the first category, the Court seemed convinced that it had received a clear signal about priorities from Congress, leaving no room for independent balancing. The cases in the second category do not involve such signals.

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208 Goldstein emphasizes this point, although he views this as an unwarranted arrogation of legislative policymaking by the courts. Goldstein, supra note 8, at 521-522 (“Every statutory case in which the Court has addressed equitable balancing arose out of apparent conflicts between parties”).
These distinctions cohere nicely with the discussion earlier about agency discretion. There the Court also seemed influenced by its perception of the core purpose of the statute in question, by whether there were conflicting federal policies that might need to be reconciled, and on whether Congress had given a clear signal of priorities. *American Trucking, Massachusetts v. EPA,* and *TVA v. Hill* are cases, in very different domains, where these factors weighed strongly against giving the decision maker authority to engage in a balancing of interests. In all three cases, it seemed clear that the Congress had prioritized public health or environmental quality over conflicting goals. At the other end of the spectrum, *EME Homer* and *Weinberger* were cases where allowing consideration of cost would involve little or no interference with the core goal of the governing statute, there were multiple federal policies involved, and Congress had not clearly made one policy dominant. As we saw in Part II(C), the Court has generally upheld agency discretion to resolve such policy conflicts.

In effect, *Winters* and similar decisions give the courts the ability to engage in such reconciliations in cases of conflicting statutory policies. Such a reconciliation must give effect to both statutory policies, not simply prioritize one over the other. In each case, the Court has assured itself that limiting injunctive relief would not

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209 Both *American Trucking* and *Massachusetts v EPA* involved unequivocal statutory mandates for EPA to establish standard for all air pollutants based on public health. *See* American Trucking, 531 U.S. at 465; Massachusetts v EPA, 549 U.S. at 532-533. In *TVA v. Hill,* the Court said:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies “to **insure** that actions **authorized, funded, or carried out** by them do not **jeopardize** the continued existence” of an endangered species or “**result in the destruction or modification of habitat** of such species . . .”

437 U.S. at 173.
interfere with compliance with the underlying statute, while it would prevent critical interference with other congressional policies. But in cases where the governing statute lacks such flexibility, other policies must give way.

If viewed as efforts to balance conflicting legal duties, cases like *Winter* raise fewer issues of legitimacy than if they are viewed as offering a de facto license to continue violating the law for extralegal reasons. But this does not mean that these cases are entirely unproblematic. *Winter*, in particular, seems impatient of arguments that stand in the way of national security and too willing to brush aside the statutory requirement for avoiding harm to whales, rather than truly seeking an accommodation. The opinion communicates a sense that it is driven more by the Court’s view of policy priorities than by Congress’s. It would be unfortunate if lower courts took the opinion as a carte blanche for implementing their own policy views over those of Congress.

**B. The Problem of Vacatur**

A special remedial issue is presented when a court is engaged in judicial review of rulemaking. The issue is what action a court should take after it finds a rule invalid. The rule might be invalid because of some remediable defect, such as failure to provide a sufficiently clear explanation of the agency’s position. Must the court vacate the rule, or may it leave the rule in place pending a response from the agency?²¹⁰

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²¹⁰ The latter response might be considered akin to a court’s discretion to issue a declaratory judgment rather than an injunction. For discussion of that option, see Andrew Bradt, “Much to Gain and Nothing to Lose” Implications of the History of the Declaratory Judgment for the (b)(2) Class Action, 58 ARK. L. REV. 767, 784-786 (2006).
The vacatur issue has been controversial. The issue was first aired in a prominent D.C Circuit case, Checkovsky v. SEC. The case involved the suspension of two accountants by the SEC for improper professional practices. Judge Silberman argued for a remand without vacating the SEC decision, saying that he could not make a substantive decision about the validity of the SEC's action until the SEC explained its standard for professional misconduct by accountants. Judge Reynolds, sitting by designation, was prepared to affirm the SEC's decision, but said that if the case was remanded, the decision should not be vacated pending review. Judge Randolph wrote a lengthy opinion, arguing that the SEC's action was invalid because of the lack of a reasoned explanation and that the court lacked discretion to remand without vacating.

