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OF TRUTH, PRAGMATISM, AND SOUR GRAPES: THE SECOND CIRCUIT’S DECISION IN SEC v.

CITIGROUP GLOBAL MARKETS

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ABSTRACT:

In June, 2014, the Court of Appeals for the Second Circuit vacated and remanded a decision by district court Judge Jed Rakoff in which Judge Rakoff refused to invoke the court’s equitable power and approve a settlement between the SEC and Citigroup Global Markets. The case was SEC v. Citigroup Global Markets. The panel’s central holding has the effect of giving the SEC primacy over courts in determining when consent decrees, and thus injunctive relief, are appropriate. In this way, the Second Circuit has relegated district courts to mere rubber stamps where the SEC seeks to invoke the equitable powers of courts.

Drawing on decades of persuasive and controlling precedent, I show that the propriety of injunctive relief is the domain of the courts and that courts have long wielded their equitable powers to both craft and withhold bespoke orders fitting the particular circumstances before them. Importantly, and contrary to the decision of the Second Circuit, this note shows that agencies are not entitled to injunctions as of right and that the degree of deference to an agency is determined by the strength of their case. Thus, courts have a duty and a right to inquire as to the factual underpinnings of the proposed settlement. Such factual review was eschewed by the Second Circuit. In this way, the decision in SEC v. Citigroup Global Markets, not only departs substantially from precedent, but in doing so violates the Separation of Powers Doctrine by vesting a core function of the judiciary in an executive agency.
INTRODUCTION

In SEC v. Citigroup Global Markets, the Second Circuit vacated a decision by District Court Judge Jed Rakoff that rejected a consent judgment between the SEC and Citi. In doing so, the Second Circuit adopted a new legal standard that improperly and excessively curtails the discretion of district courts in evaluating consent judgments with government agencies. While the court boldly states that courts are not mere “rubber stamps” to the wishes of the enforcement agencies, on close analysis provided here it is hard to see how courts will be anything but fully cooperative seconders of government settlements in light of SEC v. Citigroup Global Markets, in which the court of appeals both contradicts precedent and violates the doctrine of Separation of Powers.

In the run up to the financial crisis, Citi sold long positions in negatively forecasted mortgage-backed assets to investors, in a product known as “Class V Funding III” (“the fund”). Citi claimed that the assets comprising the fund were selected by an independent third party, when in fact they were selected by Citi itself in an effort to unload poorly projected assets. Further, and perhaps most egregiously, Citi took short positions in the same assets it sold long to

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1 See generally SEC v. Citigroup Global Mkts., Inc., 752 F.3d 285 (2d Cir. 2014) [hereinafter Citigroup IV]; see also SEC v. Citigroup Global Mkts. Inc., 827 F. Supp. 2d 328, 330 (S.D.N.Y. 2011) [hereinafter Citigroup I] (denying the proposed consent decree at the district court level). For the sake of brevity, Citi, Inc. will be referred to as Citi, unless referring to a lawsuit.

2 See Citigroup IV, 752 F.3d at 294 (“To be sure, when the district judge is presented with a proposed consent judgment, he is not merely a ‘rubber stamp.’” (quoting SEC v. Levine, 881 F.2d 1165, 1181 (2d Cir. 1989)).

3 Citigroup I, 827 F. Supp. 2d at 329.

4 Id.
investors as part of the fund. As a result of this fraud, investors lost over $700 million and Citi realized over $160 million in profits.

The SEC filed a complaint against Citi and a parallel action against Citi trader, Brian Stoker. While the complaint against Citi alleged the elements of fraud, the complaint sought to proceed under a lesser degree of mental culpability (or sciente), negligence. At the same time, the SEC’s action against Stoker, for the same transaction, alleged a higher degree of scienter: fraud. Concurrently, the SEC filed a pre-negotiated consent judgment between the SEC and Citi. The terms of the consent judgment called for disgorgement of Citi’s profits from “Class V Funding III” of $160 million, plus $30 million in interest and a civil penalty of $95 million. Additionally, Citi was required to institute certain internal control measures to prevent like occurrences in the future. Finally, Citi was enjoined from future violations of the Securities Act. Consistent with SEC enforcement practices, the consent judgment contained a clause that

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5 See id. (“Citi created a billion-dollar fund…that allowed it to dump some dubious assets on misinformed investors…Citi had arranged to include in the portfolio a substantial percentage of negatively projected assets and had then taken a short position in those very assets it had helped select.”).
6 See id. (“Although [the allegations] would appear tantamount to an allegation of knowing and fraudulent intent . . . the SEC, for reasons of its own, chose to charge Citi only with negligence . . .”). Indeed, the SEC itself referred to the transaction as “a substantial fraud.”
7 Id. at 330.
8 See id. (“Citi knew it would be difficult to place the liabilities of [the Fund] if it disclosed to investors its intention to use the vehicle to short a hand-picked set of [poorly rated assets]…Although this would appear to be tantamount to an allegation of knowing and fraudulent intent…the SEC, for reasons of its own, chose to charge Citi only with negligence . . .”).
9 Id.
10 Id.
11 See id. (describing the punitive measures contained in the consent decree).
12 Id.
allowed Citi to “neither admit nor deny” the charges, and was silent as to how the dollar amounts negotiated were reached.\textsuperscript{13}

Judge Rakoff refused to invoke the court’s injunctive power to approve the settlement.\textsuperscript{14} He openly criticized the consent judgment as containing so few stipulations of material fact that he could not assess the settlement to determine if it was “fair, reasonable, adequate, and in the public interest.”\textsuperscript{15} In light of this objection, Judge Rakoff declined to enter the consent decree and set a date for trial.\textsuperscript{16}

Both the SEC and Citi took interlocutory appeals.\textsuperscript{17} The Second Circuit ultimately held that Judge Rakoff abused his discretion by refusing a settlement between a public agency and a defendant.\textsuperscript{18} The Appeals Court reasoned that the District Court had no authority to demand facts by which to assess a settlement and instead should focus its inquiry on whether the settlement is “procedurally proper.”\textsuperscript{19} “Trials are about truth, settlements are about pragmatism,” stated the Second Circuit.\textsuperscript{20} Importantly, the Second Circuit held that the SEC is the sole arbiter of what is

\textsuperscript{13} See Citigroup IV, 752 F.3d 285, 290 (2d Cir. 2014) (stating that Judge Rakoff questioned the parties on how the dollar amounts were reached).

\textsuperscript{14} See Citigroup I, 827 F. Supp. 2d at 332 (stating public interest guides the assessment of administrative settlements and concluding that the settlement was “neither fair, nor reasonable, nor adequate, nor in the public interest.”).

\textsuperscript{15} See id. (“Most fundamentally [the Consent Judgment cannot be approved] because it does not provide the Court with sufficient evidentiary basis to know whether the requested relief is justified under any of these standards.”).

\textsuperscript{16} Id. at 335.

\textsuperscript{17} In an initial appellate decision, the Second Circuit granted a stay sought by both Citi and the SEC. Additionally, the panel withheld ruling on the merits, and appointed counsel to represent the district court’s position so that the merits panel would have the benefits of adversarial briefing. See U.S. SEC v. Citigroup Global Mkts. Inc., 673 F.3d 158 (2d Cir. 2012).

\textsuperscript{18} Citigroup IV, 752 F.3d at 291.

\textsuperscript{19} See id. (“The primary focus of the inquiry, however, should be on ensuring the consent decree is procedurally proper, using objective measures similar to the factors set out above, taking care not to infringe on the SEC’s discretionary authority to settle on a particular set of terms.”).

\textsuperscript{20} Id. at 295.
or is not in the public interest. The Court of Appeals vacated and remanded Judge Rakoff’s decision. With the menu so fixed, Judge Rakoff was left with “nothing but sour grapes” and thus approved the consent judgment.

Section I of this note will provide critical contextual information on Citigroup. Section II will discuss the Second Circuit’s decision and reasoning in SEC v. Citigroup Global Markets in detail. Section III explores the relationship between executive agencies, Article III courts, and Congress where consent decrees are concerned in order to motivate the conversation in Section IV. Ultimately, Section IV argues that Citigroup was wrongly decided. Specifically, I argue the decision is contradictory to longstanding precedent and violates the doctrine of the Separation of Powers.

Diligence: Background and Context

SEC v. Citigroup Global Markets did not occur in a vacuum. A proper understanding of events and circumstances that preceded the suit is critical to a full understanding of the opinion. While a full treatment of the 2008 Financial Crisis is beyond the scope of this note, two important background areas of will be explored as they illuminate the decision in Citigroup: the SEC’s use of “neither admit nor deny” settlements and the facts underlying Citigroup.

A. “Hallowed by history but not by reason”24: The SEC’s Use of “neither admit nor deny settlements”

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21 Id. at 296 (“The job of determining whether the proposed SEC consent decree best serves the public interest, however, rests squarely with the SEC, and its decision merits significant deference.”).
22 Id. at 298.
24 See SEC v. Citigroup Global Mkts. Inc., 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011) (“[T]he S.E.C.’s long-standing policy—hallowed by history, but not by reason—of allowing defendants to enter into Consent Judgments without admitting or denying the underlying allegations,
The SEC is the principal securities market conduct regulator in the United States. In fulfilling its mandate, the SEC has a large toolbox of enforcement mechanisms. Generally speaking, the SEC may bring a civil action in Federal Court or may bring an administrative action before an administrative law judge. Irrespective of the forum in which an action is initiated, over ninety percent of actions initiated by the SEC are resolved via settlement. Commonly, these settlements allow a defendant to “neither admit nor deny” wrongdoing. “Neither-admit-nor-denial settlements allow a defendant to settle an action without having to admit to any wrongdoing, while at the same time barring that defendant from denying having engaged in unlawful conduct. “Neither-admit-nor-denial” settlements, while not the only enforcement tool available to the SEC, are common practice for the SEC.

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28 See Danné L. Johnson, SEC Settlement: Agency Self-Interest or Public Interest, 12 FORDHAM J. CORP. & FIN. L. 627, 645 (2007) (discussing the remedies available to the SEC that do not require judicial approval, including cease-and-desist orders, suspension/revocation of SEC registration, censure, bars from future association broker-dealer or investment adviser, pecuniary fines, and disgorgement, among others).


31 Since 2011, the SEC has made much use of Deferred Prosecution Agreements (DPAs), in which the SEC agrees to withhold prosecution in exchange for certain concessions, usually including the cessation of the activities giving rise to the action. DPAs do not require approval or adjudication by a court. See Press Release, SEC, Tenaris S.A. to Pay $5.4 Million in SEC's First-
The SEC justifies its widespread use of “neither-admit-nor-deny” settlements on the grounds that they are more efficient than litigation from both the perspective of the SEC and the defendant. The settlements are further justified on the grounds that requiring a firm to admit engaging in unlawful conduct could estop the firm from denying such conduct in later actions, thus exposing the firm to an unknown amount of future damages in an unknown number of future actions. Courts have generally approved such settlements in a wide variety of contexts, not limited to securities violations.

