The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue

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Abstract

When a court concludes that an agency's decision is erroneous, the ordinary rule is to remand to the agency to consider the issue anew (as opposed to the court deciding the issue itself). Although the Supreme Court first articulated this ordinary remand rule in the 1940s and has rearticulated it repeatedly over the years, little work has been done to understand how the rule works in practice, much less whether it promotes the separation of powers values that motivate the rule. This Article conducts such an investigation—focusing on judicial review of agency immigration adjudications and reviewing the more than 400 published court of appeals decisions that have addressed the remand rule since the Court rearticulated it in 2002.

This Article finds that courts generally fail to appreciate the dual separation of powers values of Article I legislative and Article II executive authority at issue and that some circuits have not been faithful to this command. Courts that refuse to remand seem to do so when they believe the petitioner is entitled to relief and remand would unduly delay or, worse, preclude relief because the petitioner would get lost in the process. In refusing to remand, courts express perceived Article III concerns of abdicating their authority to say what the law is and to ensure that procedures are fair and rights are protected in the administrative process. In reviewing the cases, however, this Article uncovers a novel set of tools that courts have developed to preserve their role in the process and enhance the court-agency dialogue. Instead of ignoring the remand rule, this Article suggests that courts should utilize and further develop this dialogue-enhancing toolbox to exercise their constitutional authority while preserving the delicate balance of powers between courts and agencies via the ordinary remand rule.

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Introduction

The prevailing view is that American administrative law follows the appellate model of judicial review, in that the interaction between agencies and reviewing courts is analogous to the interaction between

trial courts and courts of appeals in civil litigation.[1] Under the appellate model, review is record bound in that the reviewing court does not take evidence itself. The standard of review is less or more deferential depending on whether the issue is more legal or factual—reflecting the comparative expertise or competency of the different institutions.[2] Unlike the intrabranch relationship between trial and appellate courts in civil litigation, however, the agency-court relationship plays out against the backdrop of separation of powers principles. The presumption that the reviewing court has superior competence to answer questions of law is rebutted by the fact that Congress often delegates law-elaboration authority first and foremost to the agency.[3] Similarly, unlike trial courts working under appellate courts within the judicial branch, agencies working under the executive branch (with authority delegated by the legislative branch) have certain independent law-execution responsibility under Article II of the Constitution.[4] Thus, a court's review of agency action often implicates separation of powers values with respect to both Congress (Article I) and the President (Article II).

In light of these values, the appellate review model of administrative law has evolved to embrace, among other things, an "ordinary remand rule" in both agency adjudication and rulemaking: when a court concludes that an agency's decision is erroneous, the ordinary course is to remand to the agency for additional investigation or ex-

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1 *See generally* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 940–42 (2011).

2 *Id.*

3 *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005) (explaining that "*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative," and reiterating that "the agency remains the authoritative interpreter (within the limits of reason) of such statutes"); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (describing *Chevron* deference as "an across-the-board presumption that, in the case of ambiguity, agency discretion is meant").

4 *See, e.g.*, William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 881 (2001) (explaining that "the Executive has an independent and constitutionally mandated role in the discernment and articulation of constitutional meaning in connection with its execution of the laws"); Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of Law: A* Brand X *Doctrine of Constitutional Avoidance*, 64 ADMIN. L. REV. 139, 173–82 (2012) (exploring these dual separation of powers concerns in the context of *Chevron* deference and modern constitutional avoidance). Some scholars have taken this argument a step further. *See* Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2282 (2006) (arguing that the President has constitutional authority to fill in the holes of any statutory scheme, subject to congressional override).

planation (as opposed to the court deciding the issue itself).[5] This ordinary remand rule applies not only to questions of fact, which is also the case for the appellate review model in civil litigation. It also applies to questions of the application of law to fact, policy judgments, and even certain questions of law.[6] Although the Supreme Court first articulated this "simple but fundamental rule of administrative law" in the 1940s[7] and has since rearticulated the rule on numerous occasions, little work has been done to understand how the remand rule works in practice, much less whether judicial application of the rule alleviates the separation of powers values that motivate it.[8]

To fill the void in the literature, this Article presents an in-depth examination of the use of the ordinary remand rule by federal courts of appeals within a particular agency context. The Article focuses on judicial review of agency immigration adjudications, though the findings need not be confined to the immigration context or to judicial review of agency adjudication.[9] But this particular context provides a fertile ground for investigation. Courts of appeals handle thousands

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5 *See, e.g.*, Negusie v. Holder, 555 U.S. 511, 517 (2009) ("When the BIA has not spoken on 'a matter that statutes place primarily in agency hands,' our ordinary rule is to remand to 'giv[e] the BIA the opportunity to address the matter in the first instance in light of its own expertise.'" (quoting INS v. Ventura, 537 U.S. 12, 16–17 (2002) (per curiam))). *See generally* 3 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 18.1 (5th ed. 2009).

6 *See*, *e.g.*, *Negusie*, 555 U.S. at 520 (remanding question of statutory interpretation to the agency instead of providing an answer itself).

7 SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 196 (1947); *see also* SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80, 95 (1943) (remanding the matter to the agency because the "administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained").

8 Indeed, since Judge Friendly tried to make sense of the case law concerning the remand rule in 1969, Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 222–25, examination of the ordinary remand rule has been explored in just a few articles limited to examining the standard applications and exceptions to remand in practice. *See*, *e.g.*, Patrick J. Glen, *"To Remand, or Not To Remand":* Ventura*'s Ordinary Remand Rule and the Evolving Jurisprudence of Futility*, 10 RICH. J. GLOBAL L. & BUS. 1 (2010); John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 18 GEO. IMMIGR. L.J. 605 (2004). None of these articles explores the separation of powers concerns at play or conducts a systematic review of court of appeals decisions to assess whether and when courts refuse to remand and the reasons given. The most comprehensive study on the effect of the remand rule was recently conducted by Professor Emily Hammond, examining serial litigation in the administrative rulemaking context. *See generally* Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722 (2011). This Article builds on Professor Hammond's findings in the agency rulemaking context by analyzing the use of the remand rule in the agency adjudication context.

9 Professor Hammond makes a similar observation in her insightful response to this Article. Emily Hammond, *Court-Agency Dialogue: Article III's Dual Nature and the Boundaries of Reviewability*, 82 GEO. WASH. L. REV. ARGUENDO 171, 177 (2014) (observing that the study's

of petitions for review of immigration adjudications each year, and in the last decade alone the issue of remand has been addressed in nearly 2000 decisions.[10] Because the personal stakes for the immigrant petitioners are so high, courts may be more creative in how they implement the remand rule as well as the complementary judicial tools discussed in this Article. Moreover, over the last twelve years, the Supreme Court has issued a trio of decisions in the immigration adjudication context that provide further guidance to lower courts on how the ordinary remand rule should be applied.[11] Accordingly, this Article examines all of the published federal court of appeals decisions (over 400) that have cited those decisions in the time since the Court's 2002 rearticulation of the rule in *INS v. Ventura*[12] through the end of 2012. This examination contributes to the existing literature in several ways.

First, the cases reveal that most circuits, most of the time, follow the ordinary remand rule. Indeed, this Article finds an overall compliance rate of over eighty percent, though there is much variance among circuits. Some circuits—with the Ninth Circuit leading the way—have not been faithful to this command when, for instance, they believe the petitioner is entitled to relief and remand would unduly delay or, worse, preclude relief because the petitioner would get lost in the agency process on remand. That most circuits adhere to the ordinary remand rule in most cases, by itself, may not be too remarkable. That is until one takes a closer look at these cases, as discussed below, and realizes that courts have implemented a number of novel tools to enhance court-agency dialogue on remand.

Second, while the ordinary remand rule addresses the separation of powers values discussed above, published opinions on whether to remand rarely grapple with those values. The closest courts get is mere reference to congressional delegation with little or no elaboration. The remand rule, however, does more than honor congressional delegation; it shows respect for executive authority. Put differently, the ordinary remand rule serves both to respect Congress's delegation of adjudicatory or policymaking authority to the agency *and* to not

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findings "extend[ ] beyond the immediate context . . . to other types of adjudications as well as rulemakings").

10 This calculation is a conservative estimate based on citations to the Supreme Court's 2002 opinion concerning the ordinary remand rule: *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam). Westlaw KeyCite reports that *Ventura* has been cited in more than 1750 published and unpublished decisions by courts of appeals.

11 *Negusie*, 555 U.S. 511; Gonzales v. Thomas, 547 U.S. 183 (2006); *Ventura*, 537 U.S. 12.

12 INS v. Ventura, 537 U.S. 12 (2002).

intrude on the Executive's constitutional duty to execute the law. The fact that courts seldom articulate the Article I separation of powers issue—and never even mention the Article II one—may shed light on why some courts have created broad exceptions to the ordinary remand rule.

Moreover, when courts refuse to follow the ordinary remand rule, they often express a third sort of separation of powers concern that reflects the judiciary's traditional role as authoritative interpreter of the law and protector of individual rights and due process. Courts appear to refuse to remand certain issues when the remand would allow the agency to continue to delay or deny relief when it should not, and thus result in courts abdicating their constitutional authority to say what the law is and their duty to ensure that procedures are fair and rights are protected in the administrative process. In other words, implicit in these refusals to remand is the concern that the remand rule may serve to protect the separate legislative and executive powers, but only at the expense of the judiciary's role under Article III of the Constitution.

Third, in reviewing the cases that apply the remand rule, this Article uncovers an evolving administrative common law[13] that attempts to deal with these perceived Article III concerns in a way that avoids intruding on legislative or executive authority. While some courts refuse to remand when they fear undue delay or continued denial of meritorious claims by the agency, other courts have adhered to the ordinary remand rule but have introduced certain dialogue-enhancing tools. For instance, in cases where courts are skeptical of the agency getting it right on remand, concerned about undue delay, or worried about the petitioner getting lost on remand, some circuits require the agency to provide notice of its final determination, retain panel jurisdiction over the matter, or set deadlines for an agency response to the remand. Others suggest (or order) that administrative judges be replaced on remand, certify issues for decision on remand, or set forth hypothetical answers in dicta or concurring opinions. Moreover, some circuits obtain concessions from the government at argument to narrow the potential grounds for denial of relief on remand.

The development of these novel practices is noteworthy on a number of levels. Unlike refusing to remand an issue—and thus sub-

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13 *See, e.g.*, Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012) (defining and defending "administrative common law" as "administrative law doctrines and requirements that are largely judicially created, as opposed to those specified by Congress, the President, or individual agencies").

stantively deciding the issue for the agency—these tools allow the court to remain part of the dialogue on remand while respecting congressional delegation and the Executive's law-execution responsibility. This court-agency dialogue, as Professor Emily Hammond has recently explored in the rulemaking context,[14] may unfold further on remand to the agency and subsequent judicial review. Even when the court continues to disagree with the agency and invites a continuation of dialogue on remand, such remand preserves the role of both courts and agencies under the Constitution. In addition to preserving a proper separation of judicial and executive powers, this public dialogue puts Congress, the President, and the public on clearer notice of the court's and agency's differing positions on a particular issue, thus allowing all three branches to more fully participate in the dialogue.[15] Based on these novel dialogue-enhancing practices that different circuits have developed, this Article suggests that courts assemble a judicial toolbox that can be used to enhance the court-agency dialogue as well as preserve the judiciary's proper role in the process.

Finally, the emergence of these dialogue-enhancing tools marks a further evolution of the ordinary remand rule—and the appellate review model of administrative law more generally—in light of courts' emergent understanding of their Article III responsibility in the separation of powers framework. The Supreme Court, via its ordinary remand jurisprudence, has repeatedly instructed lower courts that they cannot order an agency to reach a particular substantive conclusion when agency discretion is still available. Nor can courts order agencies to implement additional procedures on remand.[16] So instead of acting by force, some courts have resorted to the power of words—and dialogue—to help fulfill their oversight role, to encourage agencies on remand to act within their delegated powers, and to make administrative decisionmaking more transparent to the public and other

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14 Hammond, *supra* note 8, at 1743–71 (examining the dialogue on remand in a variety of agency rulemaking contexts).

15 *See, e.g.*, *id.* at 1780 ("[A]sking agencies to be equal partners in a dialogue enhances participation, deliberation, and legitimacy because . . . interested parties, Congress, and the courts can more easily understand and respond to their reasoning."); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 492 (2010) ("[R]equiring that agencies explain and justify their actions also arguably reinforces political controls by helping to ensure that Congress and the President are aware of what agencies are doing.").

