RESPONSE

Court-Agency Dialogue: Article III's Dual Nature and the Boundaries of Reviewability

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ABSTRACT

Courts reviewing agency actions frequently offer more than a positive analysis of the agencies' decisions. They might engage in advice-giving, for example, or temper the remedy as a way of modulating the impact of review. These actions can be used in a dialogic way, to provide normative signals to agencies. Yet because courts must judge agency actions only on the grounds provided by the agency at the time of the agency's decision—and must ordinarily remand actions that fail to meet substantive standards of review—these normative signals require a delicate touch so as to avoid judicially imposed policy preferences and any chipping away at Article III values. In his excellent study of the ordinary remand rule, Professor Christopher J. Walker traces the development of the rule and constructs a taxonomy of dialogic tools that might profitably accompany remands. This Response praises Professor Walker's contribution to the literature, and suggests several areas for future study. In particular, this Response emphasizes the dual nature of Article III—consisting both of powers and resistance norms—and suggests that a full account of court-agency dialogue ought to be mindful of this duality. Further, this Response suggests that agency actions at the edges of reviewability offer a unique focal point for considering how the competing Article III concerns operate. And finally, this Response cautions that taken too far, dialogic tools can undermine judicial responsibility and agencies' constitutional legitimacy.

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INTRODUCTION

When courts review agency actions, they can offer signals to agencies and others beyond mere holdings and surficial reasoning on particular points of law. At times this is apparent from the force of strongly-worded opinions.[1] More subtly, courts sometimes engage in advice-giving—providing alternative rationales that presumably would have met the applicable standard of review.[2] The remedies available to courts also vary the impact with which they have spoken.[3] Regardless, the tools that courts use in their dialogues with agencies ought to be viewed as devices that necessarily impact the constitutional balance of powers. In Professor Christopher Walker's thoughtful, hardworking study of agencies' tools for enhancing court-agency dialogue, he develops a number of insights about this balance of powers from an empirical assessment of the ordinary remand rule in action.[4] I am honored to provide this Response.

This Response proceeds as follows. Part I uses the ordinary remand

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[1] *See, e.g.*, Ctr. for Biological Diversity v. Norton, 240 F. Supp. 2d 1090, 1100 (D. Ariz. 2003) (calling an agency interpretation "knowingly unlawful").

[2] *See, e.g.*, Envtl. Def. Fund, Inc. v. EPA, 898 F.2d 183, 189 (D.C. Cir. 1990) (offering hypothetical ways in which agency might have lawfully reconciled various statutory provisions). For purposes of Professor Walker's article, this Response, and my own past work, there is little need to distinguish between arbitrary and capricious, substantial evidence, and the *Chevron* two-step standards. *See* 5 U.S.C. § 706(2)(A) (agency action can be set aside if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *id.* § 706(2)(E) (agency action can be set aside if "unsupported by substantial evidence"); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–45 (1984) (applying two-step formula to review under 5 U.S.C. § 706(2)(C) (agency action shall be set aside if "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right")); Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1732–35 (2011) ("Although these standards differ in their phrasing, each attempts to pair judicial deference with a reasoned decisionmaking requirement.").

[3] *See* Hammond, *supra* note 2, at 1737–39 (discussing deference and remedies to unlawful agency action); *see also* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 370–71 (2003) (contending remands without vacatur promote collaboration between courts and agencies).

[4] Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1590–1600 (2014).

rule as a springboard for a brief overview of the role of administrative law doctrine in furthering administrative legitimacy. This discussion sets the stage for a more detailed look at Professor Walker's findings and analysis, which is the subject of Part II. Part II highlights one of Professor Walker's most intriguing findings—an apparent Article III motivation in some courts' treatment of the ordinary remand rule. This Part applauds that insight, but argues further that a normative framework for assessing court-agency dialogue ought to be mindful of Article III's *dual* nature. That is, Article III supports both the courts' countermajoritarian power and various resistance norms meant to avoid interbranch conflicts and politically motivated outcomes when possible. Part III uses two examples—the standard of review for agency inaction[5] and the exception under the Administrative Procedure Act ("APA")[6] to reviewability for actions committed to agency discretion[7]—to illustrate how the differing sides of Article III bear on normative assessments of dialogic tools. It further argues that the dialogic tools, taken too far, can undermine Article III values. This Response concludes that Professor Walker's Article is a valuable contribution both on its own and in the questions it raises for a continuing dialogue about how best to strike a balance amongst the branches in administrative law.

I. THE ORDINARY REMAND RULE AND ADMINISTRATIVE LEGITIMACY

The ordinary remand rule stems from the *SEC v. Chenery Corp.* ("*Chenery I*")[8] principle, which provides that courts must review agency actions solely on the basis of the rationales provided by the agencies themselves.[9] Thus, courts may not supply rationales for agency decisions that the agencies themselves have not provided.[10] When the rationale for

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[5] *See* 5 U.S.C. § 706(1) (providing authority to "compel agency action unlawfully withheld or unreasonably delayed").