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

211 For conflicting views by commentators, see, e.g., Ronald M. Levin, "Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 DUKE L.J. 291 (2003); Brian S. Prestes, Remanding Without Vacating Agency Action, 32 SETON HALL L. REV. 108 (2001). For a more recent review of the case law and scholarship, see Benjamin W. Tettebaum, "Vacation" at the Farm: Why Courts Should not Extend "Remand Without Vacation" to Environmental Deregulation, 97 CORNELL L. REV. 406, 410-417 (2012). (One reason for courts to avoid vacatur is that a subsequent agency rule would generally lack retroactive effect, creating a regulatory gap. See Daniel H. Conrad, Filling the Gap: The Retroactive Effect of Vacating Agency Regulations, 29 PACE. ENV. L. REV. 1 (2011) (arguing that vacatur should be retroactive even when parties have relied on the now-vacated rule to legalize their conduct)).

212 23 F.3d 452 (D.C. Cir. 1994).

213 Id. at 454.

214 Id. at 496.

215 For Judge Randolph's discussion of the vacatur issue, see id. at 490-493.

which focuses on the seriousness of the defects in the rule and the disruptive consequences of vacating (and possibly later reinstating) the rule.

The argument that vacating a defective rule is mandatory rests heavily on the text of the APA. Section 706 provides that the “[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” For a textualist, there is obviously strong appeal to the argument that the use of “shall” rather than “may” indicates that the action is mandatory.

Non-textualists respond that Congress apparently had given no thought to the matter, that review of agency actions before the APA had involved judicial discretion, and that the statute must be construed in light of the strong tradition of equitable discretion discussed in Hecht and other cases.

Some textual counter-arguments might also be available. Section 706 does instruct courts to have “due regard for the rule of prejudicial error,” which seems to suggest the existence of discretion. Paying “due regard” to something is hardly significant if one has no discretion anyway. Perhaps due regard means that, when the prejudicial effect is unclear, the court can request clarification from the agency. The “rule of prejudicial error” is a vague phrase that could include remanding for

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185 (3d Cir. 2014)(“general remedy for failure to adequately respond to rulemaking comments is not complete vacatur of an agency rule, but rather remand for additional consideration”).

217 988 F.2d 146 (D.C. Cir. 1992).

218 Id. at 150-151. The test was first announced in International Union, UMW v. Federal Mine Safety and Health Administration, 920 F.2d 960, 966-967 (D.C. Cir. 1990).

219 See, e.g., Prestes, supra note 211, at 129-136.


221 Levin, supra note 211, at 309-315.
further explanation rather than vacating, where it is possible that the lack of a sufficient explanation was not “prejudicial” because a stronger explanation was in fact available. Finally, note that section 706 authorizes the court to set aside not only “actions” but also “conclusions” and “findings.” This language might suggest that the court has discretion to leave the action intact and merely vacate part of the explanation while awaiting further clarification. Even if these arguments are not considered fully persuasive, they might introduce enough textual ambiguity to allow a textualist to turn to the canon favoring equitable discretion.

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

These arguments must be considered in light of the developments in administrative law since the APA was passed. For instance, the term “arbitrary and capricious” probably meant something like “utterly irrational” at the time, but now encompasses probing inquiry into the details of the agency’s justification. Congress may have assumed that any agency action failing the “arbitrary and capricious” test

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222 For discussion of the relevant policies, see id. at 376-385.

223 See Prestes, supra note 211, at 124-125.
would be irremediably flawed, but that is no longer true. Unless the Supreme Court is prepared to reconsider the expansion of the test in *Overton Park* and *State Farm*, there is a mismatch between the legal test and the sanction of automatic vacatur.

Putting aside the textual issue, the policy arguments against “remand without vacatur” are not insubstantial. But they are exactly the same policy arguments that could be made against the Court’s rulings in *Weinberger*, *Amoco*, and *Winter*. The Court has not found those arguments persuasive elsewhere. Notably, even those who oppose “remand without vacatur” are open to alternative routes to achieving the same result such as allowing the court to stay the mandate in the case, leaving the order vacating the agency action hanging in limbo. Thus, opposition to “remand without vacatur” seems to rest on the formal distinction between issuing a vacation order and issuing the mandate to make the order effective.