However, the practice of allowing “neither-admit-nor-deny” settlements is not without its critics. Some observers lament that the SEC’s enforcement mechanisms lack potency and credibility. More damning is the criticism that the SEC is more concerned with fanfare and press conferences than achieving just results. In particular, a fundamental criticism


32 *See* Buell, *supra* note 28, at 89 (“The SEC very rarely tries a case against a firm, and the ‘neither admit nor deny’ settlement is a fixture in SEC practice.”).

33 *See id.* at 6 (stating that full adjudications in every case would lead to less enforcement actions).

34 *See id.* (“The reality is that many companies likely would refuse to settle cases if they were required to affirmatively admit unlawful conduct or facts related to that conduct.”); see also James B. Stewart, *S.E.C. Has a Message for Firms Not Used to Admitting Guilt*, N.Y. TIMES, June 22, 2013, http://www.nytimes.com/2013/06/22/business/secs-new-chief-promises-tougher-line-on-cases.html (“If they admit culpability to the S.E.C., plaintiffs will cite that in their cases, and that could mean hundred of millions or billions in damages”).

35 Khuzami, *supra* note 29, at 7-8 (“In enforcing the securities, antitrust, environmental, consumer protection, public health, and civil rights laws, federal courts have entered consent judgments in actions resolved by federal agencies.”).

36 *See* Buell, *supra* note 28, at 89 (“The replacement of a private citizen as plaintiff with the federal securities cop adds some gravity to the proceedings, but the routine practice of concluding cases without any finding or admission of wrongdoing by the firm may substantially blunt that effect.”).

37 *See id.* at 97 (“That leaves the problem of how to make the SEC’s litigation threat credible and sufficiently potent. Firms must believe that nonsettlement will lead to trial, that trial is likely to lead to loss, and that loss is likely to mean imposition of stronger sanctions.”).

38 *See id.* (“The SEC should move away from its current enforcement culture aiming toward a press conference at which the agency announced another large payment from a corporation.”).
of “neither-admit-nor-deny” settlements is that enforcement carried out on the public’s behalf should do more than fill government coffers. Professor Samuel Buell states that “it is practically an abdication of responsibility for a public enforcer to resolve almost all its cases with no conclusion by the legal process as to whether wrongdoing occurred.”

It is worth reflecting on the impact of a settlement where the defendant neither admits nor denies wrongdoing has on the overall objectives of the securities laws. Investor confidence is essential to well-functioning markets, and indeed promoting investor confidence was one impetus for the Securities Exchange Act of 1934. Central to investor confidence is a belief that enforcement actions will effectively deter future wrongdoing by market participants. At this juncture, it is difficult to discern how the deterrence and signaling functions of SEC enforcement are fulfilled where “neither-admit-nor-deny” settlements are regarded as a mere cost of doing business. Some on the bench have expressed misgivings about this type of settlement as well. Indeed, in a suit against Bank of America, Judge Rakoff called neither-admit-nor-deny settlements “half-baked justice at best.”

39 See id. at 98 (“Regulatory enforcement is pursued on behalf of the public, who for good reasons would very much like to be told whether the firm is a lawbreaker and, if so, exactly how and to what extent. The public would much prefer to learn this from an admission or a careful adjudicatory process than from the mere allegation of it in a federal agency’s complaint that, beyond at most a motion to dismiss, is never subject to the scrutiny of the legal process.”). 40 Id. Professor Buell later retreats from this position somewhat, but it is nonetheless illustrative of a common criticism of no-admit-no-deny settlements. 41 See S. Rep. No. 1455, 73d Cong., 2d Sess. 284 (1934) (discussing investor confidence as essential to performance of markets and fluctuations in asset prices, divorced from fundamentals); see also James D. Cox et al., SEC Enforcement Heuristics: An Empirical Inquiry, 53 DUKE L.J. 737, 759 (2003) (describing deterrence of financial fraud as a mission of SEC). 42 Stewart, supra note 34. 43 See SEC v. Goldman Sachs & Co., 790 F. Supp. 2d 147, 151 (S.D.N.Y. 2011). 44 See SEC v. Bank of Am. Corp., Nos. 09 Civ. 6829, 10 Civ. 0215, 2010 WL 624581, at *5 (S.D.N.Y. Feb. 22, 2010) (“While better than nothing, [the consent decree] is half-baked justice at best.”). There, the SEC alleged that Bank of America lied to its shareholders in a proxy statement. In order to achieve approval of Bank of America’s $50 billion acquisition of Merrill Lynch, BoA’s proxy statement stated that Merrill had agreed to withhold executive bonuses in

The story of Citigroup’s ascension to the Second Circuit reads like a Shakespearean drama: proceeding in different acts, with unlikely alliances, and the ultimate downfall of the protagonist in the final act. It is in fair New York, where we lay our scene.45 In October 2011, the SEC filed a suit against Citigroup Global Markets alleging “a substantial securities fraud.”46

According to the SEC’s complaint, Citi created a billion-dollar fund in the nascent stage of the subprime mortgage crisis, which it filled with negatively forecasted assets held by Citi in an attempt to rid itself of that exposure.47 In marketing this fund Citi claimed that the constituent assets were selected by an independent investment adviser, whereas in fact the assets were selected by Citi itself.48 Citi then took a short position in the same assets that were included in the fund.49 “Class V Funding III” netted Citi $160 million in profits while investors lost more than $700 million.50

Although the SEC’s complaint alleged the elements of fraud, the SEC, “for reasons of its own,” charged Citi only with negligence associated with “Class V Funding III”.51 The complaint

the period prior to the closing of the deal. After closing, it came to light that Merrill paid $5.8 billion in bonuses to its executives. BoA made no corrective disclosure. The SEC filed a complaint alleging BoA “materially lied” to shareholders. Judge Rakoff was frustrated not only by the paltry penalty, but also by the fact that the shareholders who would pay for the misdeeds of managers.

Judge Rakoff initially refused to approve the consent decree for want of factual support. Only after multiple supplemental Statements of Fact and “hundreds of pages of deposition testimony and other evidentiary materials[,]” Judge Rakoff reluctantly approved the settlement. In this way, Bank of America can be seen as foreshadowing Citigroup.

45 See William Shakespeare, Romeo & Juliet act 1, prologue (“In fair Verona, where we lay our scene . . . .”).
46 Citigroup IV, 752 F.3d 285, 329 (2d Cir. 2014).
47 Id.
48 Id.
49 Id.
50 See id. (“Citi realized net profits of around $160 million, whereas the investors, as the SEC later revealed, lost more than $700 million.”).
51 Id. at 330.
alleged that Citi knew it would have trouble selling the fund to investors if investors knew that the fund was being used as a vehicle for Citi to unload (and short) its poorly projected assets.\textsuperscript{52}

In a simultaneous filing, the SEC sought the court’s approval of a pre-negotiated consent judgment with Citi, including a “neither-admit-nor-den[y]” provision.\textsuperscript{53} The consent judgment had three primary provisions. First, it sought to “permanently restrain and enjoin” Citi from future violations of the same kind. Second, it called for disgorgement of $160 million in profits, plus $30 million in interest, and an additional $95 million civil penalty. And, third, it called for changes to certain internal controls of Citi for a period of three years.\textsuperscript{54}

Even in light of agency deference, the district court concluded that it could not approve the consent judgment.\textsuperscript{55} The court stated that before it can invoke its injunctive powers, it must be satisfied that the proposed settlement “is fair, reasonable, adequate, and in the public interest.”\textsuperscript{56} The court determined that the putative settlement met none of those requirements.\textsuperscript{57} The upshot of the opinion was that the Judge Rakoff was provided with no facts by which to measure the settlement.\textsuperscript{58} The Court cited the public’s interest in knowing the truth, as well as the

\textsuperscript{52} Id.
\textsuperscript{53} See id. (describing the simultaneous filing of a consent decree).
\textsuperscript{54} Id.
\textsuperscript{55} See id. (“[T]he Court has spent long hours trying to determine, whether, in view of the substantial deference due the SEC in matters of this kind, the Court can somehow approve this problematic Consent Judgment. In the end, the Court concludes that it cannot approve it, because the Court has not been provided with any proven or admitted facts upon which to exercise even a modest degree of independent judgment.”).
\textsuperscript{56} Id. at 331 (“[I]t is clear that before a court may employ its injunctive and contempt powers in support of an administrative settlement, it is required, even after giving substantial deference to the views of the administrative agency, to be satisfied that it is not being used as a tool to enforce an agreement that is unfair, unreasonable, inadequate, or in contravention of the public interest.”).
\textsuperscript{57} See id. (“Applying these standards to the case in hand, the Court concludes…that the proposed Consent Judgment is neither fair, nor reasonable, nor adequate, nor in the public interest.”).
\textsuperscript{58} See id. (“Most fundamentally, this is because it does not provide the Court with a sufficient evidentiary basis to know whether the requested relief is justified under any of these standards.”).
fear of courts becoming “mere handmaiden[s]” of government agencies.\textsuperscript{59} Risking redundancy, it is critical that Judge Rakoff refused the decree not because he required and admission of liability, but because he was provided no facts by which to assess settlement.\textsuperscript{60}

Judge Rakoff further faulted the SEC’s policy of settling actions without requiring defendants to admit or deny the underlying allegations as “depriving the Court of even the most minimal assurance that the substantial injunctive relief it is being asked to impose has any basis in fact.”\textsuperscript{61} Additionally, the court expressed displeasure with the fact that settlements of this type are most frequently viewed as a mere cost of doing business.\textsuperscript{62}

Where the public interest was concerned, Judge Rakoff cautioned that “the successful resolution of competing interests cannot automatically be equated with the public interest.”\textsuperscript{63} In

\textsuperscript{59} See id. (“When a public agency asks a court to become its partner in enforcement by imposing wide-ranging injunctive remedies on a defendant, enforced by the formidable power of contempt, the court, and the public, need some knowledge of what the underlying facts are: for otherwise, the court becomes a mere handmaiden to a settlement privately negotiated on the basis on unknown facts, while the public is deprived of ever knowing the truth in a matter of obvious public importance.”).

\textsuperscript{60} John C. Coffee Jr., Collision Course: The SEC and Judge Rakoff, N.Y. L. J. (Jan. 19, 2012), http://www.newyorklawjournal.com/id=1202538773586/Collision-Course-The-SEC-and-Judge-Rakoff?slreturn=20150205104705 (“[Judge Rakoff’s] protest that it has no information about the strength of the case is hardly the same as demanding that the defendant stipulate to the allegation’s in the SEC’s complaint.”). This is an important point, as critics of the Judge’s decision often state that his rule \textit{would} require admissions of liability and create disincentives to settle.

\textsuperscript{61} Id. at 332.

\textsuperscript{62} See id. at 333 (“As for common experience, a consent judgment that does not involve any admissions and that results only in very modest penalties is just as frequently viewed, as a cost of doing business imposed by having to maintain a working relationship with a regulatory agency, rather than as any real indication of where the truth lies. This, indeed, is Citi’s position in this very case.”).

\textsuperscript{63} Id. at 335.
particular, the Court was concerned not only that Citi got a sweet deal, but also that investors would be disserved. Not only would investors be footing the bill, but because the SEC proceeded only on a theory of negligence, even a successful adjudication of the SEC's allegations would be wholly unhelpful to private litigants because the doctrine of collateral estoppel does not apply to claims of negligence.