[6] Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551–559, 701–706 (2012)).

[7] 5 U.S.C. § 701(a)(2).

[8] SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80 (1943).

[9] The doctrine's pedigree is in a series of dialogic opinions issued in cases involving judicial review of an agency's formal adjudications. *See* SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 196 (1947) ("[A] reviewing court . . . must judge the propriety of [agency] action solely by the grounds invoked by the agency."); *Chenery I*, 318 U.S. at 87 ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *see also* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 962 (2007) (explaining classification and noting APA had not yet been enacted at time of *Chenery I*).

[10] *See* Hammond, *supra* note 2, at 1735–37 (providing historical doctrinal account of the *Chenery* principle).

an agency action is lacking or inadequate, therefore, a court should apply the ordinary remand rule, and send the matter back to the agency.[11] According to *Chenery I*, this approach reinforces separation-of-powers principles because "agenc[ies] alone" are authorized to make policy-infused administrative judgments.[12] Were courts to uphold or reject agency actions for reasons not developed by the agencies themselves, courts would "intrude upon the domain which Congress has exclusively entrusted to an administrative agency."[13]

As discussed in more detail below, this reasoning reflects an Article III concern that courts ought to avoid imposing policy preferences on the democratically accountable branches. Further, scholars have demonstrated that the *Chenery I* principle (and by extension, the ordinary remand rule) has deeper constitutional implications: it counterbalances broad delegations of discretion by requiring agencies to articulate how they have exercised their power.[14] It is thus fundamental to "the very legitimacy of the administrative state."[15]

It is helpful here to consider another fundamental administrative law value that works in tandem with *Chenery I* to temper nondelegation concerns: the reason-giving requirement. Put simply, courts cannot review agencies on the basis of the agencies' rationales if the agencies do not provide those rationales.[16] But the reason-giving requirement does much more. It guards against arbitrariness, which, as Professor Lisa Bressman has convincingly argued, has constitutional implications.[17] And it furthers procedural legitimacy as well as administrative law values by promoting participation, deliberation, and transparency.[18] Thus, the *Chenery I*

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[11] *See, e.g.*, INS v. Ventura, 537 U.S. 12, 16 (2002) (per curiam) (stating proper course is to remand to agency).

[12] *Chenery I*, 318 U.S. at 88.

[13] *Id.*

[14] Stack, *supra* note 9, at 1000; Peter L. Strauss, *Legislation That Isn't—Attending to Rulemaking's "Democracy Deficit,"* 98 CALIF. L. REV. 1351, 1356–59, 1365 (2010).

[15] Hammond, *supra* note 2, at 1735.

[16] *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990) (noting that an agency must "take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision"); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 419–20 (1971) (describing need for administrative record to facilitate review).

[17] Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 466–74 (2003).

[18] For an exhaustive treatment of the reason-giving requirement's legitimizing features, see Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 323–26 (2013).

principle, ordinary remand rule, and reason-giving requirement should be understood as reflecting a set of constitutionally-grounded rules that reinforce administrative legitimacy.

II. DIALOGIC REMANDS AND THE THREE BRANCHES

Given the constitutional implications of the *Chenery I* principle, ordinary remand rule, and reason-giving requirement, judicial behavior when remanding decisions merits close scrutiny. In this regard, Professor Walker's piece makes several contributions to the literature. Some of these contributions owe to his methodology: he examines hundreds of decisions citing recent Supreme Court precedent involving the ordinary remand rule, 372 of which involve petitions to review Board of Immigration Appeals ("BIA") immigration orders.[19] Thus, he is able to construct an important story about the court-agency relationship in a context where people's futures, and perhaps even lives, are at stake.[20] In addition, he assembles what he terms a "toolbox" of administrative common law meant to enhance court-agency dialogue while preserving the separation-of-powers balance struck by the ordinary remand rule.[21] Professor Walker's toolbox alone will have important impacts.[22]

In addition to the insights gleaned from his empirical examination, Professor Walker tracks the development of the ordinary remand rule.[23] He concludes that, although it originated with a focus on Article I considerations—i.e., courts respect Congress's intent that agencies decide particular matters rather than courts—it also reflects Article II values related to the executive's authority to faithfully execute the law.[24] This observation seems consistent with the doctrinal and theoretical

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[19] *See* Walker, *supra* note 4, at 1580 (describing the methodology used to examine the court-agency dialogue).