Although this point seems to have been previously overlooked, the Supreme Court’s ruling in *Winter* may have more than analogical significance here. *Winter* involved violations of the National Environmental Policy Act (NEPA). But NEPA does not contain a provision authorizing judicial review, so cases must be brought under the APA. Thus, the authority to issue an injunction must have derived from

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226 For instance, in the opinion where he protests vehemently against remand without vacatur, Judge Randolph opined that the SEC could apply for a stay of the court’s mandate, which he considered the “usual and appropriate method of handling such matters.” *Id.* at 493.

227 See, e.g., *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 375 (1989) (“In determining the proper standard of review, we look to § 10(e) of the Administrative Procedure Act (APA), 5 U.S.C. § 706, which empowers federal courts to “hold unlawful and set aside agency action, findings, and conclusions” if they fail to conform with any of six specified standards”); *Friends of Tims Ford v.*
section 706, the same section involved in the vacatur cases. Although the APA point was not argued, if the “shall set aside” language is truly mandatory, *Winter* was wrong to endorse a permanent injunction even if the Navy had violated its duty to issue an impact statement. Under the textualist view, the Court would have had no discretion to do anything other than “set aside” the Navy’s decision to continue the training exercises in those cases without an impact statement. The Court certainly seems to have assumed that the usual discretion over whether to issue an injunction applied to review of actions under the APA. It is somewhat hard to believe that, if someone had pointed out the use of the word “shall” in section 706 to the *Winter* Court, the Court would have changed its mind and permitted the district court to issue an order it considered to be a grave risk to national security.228

In short, the use of the word “shall” in the regulatory text does provide an argument for limiting judicial discretion. But it seems insufficient, taken alone, to justify a departure from the general principle of equitable discretion in the absence of any other evidence of congressional intent.

In essence, after the remand without vacatur, a court is left in the same position as it would be if faced with a rulemaking petition (as in the cases discussed in Part II(A)). Remand without vacatur imposes a duty on the agency to engage in further rulemaking. But the agency has no strong incentive to do so, since its

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228 Perhaps, if the Court were otherwise to reject remand without vacatur on textual grounds, it would point to a conflict between the APA’s policy and the contrary policy in favor of national security requiring the exercises to continue as a basis for exercising judicial discretion.
original rule remains in effect until it gets around to further consideration. If the agency does balk, the court finds itself in the same position it is when it is asked to order an agency to conduct a new rulemaking. It may be condemning itself to long delays and the need for repeated efforts to force the agency’s hand, only to result in a final rule that looks much the same as the initial rule. Thus, in the remand without vacatur case, the court might be well advised to set a deadline after which the rule will be vacated absent a response from the agency.

The arguments for mandatory vacatur are ultimately unconvincing. They take formalism to extremes by staking everything on a single word in the governing statute and on the difference in nomenclature between issuing a vacatur order and issuing the court’s mandate. Perhaps it is unwise for courts to remand without vacatur in many cases. Arguably, if a flaw in a regulation is not severe enough to justify vacating a rule it should not be considered important enough to invalidate the rule. But a court’s authority to vacate without remanding seems on balance clear.

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

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This concludes the exploration of the case law regarding judicial and agency discretion in Parts II and III. This exploration has been somewhat protracted for several reasons. We have had to cover several different arenas where discretion is exercised, and understanding the cases often requires a discussion of complex statutory background. Moreover, the Justices have had some difficulty articulating their approach, dealing with precedent, and agreeing on outcomes. This has required a detailed dive into the case law. We are now in a position, however, to put the pieces of the puzzle together in Part IV.

IV. Mapping the Scope of Discretion to Consider Costs

This section has several purposes. The first two subsections pursue the doctrinal questions raised earlier in the article. Part A seeks to integrate the principles governing courts with those governing agencies, in terms of discretion to take costs into consideration. Those principles align neatly. Part B turns to the opposite side of discretion: the decision maker’s ability to leave costs out of the analysis. Here a disparity exists, with agencies having more discretion than courts. Part B argues for equalizing the powers of courts and agencies by recognizing similar discretion in both cases. Finally, Part C considers whether deeper insights can be gained from the similarities between agency and judicial discretion. Because we traditionally have thought of the two branches of government in such different terms, juxtaposing them may generate new ways of thinking about each one.