In his concluding remarks, Judge Rakoff cautioned against judicial action not based in fact, calling it “inherently dangerous,” and noting that where injunctive power is not based on facts, “it serves no lawful or moral purpose and is simply an engine of oppression.” Judge Rakoff then refused to enter the settlement and set a date for trial. Both the SEC and Citi took interlocutory appeals and filed for a stay of proceedings pending the results of those appeals.

Judge Rakoff denied the parties’ motions for a stay of proceedings. Unbeknownst to the District Court however, was the fact that the SEC had filed an “emergency motion” in the Court of Appeals for the Second Circuit seeking a stay pending the outcome of its appeal in the circuit court or alternatively, a temporary stay. In an amazing (if serendipitous) feat of judicial timing, the Court of Appeals filed its response to the “emergency motion” just one minute before the

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64 See id. at 333 (“If the allegations of the Complaint are true, this is a very good deal for Citi; and, even if they are untrue, it is a mild and modest cost of doing business.”); see also id. at 334 (describing the $95 million fine as “pocket change” to Citi).
65 See id. at 334 (describing ways in which investors are slighted).
66 Id.
67 See id. (“An application of judicial power that does not rest on facts is worse than mindless, it is inherently dangerous.”).
68 See id. (“The injunctive power of the judiciary is not a free-roving remedy to be invoked at the whim of a regulatory agency, even with the consent of the regulated. If its deployment does not rest on facts—cold, hard, solid facts, established either by admissions or by trials—it serves no lawful or moral purpose and is simply an engine of oppression.”).
69 Id.
71 Id. at 340.
72 See id. (explaining Citi filed “emergency motion” without notification to the court and was “seeking a stay pending appeal or, in the alternative, a temporary stay, and representing that the motion was unopposed by Citi”).
District Court published its opinion denying the parties’ motions for a stay.\(^{73}\) The Second Circuit granted the SEC’s motion for a temporary stay in a terse opinion.\(^{74}\)

**Fixing the Menu: The Decision of the Second Circuit**

After a fair amount of procedural skirmishing\(^{75}\), the Second Circuit ultimately held that Judge Rakoff’s refusal to accept the settlement between the SEC and Citi was an abuse of discretion.\(^{76}\) An abuse of discretion is found where a district court “(1) based its ruling on an erroneous view of the law, (2) made a clearly erroneous assessment of the evidence, or (3) rendered a decision that cannot be located in within the range of permissible decisions.”\(^{77}\) The court’s analysis consisted of three distinct discussions: Whether or not the appellate court has jurisdiction to hear the appeal, whether a consent decree may be conditioned on an admission of liability, and what level of deference is owed to the SEC.\(^{78}\) Consistent with the Second Circuit’s, the analysis here will focus mainly on the third question.

The panel first considered whether it had jurisdiction to hear the interlocutory appeal. The Final Judgment Rule generally limits appeals to final dispositions, so as to avoid protracted litigation and piecemeal review of litigation.\(^{79}\) However, there exist certain exceptions to the

\(^{73}\) See id. at 341 (providing procedural posture).


\(^{75}\) Because both the SEC and Citi argued for the stay, the motions panel considered only briefs from one side of the dispute. Unsurprisingly perhaps, the three-judge panel granted the stay. First, the panel stated that Judge Rakoff gave too little deference to the SEC’s determination of what constituted serving the public interest. Addressing next the District Court’s assertion that the grant of substantial relief on the basis of allegations was unfair to Citi, the panel held that it is not within a court’s purview to protect “private, sophisticated, and counseled” parties from settlements to which they agree to. Finally, the panel rejected the notion that that a court can refuse a settlement on the grounds that the settlement does not prove or concede liability.

\(^{76}\) Citigroup IV, 752 F.3d 285, 298 (2d Cir. 2014).

\(^{77}\) See id. at 291 (internal quotation marks omitted).

\(^{78}\) See generally id. at 291-99.

\(^{79}\) Id.
Final Judgment Rule. Where lower courts issue interlocutory orders affecting the status of injunctive relief, and such orders are said to have serious or irreparable consequences, and thus interlocutory appeals may be allowed. Where the denial of a settlement is in effect the denial of injunctive relief, and if left undisturbed the denial will result in irreparable harm, a party is entitled to an interlocutory appeal. The Second Circuit held that that standard was satisfied here.

First, because the consent decree included two types of injunctive relief (a pro forma “obey the law” injunction, and implementation of certain internal compliance controls), the denial of the consent decree did deny the SEC the injunctive relief it sought. Second, the parties would suffer irreparable harm if forced to litigate the claims at trial. Thus, the Second Circuit concluded that it had jurisdiction to hear the appeal.

The appeals panel disposed of the second issue in a single paragraph. The SEC argued that Judge Rakoff abused his discretion by conditioning the approval of the consent decree on Citi’s admission of liability. However, as the district court’s pro Bono counsel stated, this was

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80 Id.
81 See 28 U.S.C. § 1292(a)(1) (2006) (granting appellate jurisdiction over interlocutory orders “granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions”); see also Carson v. Am. Brands Inc., 450 US 79, 84 (1981) (“Unless a litigant can show that an interlocutory order of the district court might have serious, perhaps irreparable, consequence, and that order can be effectually challenged only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal.”).
82 Citigroup IV, 752 F.3d 285, 293 (2d Cir. 2014).
83 Id.
84 Id.
85 Id.
86 See id. (“We are satisfied that our Court may exercise jurisdiction over this interlocutory appeal.”).
87 Id.
not the case.\textsuperscript{88} The panel accepted the concession of the district court’s counsel, “[w]ith good reason—there is no basis in law for the district court to require an admission of liability as a condition for approving a settlement between the parties.”\textsuperscript{89}

The remaining question, that is, the degree of deference owed to the SEC was “far thornier.”\textsuperscript{90} The panel first stated the background principles that there is a “strong federal policy” in favor of consent decrees, and at the same time, courts are not “rubber stamps” to the whims of agencies.\textsuperscript{91} It is between these two poles that the sparring takes place.\textsuperscript{92}

The panel next set out to determine the proper standard of review. The panel “clarif[ied]” that where a court was reviewing a consent decree involving an enforcement agency, the court should consider “whether the proposed consent decree is “fair and reasonable” and where injunctive relief is included, the court should also ensure that the public interest would not be disserviced.\textsuperscript{93} A district court is required to enter a consent decree “absent a substantial basis” that one of these elements is violated.\textsuperscript{94} Conspicuously absent is the requirement of adequacy.\textsuperscript{95}

\begin{itemize}
\item \textsuperscript{88} Id.; see Coffee Jr., \textit{supra} note 60 (stating that Judge Rakoff condition approval on application of collateral estoppel upon Citi, but upon lack of facts).
\item \textsuperscript{89} Id.
\item \textsuperscript{90} See id. (“We turn, then, to the far thornier question of what deference the district court owes an agency seeking a consent decree.”).
\item \textsuperscript{91} See id. (“Our court recognizes a strong federal policy favoring the approval and enforcement of consent decrees. To be sure, when the district judge is presented with a proposed consent judgment, he is not merely a rubber stamp.” (internal quotation marks omitted)).
\item \textsuperscript{92} Id. at 294-98.
\item \textsuperscript{93} See id. (providing that so long as an injunction is not unfair; unreasonable; or where injunctive relief is concerned, would not work a disservice to the public, consent decrees must be approved).
\item \textsuperscript{94} Id.
\item \textsuperscript{95} See id. at 295. Adequacy, the court of appeals reasoned, was borrowed from settlement review in the class action context. There, an adequacy requirement makes sense because future claims are barred via \textit{res judicata}. However, that is generally not the case in the context of consent decrees. Plaintiffs with private rights of action are free to bring those claims any time, and where no private rights of action exist, “the SEC is the entity charged with representing the victims, and is politically liable if it fails to adequately perform its duties.”
\end{itemize}
The court of appeals defined the inquiry into the fairness and reasonableness of a consent decree as focused on whether the decree is procedurally proper.\(^{96}\) A court should also ensure that the decree is not the product of collusion or corruption.\(^{97}\) Finally, the baseline legality of the decree, clarity of language, and resolution of underlying claims are among the considerations.\(^{98}\)

As to factual support for consent decrees, the court of appeals stated that requiring the SEC to establish the veracity of its allegations was an abuse of discretion.\(^{99}\) “Trials are about the truth. Consent decrees are primarily about pragmatism.”\(^{100}\) The court then engaged in a discussion of the relative merits of consent decrees in mitigating risk, uncertainty, and costs associated with litigation.\(^{101}\) While the court did not establish any bright line rule as to how well supported a consent decree must be, it stated that it believed that district courts should generally be satisfied by the averments of the SEC, and that here, the district court had a “sufficient” record on which to approve the consent decree.\(^{102}\) Thus in just one paragraph, the Second Circuit dispatched the crux of the district court’s concern.\(^{103}\)

In considering the public interest, the court of appeals stated, “[t]he job of determining whether the proposed SEC consent decree best serves the public interest, however, rests *squarely* with the SEC, and its decision merits significant deference.”\(^{104}\) In support of this, the panel offered that federal judges have no constituency, while executive agencies have a congressional

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\(^{96}\) See id. at 295 (“The primary focus of the inquiry [into fairness and reasonableness] should be on ensuring the consent decree is procedurally proper . . . .”).

\(^{97}\) Id. at 294-95.

\(^{98}\) Id.

\(^{99}\) See id. at 295-96 (“It is an abuse of discretion to require, as the district court did here, that the SEC establish the ‘truth’ of the allegations against a settling party as a condition for approving the consent decrees.”).

\(^{100}\) Id. at 295.

\(^{101}\) Id.

\(^{102}\) See id. (stating “colorable claims, supported by factual averments” provide sufficient basis for approval of consent).

\(^{103}\) Id.

\(^{104}\) Id. at 296 (emphasis added).
constituency.\textsuperscript{105} The panel then confronted Judge Rakoff’s public interest inquiry, and stated that “the district court made no findings that the injunctive relief proposed in the consent decree would disservice the public interest, in part because it defined the public interest as ‘an overriding interest in knowing the truth.’”\textsuperscript{106} To the court of appeals, this was an improper inquiry and thus constituted legal error.\textsuperscript{107}

The Second Circuit went on to state that the decisions of which causes of action to charge against particular defendants was entirely within the purview of the SEC.\textsuperscript{108} And further, for a district court to withhold approval of a consent decree because it did not believe the proper charges were brought constituted an abuse of discretion.\textsuperscript{109}

Finally, the panel points out that the SEC is free to carry out its enforcement efforts through administrative channels, outside the reach of Article III courts.\textsuperscript{110} The panel cautioned hollowly that if the SEC seeks to invoke the equitable powers of courts, “then the SEC must be willing to assure the court that the settlement proposed is fair and reasonable.”\textsuperscript{111} The court closed its analysis by restating the (equally hollow) rubber stamp motif: “For the courts to simply

\textsuperscript{105} \textit{Id.} (quoting \textit{Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.}, 467 U.S. 837, 866 (1984)).
\textsuperscript{106} \textit{Id.} at 297.
\textsuperscript{107} \textit{See id.} (“The district court’s failure to make the proper inquiry constitutes legal error.”). While a district court cannot find the public interest disserved based on a policy disagreement with the SEC, it could, for example, find the public interest disserved if the consent decree barred private causes of action.
\textsuperscript{108} \textit{See id.} (defining spheres of jurisdiction).
\textsuperscript{109} \textit{Id.} Again, this would seem to be a straw man. I suggest it is no mistake the panel appended this phrase with “to the extent that it did.”
\textsuperscript{110} \textit{See id.} (“Finally, we note that to the extent that the SEC does not wish to engage with the court, it is free to eschew the involvement of courts and employ its own arsenal of remedies instead.”).
\textsuperscript{111} \textit{Id.}
accept a proposed SEC consent decree without any review would be a dereliction of the court’s
duty to ensure the orders it enters are proper.”