16 Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 524 (1978) ("Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.").

interested government actors. This judicial evolution is an important one in the modern administrative state.

This Article proceeds as follows: Part I traces the evolution of the ordinary remand rule and how it fits within the appellate model of judicial review in administrative law—something that has not been done in any serious fashion since Judge Henry Friendly's work in 1969.[17] It examines the separation of powers values that motivate the rule and concludes that the ordinary remand rule applies broadly; the only exceptions should be when there are minor erroneous findings as to subsidiary issues that do not affect the agency's ultimate decision or when the court concludes that the agency lacks authority to decide the issue. Therefore, a court should never decide questions of fact, policy, application of law to fact, or law when such questions fall within an area delegated to an agency.

Part II presents the findings of the Article's review of the use of the ordinary remand rule among the courts of appeals in the context of judicial review of immigration adjudications from 2002 through the end of 2012. In addition to presenting the overall findings and discussing which circuits are most and least likely to remand, Part II explores some of the reasons provided by courts when remanding or refusing to remand, including courts' general failure to appreciate the separation of powers values at play, and concludes by introducing and discussing the tools that some circuits have developed to enhance dialogue on remand.

Part III takes a closer look at these dialogue-enhancing tools and how they can help preserve the judicial role in the administrative process. It begins by exploring the constraints on the tools available to courts—primarily statutory limitations and *Vermont Yankee*[18]—and then evaluates the tools some circuits have developed in light of these limitations. In addition to the tools identified in the cases, Part III suggests several additional dialogue-enhancing instruments that should be included in the toolbox, such as issuing preliminary injunctions and escalating the issue within the executive branch or to Congress.

This Article concludes by defending the importance of dialogue-enhancing tools, while suggesting that more aggressive tools are likely unnecessary and, in any event, would frustrate a proper separation of powers. These dialogue-enhancing tools allow a court to exercise its

17 Friendly, *supra* note 8.

18 *Vermont Yankee*, 435 U.S. at 524.

constitutional responsibility while preserving the balance of powers between courts and agencies via the ordinary remand rule. Instead of ignoring the ordinary remand rule as some circuits have done, this Article suggests that courts should look to—and further develop—this toolbox to strike the right balance of powers between courts and agencies.

I. Evolution of the Ordinary Remand Rule

Just as the appellate review model of administrative law has evolved to accommodate changing understandings of the relationship between courts and agencies, so too has the ordinary remand rule. This Part traces the remand rule from its *Chenery* origins through the trilogy of Supreme Court immigration cases in the 2000s that further refined the rule.

A. Chenery*, Separation of Powers, and the Appellate Model of Review*

As discussed in the Introduction, judicial review of agency action is grounded in the traditional appellate model of civil litigation, but it has evolved to accommodate separation of powers values. Thomas Merrill has thoroughly chronicled the origins of this model and notes that its continued existence is due in part to the fact that "[t]he appellate review model has . . . proven to be flexible at the macro level."[19] For instance, courts incorporated "hard look" review in response to concerns of agency capture in the 1960s and 1970s,[20] and *Chevron* deference[21] in response to the deregulation movement in the 1980s.[22] As the modern administrative state has evolved, so has the appellate review model in administrative law—taking into account more fully understood separation of powers values.

The Supreme Court's decisions in *SEC v. Chenery Corp.*[23] exemplify the model's flexibility. In *Chenery I*, the Court reviewed an or-

19 Merrill, *supra* note 1, at 998.

20 Merrick B. Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 505, 525–62 (1985) (detailing the hard look doctrine's development); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. Chi. L. Rev. 761, 761 (2008) ("In the 1960s and 1970s, the federal courts of appeals, above all the United States Court of Appeals for the District of Columbia Circuit, developed the 'hard look doctrine.'").

21 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

22 Merrill, *supra* note 1, at 999. In addition to the hard look doctrine and *Chevron*, Professor Merrill provides the whole record review rule and the reconceptualization of the record in response to the shift from agency adjudication to rulemaking as other examples of the flexibility of the appellate review model in administrative law. *Id.* at 998.

23 *Chenery II*, 332 U.S. 194 (1947); *Chenery I*, 318 U.S. 80 (1943).

der by the Securities and Exchange Commission ("SEC") that had approved a plan of reorganization of a company, which, based on equitable principles, the SEC had modified to not permit certain preferred stockholders to participate on equal footing with the other preferred stock holders.[24] Those stockholders petitioned for review of the SEC's order, and the D.C. Circuit set aside the order.[25] The Supreme Court took the case and "conclude[d] that the Commission was in error in deeming its action controlled by established judicial principles."[26]

The SEC, however, argued that the Court should affirm the agency action on alternative grounds that were not in the record before the SEC.[27] The Court did not disagree with the alternative grounds raised, but it found that "the difficulty remains that the considerations urged here in support of the Commission's order were not those upon which its action was based."[28] In light of the unique considerations implicated by judicial review of agency actions, the Court made two related moves to address this difficulty and, in turn, depart from the traditional appellate review model.

First, the Court departed from "the settled rule" in the civil litigation context that a trial court's decision "must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.'"[29] Instead, "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."[30] The *Chenery II* Court provided a more precise articulation: "That rule is to the effect that a reviewing

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24 *Chenery I*, 318 U.S. at 82–85.

25 *Id.* at 81.

26 *Id.* at 90.

27 *See id.* at 90–92. The SEC's new argument was that Congress had delegated broad powers under the SEC's authorizing statute to modify reorganization plans in light of the public interest and based on the SEC's "special administrative competence." *Id.*

28 *Id.* at 92. In fact, when the matter returned to the Court after remand, the *Chenery II* Court upheld the same action and deferred to the SEC's on-the-record justification based on public interest and special administrative expertise. *Chenery II*, 332 U.S. 194, 209 (1947) ("The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts.").

29 *Chenery I*, 318 U.S. at 88 (quoting Helvering v. Gowran, 302 U.S. 238, 245 (1937)); *see also* Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 19–26 (2001) (exploring the different role of reasons in judicial review of lower court decisions, administrative actions, and congressional statutes).

30 *Chenery I*, 318 U.S. at 87.

court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."[31]

This first *Chenery* principle has received exhaustive treatment in the literature. For instance, Kevin Stack has persuasively argued that this *Chenery* principle has a constitutional foundation in separation of powers, and specifically in the nondelegation doctrine:

> The *Chenery* principle . . . promotes core values of the nondelegation doctrine in ways that supplement the enforcement of the intelligible principle requirement. The *Chenery* principle operates both to bolster the political accountability of the agency's action and to prevent arbitrariness in the agency's exercise of its discretion. It provides assurance that accountable agency decision-makers, not merely courts and agency lawyers, have embraced the grounds for the agency's actions, and that the agency decision-makers have exercised their judgment on the issue in the first instance.[32]

In other words, the Court's departure from the traditional rule in the appellate review model that trial court decisions can be affirmed on any ground—stated or unstated by the trial court—is based on the unique constitutional relationship between agencies, courts, and Congress.

The same can be said of the second *Chenery* principle, the ordinary remand rule. As the *Chenery II* Court stated the rule, "[i]f those grounds [in the agency decision] are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."[33] Instead, the court must remand the matter to the agency for reconsideration free from the error(s).[34] Importantly, the *Chenery I* Court emphasized that courts cannot decide *any* issues in the first instance that are within the agency's discretion:

> In finding that the Commission's order cannot be sustained, we are not imposing any trammels on its powers. We are not

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31 *Chenery II*, 332 U.S. at 196.

32 Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 958–59 (2007). Others have also advanced separation of powers justifications for this *Chenery* principle. *See, e.g.*, Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 427–35; Peter L. Strauss, *Legislation That Isn't—Attending to Rulemaking's "Democracy Deficit,"* 98 CALIF. L. REV. 1351, 1364–65 (2010).

33 *Chenery II*, 332 U.S. at 196.

34 *Id.*; *see also Chenery I*, 318 U.S. at 95.

> enforcing formal requirements. We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words. We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.[35]

Put differently, "the guiding principle," as the Court reiterated several years after *Chenery*, "is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration."[36]

This remand rule exists, the *Chenery I* Court suggested, because of separation of powers. When Congress has authorized an agency to make a policy or judgment, "a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."[37] Or, as the *Chenery II* Court framed this constitutional foundation, failure to obey the ordinary remand rule "would propel the court into the domain which Congress has set aside exclusively for the administrative agency."[38]

Whereas the *Chenery* Court expressed these Article I congressional delegation concerns when instituting its two departures from the traditional model of appellate review, the Court made no mention of a separate Article II concern. Such concern, however, is also implicated when a court decides an issue that is primarily in the hands of an executive agency. The President has the constitutional duty to "take Care that the Laws be faithfully executed."[39] This execution of the law requires applying the law to facts, making policy judgments about enforcement, and even at times determining the facts relevant for enforcement. For this reason, courts have confirmed that Congress has provided a type of prosecutorial discretion for federal agencies with respect to enforcing the law.[40]

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35 *Chenery I*, 318 U.S. at 95.

36 Fed. Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20 (1952) (reversing the D.C. Circuit order for the agency to issue a license the agency had previously denied).

37 *Chenery I*, 318 U.S. at 88.

38 *Chenery II*, 332 U.S. at 196.

39 U.S. CONST. art. II, § 3.

40 *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("[W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by

Moreover, the Court has observed that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."[41] When a court decides an issue that Congress has placed within the Executive's responsibility to implement, as William Kelley has explained, "the practical effect is for the Court to dictate how the laws shall be executed, or, more precisely, how they shall not be. That arrogation by the Court creates the serious potential of violating Article II by displacing the President as the executor of the laws."[42]

Such intrusion into Article II responsibility to execute the law may well do more violence to separation of powers when the Executive is exercising express powers under Article II—as opposed to just law-elaboration authority delegated by Congress—as well as when exercising powers over immigration or national security under the plenary power doctrine.[43] Furthermore, some scholars have argued that the Executive has an independent and constitutionally mandated gap-filling power under Article II even when Congress has not expressly delegated such authority to the Executive, subject to congressional override.[44]

To understand the Article II problem here, however, one does not need to go that far. It is sufficient that the Executive has law-execution responsibility over policy judgments and the application of law to facts and that Congress has delegated the law-elaboration authority to the agency. Indeed, by refusing to follow the remand rule and instead deciding an issue itself, the court frustrates the balance of powers between all *three* branches, as it was Congress in the first place that charged the Executive to interpret and implement the statute.[45]

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the Constitution to 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. art. II, § 3)).

41 Bowsher v. Synar, 478 U.S. 714, 733 (1986).

42 Kelley, *supra* note 4, at 883.

43 As Hiroshi Motomura explains, the plenary power doctrine "declares that Congress and the executive branch have broad and often exclusive authority over immigration decisions. Accordingly, courts should only rarely, if ever, and in limited fashion, entertain constitutional challenges to decisions about which aliens should be admitted or expelled." Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990).

44 Goldsmith & Manning, *supra* note 4, at 2282 (arguing that the President has independent constitutional authority to fill in the holes of a statutory scheme, subject to congressional override).

45 This Executive-focused Article II separation of powers concern is of course most at issue with respect to executive agencies, *see* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2373 (2001), but one could imagine similar concerns when the responsibility to execute the law is bestowed on an independent agency.

B. Exceptions to the Remand Rule?

In 1969, Judge Friendly published his reflections on *Chenery* and its application over the subsequent two decades. In reviewing the cases, he "had the hope of discovering a bright shaft of light that would furnish a sure guide to decision in every case"; but he concluded that no such bright-line standard existed, and that it would probably never exist.[46] Instead, he derived three basic principles from the Court's precedent to date on the remand rule. First, a court may reverse and remand when the agency fails to adequately explain its decision, even if the agency's action is supported by the law and factual record.[47] Second, a court generally must reverse and remand an agency's decision that is based on an erroneous understanding of the law or a "logically untenable" rationale.[48] Third, a court must reverse and remand for inadequate or erroneous findings in all situations except for perhaps when "the only error is in a finding relied on in greater or less degree, along with other solid ones, as a predicate for the ultimate conclusion."[49] With respect to this third principle, Judge Friendly noted:

> This is where the purists and the realists lock horns. The purists insist that any guessing by a court about what the agency might do when apprised of such an error is an unlawful intrusion into the sanctity of the administrative process, and once such an error is detected, the case must go back so that the agency, as the sole repository of authority, can decide it right. The realists answer that neither the Constitution nor the Administrative Procedure Act forbids judges to exercise common sense.[50]

As discussed in Part II, federal courts of appeals have reversed agency decisions while refusing to remand in certain situations in the immigration adjudication context—and in so doing have created a number of exceptions to the ordinary remand rule that the Supreme Court has never addressed.[51] Judge Friendly's conclusion, on its face,

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46 Friendly, *supra* note 8, at 199.