A. Discretion to Consider Costs: Toward a Doctrinal Synthesis
The Introduction laid down some markers about the structure of doctrine, promising that the cases were governed by three principles. It is time to make good on these markers.

The first principle is simply that judicial and agency policy views are subservient to those of Congress. The *Chevron* test indicates that an agency has no discretion about consideration of costs when the statute is clear. That principle is amply reaffirmed by *Whitman* in the context of regulatory standards and by *Massachusetts v. EPA* in the context of the decision to begin a rulemaking. On the judicial side, *TVA v. Hill* demonstrates that Congress has the final word about consideration of costs, provided it speaks clearly enough.\(^{230}\)

The second principle is that both judges and administrators presumptively have discretion to consider costs in implementing statutes, unless doing so is clearly precluded by the statute. Discretion must, however, be exercised with respect for congressional purpose. Even when a statute does allow courts to consideration of costs in deciding whether to issue an injunction, all of the decisions from *Hecht* during World War II to *Winter* in this century affirm that costs are relevant only in devising a strategy for meeting the statute’s goals, not as a justification for overriding those goals.\(^{231}\) The Court is quite explicit about its clear statement rule---

\(^{230}\) The *TVA v. Hill* opinion raises doubt that the Court would have halted construction of the dam if it had been free to balance the equities. Its analysis opens with the sentence: “It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million.” 437 U.S. at 172. Instead, the Court emphasizes strongly that it’s hands are simply tied. *Id.* at 194-197.

\(^{231}\) Even in *Winter*, the case that perhaps devotes the least attention to this issue, the Court was careful to state that “[a] court concluding that the Navy is required to prepare an EIS has many tools at its disposal, including declaratory relief or an injunction tailored to the preparation of an EIS rather than the Navy’s training in the interim.” 129 S. Ct. at 381. The Court also seemed to think that
discretion to consider costs exists unless Congress has clearly spoken otherwise.\textsuperscript{232} The Court has not announced such a clear statement rule in the agency context, but \textit{Chevron} implies that an agency has discretion in the absence of a clear indication of contrary congressional intent. Thus, the bottom line is much the same for courts and for agencies.

The final principle is that discretion is particularly significant when a statute embodies conflicting policies or when more than one statute bears on the decision. The Court clearly relied on this principle in \textit{Home Builders} (in the setting of multiple statutes) and in \textit{Chevron} itself (in the case of conflicting policies within the same statute). \textit{EME Homer} explicitly relies on this principle in terms of agency discretion to consider costs. In contrast, the Court has not explicitly relied on this argument in the setting of injunctive relief. Yet is it is notable that cases denying statutory injunctions have involved a conflict between an agency's own statutory mission and environmental restrictions stemming from a separate statute.\textsuperscript{233} The Court has not questioned that the environmental statute ultimately must prevail, but the tension

\textsuperscript{232} For instance, the Court has repeatedly quoted statements that judges retain their full equitable discretion "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity." \textit{Amoco}, 480 U.S. at 542, quoting \textit{Weinberger}, 456 U.S. at 313. Both cases are in turn citing \textit{Porter v. Warner Holding Co.}, 328 U.S. 395, 398 (1946), where the language was used in support of the availability of broad equitable relief. \textit{Porter} in turn relied on a statement in a previous case that "[t]he great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." \textit{Id.} (quoting \textit{Brown v. Swann}, 10 Pet. 497, 503 (1836)), where the statement was used to uphold a court's power to order discovery despite a seemingly limiting statute. It seems plain that the original language in \textit{Porter} referred to statutes that might bar certain kinds of equitable relief, not to statutes that might require it.

\textsuperscript{233} In \textit{Weinberger} and \textit{Winter}, the conflict was between an environmental mandate and the military's national security mission. In \textit{Amoco}, the conflict was internal to the statute, between the goal of exploiting offshore oil reserves and that of respecting the interests of Alaskan Natives. See 480 U.S. at 545-546.
between these congressional purposes offers support for allowing some flexibility in timing and method for coming into compliance.