AGENCIES & ARTICLE III COURTS

At the heart of the issue in Citigroup is a question of Separation of Powers and the role of
courts vis-à-vis agencies. That is, to what extent do the desires of executive agencies compel
judicial action? Specifically, how much discretion do courts retain where an executive agency
seeks injunctive relief authorized by statute? This section will discuss precedent related to the
doctrine of Separation of Powers and statutory injunctions in an effort to illuminate the
discussion in section V.

Against Tyranny: The Doctrine of Separation of Powers

The Constitution established a government consisting of three branches: the
legislature, executive and judiciary. The branches were not intended to be entirely
separate in all of their roles, though each was designed to wield certain core functionalities which
were to be vigilantly guarded from usurpation by another branch. In this way, the framers

112 Id.
113 See Coffee Jr., supra note 60 (“[Citigroup] poses fundamental questions about the
relationship between administrative agencies and federal courts.”).
114 See US CONST. art. I.
115 See id. at art. II.
116 See id. at art. III.
principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining
the assistance of its coordinate Branches.”); see also People v. Owens, 228 P.3d 969, 971-72
(Colo. 2010) (stating that “separate branches of government cannot operate in mutually
exclusive, watertight compartments, but must cooperate with each other”); see also THE
FEDERALIST NO. 47 (James Madison)(refuting the idea that the branches of government should
be entirely distinct while also stating that core functions of each branch should not be absorbed
by other branches). For example of overlapping functions, many administrative agencies,
including the SEC, utilize Administrative Law Judges to adjudicate issues that would otherwise
crowd the dockets of the court system.
intended to prevent the concentration of power in any one branch.\textsuperscript{118} In Federalist 47, James Madison, writing under the pseudonym Publius\textsuperscript{119} states that “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed [sic], or elective, may justly be pronounced the very definition of tyranny.”\textsuperscript{120} In Federalist 51, the Friend of the People lays out his vision for a system of government wherein the constituent branches both balance and check one another.\textsuperscript{121} By vesting each branch with “rival and competing interests,” Madison believed that the “great difficulty” of creating a government that controls the governed as well as itself might be overcome.\textsuperscript{122}

As stated, the functions of the spheres of government are not mutually exclusive and some degree of overlap is essential to the practical administration of government.\textsuperscript{123} The doctrine is apposite with respect to purely ministerial or administrative functions.\textsuperscript{124} But where the actions of one branch usurp the powers traditionally vested in another branch, the Separation of Powers doctrine is violated.\textsuperscript{125}

\textsuperscript{118}See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151-52 (2010) (discussing the Separation of Powers doctrine as it applies to the executive); see also THE FEDERALIST NO. 48 (James Madison), at 1 (“It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers.”).

\textsuperscript{119}Publius, latin for “Friend of the People,” was a Roman Consul who helped to overthrow the Roman monarchy around 509 BC.

\textsuperscript{120}THE FEDERALIST NO. 51 (James Madison).

\textsuperscript{121}See THE FEDERALIST NO. 51 (James Madison), at 1 (“But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”).

\textsuperscript{122}Id.

\textsuperscript{123}For a further discussion of overlapping government functions, see supra note 117 and accompanying text.

\textsuperscript{124}See Chadha v. INS, 634 F.2d 408, 424-25 (9th Cir. 1980) (stating that some actions “not implicating a suspect form or degree of power” are undeserving of judicial attention).

The Ninth Circuit, in a decision affirmed by the Supreme Court, enunciated a clear standard for the Separation Doctrine in *Chadha v. Immigration and Naturalization Service*:

[W]e define a constitutional violation of the Separation of Powers as an assumption by one branch of the powers that are central or essential to the operation of a coordinate branch, provided also that the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the Government.\(^{126}\)

Furthermore, where assumptions of power are sustained and routine, a violation is “more easily established.”\(^{127}\) The standard in *Chadha* was largely adopted from *Nixon v. Administrator of General Services*, where the Supreme Court stated that the coordinate branches of government were not intended to be totally independent, and that the loci of the inquiry should be on the degree to which intrusion prevents an aggrieved branch from fulfilling its constitutional duties.\(^{128}\)

In *Heckler v. Chaney*, the Supreme Court held that there was a presumption of unreviewability where an agency declines to initiate or pursue an enforcement action.\(^{129}\) There, prison inmates convicted of capital crimes and sentenced to death by lethal injection alleged that use of certain drugs for lethal injection violated the Food, Drug, and Cosmetic Act and sued the Food and Drug Administration to prevent their use.\(^{130}\) The FDA declined to take any enforcement action.\(^{131}\) The DC Circuit held that the FDA’s

\(^{126}\) *Chadha*, 634 F.2d at 425.

\(^{127}\) *Id.*

\(^{128}\) *See Nixon*, 433 U.S. at 426 (“The separate powers were not intended to operate with absolute independence, but in determining whether the Act violates the separation-of-powers principle the proper inquiry requires analysis of the extent to which the Act prevents the Executive Branch from accomplishing its constitutionally assigned functions . . . .”).


\(^{130}\) *Id.*

\(^{131}\) *Id.*
decision not to pursue the inmates’ claims was an abuse of discretion, and remanded the case so that the FDA would “fulfill its statutory function.”

Chief Justice Rehnquist, writing for the majority, began the Court’s analysis with the Administrative Procedure Act’s initial thresholds for judicial review of agency enforcement: there is a presumption of reviewability of agency enforcement actions unless review is expressly precluded in the relevant statute, or the action is committed to agency discretion by law. Actions may be deemed to be committed to agency discretion where there is “no law to apply.” The Court faulted the DC Circuit for its narrow construction of the “no law to apply” test in this case because that test is more aptly suited for instances concerning affirmative agency enforcement actions, as opposed to where an agency’s chooses not to act. The Court stated that it had long recognized a presumption on unreviewability where agencies decide not to act.

The Court offered three reasons supporting this presumption. First, agencies are uniquely situated to balance factors “which are peculiarly within its expertise,” such as the cost of resources, likelihood of success, and opportunity costs. Second, decisions not to take enforcement actions do not involve “coercive power over an individual’s liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect.” Finally, the Court likened a decision not enforce to a

\[\text{id.}\] at 826.

\[\text{5 U.S.C. \textsection 701(a)(1)-(2) (2012); Heckler, 470 U.S. at 828.}\]


\[\text{Heckler v. Chaney, 470 U.S. 821, 831 (1985).}\]

\[\text{id.}\]

\[\text{id.}\]

\[\text{See id. ("Similarly, when an agency \textit{does} act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency exceeded its statutory powers.") (emphasis in original)).}\]
prosecutor’s decision not to indict, recognizing a “special province of the Executive Branch” by virtue of the Take Care Clause of the Constitution.\textsuperscript{139}

In \textit{Baltimore Gas and Electric Company v. FERC}, Baltimore Gas sued FERC over its decision to settle a regulatory matter under the Natural Gas Act with Columbia Gas.\textsuperscript{140} The DC Circuit read \textit{Chaney} as based in the Separation of Powers doctrine.\textsuperscript{141} In this vein, the power to enforce (or not to enforce) the law is a power vested only in the Executive Branch, and “[w]hen the judiciary orders an executive agency to enforce the law it risks arrogating to itself a power the Constitution commits to the executive branch.”\textsuperscript{142}

The court’s central holding in both \textit{Heckler} and \textit{Baltimore Gas} was that a court cannot compel an agency to act. A natural extension of these holdings is their converse: An agency cannot compel a court to act. This would seem to be especially the case where an agency seeks to invoke a central and essential power of the courts, and where the relevant statute and precedent contemplate judicial independence. If it were otherwise, a court is relegated to the role of rubber stamp, regardless of the verbiage in which it is swaddled.\textsuperscript{143}

The doctrine of Separation of Powers has specific application within the context of statutory injunctions. While courts may not call out the doctrine by name, the opinions

\textsuperscript{139} US CONST. art. II § 3; see also \textit{Heckler}, 470 U.S. at 831.
\textsuperscript{141} See id. at 268 (“\textit{Chaney}’s recognition that the courts must not require agencies to initiate enforcement actions may well be a requirement of the Separation of Powers commanded by our Constitution.”).
\textsuperscript{142} Id. at 268.
and holdings imply a concerted effort to prevent the usurpation of injunctive powers by the executive branch.\textsuperscript{144}

\textit{Separation of Powers in the Context of Statutory Injunctions}

An early, and still controlling, case on whether agencies are entitled to injunctions authorized in statute as a matter of right is \textit{Hecht Co. v. Bowles}.\textsuperscript{145} There, the Price Administrator of the Office of Price Administration was seeking to enforce § 205(a) of the Emergency Price Control Act of 1942 which established maximum prices for certain goods.\textsuperscript{146} The Act stated that “upon a showing by the Administrator that such a person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.”\textsuperscript{147} It was undisputed that Hecht, a large department store, had violated the substantive provisions of the Emergency Price Control Act.\textsuperscript{148} The issue before the Supreme Court was whether, upon proving violations of the act, an injunction was mandatory, as the appellate court below held.\textsuperscript{149}

The Administrator urged that he was entitled to injunctive relief as a matter of right, per the plain language of the statute.\textsuperscript{150} In support of this position the Administrator distinguished the language of the Price Control Act from that of other Acts, including the 1933 and 1934 Acts at

\textsuperscript{144} See \textit{THE FEDERALIST} 47 (James Madison), at 3 (“Were [the power of the judiciary] joined to the executive power, THE JUDGE might behave with all the violence of AN OPPRESSOR.” (emphasis in original)).
\textsuperscript{145} Hecht Co. v. Bowles, 321 U.S. 321 (1944).
\textsuperscript{146} \textit{Id.} at 321-22.
\textsuperscript{147} Emergency Price Control Act of 1942, 50 U.S.C. App. Supp. II Section(s) 901 et seq., 925.
\textsuperscript{148} See \textit{Hecht Co.}, 321 U.S. at 324. (“There is no substantial controversy over the facts. . .The investigation was a spot check, confined to seven departments. In each of the seven departments violations were disclosed. . .numerous violations both as respects prices and records were discovered.”).
\textsuperscript{149} See \textit{id.} at 322 (“The question in this case is whether the Administrator, having established that a defendant has engaged in acts or practices violative of s 4 of the Act is entitled as of right to an injunction restraining the defendant from engaging in such acts or practices or whether the court has some discretion to grant or withhold such relief.”).
\textsuperscript{150} \textit{Id.} at 326.
issue in *Citigroup*, which he claimed left room for judicial discretion.\(^\text{151}\) The Administrator urged
the Court to adopt a simple logical construction of the statute: if a violation is proven, then an
injunction will issue. The Administrator argued that this construction differed from that of other
statutorily authorized injunctions which included phrases like “upon a proper showing,” or “for
cause shown,” that implied a more discretionary role for courts.\(^\text{152}\)

Ultimately, the Supreme Court disagreed.\(^\text{153}\) As an initial matter, the Court did not accept
that the plain language of the Act mandated the issuance of an injunction.\(^\text{154}\) Merely, the Court
stated the Act was a grant of jurisdiction to issue injunction, not a command to do so.\(^\text{155}\) At the
heart of the Court’s opinion was the history of equity practice, and courts’ traditionally wide
latitude to craft bespoke equitable orders with respect to the individual circumstances of each
case.\(^\text{156}\) The Court stated, “[t]he essence of equity jurisdiction has been the power of the
*Chancellor* to do equity and to mold each decree to the necessities of the particular case.”\(^\text{157}\)
Moreover, injunctions had always been intended to deter future conduct, not to punish past
conduct.\(^\text{158}\) The Court stated that if Congress had intended such a drastic break from tradition,

\(^{151}\) *Id.* at 327.