47 *Id.* at 222.

48 *Id.* at 222–23.

49 *Id.* at 223.

50 *Id.*

51 *See* Glen, *supra* note 8, at 22–43 (surveying the courts of appeals' exceptions to the ordinary remand rule in immigration cases); *see also id.* at 54 (concluding that "if the issue is purely legal, the presumption of remand is rebuttable, but only on a heightened demonstration that remand would be futile," and "futility is a necessary, but not a sufficient condition for denying remand").

may seem to support such exceptions, but his third principle only applies to whether to remand "on the basis of a judicial belief that the agency is certain to come to the same conclusion."[52]

The exception Judge Friendly discusses—and the Supreme Court precedent on which he relies[53]—does not concern whether to set aside agency action but *not* remand for agency reconsideration. Instead, it concerns whether to affirm agency action or remand based on "inadequate or erroneous subsidiary findings" that the court is fairly confident would not change the outcome on remand.[54] In those situations, the separation of powers values that motivate the remand rule are far less compelling, as the court is not substituting its judgment for the agency's ultimate judgment but merely brushing aside erroneous subsidiary findings the court finds constitute harmless error. Indeed, in the Administrative Procedure Act ("APA"),[55] Congress has codified this harmless error standard.[56]

In sum, per Judge Friendly, the remand rule as it stood in 1969 swept broadly to require courts not to displace an agency's authority to determine a question of fact, policy, or application of law to the facts with one of its own (unless the court were affirming the agency action and only quibbling with subsidiary issues that did not affect the outcome). The Supreme Court aptly summarized this ordinary remand rule some years later:

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52 Friendly, *supra* note 8, at 223–24.

53 *See, e.g.*, NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 n.6 (1969) (affirming agency action and refusing to reverse where the agency's "command is not seriously contestable," "[t]here is not the slightest uncertainty as to the outcome of a proceeding before the [agency]," and thus "[i]t would be meaningless to remand"); Penn-Cent. Merger & N & W Inclusion Cases, 389 U.S. 486, 526 & n.14 (1968) (affirming agency action and refusing to apply *Chenery* remand rule where the agency's decision was correct and "the District Court appears to have agreed in substance with all the major findings of the Commission" yet "added several points that it believed would *also* support the Commission's conclusions"); Mass. Trs. of E. Gas & Fuel Assocs. v. United States, 377 U.S. 235, 247–48 (1964) (affirming agency action and refusing to extend *Chenery* to require remand "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached").

54 Friendly, *supra* note 8, at 224. The one exception to this rule that Judge Friendly noted is *City of Yonkers v. United States*, in which the Court set aside an agency action without remanding. City of Yonkers v. United States, 320 U.S. 685, 692 (1944). There, however, the Court did not remand because it found that the agency had no jurisdiction to take any action. *See id.* at 691–92. Where an agency has no authority to act, the separation of powers concerns *Chenery* seeks to address are not implicated, and thus no remand would be necessary. The same is true where a court finds a statute unambiguous at "*Chevron* step zero." *See infra* note 80 and accompanying text.

55 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2012).

56 *See* 5 U.S.C. § 706 ("In making the foregoing determinations, . . . due account shall be taken of the rule of prejudicial error.").

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.[57]

In such circumstances, the court's review function "ends when an error of law is laid bare," and the matter is remanded to the agency for reconsideration.[58] The following Part turns to the evolving standard for remanding questions of law to the agency.

C. Chevron *and* Brand X *Expansion of the Remand Rule*

As Judge Friendly explained in 1969, the *Chenery* remand rule originally required that, where there was an error in an agency's decision, the court must remand to allow the agency to answer the question in the first instance—whether that be a question of fact, policy, or application of law to fact.[59] Absent from his discussion is a precise description of when a court must remand to allow an agency to address a question of statutory interpretation. That is likely because his article was published some fifteen years before *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[60] This Part addresses how *Chevron* and its progeny have expanded the remand rule to encompass questions of law with respect to ambiguities in statutes that agencies administer.

Chevron must be placed in its proper historical context. Prior to *Chenery*, the Court had vacillated in its approach to reviewing administrative interpretations of law, but by the New Deal era the Court had generally begun to give broad deference to agencies' statutory interpretations.[61] Two decisions that came down the year after *Chenery I* are illustrative. First, in *NLRB v. Hearst Publications, Inc.*,[62] the Court, in upholding an agency's statutory construction, explained that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute

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57 Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

58 Fed. Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20 (1952).

59 Friendly, *supra* note 8, at 222–23.

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

61 *See* Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. 1349, 1356–62 (2013); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 407–12, 430–38 (2007).

62 NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944), *overruled in part by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

must determine it initially, the reviewing court's function is limited."[63] The *Hearst* Court stated that an agency's statutory interpretation in this context would "be accepted if it has 'warrant in the record' and a reasonable basis in law."[64]

Later that same Term, the Court took "a more contextual approach to deference"[65] in *Skidmore v. Swift & Co*.[66] There, the Department of Labor had issued an interpretative bulletin that set forth a standard for calculating "working time" under the Fair Labor Standards Act.[67] In reversing the district court's refusal to grant any deference to the agency's interpretation, the Court explained that such less formal agency interpretations are "not controlling upon the courts by reason of their authority," but that they "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[68] The Court then listed a number of factors that provide an agency's interpretation "power to persuade, if lacking power to control."[69] Accordingly, as of 1944—one year after *Chenery I* and several before *Chenery II*—it would appear, though the Court never confirmed, that erroneous statutory interpretations that fall within *Hearst* would have to be remanded to the agency. Conversely, *Skidmore* interpretations arguably would not need to be remanded as the agency does not have controlling authority to interpret but only persuasive power to affect the court's interpretation.[70]

Fast forward four decades[71]—some fifteen years after Judge Friendly's reflections on *Chenery* and the remand rule[72]—and the

63 *Id.* at 131.

64 *Id.*

65 Mathews, *supra* note 61, at 1358.

66 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

67 *Id.* at 138; *see* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2012).

68 *Skidmore*, 323 U.S. at 140.

69 *Id.* (explaining that the factors to consider when giving "weight" to an agency's noncontrolling interpretation include "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade").

70 Peter Strauss has helpfully reframed these two types of deference, referring to *Hearst* (now *Chevron*) deference as "*Chevron* space" and *Skidmore* deference as "*Skidmore* weight." Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight*,*"* 112 COLUM. L. REV. 1143, 1144–45 (2012); *see also* Christopher J. Walker, Response, *How to Win the Deference Lottery*, 91 TEX. L. REV. SEE ALSO 73, 78–79 (2013) (exploring the space/weight reformulation in more detail).

71 The Court, of course, continued to grapple with these deference questions during those four decades, and those cases are chronicled in William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1086 n.10 (2008).

72 Friendly, *supra* note 8, at 199.

Court embarked on what has been coined the "*Chevron* revolution."[73] In *Chevron*, the Court was asked to defer to an interpretation by the Environmental Protection Agency ("EPA"). In upholding EPA's interpretation of "stationary source," the Court announced what is the now-familiar *Chevron* two-step approach to judicial review of administrative interpretations of law: a court must defer to an agency's construction of a statute it administers if, at step one, the court finds "the statute is silent or ambiguous" and then, at step two, determines that the agency's reading is a "permissible construction of the statute."[74] Even before *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[75] (discussed below[76]), the Court had hinted that *Chevron* deference is motivated at least in part by separation of powers: "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[77]

So how does *Chevron* deference interact with the ordinary remand rule?[78] *Chevron* itself suggests that if the agency's interpretation fails at the first step, there would be no reason to remand because the statutory provision at issue is unambiguous and the agency would

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73 Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 834–35 (2001).

74 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

75 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

76 *See infra* notes 84–93 and accompanying text.

77 Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996); *see also* Walker, *supra* note 4, at 176–77 (further exploring *Chevron*'s separation of powers foundation).

78 Although outside the scope of this Article, it is important to further contextualize the interaction between *Chevron* and *Chenery*. As explained in Part I.A, *Chenery* advanced two related principles motivated by separation of powers: the ordinary remand rule and a reason-giving requirement. *See supra* Part I.A. Similarly, *Chevron* deference was preceded the prior Term by the Court's adoption of "hard look" review. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983). Just like the *Chenery* Court, which instituted a reason-giving requirement, the *State Farm* Court adopted a reasoned decisionmaking requirement for arbitrary and capricious review under the APA: "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)); *see also* Stephanie R. Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. (forthcoming 2014), *available at* http://ssrn.com/abstract=2393412 (exploring hard look review under the APA in more detail). In other words, both *Chenery* and *Chevron*/*State Farm* attempt to strike the separation of powers balance by allowing agencies to be the primary enforcers and interpreters of the statutes they administer, but only to the extent that the agencies engage in reasoned decisionmaking prior to judicial review.

have no discretion to exercise: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[79] Similarly, if the court concludes that the agency lacks authority to interpret the statute—which inquiry has been termed *Chevron* step zero[80]—then only *Skidmore* persuasive deference would apply,[81] and arguably there would be no need to remand.[82] But what happens if the agency's interpretation survived steps zero and one and was struck down as unreasonable at step two? *Chevron* itself does not expressly provide the answer, stating only that "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation."[83]

Subsequent decisions, based on the principles set forth in *Chevron*, have provided a clearer answer that suggests remand is necessary whenever there is an ambiguity in a statute an agency administers—even if the agency has already provided an interpretation that has been deemed unreasonable at *Chevron* step two. The chief precedent on point is *Brand X*.[84] In *Brand X*, the Court reaffirmed the general *Chevron* rule: "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's

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79 *Chevron*, 467 U.S. at 842–43.

80 *See, e.g.*, Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006).

81 The Court's decision in *United States v. Mead Corp.* confirmed that *Skidmore* deference applies when *Chevron* does not. United States v. Mead Corp., 533 U.S. 218, 234–35 (2001). *Mead*, however, also further muddied the waters about when *Chevron* or *Skidmore* applies. *See id.* at 239–61 (Scalia, J., dissenting) (explaining the confusion *Mead* causes for courts in deciding whether *Chevron* deference applies); *see also* Mathews, *supra* note 61, at 1353 (describing a court's decision whether to apply *Chevron* or *Skidmore* as a "deference lottery"); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 480 (2002) (describing *Mead* as "provid[ing] little guidance to lower courts, agencies, and regulated parties about how to discern congressional intent in any given set of circumstances"); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 813 (2002) (explaining that *Mead* provides "an undefined standard that invites consideration of a number of variables of indefinite weight"); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 361 (2003) (arguing that *Mead*'s opaque standard "inadvertently sent the lower courts stumbling into a no-man's land"). Whether *Chevron* or *Skidmore* applies in a particular case after *Mead* lies outside the ambition of this Article, but the strategic implications of this uncertainty on agencies are explored in Walker, *supra* note 70.

82 *But see* Collin D. Schueler, *A Framework for Judicial Review and Remand in Immigration Law*, 92 DENV. U. L. REV. (forthcoming 2015), *available at* http://ssrn.com/abstract=2485280 (arguing that courts should remand statutory questions entitled to either *Chevron* or *Skidmore* deference).

83 *Chevron*, 467 U.S. at 843 (footnote omitted).

84 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

reading differs from what the court believes is the best statutory interpretation."[85] That is because of separation of powers: "[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion."[86]

Based on separation of powers, the *Brand X* Court took this principle one step further and in the process departed further from the traditional model of appellate review. The Ninth Circuit below had refused to accord *Chevron* deference because it had already construed the same provision of the Communications Act in a conflicting manner.[87] It thus held that the FCC's interpretation was foreclosed by that prior precedent.[88] The Supreme Court reversed. It held that "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[89] Thus, once the court has identified such an ambiguity, there is a "presumption" that Congress "desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows"—regardless of any prior judicial interpretation.[90]

Although *Brand X* had no occasion to address the remand rule, the principles it embraces clarify that courts should remand any legal question that would advance past *Chevron* step one so that the agency can exercise its congressionally delegated authority to interpret the statute in the first instance. Indeed, even if a court has already interpreted the statute to address the ambiguity, the agency maintains the authority to trump the court's interpretation with one of its own so

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85 *Id.* at 980 (citing *Chevron*, 467 U.S. at 843–44 & n.11).