[20] Using judicial reviews of BIA orders was an elegant choice because the Supreme Court recently offered its view of the ordinary remand rule in this very context not once, but *three times*. By staying in the same context, Professor Walker avoided any siloing—a phenomenon in which lines of administrative law decisions develop unique features specific to particular agencies under review—that may have taken place were he to have focused on a different topical area. *Cf. generally* Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499 (2011) (considering the silo effect).

[21] Walker, *supra* note 4, at 1607.

[22] From a practical perspective, it is a resource for courts and litigants seeking authority for flexible case-management approaches in the administrative law context. Moreover, by arranging the tools according to their dialogic promise and filtering those tools through a constitutional powers perspective, Professor Walker adds further value for courts and scholars alike.

[23] Walker, *supra* note 4, at 1561–79.

[24] *Id.* at 1564–65.

development of administrative law more generally: after all, *Chenery I* came on the heels of the New Deal's legislative outpouring,[25] whereas *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*'s[26] rationale ushered in a strong focus on executive power.[27]

What is more intriguing is that Professor Walker uncovers hints that courts are mindful of Article III powers when they *depart from* the ordinary remand rule. For example, some courts in his dataset referenced process-type concerns such as undue delay and unfair adjudicators when departing from the rule.[28] He thus highlights two judicial powers relevant to administrative law: saying what the law is and protecting process-based rights.[29] Indeed, a closer look at the data brings these concerns into focus. As noted above, BIA appeals involve high stakes; the number of observations in the dataset also suggests the decisions are quite numerous. These attributes may heighten the courts' countermajoritarian responsibilities and account for their occasional departures from the ordinary remand rule.[30]

III. ACCOUNTING FOR THE DUAL NATURE OF ARTICLE III

But suppose one were to take one more step down the three-branch road and consider how the other set of Article III values—those grounded in judicial self-restraint—fare in the article's account. Although Professor Walker mentions *Marbury v. Madison*'s[31] classic assignment of the courts' power to say what the law is,[32] he might also engage that portion of the case that emphasizes courts are not to interfere with executive discretion because "the subjects are political."[33] Although this sounds like an Article II grounding, it also provides authority for what Professor Mark Seidenfeld

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25 This time period saw frequent and broad delegations of authority to agencies. *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1758–60 (2007) (outlining theories of administrative law over time); Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 756–59 (2011) (tracking the history of agency models of behavior and deference to agency expertise).

26 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

27 *See* Bressman, *supra* note 25, at 1765 ("*Chevron*, more than any other case, is responsible for anchoring the presidential control model.").

28 Walker, *supra* note 4, at 1587–88.

29 *Id.* at 1587–89.

30 Professor Walker hints at this notion, but does not go so far as to claim that protecting constitutional rights animates the courts' departures from the ordinary remand rule. Walker, *supra* note 4, at 1587–88.

31 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

32 Walker, *supra* note 4, at 1589.

33 *Marbury*, 5 U.S. at 166.

has called "judicial self-limitation."[34]

This concept of judicial restraint has been called a "resistance norm,"[35] and is grounded in the classic concern over the courts' countermajoritarian difficulty.[36] Although there is a robust literature in constitutional law on this topic,[37] administrative law scholars could do more to engage this concept.[38] The very idea of dialogue—which Professor Walker indeed engages—suggests that courts will self-impose limits on their own power to avoid confrontations with the other branches.[39] On this understanding, could *Chenery I* be viewed as being grounded in Article III's softer norms?

At the very least, this possibility warrants a closer look at judicial tools of engagement. For one thing, doing so illustrates that Professor Walker's toolbox extends beyond the immediate context he studied to other types of adjudications as well as rulemakings. Even better, it provides a frame for thinking about courts' options within the "grey areas" of reviewability. Take two examples: the standard of review for agency inaction[40] and the "committed to agency discretion" exception to judicial review found in § 701(a)(2) of the APA.[41]

The reasons for these two examples are worth a pause. Each is a tricky area of administrative law guided by separation-of-powers concerns; thus, both embody many of the considerations identified by Professor Walker as animating the ordinary remand rule. But each is different from the review of adjudication context because each is an area where courts are much more skittish about overstepping their roles. Whereas an agency adjudication provides a developed record and affirmative exercise of

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[34] Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 292 (2011).

[35] *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1552 (2000); *see also* Seidenfeld, *supra* note 34, at 276 n.8 (collecting sources and describing Young, *supra*, as "coining the phrase 'resistance norm' for a doctrine meant to discourage but not ban government action that impinges on constitutionally recognized interests").

[36] *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 5 (1962) (exploring whether "the judicial Power" under the Constitution was envisioned to include the authority to overrule duly passed majoritarian legislation).

[37] Hammond, *supra* note 2, at 1724 n.3 (collecting several examples of constitutional law scholarship on dialogic considerations).

[38] Professor Seidenfeld's work grounding *Chevron* in Article III norms is an important exception. *See generally* Seidenfeld, *supra* note 34.