\(^{152}\) *Id.*

\(^{153}\) *See id.* at 328 (“[W]e do not think that under all circumstances the court must issue the
injunction or other order which the Administrator seeks.”).

\(^{154}\) *See id.* (“It seems apparent on the face of s 205(a) that there is some room for the exercise of
discretion on the part of the court.”).

\(^{155}\) *See id.* at 329 (“Such courts are given jurisdiction to issue whatever order to enforce
compliance is proper in the circumstances of each particular case. . . A grant of jurisdiction to
issue compliance orders hardly suggests an absolute duty to do so under any and all
circumstances.” (internal quotation marks omitted)).

\(^{156}\) *See id.* (“We are dealing here with the requirements of equity practice with a background of
several hundred years of history . . . An appeal to the equity jurisdiction conferred on federal
district courts is an appeal to the sound discretion which guides the determinations of courts of
equity . . . The essence of equity jurisdiction has been the power of the Chancellor to do equity
and to mould [sic] each decree to the necessities of the particular case. Flexibility rather than
rigidity has distinguished it.”).

\(^{157}\) *Id.* (emphasis added).

\(^{158}\) *See id.* at 329 (“The historic injunctive process was designed to deter, not to punish.”).
then they would have made that intent clear through explicit language in the statute.\textsuperscript{159} Thus, the Court resolved the ambiguity “in accordance with…traditional practices, as conditioned by the necessities of the public interest….”\textsuperscript{160} The \textit{Hecht} Court was careful to impress that courts should not grant injunctive relief “grudgingly,” however.\textsuperscript{161} Where an agency seeks approval of a consent decree, the propriety of injunctive relief was dictated by concerns of the public interest, and not the private concerns of the litigants.\textsuperscript{162}

In \textit{Yakus v. United States}, the Supreme Court again confronted the issue of injunctions under the Emergency Price Control Act of 1942.\textsuperscript{163} The Court reiterated that the award of an interlocutory injunction “has never been regarded as strictly a matter of right,”\textsuperscript{164} rather it was a matter of “sound judicial discretion.”\textsuperscript{165} The Court held that where injunctive relief would adversely affect the public interest it may rightly be withheld, even if such a decision is causes injury to the moving party.\textsuperscript{166} In closing, the court stated “[c]ourts of equity may, and frequently

\begin{itemize}
\item \textsuperscript{159} See \textit{id.} at 330 (“[I]f Congress desired to make such an abrupt departure from traditional equity practice as suggested, it would have made its desire plain.”).
\item \textsuperscript{160} \textit{id.}
\item \textsuperscript{161} See \textit{id.} (“We do not mean to imply that courts should administer s 205(a) grudgingly.”). The Court pointed out that executive agencies and Article III courts are two tools that are meant to give effect to the aims Congress “through co-ordinated action,” and that courts must exercise their discretion consistent with the underlying purposes of the Act.
\item \textsuperscript{162} See \textit{id.} at 331 (“[T]he standards of the public interest not the requirements of private litigation measure the propriety of injunctive relief in these cases”).
\item \textsuperscript{163} \textit{Yakus v. United States}, 321 U.S. 414, 418 (1944). There, the petitioners were convicted in the trial court of selling cuts of meat at prices above the statutory ceiling. The Emergency Price Control Act established an administrative method by which regulations promulgated under the Act could be challenged. Included was a provision that disallowed any interlocutory injunctive relief, meaning that a regulation would remain in force until there was a full adjudication of the claim. The petitioners claimed that the statutory preclusion of interlocutory injunctive relief violated their right to due process. The Court disagreed, holding that Congress could permissibly choose to protect the public from wartime inflation over providing interlocutory relief.
\item \textsuperscript{164} \textit{id.} at 439.
\item \textsuperscript{165} \textit{id.} at 440.
\item \textsuperscript{166} \textit{id.}
\end{itemize}
do, go much further both to give and withhold relief in furtherance of the public interest than
they are accustomed to go when only private interests are involved.”

Factors Informing Principles of Traditional Equity

Whereas Hecht and Yakus are valuable in their discussions of the scope of a court’s
equitable powers, the following cases are illustrative of the factors that inform the a court’s
decision. In SEC v. Culpepper, the SEC was seeking to enjoin the defendant from further
offerings of unregistered stock, despite the fact that defendants had ceased dealing in the
unregistered stock prior to the SEC’s action. The Second Circuit held that the cessation of the
illegal activities was immaterial, but due to the prospective nature of injunctions the burden is on
the moving party to show “some cognizable danger of recurrent violation…” In assessing the
showing by the moving party, “[t]he chancellor’s decision is based on all the circumstances; his
discretion is necessarily broad and a strong showing of abuse must be made to reverse it.”

Later, in SEC v. Manor Nursing Centers, Inc., the Second Circuit considered a number of
factors in assessing the propriety of an injunction granted below. But generally, the court
acted, “in deciding whether to grant injunctive relief, a district court is called upon to assess all
those considerations of fairness that have been the traditional concern of equity courts.” The
district court in Manor Nursing granted ancillary relief in the form of disgorgement of profits.

The appellants challenged this sanction on the grounds that disgorgement of profits was not

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167 Id. at 441 (quoting Virginian Ry. Co. v. Sys. Fed’n No. 40, 300 U.S. 515, 552 (1937)).
169 See Culpepper, 270 F.2d at 250 (“But the moving party must satisfy the court that relief is
needed. The necessary determination is that there exists some cognizable danger of recurrent
violation, something more than the mere possibility which serves to keep the case alive.”).
170 Id.
171 See SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1100 (2d Cir. 1972) (considering the
likelihood of future violations based off of past violations, the egregiousness of past violations,
the degree of remorse, and assurances that the violative conduct would cease).
172 Id. at 1102.
173 Id. at 1103.
explicitly authorized in under the relevant statutes, the 1933 and 1934 Acts, unlike injunctions.\textsuperscript{174} However, the panel held that courts have “general equity powers” under the 1933 and 1934 Acts, and that “[o]nce the equity jurisdiction of the district court has been properly invoked by a showing of a securities law violation, the court possesses the necessary power to fashion an appropriate remedy.”\textsuperscript{175}

Elsewhere, the Third Circuit announced a list of factors which courts should consider in weighing injunctive relief in \textit{SEC v. Bonastia}.\textsuperscript{176} Although consideration of various factors was important, the Third Circuit stated that the court’s determination should ultimately be guided by whether future violations were likely based on the totality of the circumstances.\textsuperscript{177} The Court of Appeals determined that the repeated violations committed with scienter weighed heavily in favor of an injunction, regardless of the petitioner’s current occupation.\textsuperscript{178} The multi-factor framework has been applied in other Circuits as well.\textsuperscript{179} The \textit{Bonastia} panel closed by stating, “[w]hen a district court refuses to apply well-settled legal precepts to a conceded set of facts, it

\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} \textit{See SEC v. Bonastia, 614 F.2d 908, 912-13. (3d Cir. 1980) (“[A]mong other things, the degree of scienter involved on the part of the defendant, the isolated or recurrent nature of the infraction, the defendant’s recognition of the wrongful nature of his conduct, the sincerity of his assurances against future violations, and the likelihood . . . that future violations might occur.”). The court of appeals reversed the trial court, stating that the district court’s myopic view on only one factor, whether the defendant still dealt in securities, was an abuse of its discretion.}
\textsuperscript{177} \textit{See id. (“Essentially, a court makes a prediction of the likelihood of future violations based on an assessment of the totality of the circumstances surrounding the defendant and the past violations that were committed.”).}
\textsuperscript{178} \textit{See id. at 913 (“[H]ere we have a situation in which the repetitiveness of the violations weights heavily in favor of the imposition of an injunction. Furthermore. . . [the defendant] acted with scienter of the violations. That scienter was clearly established underscores the propriety of injunctive relief. . . .”).}
\textsuperscript{179} \textit{See SEC v. Youmans, 729 F.2d 413, 415 (6th Cir. 1984) (considering, in addition to the \textit{Bonastia} factors, the egregiousness of the violation, and the age and health of the defendant); \textit{see also SEC v. Blatt, 583 F.2d 1325, 1344 (5th Cir. 1978) (“The trial court should consider several factors in deciding whether to issue an injunction in light of past violations. The critical question in issuing the injunction and also the ultimate test on review is whether defendant's past conduct indicates that there is a reasonable likelihood of further violations in the future.”).}
acts outside its allowable discretion.”  

The issue for Judge Rakoff in *Citigroup*, was that there was no “conceded set of facts,” on which to apply “well-settled legal precepts.”

In *In re Tutu Water Wells CERCLA Litigation*, the Third Circuit stated that before approving a consent judgment under CERCLA, a reviewing judge must adjudge both the procedural and substantive propriety of the consent agreement. This is in stark contrast to the approach taken in *Citi*, where substance is given extremely little scrutiny.