86 *Id.*

87 Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1127–32 (9th Cir. 2003), *rev'd sub nom.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

88 *Id.* at 1131.

89 *Brand X*, 545 U.S. at 982–83.

90 *Id.* at 982 (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996)). Justice Scalia dissented, predicting that the "wonderful new world that the Court creates [is] one full of promise for administrative-law professors in need of tenure articles and, of course, for litigators." *Id.* at 1019 (Scalia, J., dissenting). He accused the majority of creating a "breathtaking novelty: judicial decisions subject to reversal by Executive officers." *Id.* at 1016. This new rule, he argued, is unconstitutional as it forces courts to issue advisory opinions. *Id.* at 1017–19 & nn.12–13. The majority dismissed this accusation, noting that the judicial "precedent has not been 'reversed' by the agency, any more than a federal court's interpretation of a State's law can be said to have been 'reversed' by a state court that adopts a conflicting (yet authoritative) interpretation of state law." *Id.* at 983–84.

long as such interpretation is reasonable.[91] The *Brand X* Court further explained:

> Since *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.[92]

Regardless of whether a court has already spoken—or an agency has already provided an interpretation that has been invalidated at *Chevron* step two—"the agency remains the authoritative interpreter (within the limits of reason) of such statutes."[93] Accordingly, in such circumstances, a court should adhere to the remand rule and not decide the question of statutory interpretation in the first instance.

Adherence to the remand rule produces a positive externality: avoiding the *Brand X* problem of having an agency's interpretation trumping a court's prior interpretation. If the remand rule were faithfully applied in this context, the *Brand X* problem often would be avoided because the court would not have provided an interpretation but instead remanded the question to the agency to interpret in the first instance. Judge Bybee (a former administrative law professor), writing for the Ninth Circuit en banc, recently observed "the wisdom of remanding to the [agency] where the [agency] has not previously interpreted the statute and where we believe the statute is ambiguous."[94] Importantly, he noted "that doing so will, in most situations, avoid the *Brand X* problem posed in this case."[95] This is not just wisdom, but command. *Brand X*, when read in conjunction with *Chenery* and related remand rule precedent, instructs that a court must remand such issues to the agency.

Indeed, Kathryn Watts takes *Brand X* one step further. Based on *Brand X*'s recognition that the agency (and not the court) is the authoritative interpreter, Professor Watts suggests an interactive approach where courts informally consult with the relevant agency even

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91 *Id.* at 983.

92 *Id.*

93 *Id.*

94 Garfias-Rodriguez v. Holder, 702 F.3d 504, 516 n.8 (9th Cir. 2012) (en banc).

95 *Id.*

in actions between private parties when the meaning of an ambiguous statute the agency administers is implicated.[96] To reach this conclusion, she looks to the federalism context and federal courts' response to *Erie Railroad Co. v. Tompkins*,[97] when federal courts were confronted with questions of state law to which state courts had yet to provide an answer. Those responses include federal courts abstaining from ruling until the state court acted, or, alternatively, certifying state-law statutory interpretation questions to state supreme courts when they were questions of first impression.[98]

Certification is, in essence, the same process as remanding a question—the difference being that the question was not before the certifying body in the first instance. Although this Article does not suggest that the ordinary remand rule is required even in lawsuits between private parties,[99] such approach does seem like sound wisdom. *Brand X*, however, should be read to require remand whenever a court is considering a direct challenge to an administrative interpretation of law under *Chevron* step two.[100] The Supreme Court trilogy of immigration cases discussed in the following Part further underscores this conclusion.

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96 Kathryn A. Watts, *Adapting to Administrative Law's* Erie *Doctrine*, 101 Nw. U. L. REV. 997, 1025–47 (2007).

97 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that federal courts lack authority to create general federal common law when considering state-law claims under diversity jurisdiction).

98 Watts, *supra* note 96, at 1001–02; *see, e.g.*, Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974) ("[Certification] does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism."). *See generally* Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157 (2003).

99 Nor does Professor Watts. Instead, she suggests a court may refer the matter to the agency under the primary jurisdiction doctrine or, better yet, could just seek the agency's views via an amicus brief in the pending litigation. Watts, *supra* note 96, at 1025–40.

100 As discussed above, remand is not necessary if the court concludes that Congress did not delegate any *Chevron* discretion to the agency (*Chevron* step zero) or if the statutory provision is unambiguous and thus the agency has no discretion to exercise (*Chevron* step one). Moreover, the Court has cautioned against reading too much into pre-*Chevron* cases when applying the *Brand X* principle. *See* United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1843 (2012). That a court said there was ambiguity—especially before *Chevron*—does not in fact mean there is ambiguity for *Chevron* purposes. *See id.* at 1842–44 (reaffirming *Brand X* principle but rejecting the agency's argument that a 1958 Supreme Court opinion stating that a statute is ambiguous creates space for subsequent agency interpretation when the statute is in fact unambiguous).

D. Immigration Trilogy on the "Ordinary" Remand Rule

During the 2000s, the Supreme Court issued a trio of remand decisions in the immigration context that further developed and crystalized what the Court now calls "the *Ventura* ordinary remand rule"—a rule that must apply absent "exceptional circumstances."[101] These three decisions track the evolution of the remand rule itself, starting with the application of the remand rule to questions of fact,[102] then to mixed questions of law and fact,[103] and finally to questions of law where statutory provisions are found ambiguous under *Chevron* step one.[104]

1. INS v. Ventura*: Remand Questions of Fact*

In 2002, the Supreme Court decided the first case in the trilogy: *INS v. Ventura*.[105] There, the Ninth Circuit reversed a decision by the Board of Immigration Appeals ("BIA"), which had determined that Mr. Ventura had failed to qualify for asylum because any persecution he faced before leaving Guatemala was not "'on account of' a 'political opinion.'"[106] Instead of simply reversing and remanding to the agency for further proceedings, the Ninth Circuit evaluated an alternative argument that the government had made before the agency—i.e., "that Orlando Ventura failed to qualify for protection regardless of past persecution because conditions in Guatemala had improved to the point where no realistic threat of persecution currently existed."[107] Despite that the BIA did not rule on this factual claim of changed circumstances, and that the parties agreed that the court should remand the issue, the Ninth Circuit did not remand.[108] Instead, it decided the factual issue itself and refused to remand, because it

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101 Negusie v. Holder, 555 U.S. 511, 523–24 (2009) (calling it "the *Ventura* ordinary remand rule"); *accord* INS v. Ventura, 537 U.S. 12, 17 (2002) (per curiam) (describing it as "the law's ordinary remand requirement"); *see also* Gonzales v. Thomas, 547 U.S. 183, 185 (2006) (per curiam) (noting that the rule is "what this Court described in *Ventura* as the ordinary remand rule" (internal quotation marks omitted)).

102 *Ventura*, 537 U.S. at 15–16 (remanding to the agency factual question of "changed circumstances").

103 *Thomas*, 547 U.S. at 186 (remanding to the agency mixed questions of law and fact where "[t]he matter requires determining the facts and deciding whether the facts as found fall within a statutory term").

104 *Negusie*, 555 U.S. at 523 (2009) (remanding to the agency question of statutory interpretation where the agency "has not yet exercised its *Chevron* discretion to interpret the statute in question").

105 INS v. Ventura, 537 U.S. 12 (2002).

106 *Id.* at 13 (quoting 8 U.S.C. § 1101(a)(42) (2012)).

107 *Id.*

108 *See* Ventura v. INS, 264 F.3d 1150 (9th Cir. 2001), *summarily rev'd*, 537 U.S. 12 (2002).

determined that "it is clear that we would be compelled to reverse the BIA's decision if the BIA decided the matter against the applicant."[109]

The government sought further review, and the Supreme Court summarily reversed without oral argument—a procedural mechanism reserved for an error that "is so apparent as to warrant the bitter medicine of summary reversal."[110] In so doing, the Court rearticulated "well-established principles of administrative law" that required the Ninth Circuit to remand the "changed circumstances" question to the BIA.[111] These principles are grounded in separation of powers. The Court began by citing *Chenery*'s rule that "a 'judicial judgment cannot be made to do service for an administrative judgment.'"[112] That is because, first, a court cannot "'intrude upon the domain which Congress has exclusively entrusted to an administrative agency,'"[113] and, second, a court "'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'"[114] In other words, there are two distinct Article I separation of powers values at play: congressional delegation to the agency to decide the issues, and the lack of congressional delegation or other source of authority for the judicial actor to decide the issue de novo. These become Article II values as well, as they intrude on the Executive's responsibility to execute the law.

The *Ventura* Court thus reiterated the ordinary remand rule: "'[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'"[115] By remanding, the Court explained, "[t]he agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discus-

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109 *Id.* at 1157.

110 Spears v. United States, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting). *See generally* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 5.12(c)(7)(d) (9th ed. 2007) ("If the Supreme Court considers the decision below to be clearly wrong but not worthy of oral argument, it may summarily dispose of the case as suggested."); David C. Frederick, Christopher J. Walker & David M. Burke, *The Insider's Guide to the Supreme Court of the United States*, *in* APPELLATE PRACTICE COMPENDIUM 8 (Dana Livingston ed., 2012) (discussing the Court's summary reversal practice under Supreme Court Rule 16.1).

111 *Ventura*, 537 U.S. at 16.

112 *Id.* (quoting *Chenery I*, 318 U.S. 80, 88 (1943)); *see also id.* ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.").

113 *Ventura*, 537 U.S. at 16 (quoting *Chenery I*, 318 U.S. at 88).

114 *Id.* (quoting Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985)).

115 *Id.* (quoting *Lorion*, 470 U.S. at 744).

sion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides."[116]

2. Gonzales v. Thomas*: Remand Applications of Law to Fact*

Four years later, in 2006, the Court resumed its explication of the ordinary remand rule in the immigration context in *Gonzales v. Thomas*.[117] There, the Ninth Circuit had once again failed to follow the ordinary remand rule. Acting en banc, the Ninth Circuit reversed the BIA's denial of asylum because the BIA had only focused on the Thomas family's race-based claims for asylum and did not adequately consider their claims of persecution based on being relatives of a man who allegedly had racist views and had mistreated black workers at the company where he worked.[118] Despite that the BIA had expressed no opinion on the matter in that case, the Ninth Circuit held that "a family *may* constitute a social group for the purposes of the refugee statutes" and that the family at issue in the case was in fact a particular social group.[119]

Finding the Ninth Circuit's refusal to remand an obvious error in light of *Ventura*, the Court once again summarily reversed.[120] In so doing, the Court found that "[t]he agency has not yet considered whether Boss Ronnie's family presents the kind of 'kinship ties' that constitute a 'particular social group'" and that such an inquiry "requires determining the facts and deciding whether the facts as found fall within a statutory term."[121] The import of this decision for the development of the ordinary remand rule is that it makes crystal clear—to the extent it was not already clear—that the remand rule applies both to factual determinations *and* to applications of law to fact.[122]

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116 *Id.* at 17. In light of *Ventura*, the Court granted, vacated, and remanded two other Ninth Circuit decisions that similarly failed to follow the ordinary remand rule. *See* INS v. Silva-Jacinto, 537 U.S. 1100 (2003) (mem.); INS v. Yi Quan Chen, 537 U.S. 1016 (2002) (mem.); *see also* Glen, *supra* note 8, at 15–16 (discussing these cases in more detail).

117 Gonzales v. Thomas, 547 U.S. 183, 185 (2006).

118 Thomas v. Gonzales, 409 F.3d 1177, 1189 (9th Cir. 2005), *rev'd*, 547 U.S. 183 (2006) (per curiam).

119 *Id.* at 1187–88 (emphasis added).

120 *Thomas*, 547 U.S. at 186.