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

B. Discretion to Limit Consideration of Costs

As shown in Part A above, similar standards are used to determine whether a court or an agency have discretion to consider costs. But when the statute is unclear, discretion to limit consideration of costs is quite different. Chevron does not have a built-in bias in favor of any particular policy outcome, so an agency is free to ignore costs whenever that is a reasonable interpretation of the statutory language. But under eBay and the Weinberger line of cases, unless the statute clearly precludes consideration of costs, courts must do so in determining whether to issue an injunction. This is a peculiar asymmetry. Perhaps the Court will realign these different standards in its review of White Stallion, but at least in the meantime, we seem to be left with a puzzle: Why should it be so much more important to preserve the power to consider costs in the judicial setting as opposed to the agency setting?
It could be argued that allowing courts to read ambiguous statutes to preclude or limit consideration of costs should be avoided because judicial balancing at the injunction stage is particularly valuable. But the reasons are obscure why judicial consideration of costs is more valuable than agency consideration. Perhaps one might argue that such balancing is particularly valuable because it allows tailoring of remedies to the individual circumstances of each case, which Congress could not very well anticipate in advance. On the other hand, in the regulatory setting, the agency is inherently making determinations across a broad range of cases, so it is less likely that there are unique circumstances never considered by Congress. In addition, balancing by courts might be more desirable because the independent judiciary is less likely to be swayed by bias or favoritism. In contrast, agencies might be prone to more political pressure in how they consider costs.234

These arguments rest on the greater individuation of injunctions and the greater independence of courts. The difficulty is that both of these characteristics can equally well support contrary arguments. The case-by-case nature of judicial discretion increases the likelihood that similar cases will be decided differently, as well as creating uncertainty and an opening for decisions based on irrelevant factors. An agency rule at least treats everyone subject to it alike. As to judicial independence, that too cuts both ways, since one might argue that it is better for balancing of costs and benefits to be performed by actors who are politically

234 That argument, however, runs into a fairly obvious problem. If an agency has enough political gumption to rule out costs entirely, it presumably would able to resist opportuning by interested parties if it actually did consider costs.
accountable. So the same factors that arguably counsel entrenching a judicial duty to consider costs (subject to a contrary clear statement by Congress), as opposed to an agency duty to do so, seem to support a contrary argument just as strongly.

The Court in eBay did not, in any event, attempt any such justification. It was content to rely on what it supposed to be a firmly established judicial practice that Congress presumably accepts unless it says otherwise. That history may not be as clear as the Court supposed. But in any event, the same history might also be viewed as establishing that, in the absence of statutory restrictions, courts have exercised the power to determine for themselves the rules to govern injunctions (which might in appropriate cases modify the role of costs). In other words, the same history could support an inference that the rules governing the issuance of injunctions are federal common law, subject to modification by the courts rather than frozen in stone in statutory cases.

In the end, if we assume that an agency can sometimes justifiably conclude that ignoring costs in a particular regulatory setting is the better course—better in terms of statutory purposes and in terms of its sense of society's values—it is hard to see why a court should not be able to make the same determination. The only contrary argument seems to be greater diffidence about the ability of judges to reflect societal values. Yet, distrust of judicial value judgment is equally an argument for precluding case-by-case balancing. In short, there seems little reason to distinguish agencies and courts in this setting.

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235 See Goldstein, supra note 8, at 490-505.
If we are to treat agencies and courts the same, we have two choices about how to achieve equality. We might, like the dissenting judge in *White Stallion*, say that it is never reasonable (under *Chevron* step II) for an agency to decide that an statute precludes consideration of cost. Conceivably, the Supreme Court will adopt that view of the case, but it seems such a limitation on agency discretion seems more likely to reflect judges’ views of social policy rather than any policy judgment that can be attributed to the legislature. As cases like *Massachusetts v. EPA, Whitman,* and *TVA v. Hill* show, Congress does at times preclude consideration of costs in very important regulatory settings. Moreover, if that approach is right, *Home Builders* would seem to be wrong – the Court clearly thought the statutory situation was unclear, and if so it should have construed the statutes to require EPA to consider harm to biodiversity in its decisions.