In *Mitchell v. Hodges*, the Secretary of Labor sought an injunction authorized by statute against a construction firm for violations of the Fair Labor Standards Act. The Fifth Circuit held that statutory injunctions do not issue as a matter of course. Rather, the decision of whether to issue an injunction and the terms of the injunction “must inevitably be left to the sound discretion of the judge.” The judge’s discretion should be informed by a list of factors, including sincerity and candor of the defendant, and when these factors have been properly evaluated the decision of the district judge will be left undisturbed. The Fifth Circuit expanded

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180 *Id.*
181 See *Citigroup I*, 827 F. Supp. 2d 328, 333 (S.D.N.Y. 2011) (discussing lack of factual basis as the “fundamental[]” reason for denying the consent judgment).
182 See *In re Tutu Water Wells CERCLA Litigation*, 326 F.3d 201, 208 (3d Cir. 2003) (describing the substantive inquiry as ensuring that the settlement reflects comparative fault); see also United States v. George A. Whiting Paper Co., 644 F.3d 368, 372 (7th Cir. 2011) (stating that consent judgment should be approved if consistent with CERCLA, and is substantively and procedurally fair). Although a distinction might be made between CERCLA and the securities laws, in *In re Tutu Water Wells*, the requirement of substantive consideration was judge-made. How do we reconcile substantive judicial scrutiny where the EPA is concerned and not the SEC? Is this an implicit suggestion that the SEC is better at their job than the EPA?
183 See *Mitchell v. Hodges Contracting Co.*, 238 F.2d 380, 381 (5th Cir. 1956) (alleging that the contractor violated work hour, pay, and record keeping provisions of the act). Despite finding the defendant guilty of the violations, the court nonetheless, refused to grant an injunction.
184 *Id.*
185 *Id.*
186 See *id.* at 381-82 (describing the trial judge as the best witness of the parties’ demeanors and stating “[w]here these have been properly evaluated, the action of the Trial Court, whether granting or denying an injunction, will be sustained”).
on this analysis in Mitchell v. Bland. The appeals court held that even if the panel accepted the Secretary of Labor’s arguments that the findings of the district court were erroneous, “the Court would have been justified in either granting or denying injunctive relief under the broad discretion lodged in it by accepted equitable principles.” It is extremely difficult to reconcile Citigroup’s restrictive holding, focused on procedural propriety, with the vast degree of discretion allowed in Bland.

The judicial reticence to grant injunctive relief was captured in Judge Friendly’s opinion in SEC v. Commonwealth Chemical Securities, where he cautioned that injunctive relief can have significant collateral consequences for firms. Judge Friendly stated that courts had become “more circumspect” in their acquiescence to SEC requests for injunctions due to a recognition that injunctions were often more than the “mild prophylactic” that they are sometimes described to be. In denying an injunction for price manipulation, Judge Friendly explicitly cited a lack of factual basis provided by the SEC. This proposition, that an injunction sought by the SEC can be denied for want of factual evidence, is antipodean to the rule announced in Citigroup.

Consider, in this vein, US v. Hooker Chemicals and Plastics Corp. In Hooker a district court reviewing a consent decree announced a deferential standard of review, so long as the court

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187 See Mitchell v. Bland, 241 F.2d 808, 809 (5th Cir. 1957). There, the Secretary of Labor was again seeking an injunction for violations of the Fair Labor Standards Act. The district court refused to issue an injunction.

188 See id. at 810 (“But we do not consider these considerations of controlling importance. Even assuming appellant's contentions to be sound in both instance, the Court would have been justified in either granting or denying injunctive relief under the broad discretion lodged in it by accepted equitable principles.”).


190 Id.

191 See id. at 100 (“Since we have held the evidence was insufficient to find that Ms. Sharpe engaged in or aided and abetted the manipulation, there is no basis for enjoining her with respect to conduct of that sort.”).

was satisfied of the factual underpinnings of the settlement. The defendant in *Hooker* was an industrial enterprise accused of depositing 80,000 tons of toxic waste into a landfill that had the potential to contaminate nearby waterways. The Environmental Protection Agency sued Hooker, and soon thereafter the parties entered into a settlement containing injunctive relief and monetary damages. The court, “recognizing that the resolution of these issues by agreement could have tremendous impact upon the residents of the community and, indeed, upon all of the surrounding areas,” ordered the parties appear before the court to explain the settlement provisions and answer any questions from the court. In addition, the parties held a public hearing at a local university regarding the settlement and held a public notice and comment period for the settlement, thereby hearing and addressing concerns of the general public.

Still, the court was “convince[d]…that many questions remained unanswered and [that] many concerns had not been addressed during the prior hearing[,]” and thus ordered further hearings “in an attempt to clarify the highly technical and complex settlement.” After eight days of hearings, over 2,000 pages of court transcripts, and hearing testimony from 15 expert witnesses, the court was satisfied that the record was “complete [and] fully developed….” Only after these protracted factual inquiries did the court agree to pass judgment on the settlement. Contrast with *Citigroup*, in which the SEC argued that it should be taken at its word, and attempts to distill facts were deemed an abuse of discretion.

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193 *Id.* at 1072-73.
194 *Id.* at 1070.
195 *Id.*
196 *Id.* at 1071.
197 *Id.*
198 *Id.*
199 *Id.* at 1071-72.
200 *See* *Citigroup IV*, 752 F.3d 285, 295-96 (2d Cir. 2014) (“In many cases, setting out the colorable claims, supported by factual averments by the SEC . . . will suffice to allow the district court to conduct its review.”); *see also* Brief of Amici Curiae Securities Law Scholars for
In its assessment of the consent decree, the court in Hooker first recognized a “clear policy in favor of encouraging settlements….” The role of the reviewing court was to “assure itself that the terms of the decree are fair and adequate and are not unlawful, unreasonable, or against public policy.” Further, a court has a “limited duty to inquire into the technical terms and factual disputes underlying the proposed settlement.” In its assessment, a court may consider the strength of the plaintiff’s case, the good faith efforts of negotiators, risks of litigation, and whether the putative decree is in line with statutory objectives. Whereas the Hooker court’s limited duty was fulfilled only though production of voluminous transcripts and extensive efforts inside and outside the courtroom, the Citigroup panel eschewed a relatively miniscule inquiry by Judge Rakoff.

Not only are facts important to an understanding of the substantive terms of the consent decree as exemplified by Hooker, but facts also determine the degree of deference a judge should show an agency seeking injunctive relief. In FTC v. Standard Financial Management Corp., judicial independence was paramount. The court cautioned against “judicial inertia,” and stated the measure of deference owed to an agency “depends on the persuasive power of the agency’s proposal and rationale, given whatever practical considerations may impinge and the

Affirmance in Support of the District Court’s Order and Against Appellant and Appellee at 6, SEC v. Citigroup Global Mkts., Inc., 752 F.3d 285 (2d Cir. 2014) (No.11-5227), 2012 WL 7009633, at *13 (“The SEC’s position effectively leaves no place for judicial review. ‘Trust us!’ says the SEC.”).

201 Hooker Chems. & Plastics Corp., 540 F. Supp. at 1072 (quoting Patterson v. Newspaper & Mail Deliverers’ Union of N.Y. & Vicinity, 514 F.2d 767 (2d Cir. 1975)).
202 Id.
203 Id.
204 Id.
205 Id.
206 Id
207 Id. at 1073.
208 See FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 408 (1st Cir. 1987) (measuring the amount of deference by the strength of the government’s case).
209 Id.
full panoply of the attendant circumstances.” Moreover, “rather than blindly following the agency’s lead, [a court] must make its own inquiry into the issue of reasonableness before entering judgment.” The notion that the degree of deference is to be determined by the strength of the plaintiff’s claims has found traction in other circuits as well. Indeed, in *EEOC v. Hiram Walker & Sons, Inc.*, the Seventh Circuit declared this to be the most important factor in the decision on a consent judgment. In this light, Judge Rakoff’s decision was far from an abuse of discretion, but wholly within the mainstream. To Judge Rakoff, the SEC’s case (unsupported by any factual stipulations) was weak, and thus the SEC was given relatively little deference.

To this point, consider *FTC v. Weyerhaeuser Co.* The FTC sought a preliminary injunction to block a merger it alleged violated antitrust laws. After acknowledging that the court owed a degree of deference to the FTC the DC Circuit maintained that a “judge remains obligated to exercise independent judgment on the propriety of issuance of a temporary restraining order or preliminary injunction. . .Independent judgment is not exercised when a court responds automatically to the agency’s threshold showings. To exercise such judgment, the court must take genuine account of ‘the equities.’” The rule of the Second Circuit, that reviewing courts should generally be satisfied by the SEC’s threshold allegations stands in stark contrast to the notion of independent judgment as described by the DC Circuit.

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210 *Id.*
211 *Id.*
212 See Flinn v. FMC Corp., 528 F.2d 1169, 1173 (4th Cir. 1975) (“The most important factor to be considered in determining whether there has been such a clear abuse of discretion is whether the trial court gave proper consideration to the strength of the plaintiffs’ claims on the merits.”); see also United States v. Oregon, 913 F.2d 576, 580-81 (9th Cir. 1990) (discussing standard of review for consent decrees); EEOC v. Hiram Walker & Sons, Inc., 768 F.2d 884 (7th Cir. 1985); Walsh v. Great Atl. & Pac. Tea Co., Inc., 726 F.2d 956 (3d Cir. 1983).
213 *Hiram Walker & Sons, Inc.*, 768 F.2d at 889.
215 *Id.* at 1082 (internal quotation marks omitted).
Each of the cases above illustrate the degree to which courts delve into the specific facts underlying a proposed settlement, facts that Judge Rakoff believed to be missing. Furthermore, the cases illustrate the breadth of considerations a district court may, and should, consider in its decision to grant or deny injunctive relief. The Second Circuit’s narrow focus on “procedural propriety,” is thus neither supported by precedent nor fundamental equitable principles.

In eBay v. MercExchange the Supreme Court underscored the importance of the same fundamental principles of equity the Citigroup court treated so casually. Justice Thomas, writing for the majority, stated that the traditional considerations of equity must be considered where injunctive relief is sought and that no general rule or formula may govern its application. There, upon suing eBay for patent infringement and obtaining a favorable verdict, MercExchange sought to permanently enjoin eBay from further infringement. The district court refused the motion, stating that MercExchange fell within a broad class to which injunctive relief was unavailable. Invoking a similarly broad brush (albeit in favor of issuance), the Federal Circuit reversed and stated a permanent injunction should always issue where a patent has been determined to be both valid and infringed.

The Supreme Court, with eight justices concurring and one recusal, rejected categorical rules and injunctions as of right. The Court admonished that traditional equity principles are

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216 See eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) (holding that the traditional equity considerations are at play wherever injunctive relief is sought).
217 See id. at 392-93 (“[T]his Court has consistently rejected invitations to replace traditional equitable considerations with rule that an injunction automatically follows a determination that a copyright has been infringed.”).
218 Id. at 391.
219 Id. at 393 (stating that because MercExchange was willing to license its patent, and was not itself pursuing the patent, that a permanent injunction was unavailable).
220 Id. at 393-94.
221 See id. at 392-93 (stating that blanket rules and principles of equity are irreconcilable).
always in effect but for an express mandate from Congress. In his concurrence, Chief Justice Roberts instructed that history is the lodestar of equity. Although eBay concerned a permanent injunction under the Patent Act, Justice Thomas’ language was broad and has been interpreted to apply in a variety of contexts.

As it applies to CitiGroup, a colorable argument could be made that the panel’s rule goes so far as to amount to a categorical rule. That is, where the SEC seeks an injunction, sets out allegations in support, and has reached a procedurally proper consent judgment with the defendant, the consent judgment must be approved and an injunction must issue. This would be impermissible under eBay. More on point, the importance of history in the opinion and its concurrences leaves little room for doubt that equitable precedent looms large and should not be lightly set aside in the name of pragmatism or deference.