121 *Id.*

122 INS v. Ventura, 537 U.S. 12, 17 (2002) (per curiam). In light of *Thomas*, the Court granted, vacated, and remanded two other court of appeals decisions that similarly failed to follow the ordinary remand rule. *See* Keisler v. Hong Yin Gao, 552 U.S. 801 (2007) (mem.); Gonzales v. Tchoukhrova, 549 U.S. 801 (2006) (mem.); *see also* Glen, *supra* note 8, at 17–18 (discussing these cases in more detail). *But see* Brenna Finn, Comment, *Save Me from Harm: The Consequences of the Ordinary Remand Rule's Misapplication to* Gao v. Gonzales, 16 AM. U.

3. Negusie v. Holder*: Remand Certain Questions of Law*

The final chapter in the Court's immigration trilogy on the ordinary remand rule came in 2009. In *Negusie v. Holder*,[123] the Court was asked to consider whether the agency's interpretation of a persecutor bar to asylum relief was owed *Chevron* deference. The agency had interpreted the statutory provision[124] to require denial of asylum to any otherwise qualifying noncitizen if he had persecuted others in his native country—regardless of whether that participation in persecution was voluntary.[125] The Court concluded that *Chevron* deference did not apply because the agency had misread prior Supreme Court precedent and erroneously concluded it was bound by that precedent at *Chevron* step one.[126]

In other words, the agency had not exercised any discretion to which *Chevron* deference would apply. Instead of reaching the question itself,[127] however, the Court remanded the question to the agency to consider in the first instance, reiterating the ordinary remand rule: "Having concluded that the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'"[128] Importantly, Justice Kennedy, writing for the Court, relied on *Brand X* to justify extending the ordinary remand rule to questions of statutory interpretation:

> This remand rule exists, in part, because "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps . . . involves difficult

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J. GENDER SOC. POL'Y & L. 527, 528–29 (2008) (arguing "that the Second Circuit properly exercised its power to review the BIA decision without remanding to the BIA for reconsideration of the contested issues, and assert[ing] that the Supreme Court erroneously applied the ordinary remand rule to Ms. Gao's case").

123 Negusie v. Holder, 555 U.S. 511 (2009).

124 *See* 8 U.S.C. § 1101(a)(42) (2012).

125 *Negusie*, 555 U.S. at 514.

126 *Id.*

127 Justice Stevens, joined by Justice Breyer, wrote separately to argue that the Court should have reached the question, as it is one of law to which the agency should receive no deference. *Id.* at 534–38 (Stevens, J., concurring in part and dissenting in part). Justice Thomas dissented, arguing that the statute unambiguously precludes any inquiry into whether the persecutor acted voluntarily. *Id.* at 538–39 (Thomas, J., dissenting).

128 *Id.* at 523 (majority opinion) (quoting Gonzales v. Thomas, 547 U.S. 183, 186 (2006) (per curiam)) (internal quotation marks omitted).

> policy choices that agencies are better equipped to make than courts."[129]

To the extent that *Brand X* does not plainly establish that the remand rule applies to questions of statutory interpretation, *Negusie* removes any doubt: if a question of interpretation remains with respect to an ambiguous provision of a statute an agency administers, the ordinary course is for the court to remand the question to the agency, which Congress has authorized to be the statute's authoritative interpreter.[130]

* * *

In sum, the Court's remand precedent from *Chenery* through the immigration trilogy demonstrates the sweeping nature of the ordinary remand rule and the separation of powers values that motivate the rule. Under the decisions discussed in this Part, the ordinary remand rule applies broadly, and the only exceptions should be when there are minor errors as to subsidiary issues that do not affect the agency's ultimate decision, or when the agency lacks authority to decide the issue. In other words, a court should never decide questions of fact, policy, application of law to fact, or law when such questions fall within the space delegated to an agency.

II. Remand in Practice: Application of the Immigration Trilogy in the Courts of Appeals, 2002–2012

With these principles in mind, this Part analyzes how courts of appeals have applied the ordinary remand rule since the Court issued its *Ventura* decision in 2002 through the end of 2012. Part II.A briefly sets forth the methodology and summarizes the general findings with respect to the circuits' adherence to the ordinary remand rule. Part II.B then looks at the circuits' reasoning for remanding or not—focusing on any separation of powers values expressed. Finally, Part II.C

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129 *Id.* (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005)).

130 *Negusie* is significant because Justice Scalia joined the Court's opinion. Perhaps taking a step back from his dissent in *Brand X*, *see supra* note 90 (discussing dissent), Justice Scalia agreed that the agency should have the first opportunity to construe the statute: "It is to agency officials, not to the Members of this Court, that Congress has given discretion to choose among permissible interpretations of the statute." *Negusie*, 555 U.S. at 528 (Scalia, J., concurring). In other words, it seems that, for Justice Scalia, the agency only loses its authority to interpret a statute it administers when a court has weighed in on a statute before *Negusie* applied the *Ventura* ordinary remand rule to *Chevron* questions, when the interpretation is made in a lawsuit between private parties, or when a court decides that extraordinary circumstances justify departing from that ordinary remand rule.

introduces the tools some courts have begun to develop and implement when they follow the remand rule but attempt to enhance their dialogue with the agency on remand.

A. Methodology and General Findings

To evaluate the remand rule in practice, the author analyzed every published decision by a federal court of appeals that cited *Ventura*, *Thomas*, or *Negusie* from 2002 through the end of 2012. In total, there are 405 unique cases.[131] Of the 405 cases, 372 deal with petitions for review of BIA immigration adjudication decisions, whereas 33 deal with other administrative contexts.[132] Sixty-three of the cases cite *Ventura*, *Thomas*, or *Negusie* for a proposition other than the remand rule, leaving 342 cases that cite these cases for the remand rule. These 342 cases, which include 26 cases outside of the immigration adjudication context, are the basis of the remaining review.

At the outset, the limitations of this methodology should be noted. First and foremost, because the focus is on published decisions, the over 1500 unpublished decisions—most of them from the Ninth Circuit—remain unanalyzed and thus not incorporated in this Article's findings. Circuit rules typically only allow the court to issue unpublished decisions in circumstances squarely controlled by existing circuit precedent.[133] Accordingly, one may expect that the unpublished decisions should track the published decisions, breaking no new ground and creating no new exceptions to the remand rule. But it is quite possible that these unpublished decisions contain a fair amount of mischief. For example, in one unpublished Ninth Circuit decision, Judge Ikuta remarked in her dissent: "Reading [*Ventura* and *Thomas*] together, the Supreme Court's message to the Ninth Circuit is clear: 'What about the ordinary remand rule don't you understand?' But

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131 The author utilized Westlaw KeyCite to collect the universe of cases for the relevant time period. If a case was reheard en banc and *Ventura* was cited in both the panel and en banc opinions, this represented only one unique case, even though there are multiple opinions. Only the en banc opinion was counted for reporting purposes. Similarly, a case that cited more than one of the Supreme Court trilogy of the ordinary remand rule, which was quite common, is counted only once. However, subsequent opinions after remand that cited one of the Supreme Court trilogy were counted as separate cases.

132 *See, e.g.*, Perry v. Mynu Coals, Inc., 469 F.3d 360, 369 (4th Cir. 2006) (Williams, J., dissenting) (applying *Ventura* and *Thomas* to the decision of an Administrative Law Judge and Benefits Review Board of the United States Department of Labor because, "[j]ust as in *Ventura*, every consideration that classically supports the law's ordinary remand requirement does so here" (internal quotation marks omitted)).

133 *See, e.g.*, 9TH CIR. R. 36-2 (setting forth criteria for publishing an opinion).

here we go again."[134] Similarly, because the remand rule is ordinary and well established in administrative law, no doubt a number of decisions—published and unpublished—apply the rule without citing any of the Supreme Court trilogy.[135] A more cynical observer may question whether courts refusing to apply the remand rule could also decide not to cite *Ventura*, *Thomas*, or *Negusie*.[136] This study would similarly not account for those cases of judicial mischief.

Notwithstanding these limitations, this sample of 342 published decisions provides fertile ground for unearthing a number of important insights into how the circuits apply the ordinary remand rule. First, most circuits, most of the time, faithfully followed the remand rule. Of the 342 cases, courts remanded the questions at issue in 239 cases and denied the petition in 45 of them. When the courts denied the petition yet cited the remand rule, they often concluded that there was no need to reach the subsidiary issue raised that would have required the remand. That said, of the 45 decisions denying the petitions, 21 (47 percent) raise colorable violations of *Chenery*—either because there is a dissent from the refusal to remand or because the decision otherwise suggests that the court decided an issue in favor of the agency that probably should have been remanded to the agency.

With the exception of one Ninth Circuit decision that sent the matter to mediation,[137] courts in the remaining fifty-seven decisions refused to follow the remand rule and instead resolved the issue themselves. These cases were not always easy to classify. Some courts expressly stated that they were applying an exception to or otherwise departing from the ordinary remand rule, whereas other courts simply decided the issue and then remanded the case to the agency for further proceedings consistent with the court's decision. At first blush, cases in the latter category may appear to follow the remand rule, but more careful review reveals that the court actually decided an issue for which the agency still had discretion—in violation of the ordinary remand rule. When the decisions denying the petition (or sending it

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134 Sutandar v. Holder, 450 F. App'x 592, 597 (9th Cir. 2011) (Ikuta, J., dissenting).

135 *See, e.g.*, Berhane v. Holder, 606 F.3d 819, 825 (6th Cir. 2010) (applying the remand rule without citing *Ventura*, *Thomas*, or *Negusie*). This appears to be especially true in the Second Circuit, which often just cites its own precedent when remanding. *See, e.g.*, Musenge v. Bureau of Citizenship & Immigration Servs., 196 F. App'x 29, 31 (2d Cir. 2006) (remanding while citing Second Circuit precedent applying "the well-worn ordinary remand rule" without citing *Ventura*, *Thomas*, or *Negusie*).

136 *See, e.g.*, Zi Zhi Tang v. Gonzales, 489 F.3d 987, 988 (9th Cir. 2007) (reversing the BIA's denial of asylum and withholding of removal without remanding and without citing *Ventura*, *Thomas*, or *Negusie*).

137 Leppind v. Mukasey, 530 F.3d 862, 863 (9th Cir. 2008).

to mediation) are excluded from the sample, the overall noncompliance rate with the remand rule is 19 percent (57 of 296 cases). Thus, the "rare circumstances" exception[138] to the *Ventura* ordinary remand rule does not appear to be all that rare. In about one in five published decisions a court of appeals declines to follow the ordinary rule.

Not all circuits, however, are created equal. Although the one-in-five rate is true as to the entirety of the cases reviewed, when the circuits are analyzed individually, it becomes clear that some circuits follow the ordinary remand rule much more faithfully than others.[139] Table 1 provides a circuit-by-circuit breakdown.

TABLE 1. CIRCUIT-BY-CIRCUIT SUMMARY OF ADHERENCE TO REMAND RULE

Circuit Court	Total Cases	Issues Remanded	Petition Denied	Issues Not Remanded	Noncompliance Rate
First	11	9	2	0	0%
Second	29	27	1	1	4%
Third	38	34	1	3	8%
Fourth	13	8	3	2	20%
Fifth	11	6	2	3	33%
Sixth	21	12	8	1	8%
Seventh	18	13	4	1	7%
Eighth	19	15	2	2	12%
Ninth*	154	94	15	44	32%
Tenth	9	7	2	0	0%
Eleventh	17	12	5	0	0%
Federal	2	2	0	0	0%
Total	**342**	**239**	**45**	**57**	**19%**

*One case referred to mediation.

As Table 1 illustrates, the First, Second, Third, Sixth, Seventh, Tenth, and Eleventh Circuits (and the Federal Circuit, which cited the rule in two nonimmigration contexts and remanded in both[140]) all fol-

138 INS v. Ventura, 537 U.S. 12, 16 (2002) (per curiam) ("[T]he proper course, except in rare circumstances, is to remand to the agency . . . ." (internal quotation marks omitted)).

139 Compliance rates are reported in the aggregate for the eleven-year period of the cases reviewed (2002–2012), but *Thomas* (2006) and *Negusie* (2009) were issued during the review period. Whether the issuance of *Thomas* or *Negusie* has affected circuit compliance rates with the ordinary remand rule lies outside the scope of this Article.