The other option is to hold that *eBay* is wrong, or at least too rigid, in precluding consideration of whether balancing is the best approach to injunctive remedies for statutory violations. Commentators have persuasively argued that the Court was actually misreading a more nuanced tradition, one that gave defendants much less than an absolute right for their compliance costs to be balanced equally with the plaintiff’s rights. The disparity between the requirements for agencies

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

Notably, when balance-of-hardships concerns enter through the undue-hardship defense, the right violator bears a considerable burden of production from the start, a situation that contrasts with that under an *eBay* test unsupplemented by any presumptions in favor of the right holder. The traditional undue-hardship defense acts not as a no-injunction default but instead as a form of safety valve, enabling courts to deny injunctive relief under circumstances where such relief appears very unlikely to serve the public interest or, perhaps more specifically, a goal of maximizing net private interests. Even this safety valve can be closed. A presumption of irreparable injury can be supplemented by a rule—or at least a strong further presumption—making the undue-hardship defense unavailable where
and courts may help bolster that argument. Taking costs into account may often be the best approach to deciding when to enjoin a statutory violation, but even when Congress has not clearly precluded this approach, the courts should still be free to hold to the contrary.

It might seem that it’s only sensible to take the cost of compliance into account when issuing an injunction. But there are several reasons why a court might reach the opposite solution. One is simply that, although the statute is not crystal clear, the court might think that on balance this interpretation is stronger simply based on the normal tools of statutory interpretation. Simply because the statute is ambiguous does not mean that any interpretation is as good as any other. Second, although a court might think that, whatever the statute itself might have to say, judges should accept a contemporary consensus that statutory goal has priority over costs. For instance, even if a civil rights statute did not itself eliminate compliance cost as a factor, a court might conclude current norms require immediate cessation of civil rights violations regardless of cost. Or the court might think that willful violations, at least, should uniformly be met with injunctions. Such rulings might be less a matter of statutory interpretation than of evolution in the

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the rights violation has been willful. For example, undue hardship generally is not a ground to decline to order the removal of an encroaching structure from land if the encroachment is not the result of a reasonable accident. An owner of property backed by such a rule can truly be said to have something close to absolute dominion over the property’s use. At least against willful infringers, courts will back the owner’s right to extract whatever payment it can for permission to use the property.

Gergen et al., supra note 125, at 227-228.

237 Besides the reasons discussed in the text, another possible reason is that in some category of cases, it might be unusually difficult to ascertain that cost or to balance it against the statutory goals or the interests of third parties. As a variant on that rationale, the court might believe that it would be difficult to ascertain costs reliably before defendants attempted to comply and that a contempt proceeding would be a more appropriate time to take hardship to the defendant into account.
judicially created standards for equitable remedies, a type of federal common law. Finally, a court might conclude that the regulatory process had provided an avenue for consideration of costs, which judges should not supplement once a violation was found. This rationale could be attributed to Congress as a matter of statutory interpretation or viewed as a common law development in equitable remedies. In any given case, these arguments might or might not be persuasive. But there is no reason why courts should be stripped of authority to consider them.

C. Rethinking the Sources of Discretion

There is an essential similarity between agency and administrative discretion, despite the very different institutional settings. After all, “a remedial decree is the judicial analogue to administrative or executive discretion – the implementation of a general command in a particular setting.” This is not to say that the difference in institutional settings is insignificant. Clearly, the greater expertise and political accountability of agencies shapes our view about the legitimate exercise of agency discretion, while judicial independence (and their corresponding lack of political accountability) shapes our view of judicial discretion. Nevertheless, we may gain a better understanding of the roots of discretion by understanding the similarities as well as the differences.

The Court seems to have thought about agency and judicial discretion in quite different terms. Chevron grounds agency discretion in enforcing statutes in two ways – as a consequence of an implicit delegation from Congress and as a

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consequence of the political accountability of agencies. These justifications are not only different but in some tension, since one portrays agencies as agents of Congress and the other as agents of the President. The Court seems to have given less thought to the reasons why courts should have discretion in enforcing statutes. Perhaps this is not surprising: As Judge Fletcher has observed, “[d]iscretion occupies an oddly neglected place in Anglo-American legal thought.”239 In part, the court’s theory seems to be that such discretion is an inherent part of the courts’ equity powers, which remains unless Congress affirmatively takes it away. In part, the theory seems to be the benefits of individuation of remedies, but as we have seen, that argument rests on shaky foundations.