It is important to note that Congress can, and has from time to time, restricted or guided the discretion of courts sitting in equity. However, because equity practice has a “background of several hundred years of history,” this is not accomplished without an express Congressional

222 See id. at 391-92 (“As this Court has long recognized, a major departure from the long tradition of equity practice should not be lightly implied.” (internal quotation marks omitted)). Justice Alito took no part in the consideration of case.
223 See id. at 396 (Roberts, C.J., concurring) (“When it comes to discerning and applying those standards [of equity], in this area as others, ‘a page of history is worth a volume of logic.’” (quoting N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)); see also eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 395-96 (2006) (Kennedy, J., concurring) (“The Chief Justice is also correct that history may be instructive . . . .”)
224 It is worth noting that Justice Thomas cited in his opinion, Weinberger v. Romero-Barcelo and Amoco Production Co. v. Villiage of Gambell, which did not concern intellectual property; see also Salinger v. Colting, 607 F.3d 68, 77-78 (2d Cir. 2010) (“[N]othing in the text or logic of eBay suggests that its rule is limited to patent cases. On the contrary, eBay strongly indicates that the traditional principles of equity it employed are the presumptive standard for injunctions in any context.”).
225 See Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) (stating that the principles of equity jurisdiction will not be forsaken without a clear Congressional mandate); see also Weinberger v. Romero-Barcelo, 456 U.S. 305, 313-14 (1982) (“Of course, Congress may intervene and guide or control the exercise of the courts’ discretion, but we do not lightly assume that Congress has intended to depart from established principles.”).
mandate. The best announcement of this notion comes from the Supreme Court in *Porter v. Warner Holding Co.*:

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

**CONFRONTING THE SECOND CIRCUIT’S DECISION**

The decision of the Second Circuit in *Citigroup* is flawed in at least two respects. First, the decision patently violates the Separation of Powers Doctrine by placing the central consideration in the issuance of an injunction with the SEC. Second, it ignores longstanding precedent regarding the role of courts with respect to equitable relief.

**Separation of Powers: Ceding a Central Function**

In *Citigroup*, the Second Circuit’s holding grants to the SEC a function central and essential to the judiciary, and thus violates the Separation of Powers principle. Namely, the decision permits the SEC to be the arbiter of the public interest: “The job of determining whether the proposed SEC consent decree best serves the public interest, however, rests squarely with the SEC, and its decision merits significant deference.”

Given that the primary consideration in injunctive relief is consideration of the public interest, the SEC may now decide for itself where injunctive relief is warranted, and this decision will be largely devoid of judicial imprimatur. After *Citigroup*, the decision to

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226 *See Hecht*, 321 U.S. at 329 (“We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied.”).
227 *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see also Brown v. Swann*, 35 U.S. 497, 503 (1836) (“The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.”).
228 *See Chadha v. INS*, 634 F.2d 408, 424 (9th Cir. 1980) (“[W]e define a constitutional violation of the separation of powers as an assumption by one branch of the powers that are central or essential to the operation of a coordinate branch.”).
229 *See Citigroup IV*, 752 F.3d 285, 298 (2d Cir. 2014).
grant or deny injunctive relief is only nominally a decision for the courts. Professor John Coffee, writing before the decision of the Second Circuit came down, stated that the only way the court of appeals could reverse Judge Rakoff was to declare that the SEC has the “sole discretion” to determine where injunctive relief is warranted. That is precisely what the Second Circuit held.

The decision is also disruptive to the judiciary, and prevents judges from discharging their duties, meeting the standard set out in Nixon for finding a separation of powers violation. Article III of the constitution explicitly vests equity power in the courts. There is no indication courts are unsatisfactory or ill-situated in this regard. On the contrary, hundreds of years of equitable precedent provide compelling reason to conclude that courts take this responsibility seriously and discharge this duty to effect just and reasonable outcomes. Citigroup, however, all but places the courts’ equity powers with the SEC in the context of securities cases. Courts are thus confined in their own use of equitable powers, resulting in the loss of a key function that is constitutionally granted.

Equitable relief is precisely the sort of central and essential power contemplated in Chadha. Equitable relief has been a crucial tool of the courts in a an array of contexts.

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230 See Coffee Jr., supra note 60 (“The only basis on which the Second Circuit could seemingly grant the requested relief...would be to find that the SEC, and not the district court, has the sole discretion to determine whether a proposed settlement is fair, reasonable, adequate, and in the public interest. To date, even though the SEC is entitled to deference, the case law does not go anywhere near this far.”).


232 See U.S. CONST. art. III, § 2, cl. 1 (“The judicial power shall extend to all cases, in law and equity . . . .”). The Supreme Court was the only court explicitly contemplated in the Constitution, and for that reason, the text grants the “judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”

233 Id.
such as antitrust,\textsuperscript{234} desegregation,\textsuperscript{235} and prison reform.\textsuperscript{236} Without such equitable powers, court-issued mandates would lack potency and credibility. Equitable powers, the “formidable” power of contempt among them, are that which give court decisions their “bite,” and are thus a critical to the judiciary.\textsuperscript{237}

\textit{Ignoring Hecht and its Progeny}

One of the more striking features of the Second Circuit’s opinion is the fact that it contains scant treatment of precedent. This is true of controlling precedent from the Supreme Court and the Second Circuit, as well as persuasive precedent from other circuits. Despite the Second Circuit’s casualness on this point, precedent is very informative of the dispute it

\textit{Citigroup}.

Like \textit{Hecht}, our analysis begins with the relevant statutory language.\textsuperscript{238} The SEC brought its case against Citi under the Securities Act of 1933.\textsuperscript{239} Section 20(b) of that Act provides for statutory injunctions in the following language:

\begin{quote}
Whenever…any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, the Commission may, in its discretion, bring an action in any district court of the United States…to enjoin
\end{quote}

\begin{footnotes}
\textsuperscript{234} See United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (using injunctive relief to compel disclosure of certain proprietary information).
\textsuperscript{235} See Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955) (“In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.”).
\textsuperscript{236} See Brown v. Plata, 131 S. Ct. 1910 (2011) (using injunctive relief to impose prison population limits to ensure prisoner’s Eight Amendment rights were protected).
\textsuperscript{237} See \textit{Citigroup I}, 827 F. Supp. 2d at 332 (“But when a public agency asks a court to become its partner in enforcement by imposing wide-ranging injunctive remedies on a defendant, enforced by the formidable judicial power of contempt, the court, and the public, need some knowledge of what the underlying facts are. . . .”).
\textsuperscript{238} \textit{Hecht}, 321 U.S. at 321-22.
\textsuperscript{239} \textit{Citigroup IV}, 752 F.3d 285, 289 (2d Cir. 2014).
\end{footnotes}
such acts or practices, and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.\textsuperscript{240}

A long line of Supreme Court cases hold that unless the governing statute contains express language circumscribing the discretion of district courts, that the background principles of equity remain in force.\textsuperscript{241} The above language is far from the “inescapable inference,” required by \textit{Warner Holding Co.} to conclude that the discretion of the district court is in some way curtailed.\textsuperscript{242} In fact in \textit{Mills v. Electric Auto-Lite Co.}, the Supreme Court was clear the statutory language of the 1934 Act, substantially similar to that of the 1933 Act, did not restrict courts’ discretion: “[W]e cannot fairly infer from the Securities Exchange Act of 1934 a purpose to circumscribe the courts’ power to grant appropriate remedies.”\textsuperscript{243}

At the risk of trivializing this plain yet important point, the Supreme Court in \textit{Hecht} held that even where a statute uses \textit{more} restrictive language that it is still entirely within a courts purview to determine the propriety of injunctive relief.\textsuperscript{244} In addition, the \textit{Hecht} Court specifically cited the 1933 and 1934 Act as containing language that requires an element of judicial discretion.\textsuperscript{245} Having thus established that the operative language in the 1933 Act does not circumscribe the discretion of courts, it follows that “[t]he decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court.…”\textsuperscript{246} The panel in \textit{Citigroup} all but rejected this rule by vesting the primary consideration in equitable relief, the

\begin{footnotesize}
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\item \textsuperscript{240} Securities Act of 1933 § 20(b); 15 U.S.C. § 77t(b) (2006).
\item \textsuperscript{242} \textit{Id.}
\item \textsuperscript{244} \textit{Hecht}, 321 U.S. at 591.
\item \textsuperscript{245} \textit{Id.} at 331 n.7.
\item \textsuperscript{246} \textit{eBay Inc.}, 547 U.S. at 391.
\end{itemize}
\end{footnotesize}
public interest, with the SEC.\textsuperscript{247} A reviewing court under \textit{Citigroup} is confined to reviewing the “procedural propriety” of the consent decree, and absent any irregularities must generally issue the injunction sought.\textsuperscript{248}

Courts have a duty to independently assess the merits of a proposed consent decree.\textsuperscript{249} The court’s ultimate decision is to be based on the entirety of the attendant circumstances.\textsuperscript{250} The decision is based on “all those considerations of fairness that have been the traditional concern of equity courts.”\textsuperscript{251} Further, courts have a “duty inquire into the technical terms and factual disputes underlying the proposed settlement.”\textsuperscript{252} Courts are compelled to “take genuine account of the equities.”\textsuperscript{253} It is thus plain that the Second Circuit’s preoccupation with procedural correctness as opposed to substantive or factual propriety is largely misplaced. The topical considerations authorized by the court of appeals fall far short of the searching review that should, and traditionally has, characterized equitable practice.

Judge Rakoff, as trial judge, was in the best possible position to view and assess the factual record. Presiding over the proceedings first hand, Judge Rakoff was able to witness the candor and forthrightness of the parties. To borrow language from the Second Circuit, he was

\textsuperscript{247} \textit{See Citigroup IV, Inc.}, 752 F.3d 285, 296 (2d Cir. 2014) (“The job of determining whether the proposed SEC consent decree best serves the public interest, however, rests squarely with the SEC. . . .”).

\textsuperscript{248} \textit{See id.} at 295-96 (“The primary focus of the inquiry, however, should be on ensuring the consent decree is procedurally proper . . . taking care not to infringe on the SEC’s discretionary authority to settle on a particular set of terms.”).

\textsuperscript{249} \textit{Id.} at 293; \textit{see also} Arizona v. City of Tucson, 761 F.3d 1005, 1012 (9th Cir. 2014) (discussing independent review in the context of CERCLA consent decrees); \textit{see also} City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (stating that courts are to “eschew any rubber stamp approval in favor of an independent evaluation”).

\textsuperscript{250} \textit{See SEC v. Culpepper}, 270 F.2d 241, 250 (2d Cir. 1959) (“The chancellor’s decision is based on all the circumstances. . . .”).

\textsuperscript{251} \textit{SEC v. Manor Nursing Ctrs., Inc.}, 458 F.2d 1082, 1102 (2d Cir. 1972).

\textsuperscript{252} \textit{United States v. Hooker Chems. & Plasctics Corp.}, 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982).