140 In total, 26 of the 342 remand cases are from outside of the immigration adjudication context, and the noncompliance rate in this subset is 35 percent (9 of 26 cases)—substantially higher than the overall 19 percent noncompliance rate. Again, however, the Ninth Circuit dominates this subset (10 cases), as well as the number of departures from the ordinary remand rule in the subset (6 of 10 cases). When the Ninth Circuit is removed, the noncompliance rate falls to

lowed the remand rule most of the time when they disagreed with the agency's ultimate conclusion—though one should be cautious of drawing too strong a conclusion, as the sample size for some circuits is quite small. But even several of these circuits have recognized exceptions to the ordinary rule. For instance, the Seventh Circuit is internally split on whether the remand rule applies to questions of law—a question *Negusie* has answered in the affirmative.[141] The Second and Sixth Circuits have recognized exceptions for when the courts determine that a remand would be "futile"[142]—an exception the Supreme Court has never recognized and one that usurps the agency's role to determine whether the issue is as clear as the reviewing court believes. And the Third Circuit has struggled to arrive at a consistent approach—at times not remanding based on futility, deciding the issue itself, or refusing to remand because the agency already had an opportunity to answer the question.[143]

The Fifth and Ninth Circuits, by contrast, refuse to follow the remand rule in roughly one in three cases. The Fifth Circuit, for instance, does not remand when the issue is one of law,[144] nor when the agency has already had an opportunity to answer the question (and answered it incorrectly).[145] The Fourth and Eighth Circuits—with a twenty percent noncompliance rate for the Fourth (two of ten) and

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19 percent (3 of 16 cases) with the following circuit-by-circuit breakdown: Second Circuit: 1 of 2; Third Circuit: 0 of 3; Fourth Circuit: 2 of 3; Fifth Circuit: 0 of 2; Sixth Circuit: 0 of 2; Eighth Circuit: 0 of 1; Eleventh Circuit: 0 of 1; and Federal Circuit: 0 of 2.

141 *Compare* Ghebremedhin v. Ashcroft, 392 F.3d 241, 242–44 (7th Cir. 2004) (denying rehearing because only factfinding remanded), *with* Kholyavskiy v. Mukasey, 540 F.3d 555, 571–72 (7th Cir. 2008) (remanding for error in law). This intracircuit split materialized before *Negusie*, which should provide grounds for the Seventh Circuit to resolve the split without having to take the issue en banc. Similarly, the Eleventh Circuit—before *Negusie* and in a case in which the court denied the petition—recognized that review of an error of law would constitute a "rare circumstance" exception to the ordinary remand rule. Calle v. U.S. Attorney Gen., 504 F.3d 1324, 1330 (11th Cir. 2007).

142 *See, e.g.*, Karimijanaki v. Holder, 579 F.3d 710, 721 (6th Cir. 2009) ("[A] remand is not required where such a gesture would be futile."); Watson v. Geren, 569 F.3d 115, 130 (2d Cir. 2009) (applying the futility exception).

143 *See, e.g.*, Yusupov v. Attorney Gen., 650 F.3d 968, 993 (3d Cir. 2011) (refusing to remand because agency already had one opportunity to address the issue); Fei Mei Cheng v. Attorney Gen., 623 F.3d 175, 197 (3d Cir. 2010) (deciding the open issue and then remanding for decision consistent with holding); Jean-Louis v. Attorney Gen., 582 F.3d 462, 469–70 & n.10 (3d Cir. 2009) (not remanding because futile based on BIA precedent).

144 *See, e.g.*, *Ghebremedhin*, 392 F.3d at 243 (order denying rehearing on legal issues because remand only appropriate for factual questions).

145 *See, e.g.*, Zhu v. Gonzales, 493 F.3d 588, 602 (5th Cir. 2007) ("In sum, the BIA has now had two opportunities to address the legal and factual issues that are again before this court; we need not give it a third bite at this apple.").

twelve percent for the Eighth (two of seventeen)—are somewhere in between the majority approach and the Fifth and Ninth Circuits, although the sample sizes are small for both.

The Ninth Circuit is the least compliant of all, at least when it comes to the raw numbers. The Ninth Circuit's decisions constitute over 45 percent of the overall sample (154 of 342), yet its decisions refusing to apply the remand rule constitute nearly 80 percent of the total number of decisions refusing to remand (44 of 57). As Judge Kozinski has remarked in dissent to the court's refusal to remand: "Maybe there's something in the water out here, but our court seems bent on denying the BIA the deference a reviewing court owes an administrative agency. Instead, my colleagues prefer to tinker—to do the job of the Immigration Judge and the BIA, rather than their own."[146] Like the Fifth Circuit, the Ninth Circuit has refused to remand when the agency has already considered the issue and reached the wrong conclusion,[147] as well as when the question at issue is a legal one.[148]

But the Ninth Circuit has gone even further to decide factual issues without remanding, deeming, for instance, an immigrant petitioner credible despite an immigration judge having found the petitioner not credible.[149] Indeed, as Judge Gould has remarked, the Ninth Circuit is unique in this respect, as "no other circuit has adopted this 'deemed credible' rule."[150] To the contrary, at least the First, Second, Third, and Tenth Circuits have expressly rejected such an exception to the ordinary remand rule.[151]

In sum, this snapshot of 342 cases reveals that the federal circuits refuse to remand issues to the agency in roughly one in five decisions

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146 Jahed v. INS, 356 F.3d 991, 1001 (9th Cir. 2004) (Kozinski, J., dissenting).

147 *See, e.g.*, Retuta v. Holder, 591 F.3d 1181, 1189 (9th Cir. 2010).

148 *See, e.g.*, Kyong Ho Shin v. Holder, 607 F.3d 1213, 1221 (9th Cir. 2010). *But see id.* at 1224 (Wallace, J., dissenting) ("When we proceed to the interpretation of a statute in the absence of agency guidance, we create the potential for conflict between ourselves and the agency, and between ourselves and other circuits. Inversion of this sequence is not without consequences."); Perez-Enriquez v. Gonzales, 463 F.3d 1007, 1016 (9th Cir. 2006) (en banc) (Bybee, J., dissenting) ("I am with the majority until that final step. I am not so confident that we can reach that conclusion for BIA, even though we may have invited the error. An agency has a duty of consistent dealing. It also has the duty, in the first instance, to construe the statutes it enforces.").

149 *See, e.g.*, Zheng v. Ashcroft, 397 F.3d 1139, 1148–49 (9th Cir. 2005); Guo v. Ashcroft, 361 F.3d 1194, 1204 (9th Cir. 2004); He v. Ashcroft, 328 F.3d 593, 604 (9th Cir. 2003).

150 Soto-Olarte v. Holder, 555 F.3d 1089, 1093 (9th Cir. 2009).

151 *See* Castañeda-Castillo v. Gonzales, 488 F.3d 17, 24–25 (1st Cir. 2007) (en banc); Li Zu Guan v. INS, 453 F.3d 129, 136 (2d Cir. 2006); Elzour v. Ashcroft, 378 F.3d 1143, 1154 (10th Cir. 2004); Dia v. Ashcroft, 353 F.3d 228, 260 (3d Cir. 2003).

(excluding denied petitions). But this overall statistic is deceptive because some circuits—the Fifth and the Ninth Circuits in particular—are far less faithful to the Supreme Court's immigration trilogy than their sister circuits.[152] This is particularly problematic because the Ninth Circuit reviews the bulk of immigration adjudication petitions each year.[153]

B. Separation of Powers and Reasons for Remanding

As discussed in Part I.A, the ordinary remand rule serves to respect separation of powers values—both in the Article I form of congressional delegation to the agency to be the primary decisionmakers and in the Article II form of executive responsibility to ensure the law is faithfully executed. Despite these constitutional motivations, the published decisions in this context rarely grapple with these values.

The closest courts get is reference to congressional delegation with little or no elaboration. Of the 342 cases in the sample, 48 decisions (14 percent) mention that the court is remanding in part because Congress has delegated the authority to the agency to answer in the first instance.[154] For example, shortly after *Ventura* came down, the Tenth Circuit noted when remanding an issue to the agency that "[t]he Supreme Court recently reminded the appellate courts that agencies should be the primary decision makers over matters which Congress has vested in their authority."[155] Similarly, the Ninth Circuit has noted

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152 Disparity among circuits in the immigration context is well chronicled. *See, e.g.*, Fatma Marouf, Michael Kagan & Rebecca Gill, *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 337 (2014) (chronicling disparate grant rates in stay-of-removal context); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007) (finding, in the most expansive empirical study on immigration adjudication to date, "amazing disparities in grant rates" of immigration adjudication petitions, such that the process was compared to "refugee roulette"); Christopher J. Walker, Response, *Does the Legal Standard Matter? Empirical Answers to Justice Kennedy's Questions in* Nken v. Holder, 75 OHIO ST. L.J. FURTHERMORE 29 (2014) (responding to Marouf, Kagan & Gill, *supra*).

153 The Ninth Circuit's decisions make up over 45 percent of the overall sample (154 of 342). Moreover, in 2012, the federal courts of appeals decided 2711 total immigration petitions in published and unpublished opinions. Of those, the Ninth Circuit decided 1097 decisions, followed by the Second Circuit with 686, the Third Circuit with 224, the Eleventh Circuit with 138, the Fifth Circuit with 133, the Fourth Circuit with 131, and the Sixth Circuit with 106. The remaining circuits decided around 50 petitions each. John Guendelsberger, *Circuit Court Decisions for December 2012 and Calendar Year 2012 Totals*, IMMIGR. L. ADVISOR, Jan. 2013, at 4.

154 *See, e.g.*, Mickeviciute v. INS, 327 F.3d 1159, 1164–65 (10th Cir. 2003).

155 *Id.* at 1164. The bulk of the decisions that cite congressional delegation merely quote or paraphrase that justification from the Supreme Court trilogy. *See* Negusie v. Holder, 555 U.S. 511, 523 (2009) ("This remand rule exists, in part, because ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory

that "[b]y remanding . . . we pay due respect to Congress's decision to entrust this initial determination to the Board."[156]

The ordinary remand rule, however, does more than honor congressional delegation; it serves the dual separation of powers values of legislative and executive authority. Put differently, the remand rule serves both to respect Congress's delegation of decisionmaking authority to the agency *and* to not intrude on the Executive's congressionally delegated authority as well as its constitutional responsibility to execute the law. The fact that courts seldom mention the Article I separation of powers issue—and never the Article II one—may shed light on why some courts have created broad exceptions to the ordinary remand rule.

To be sure, these separation of powers values are not completely absent from the cases reviewed. Some dissents to refusals to remand explore the Article I separation of powers issues in more depth and seem to even suggest Article II concerns. Consider Judge Trott's dissent from the Ninth Circuit's refusal to remand in *Ramirez-Alejandre v. Ashcroft*[157]:

> Congress has charged the Attorney General, not us, with the primary responsibility for administering the immigration laws. Our assigned limited role is to *review* the workings of the BIA, not to run the INS. When we exceed our authority, separation and allocation of powers in a constitutional sense are clearly implicated. "In this government of separated powers, it is not for the judiciary to usurp Congress' grant of authority to the Attorney General by applying what approximates *de novo* appellate review."[158]

Judge Trott then appeared to suggest that the failure to remand implicates Article II values because "[t]his excursion beyond our warrant is particularly troubling here because of the connection between immigration law, foreign affairs, and national defense."[159] In other

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gap in reasonable fashion." (internal quotation marks omitted)); INS v. Ventura, 537 U.S. 12, 16 (2002) (per curiam) ("Nor can an appellate court . . . intrude upon the domain which Congress has exclusively entrusted to an administrative agency." (omission in original) (internal quotation marks omitted)).

156 Azanor v. Ashcroft, 364 F.3d 1013, 1021 (9th Cir. 2004).

157 Ramirez-Alejandre v. Ashcroft, 319 F.3d 365 (9th Cir. 2003).

158 *Id.* at 397 (Trott, J., dissenting) (citation omitted) (quoting INS v. Rios-Pineda, 471 U.S. 444, 452 (1985)).