The difference in theories might inspire some deeper thinking on both issues. On the agency side, we can imagine a very different argument for discretion: that discretion is an inherent part of the administrative role.240 Administrators have had to interpret statutes and exercise discretion since administrators and statutes have existed. We might even see this discretion as having some roots in the grant of the executive power, as Justice Scalia has sometimes hinted.241 Thus, an argument for agency discretion could be made along much the same lines as that the Court currently uses to defend judicial discretion in enforcement. As Judge Fletcher observed over thirty years ago, “there comes a point when certain government tasks,” whether undertaken by the political branches or the judiciary, simply cannot

239 Id. at 641.

240 For a useful typology of situations involving discretion, see Martin Shapiro, Administrative Discretion: The Next State, 91 YALE L.J. 1487 (1982).

be performed effectively without a substantial amount of discretion.”

Because of this similarity in the roots of discretion, experience with the exercise of judicial discretion may have more relevance to agencies than meets in the eye.

On the judicial side, there may also be a stimulus for new thinking. We may be used to thinking of injunctions as a private law remedy, but perhaps judges have been too facile in applying this vision in the public law setting. *Chevron* suggests some interesting questions about judicial discretion: Are there reasons to think that Congress meant to delegate to courts the power to allow statutory violations to continue at least during an interim period? Did Congress implicitly delegate to courts the power to set appropriate standards for injunctions rather than requiring them to stick with a fixed test like *eBay*?

Perhaps it is indeed reasonable to think that Congress meant to allow a little play in the joints during the enforcement process, whether the enforcement decision is made by a prosecutor, a court, or a jury. But if so, the argument should be made and not merely assumed. The same is true for any argument that the judiciary lacks power to redefine the appropriate scope of discretion to ignore costs or give them less weight. And given that courts are not politically accountable, is it troublesome for them to be engaging in balancing of often conflicting values (protecting whales versus detecting submarines)? Again, judicial independence might mean that courts can more reliably conduct such balancing than agencies, but the argument at least would have to be made and supported. Such an argument might well identify

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242 Fletcher, *supra* note 238, at 641.
particular cases as especially appropriate, perhaps based on differences in political dynamics in different settings.

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

V. Conclusion

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

Efforts to synthesize confusing areas of legal doctrine have a long history in legal scholarship. But since such a synthesis is largely supportive of existing case law by its nature, it is not out of place to consider the benefits of such an activity. There is a certain satisfaction in bringing order to unruly bodies of case law, even greater when doing so allows a unified theory for more than one area of law. Clarity is an underrated virtue, but more than aesthetics is at stake.
Clear principles provide less of an invitation to error and greater predictability. Moreover, articulating clear principles enhances legitimacy by making the bases for decisions more understandable to stakeholders and the public. Furthermore, because the applicable principles provide a better understanding of how discretion meshes with statutory purposes, they may decrease the risk that one side of the equation or the other will be overemphasized in a particular case. More importantly, clarifying the applicable principles allows disputes to focus more productively on how to apply the principles in particular cases. That may itself be a difficult and contentious undertaking, but at least providing a framework for the analysis should be helpful.

Although much of the Article is devoted to harmonizing the case law, it does have critical bite as well. The symmetry between the principles of judicial discretion and agency discretion also raises a red flag over the one area of difference – the unwillingness of the eBay Court to give courts the same discretion that agencies have had to cabin the consideration of costs when statutes are unclear. It is difficult to see why an agency should have the ability to read an ambiguous statute as limiting the role of costs but a court should not. Perhaps the Court’s review of White Stallion will narrow this gap – but if so, it may do so in the wrong direction, limiting agency discretion over the weight to give to costs, just as it is done to courts in eBay.

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

Although the basic principles governing judicial discretion and agency discretion may be straightforward, their application is not necessarily self-evident. Ultimately, an act of judgment is involved in applying the principles, and reasonable judges (not to mention unreasonable ones) will sometimes disagree. These disagreements might be more fruitful, however, if both sides understood that the dispute is over the application of shared principles, not over the principles themselves.