\textsuperscript{253} \textit{F.T.C. v. Weyerhaeuser Co.}, 665 F.2d 1072, 1082 (D.C. Cir. 1981).
“on the firing line and [able to] evaluate the action accordingly.” Conversely, the appeals panel had only a second order view of the record and, from its lofty vantage point, ruled it sufficient. The court of appeals went so far as to say that short of collusion, district courts should be satisfied by the averments of the SEC alone. Averments are by definition unproven. It is difficult to reconcile the long standing requirement that courts satisfy themselves of the factual underpinnings of equitable relief and the position of the court of appeals which essentially has courts taking the SEC at its word.

As discussed in connection with Bonastia, we understand that a failure “to apply well-settled legal precepts to a conceded set of facts” is an abuse of discretion. The Second Circuit would lead one to believe this was the case in Citigroup. In fact, as far as Judge Rakoff was concerned, there was no set of conceded facts. Judge Rakoff was doing little more than conducting his own, independent factual analysis as called for by Hooker, and a much more limited inquiry at that. And although Judge Rakoff set a date for trial, I submit that had his factual questions been answered he likely would have approved the settlement, just as he did in SEC v. Bank of America. There, Judge Rakoff initially refused to enter a consent decree for want of facts, and after receiving additional information from the parties entered approved the settlement. Importantly, the admissions of the bank stopped short of admitting liability, thus

254 See Grinnell Corp., 495 F.2d at 454 (“Great weight is accorded his (the trial judge’s) views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible bars to success. Simply states, he is on the firing line and can evaluate the action accordingly.”).
255 Citigroup IV, 752 F.3d 285, 296 (2d Cir. 2014).
256 Id.
257 BLACK’S LAW DICTIONARY 168 (9th ed. 2014) (“n. (15c) A positive declaration or affirmation of fact; esp., an assertion or allegation in a pleading.” (emphasis added).
foreclosing on collateral exposure and providing a model of what a factually robust settlement with Citi could have looked like.\footnote{Id.; see also Coffee Jr., supra note 60 (discussing parallels between Citigroup and Bank of America).}

By far the most shocking aspect of the opinion by the court of appeals was the degree of deference afforded to the SEC in determining what satisfied the public interest.\footnote{Citigroup IV, 752 F.3d at 297.} The court stated unequivocally, “The job of determining whether the proposed SEC consent decree best serves the public interest, however, rests \textit{squarely} with the SEC, and its decisions merits significant deference[.]\footnote{Id. at 296.} This level of deference is akin to \textit{Chevron} deference, and while \textit{Chevron} deference might often be a safe harbor for agencies when engaged in rulemaking, it would seem that the court of appeals ceded too much judicial authority to the SEC by extending \textit{Chevron}-level deference to considerations of equity—the domain of courts.\footnote{See Chris Rice, \textit{Injunctive Relief and Judicial Deference}, COLUM. BUS. L. REV. ONLINE (Apr. 8, 2012, 5:21 PM), http://cblr.columbia.edu/archives/12065 (describing the misplaced reliance on \textit{Chevron}).}

The panel did itself a disservice in relying on \textit{Heckler}. There the agency decision being challenged there was one \textit{not} to take up an enforcement action. As Chief Justice Rehnquist stated, decisions not to act do not involve “coercive power” on the part of an agency. The situation in \textit{Citigroup} is precisely the opposite: the SEC \textit{was} acting affirmatively, and its request for injunctive relief \textit{does} implicate coercive power over those areas traditionally protected by courts. The Second Circuit’s reliance on \textit{Heckler} is not only mistaken, but undermines their conclusion.\footnote{See id. (“\textit{Heckler} concerned a decision by an administrative agency \textit{not} to pursue injunctive relief; while a request for injunctive relief involves the court’s conception of the public interest, the absence of such a request does not involve the court in the same way.”).}
Many circuits have held that the most important factor in determining the degree of deference afforded to a party seeking approval of a consent decree is “the persuasive power of the agency’s proposal and rationale…” 266 Apparently, the court of appeals was so impressed by the strength of SEC’s case that it felt it necessary to cede the bench’s most essential function to the SEC in this and all future cases. 267 Remarkable, really, considering there were no stipulations of fact here. 268 How could a trial judge be convinced of the relative strengths of the parties’ positions where there are no factual stipulations and the defendant neither admits nor denies the allegations?

On this analysis, it is clear that the Second Circuit relinquished a critical role of the judiciary to the SEC. The court of appeals uses the justification that the SEC has a constituency, whereas courts do not. 269 This reasoning is flawed for two reasons. As we show above, the Congressional “constituency” gave its mandate to the SEC through the operative language of the Act, which preserves the traditional role of the courts, and thus, the role of the SEC. Second, even if this were not the case, the framers intended that courts act as a check on the whims of the Executive and Congress. Excesses of Congress or the Executive cannot be justified on the grounds that they have a constituency.

Implications of a Flawed Ruling

A question that arises naturally from the Second Circuit’s decision is what degree of discretion remains for courts in granting their judicial imprimatur after Citigroup. And, relatedly, were there any other courses of action Judge Rakoff could have elected. As to the first question,

267 Citigroup IV, 752 F.3d at 296.
268 See Citigroup I, 927 F.Supp.2d at 330 (noting court cannot approve settlement due to lack of “proven or admitted facts”).
269 Citigroup IV, 752 F.3d at 296.
the opinion in *Citigroup* makes clear that a reviewing court’s analysis should be limited to the procedural propriety of the consent decree.\(^{270}\) However, other circuits have not winnowed the role of reviewing courts to such a degree and leave a substantial basis for the conclusion that the role of courts is much broader.

For example, the *Hooker* court recognized a duty to inquire as to the factual underpinnings of a consent decree.\(^{271}\) Along those lines, the First Circuit in *Standard Financial*, the Fourth Circuit in *FMC Corp.*, and the Seventh Circuit in *Hiram Walker & Sons, Inc.*, all state that an important factor for a reviewing judge to consider is the strength of the plaintiff’s case. Indeed the Seventh Circuit regards it as the most important factor.\(^{272}\) Elsewhere, judges consider the substantive terms of the consent agreement.\(^{273}\) Some courts go so far as to require that the consent judgment “represents a reasonable factual and legal determination based on the facts of record, whether established by evidence, affidavit, or stipulation.”\(^{274}\)

A Recent Case Note in *The Harvard Law Review* proposes a district court standard of review restricted to “the adequacy of the individual settlement package.”\(^{275}\) At the same time, the author characterizes as “overreaching” efforts to discern factual underpinnings.\(^{276}\) This seems to be a logical inconsistency; how can a judge possibly assess the adequacy, or any aspect of a proposed consent decree, without facts by which to measure it? I suggest that in order to accord

\(^{270}\) *Id.* at 295.

\(^{271}\) *See* United States v. Hooker Chems. & Plastics Corp., 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982) (“[T]he reviewing court has a limited duty to inquire into the technical terms and the factual disputes underlying the proposed settlement.”).

\(^{272}\) EEOC v. Hiram Walker & Sons, Inc., 768 F.2d 884, 889 (7th Cir. 1985).

\(^{273}\) In re Tutu Water Wells CERCLA Litigation, 326 F.3d 201, 207 (3d Cir. 2003).

\(^{274}\) United States v. City of Miami, 664 F.2d 435, 441 (5th Cir. 1981).


\(^{276}\) *See id.* at 1291 (“Judge Rakoff overreached in his demand that the SEC establish the ‘truth’ of the allegations against Citi.”).
with the rich history of equitable practice, and to allow judges the flexibility needed to effect just results, reviewing judges should be given wide latitude to inquire into the facts supporting a settlement. This is not to say they will or should do so in every case, only that they should be permitted to do so when they wish. Moreover, to equate attempts to determine the factual circumstances with admissions of liability mischaracterizes the inquiry.

On the second question, I argue that Judge Rakoff could have approved the terms of the settlement less the injunctive elements.\textsuperscript{277} This conclusion is bolstered by \textit{US v. City of Miami}, in which the court discusses hybrid consent judgments, “based in part on the parties’ settlement agreement and in part on the court’s own judgment.”\textsuperscript{278} More generally, the Supreme Court’s announcement in \textit{Yakus}, that courts sitting in equity “go much further both to give and withhold relief” where the public interest is implicated than they do where only private interests are concerned also lends support to this idea.\textsuperscript{279} Admittedly, this result would have been a windfall for Citi, as its punishment would have been \textit{less} severe without the injunctive elements, but it would have sent a powerful message to the SEC. In addition to rebuking the SEC, such a settlement would have deprived the SEC of nothing of practical value as the SEC seldom enforces its injunctions.\textsuperscript{280}

\textsuperscript{277} See Coffee Jr., \textit{supra} note 60 (arguing that if the SEC itself pursued a settlement without injunctions, it could likely extract higher monetary penalties).

\textsuperscript{278} See \textit{City of Miami}, 664 F.2d at 440 (“Complete accord on all issues, however, is not indispensable to the entry of any order. Even in a two-party litigation the parties may agree on as much as they can…and call upon the court to decide the issues they cannot resolve . . . Thus, there may be a decree “partially consensual and partially litigated.”) (internal citation marks omitted).

\textsuperscript{279} \textit{Yakus v. United States}, 321 U.S. 414, 441 (1944).

\textsuperscript{280} See \textit{Brief of Amici Curiae Securities Law Scholars for Affirmance in Support of the District Court’s Order and Against Appellant and Appellee at 6}, \textit{SEC v. Citigroup Global Mkts., Inc.}, 752 F.3d 285 (2d Cir. 2014) (No.11-5227), 2012 WL 7009633, at *16; \textit{see also} Coffee, \textit{supra} note 276 (“Nor is it credible that injunctive relief is that important to the SEC…because the SEC never seeks to enforce its injunctions through contempt”).
A court’s injunctive power should not be wielded casually.\textsuperscript{281} Where the SEC seeks to invoke the equitable power of courts, it ought to be prepared to justify its need with factual support.\textsuperscript{282} Contrary to what commentators and the SEC itself argued, this does not require an admission of liability and resulting collateral exposure.\textsuperscript{283}

\textbf{CONCLUSION}

In \textit{SEC v. Citigroup Global Markets}, the Second Circuit’s flawed decision restricted the role of judges reviewing consent decrees in agency enforcement action to primarily ensuring that the proposed settlement is procedurally proper. Further, the Second Circuit gives excessive deference to the SEC and its determination of what is in the public interest. Because the public interest is the primary consideration in the decision to grant or deny equitable relief, the Second Circuit relegated courts to the role of mere seconders to the whims of agencies. In so holding, the Second Circuit rejected precedent and violated the Separation of Powers.

\textsuperscript{281} \textit{See SEC v. Commonwealth Chem. Sec., Inc.}, 574 F.2d 90, 99 (2d Cir. 1978) (explaining that “collateral consequences of an injunction can be very grave” and describing judicial reticence to issue injunctions); \textit{see also} United States v. Local 1804-1, Int'l Longshoremen's Ass'n, AFL-CIO, 44 F.3d 1091, 1095 (2d Cir. 1995) (describing contempt as “among the most formidable weapons in the court's arsenal”).

\textsuperscript{282} \textit{See} Coffee Jr., \textit{supra} note 60 (stating that “courts should seek a full explanation of the enforcement agency’s reasoning and should have some factual understanding of the strength of the case before imposing injunctive relief.”).

\textsuperscript{283} \textit{Id}.