159 *Id.* As Tino Cuéllar has similarly noted in the executive power context, "both law students and executive branch officials themselves no doubt soon recognize that courts view the executive branch as far more than a mere mechanistic implementer of rigidly written legislative statutes." Mariano-Florentino Cuéllar, *American Executive Power in Historical Perspective*, 36

words, the court's refusal to remand to the executive agency is in tension with the plenary power doctrine, which "declares that Congress *and the executive branch* have broad and often exclusive authority over immigration decisions."[160]

Whereas separation of powers should motivate adherence to the remand rule, perhaps the most surprising finding from the cases reviewed is that courts seem to discuss separation of powers more as a justification for *refusing* to remand than for following the ordinary remand rule. Granted, courts do not label this justification as a separation of powers rationale and certainly do not express Article I or Article II worries. Instead, many decisions not to remand reflect perceived Article III concerns—i.e., judicial obligations under Article III to say what the law is and to ensure that procedures are fair and rights protected in the administrative process.

Aside from relying on the futility exception discussed above, courts often refuse to remand because they believe the agency should not get a second (or even a third) bite at the apple when the agency has already gotten it wrong once.[161] Some courts frame this concern in terms of fairness,[162] whereas others worry about the undue delay to the petitioner.[163] To be sure, some circuits have explicitly (and properly) rejected the "one bite" exception to remanding.[164] But others, including the Ninth Circuit, have a fairly well-established line of precedent excusing remand when the agency has already heard the is-

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HARV. J.L. & PUB. POL'Y 53, 59 (2013). Instead, there is "a judicial recognition of the special role of the executive in both domestic and international affairs, even if that role is ultimately one that must be reconciled with the importance assigned to congressionally enacted statutes." *Id.*

160 Motomura, *supra* note 43, at 547 (emphasis added).

161 *See, e.g.*, Zhu v. Gonzales, 493 F.3d 588, 602 (5th Cir. 2007) ("[T]he BIA has now had two opportunities to address the legal and factual issues that are again before this court; we need not give it a third bite at this apple.").

162 *See, e.g.*, Ndom v. Ashcroft, 384 F.3d 743, 756 (9th Cir. 2004) (not remanding because it would be "exceptionally unfair" to allow the government a third chance to present evidence (quoting Baballah v. Ashcroft, 367 F.3d 1067, 1078 n.11 (9th Cir. 2004))).

163 *See, e.g.*, Shi Liang Lin v. U.S. Dep't of Justice, 494 F.3d 296, 313–14 n.15 (2d Cir. 2007) (en banc) ("We see no reason to remand yet again—ping pong style—when the BIA has had ten years and several opportunities to reconsider a rule that has no basis in statutory text.").

164 *See, e.g.*, Castañeda-Castillo v. Gonzales, 464 F.3d 112, 128 (1st Cir. 2006) (not remanding when the BIA has already considered the issue), *rev'd on reh'g en banc*, 488 F.3d 17, 24–25 (1st Cir. 2007) (en banc) ("The suggestion may be made that remand gives the agency a second bite at the apple. The short answer is that, outside criminal prosecutions governed by double jeopardy principles, second bites are routine in litigation. If the agency decision is flawed by mistaken legal premises, unsustainable subsidiary findings, or doubtful reasoning, remanding to give the agency an opportunity to cure the error is the *ordinary* course." (citation omitted)).

sue.[165] These courts seem to believe that, at some point, courts must exercise their duty "to say what the law is."[166]

In addition to this *Marbury*-like concern, some courts raise concerns that sound in due process. These courts criticize the agency's process as impeding the petitioner's rights. For example, in refusing to remand, Judge Thomas, writing for the Ninth Circuit en banc, has compared the BIA's process to "Tegwar" (or "The Exciting Game Without Any Rules") from Mark Harris's book *Bang the Drum Slowly*:

> [M]embers of the fictional New York Mammoths amused themselves by drawing in dupes with a card scam known as "Tegwar" . . . . The mark, lured into the game by the players' enthusiasm, would be given a handful of cards and encouraged to make wild bids using a weird vocabulary of calls that changed from round to round. The poor cluck would always lose but would be reassured of the game's legitimacy by the veneer of rationality that appeared to overlie the seemingly sophisticated game.
>
> For years, the Board of Immigration Appeals ("BIA") played a variant of Tegwar in its procedural treatment of appeals from suspension of deportation decisions issued by immigration judges ("IJs").[167]

Similarly, some courts fear that a remand would take too much time, allow for too much uncertainty, or even cause the case (and thus the petitioner) to get lost in the fray of a remand.[168] Indeed, in a pre-*Ventura* decision, the Ninth Circuit compared application of the re-

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165 *See, e.g.*, Retuta v. Holder, 591 F.3d 1181, 1189 n.4 (9th Cir. 2010) (refusing to remand because "the BIA considered and ruled on the issue"); Ali v. Ashcroft, 394 F.3d 780, 788 (9th Cir. 2005) (not remanding to the BIA because the IJ considered the issue and the BIA affirmed without opinion); Moisa v. Barnhart, 367 F.3d 882, 887 (9th Cir. 2004) (not remanding because "[t]he [agency], having lost this appeal, should not have another opportunity to show that [the petitioner] is not credible"). *But see* Lopez v. Ashcroft, 366 F.3d 799, 806–07 (9th Cir. 2004) ("[W]e are aware of no precedent establishing a legal principle limiting the BIA's role on such an issue to 'one bite at the apple' . . . .").

166 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

167 Ramirez-Alejandre v. Ashcroft, 319 F.3d 365, 368 (9th Cir. 2003) (en banc) (citations omitted) (citing MARK HARRIS, BANG THE DRUM SLOWLY 8, 48, 60–64 (1956)). *But see id.* at 397 (Trott, J., dissenting) ("When we exceed our authority, separation and allocation of powers in a constitutional sense are clearly implicated.").

168 *See, e.g.*, Hoxha v. Ashcroft, 319 F.3d 1179, 1185 n.7 (9th Cir. 2003) (not remanding because "constant remands to the BIA to consider the impact of changed country conditions occurring during the period of litigation of an asylum case would create a 'Zeno's Paradox' where final resolution would never be reached" (citing Avetova-Elisseva v. INS, 213 F.3d 1192, 1198 n.9 (9th Cir. 2000))); Mayo v. Ashcroft, 317 F.3d 867, 874–75 (8th Cir. 2003) (finding "rare circumstances" excusing remand in a case that lasted over twelve years because "[n]o immigrant

mand rule in a case involving fear of persecution claims—where, in the court's opinion, "any remand in such circumstances would be extremely unfair to litigants, potentially triggering multiple determinations and repeated appeals"—to "a sort of Zeno's Paradox in which the arrow could never reach the target."[169]

Whether the concerns courts have expressed in fact implicate Article III constitutional duties and obligations is beside the point for purposes of this Article. Instead, what matters is what courts perceive their Article III duties to encompass, and the concerns expressed in the cases reviewed seem to reflect a constitutional dimension. To be sure, in the context of structural separation of powers litigation, the Supreme Court has emphasized that Article III "serves both to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government' and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches.'"[170] And the Court has reiterated *Marbury*'s command that "Article III establishes a 'judicial department' with the 'province and duty . . . to say what the law is' in particular cases and controversies" and that Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them . . . ."[171] Neither of these Article III principles addresses the actual concerns at issue here. Instead, these principles deal with structural challenges to other branches' use or delegation of powers that should be reserved to the judiciary under Article III. Notwithstanding, it is understandable that a court may feel that it ultimately abdicates its Article III duty by remanding an issue to an agency when such remand would only lead to further improper denials and thus unnecessary delay of relief to which the court believes a petitioner is entitled.

Likewise, courts have duties under Article III—coupled with the Due Process Clause—to ensure that governmental procedures affecting individual liberty and property interests are fair.[172] This duty to guarantee fair procedures may become more searching, as John Hart

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should have to live over ten years with the uncertainty as to whether she can stay in this country or not").

169 Avetova-Elisseva v. INS, 213 F.3d 1192, 1198 n.9 (9th Cir. 2000). The Ninth Circuit reapplied this analogy after *Ventura* as well. *See Hoxha*, 319 F.3d at 1185 n.7.

170 Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 583 (1985) and United States v. Will, 449 U.S. 200, 218 (1980)).

171 Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995) (first omission in original) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

172 *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property'

Ely would argue, where the procedural defects (or even substantive law) lead to "the victimization of a discrete and insular minority."[173] Again, however, in refusing to remand, courts are not finding but merely fearing that actual due process violations would occur on remand. In many ways, both the *Marbury* and due process concerns that courts have expressed are grounded in a deeper concern about whether the congressional delegation of adjudicative or lawmaking authority—with respect to a particular case, and not the administrative system as a whole—exceeds constitutional bounds by displacing courts' core duties under Article III.

These concerns may not be grounded in actual constitutional rights and obligations under Article III or elsewhere. This Article does not attempt to provide a definitive answer. Instead, assuming these values are important under either the Constitution or just administrative law and policy, the following Part turns to evaluate how some courts have addressed the concerns while still following the ordinary remand rule.

C. Tools to Enhance Dialogue Between Courts and Agencies

It may not be too remarkable that most circuits follow the ordinary remand rule in most cases. Nor perhaps is it surprising that courts fail to articulate Article I and Article II separation of powers principles when following the remand rule, yet seem to articulate Article III concerns when refusing to remand. That is until one considers that some courts express Article III concerns yet still remand. In so doing, they implement a number of novel administrative common law tools. These tools, outlined in this Part, focus on enhancing dialogue on remand and appear to address courts' perceived Article III concerns while still respecting the separate Article I and Article II values that motivate the ordinary remand rule.[174]

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interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

173 JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 182 (1980).

174 In her response to this Article, Professor Hammond posits that courts that express Article III concerns yet remand may be doing so in part because of the dual nature of Article III, which also commands judicial self-restraint regarding interference "with executive discretion because 'the subjects are political.'" Hammond, *supra* note 9, at 176 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803)); *see also* Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 292 (2011) (calling this Article III value "judicial self-limitation"). This is an astute observation—one that seems closely related to the Article I and Article II values for *Chenery*'s remand rule (and *Chevron* deference) discussed in Part I. *See supra* Part I.A. And it is a friendly amendment to the framework set forth in this Article to the extent that reframing

1. Notice of Agency Decision on Remand

The first (and perhaps mildest) tool uncovered in the cases reviewed is the requirement that the parties provide notice of the agency's decision on remand.

In *Sinha v. Holder*,[175] Judge Berzon, writing for the Ninth Circuit, found numerous faults with the agency's denial of the petitioner's asylum claim and remanded most of those issues to the agency.[176] In so doing, the Ninth Circuit expressed serious concerns about a number of the immigration judge's "unsupportable" and "illogical" rulings.[177] Perhaps to alleviate those concerns, however, the court took an unusual step and stated at the end of its opinion that "[t]he parties are directed to notify the court immediately after the BIA's decision on remand."[178]

In contrast to deciding the substantive issues itself in violation of the ordinary remand rule or just issuing a blanket remand, the Ninth Circuit requested notice of the final outcome on remand.[179] This notice requirement ensures that the court-agency dialogue continues after remand and signals to the agency that the court is interested in the outcome. In other words, the notice tool serves to alleviate apparent Article III concerns that the petitioner will get lost on remand by requiring that the parties report back to the court when the process is over.

2. Panel Retention of Jurisdiction

A second and perhaps slightly more aggressive tool involves the panel retaining jurisdiction over a case. The First Circuit has noted that, "[a]lthough use of the limited remand device is perhaps not usual in this context, its use is also not unprecedented."[180] Indeed, four cir-

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these Article I and Article II values as part of "Article III's softer norms," Hammond, *supra* note 9, at 177, helps courts apply the remand rule and the dialogue-enhancing tools discussed in this Part.

175 Sinha v. Holder, 564 F.3d 1015 (9th Cir. 2009).

176 *Id.* at 1026. While remanding most issues, the Ninth Circuit nevertheless refused to remand one issue and, instead, held that "[t]he record compels the conclusion that, contrary to the IJ's decision, the harm Sinha suffered was 'on account of' his race." *Id.*

177 *Id.* at 1022–23.

178 *Id.* at 1026. The agency granted the petitioner relief on remand, and the Ninth Circuit took notice of the agency's decision despite that the parties had not yet provided notice per the court's directions. *See* Sinha v. Holder, No. 07-72289 (9th Cir. Dec. 23, 2010). The court subsequently excused the parties for failure to timely comply with the notice requirement. *See* Sinha v. Holder, No. 07-72289 (9th Cir. Feb. 11, 2011).

179 *Sinha*, 546 F.3d at 1026.