[39] *See* Hammond, *supra* note 2, at 1777–80 (connecting dialogic considerations in administrative law to separation-of-powers values from constitutional law literature).

[40] *See* 5 U.S.C. § 706(1) (2012) (providing authority to "compel agency action unlawfully withheld or unreasonably delayed").

[41] *Id.* § 701(a)(2).

administrative power, agency inaction usually lacks a record and is in essence a decision *not* to exercise such power. Similarly, the § 701 exception applies when there is no standard by which a court can judge what the agency has done; there is "no law to apply."[42] Although there is sometimes a record in such circumstances,[43] there typically has been no exercise of administrative power, making it very difficult for courts to assess the lawfulness of the agency's behavior.

As Professor Ron Levin has demonstrated, both of these examples are animated by separation-of-powers and comparative institutional competence concerns.[44] They reveal judicial reluctance to interfere with agency priorities, are identified in part by the absence of a legal standard to help focus review, and lack an agency decision to help focus the issues on review.[45] The Article III account would counsel that, where courts identify these possibilities, they should err on the side of demurring in the agencies' favor because there are special risks that the courts would impose their own policy preferences were they to take up substantive review.

And yet courts find ways to promote dialogue within these grey areas using tools like the ones Professor Walker identifies. Where an agency fails to respond to a rulemaking petition, for example, a court might retain jurisdiction over the matter as a way of signaling its continued interest, yet refrain from issuing a writ of mandamus.[46] For agency behavior within the § 701 exception, a court might find it lacks jurisdiction to review the case but remind the parties of avenues for possible future review.[47] Examples like these show that, even where concerns for Article III self-restraint may be heightened, courts can modulate their messages to simultaneously invoke their Article III power.

Nevertheless, the tools should be used carefully to avoid tilting too far. Consider, for example, Professor Walker's tool of providing hypothetical

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[42] Heckler v. Chaney, 470 U.S. 821, 830 (1985) (internal quotation marks omitted).

[43] ICC v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 283 (1987) (explaining that otherwise unreviewable agency actions are not made reviewable by fact that the agency has provided reasons).

[44] Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 771–72 (1990).

[45] Hammond & Markell, *supra* note 18, at 338.

[46] *E.g.*, Telecomms. Research & Action Ctr. v. FCC (*TRAC*), 750 F.2d 70, 80 (D.C. Cir. 1984); *cf.* Walker, *supra* note 4, 1591–93 (discussing panel retention of jurisdiction).

[47] *E.g.*, Sierra Club v. EPA, 377 F. Supp. 2d 1205, 1208 (N.D. Fla. 2005) (finding no jurisdiction because act was committed to agency discretion, but making note of other avenues for judicial challenges); *cf.* Walker, *supra* note 4, at 1594–96 (discussing hypothetical solutions).

solutions to agencies along with their remand orders.[48] His assertion that this practice is not particularly troubling may not hold true in all circumstances. The following example demonstrates.[49] Suppose a court holds an agency action invalid for failure to accommodate all of a statute's provisions. The court offers a hypothetical rationale that, it suggests, would have reasonably resolved the issue. The court remands the rule without vacating it, and the agency does nothing for fifteen years, after which it adopts a new rule supported by the court's hypothetical rationale. The new rule is easily upheld on a subsequent challenge.

On one hand, this example suggests the value of court-agency dialogue. After all, the agency benefitted from judicial guidance in developing its rationale on remand and was rewarded by a subsequent court. Yet viewed from a practical perspective, the overall scenario looks close to rational basis review: an invalid agency rule remained in effect against the backdrop of a court's hypothetical. This, of course, was the very approach that *Chenery I* and its accompanying rules eschewed. Given the constitutional grounding of *Chenery I*, the ordinary remand rule, and the reason-giving requirement, this example suggests a problematic exercise of judicial authority.[50] Taking this understanding further, what appears to be an act of judicial self-restraint—remanding without vacatur—becomes an abdication of the judicial role that simultaneously upsets the compromise of constitutionality that *Chenery I* established.

This claim is not meant to reach too far, but is raised to illustrate that more work is needed to understand how the *different* Article III values play out as courts select their communication tools and couple those tools with remedies. Given that the grey areas of reviewability sharpen these competing values, they may be fruitful areas for further exploration of the constitutional implications of dialogic tools. And it is to Professor Walker's credit that he has provided an insightful launching point for a continuing conversation.

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[48] *See* Walker, *supra* note 4, at 1594–96.

[49] This example is loosely based on a series of cases culminating in *Environmental Defense v. EPA*, 489 F.3d 1320 (D.C. Cir. 2007), which is outlined in detail at Hammond, *supra* note 2, at 1769–72.

[50] Hammond, *supra* note 2, at 1782.