180 Castañeda-Castillo v. Holder, 638 F.3d 354, 363 (1st Cir. 2011) (collecting cases).

cuits—the First, Second, Third, and Ninth Circuits—each utilized this tool in at least one of the cases reviewed.[181] And the Seventh Circuit appears to have pioneered this tool in a pre-*Ventura* case, in which the court stated that "[i]n the event that on remand [the petitioner] does not receive relief, this panel retains jurisdiction, and his petition for review in this Court will be reactivated."[182]

The Article III motivations for this tool are made plain in the cases reviewed. For instance, in *Castañeda-Castillo v. Holder*,[183] Judge Torruella, writing for the First Circuit, justified the panel's retention of jurisdiction based on "[t]he unusually prolonged and convoluted history of this case," which included "two sets of IJ and BIA decisions, as well as both a panel and an en banc opinion in the First Circuit."[184] The court was concerned about undue delay in the process, as "the Castañeda family has been awaiting resolution of their claims for the last eighteen years."[185] Accordingly, while obeying the ordinary remand rule, the First Circuit concluded that "[t]he need for a speedy resolution of the petitioner's asylum claims is therefore exceptionally pressing on the facts of this case, and underwrites our retaining jurisdiction over the case while it is on remand to the BIA."[186] The Second Circuit has expressed similar concerns of undue delay when it has retained jurisdiction.[187]

In addition to concerns for delay, the Ninth Circuit has utilized the panel jurisdiction retention tool when it applied the ordinary remand rule to allow the agency to consider the issue in the first instance but felt the petitioner was likely entitled to relief. In *Viridiana v. Holder*,[188] Judge Paez noted for the court that "[i]n the event the agency again concludes that [the petitioner] did not suffer past persecution, she may raise the issue in any future petition for review," and then, critically, provided that "[t]his panel retains jurisdiction over future appeals to this court."[189]

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181 *See, e.g.*, *id.* at 363–64; Viridiana v. Holder, 646 F.3d 1230, 1239 (9th Cir. 2011); Lavira v. Attorney Gen., 478 F.3d 158, 172 (3d Cir. 2007), *overruled on unrelated grounds by* Pierre v. Attorney Gen., 528 F.3d 180, 189–90 (3d Cir. 2008) (en banc); Ucelo-Gomez v. Gonzales, 464 F.3d 163, 172 (2d Cir. 2006) (per curiam); Oh v. Gonzales, 406 F.3d 611, 613–14 (9th Cir. 2005).

182 Asani v. INS, 154 F.3d 719, 726 (7th Cir. 1998).

183 Castañeda-Castillo v. Holder, 638 F.3d 354 (1st Cir. 2011).

184 *Id.* at 363, 364.

185 *Id.* at 364.

186 *Id.*

187 *See* Ucelo-Gomez v. Gonzales, 464 F.3d 163, 172 (2d Cir. 2006) (per curiam) (retaining jurisdiction and setting forty-nine day time limit for remand proceedings).

188 Viridiana v. Holder, 646 F.3d 1230 (9th Cir. 2011).

189 *Id.* at 1239.

Although some courts recognize that this is an "extraordinary" step,[190] it may not be as extraordinary as the cases reviewed suggest. For instance, at least the Sixth Circuit has an internal circuit rule that provides that "[i]n appeals after this court returns a case to the lower court or agency for further proceedings, . . . the original panel will determine whether to hear the appeal or whether it should be assigned to a panel at random."[191] Such a default rule, however, is not as effective in promoting dialogue as an express indication in the judicial opinion. Although a default rule ensures that the dialogue can continue between the agency and the same panel if there is further review after remand, the panel does not signal to the agency its particular interest in retaining jurisdiction.

In all events, the panel jurisdiction retention tool can be especially useful when a case has been unusually delayed in resolution or when the court feels the petitioner is likely entitled to relief. Like the notice requirement, the panel jurisdiction retention tool facilitates court-agency dialogue by signaling to the agency that the court is interested in the outcome on remand and that the panel itself is particularly interested in continuing the dialogue after remand in the event that the agency denies relief again. The decision to retain jurisdiction not only enhances court-agency dialogue, but it also allows the petitioner to immediately come back to the panel familiar with the case instead of having to start the process over again in front of a new panel that is less familiar with the ongoing court-agency dialogue. In so doing, the court addresses its perceived Article III concerns while preserving a proper separation of power by following the ordinary remand rule.

3. Time Limit on Remand

A related tool—and one that is often used in conjunction with the panel jurisdiction retention tool—is to set a time limit for the remand. For instance, the Second Circuit has used these tools in tandem: retaining jurisdiction and ordering the agency "to issue its responsive opinion *within 49 days*."[192] Some circuits have refrained from setting a specific deadline and instead strongly urged that the agency accelerate its process on remand. For instance, in *Castañeda-Castillo*, the First Circuit not only retained panel jurisdiction but "stress[ed] that this case has been ping-ponging around for over eighteen years . . . .

190 *Castañeda-Castillo*, 638 F.3d at 364.

191 6TH CIR. I.O.P. 34(b)(2).

192 *Ucelo-Gomez*, 464 F.3d at 172.

[E]nough is enough. . . . [I]t is our expectation that our opinion today will aid the IJ and BIA in the expeditious and final resolution of [the petitioner's] asylum claims."[193] Finally, the Ninth Circuit has taken a somewhat analogous approach in vacating submission of an appeal for ninety days while it ordered the case to the Circuit Mediation Office.[194]

Setting a deadline for the response on remand—or at least urging prompt resolution—is perhaps the most direct way to expedite the remand process, speed up the dialogue, and in the process alleviate Article III fears based on undue delay. In the context of remand without vacatur, Professor Hammond also suggests that courts consider imposing deadlines as "a gentle counterbalance to a deferential remedy, thus contributing to the meaningful equilibrium that should mark the relationship between judicial and administrative power."[195] Ronald Levin and the American Bar Association similarly suggest the imposition of deadlines for remands without vacatur.[196] Deadlines are not only a "gentle counterbalance" to the ordinary remand rule, but they are also a meaningful way of enhancing court-agency dialogue by signaling a strong interest in a continuing dialogue and by speeding up that conversation.

4. Hypothetical Solutions

The predominant dialogue-enhancing tool utilized by courts in the cases reviewed is the issuance of hypothetical solutions to remanded issues.

In the cases reviewed, courts—in dicta or a concurring opinion—often set forth hypothetical solutions, gave guiding principles and facts, or provided an analysis and counteranalysis to be used on re-

193 *Castañeda-Castillo*, 638 F.3d at 367; *accord* Jian Hui Shao v. Bd. of Immigration Appeals, 465 F.3d 497, 502–03 (2d Cir. 2006) ("[W]e respectfully request that the BIA resolve this matter as soon as possible.").

194 Leppind v. Mukasey, 530 F.3d 862, 863 (9th Cir. 2008). This approach to order a pending appeal to circuit mediation is novel and merits further exploration. As Professor Hammond has noted, "empirical evidence suggests that remanded actions settle 40% to 50% of the time." Hammond, *supra* note 8, at 1740 (citing Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1045). Judicially mandated mediation before remand may well avoid the costs of remand and assist the parties in reaching a mutually agreeable outcome. This mediation tool, however, is limited to a mere sentence and footnote in this Article because it does not appear to be a dialogue-enhancing tool, but rather a conflict-resolution tool.

195 Hammond, *supra* note 8, at 1786–87.

196 Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 384 (2003) (quoting AM. BAR ASS'N RECOMMENDATION NO. 107B (1997)).

mand.[197] Under this tool, the court hints, suggests, encourages, or outright says what it believes would be the correct answer (or at least one or more reasonable answers). But the court stops short of deciding the issue and instead properly remands the issue to the agency. Professor Hammond has noted that this dialogue-enhancing tool can be used even before the opinion is issued, as "[j]udges might also send signals to an agency during oral argument."[198] In such circumstances, this tool not only facilitates dialogue on remand, but it more expressly starts the dialogue before remand. The court provides more guidance to the agency, and in so doing signals to the public and other branches of government that a dialogue is taking place and that the court has its own views on an appropriate course of action.

Scholars and commentators who have considered courts' practice of providing hypothetical solutions do not agree on its propriety. On the one hand, one current member of the BIA has noted that "[t]his procedure likely accomplishes the desired result [of obtaining relief for the petitioner] without raising any question of compliance with the *Ventura* remand requirement."[199] Professor Hammond, on the other hand, argues that "courts ought to be reluctant to offer hypothetical reasonable approaches" because "these signals may overstep the judicial role in administrative law."[200] It is true that, taken to its extreme,

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197 Seck v. U.S. Attorney Gen., 663 F.3d 1356, 1368 (11th Cir. 2011) (performing an analysis of the facts and indicating that the petitioner would likely win on remand); Singh v. Holder, 658 F.3d 879, 887–88 (9th Cir. 2011) (suggesting facts to be considered on remand); Pannu v. Holder, 639 F.3d 1225, 1229 (9th Cir. 2011) (providing a principle for the BIA to apply on remand); Bi Xia Qu v. Holder, 618 F.3d 602, 609 (6th Cir. 2010) (hinting at the outcome of remand); Kueviakoe v. U.S. Attorney Gen., 567 F.3d 1301, 1306 n.4 (11th Cir. 2009) (foreclosing a BIA finding based on the same facts without foreclosing the same BIA finding with new facts, hence encouraging more factfinding); Koudriachova v. Gonzales, 490 F.3d 255, 263 (2d Cir. 2007) (instructing the BIA what the petitioner must show on remand to prevail); Corado v. Ashcroft, 384 F.3d 945, 948 (8th Cir. 2004) (analyzing and counteranalyzing the record); Mendez-Gutierrez v. Ashcroft, 340 F.3d 865, 870 (9th Cir. 2003) (hinting that the petitioner would likely lose, but recognizing that the BIA needs to determine it in the first instance); Vera-Villegas v. INS, 330 F.3d 1222, 1229 n.5 (9th Cir. 2003) (listing all of the facts that help the petitioner); Melkonian v. Ashcroft, 320 F.3d 1061, 1071 (9th Cir. 2003) (noting "two factors of particular significance" for the BIA to consider on remand).

198 Hammond, *supra* note 8, at 1735 n.54 (citing Pub. Citizen Health Research Grp. v. Chao, 314 F.3d 143, 145 (3d Cir. 2002)).

199 Guendelsberger, *supra* note 8, at 638. Mr. Guendelsberger published this article when he was Senior Counsel to the BIA Chairman in 2004, *see id.* at 605 n.*, which was two years after *Ventura*. *See* INS v. Ventura, 537 U.S. 12 (2002). The Attorney General appointed Mr. Guendelsberger as a BIA member in 2009. *Board of Immigration Appeals—Biographical Information*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/fs/biabios.htm#JohnW.Guendelsberger (last updated Feb. 2014).

200 Hammond, *supra* note 8, at 1786; *see also* Piranej v. Mukasey, 516 F.3d 137, 145 (2d Cir.

this tool comes very close to a refusal to follow the ordinary remand rule by deciding the issue itself.

Consider the Ninth Circuit's use of this tool in *Murillo-Salmeron v. INS*.[201] There, the court, in an opinion authored by Judge Wardlaw, found the conclusion "plain enough" but still remanded: "Although it seems plain enough that [the petitioner's] twenty-five years of U.S. residence, four dependent citizen children, and entire extended family within the United States more than outweigh his stale DUI convictions, the procedural posture of this case requires us to return it to the BIA."[202] Even in *Murillo-Salmeron*, however, the court respected the agency's proper role. It did not order the agency to decide any issue a particular way. At most, the court merely communicated with a shout, rather than a whisper. But it still used only words, not force—thus preserving a proper separation of powers. That the agency may be more likely to heed the court's guidance does not, without more,[203] upset the balance of powers between courts and agencies.

5. Certification of an Issue for Remand

Not only do courts offer hypothetical solutions during oral argument or in their written decisions. Some courts also channel the court-agency dialogue by flagging certain issues that the agency should address on remand. In the cases reviewed, the Second, Seventh, Eighth, and Ninth Circuits all implemented a variant of this tool.[204]

For instance, the Second Circuit has read the Court's ordinary remand rule decision in *Thomas* to "require[ ] that we (in effect) cer-

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2008) ("Since the BIA majority expressly declined to speak to these issues . . ., the less said about them by us at this time, the better.").

201 Murillo-Salmeron v. INS, 327 F.3d 898 (9th Cir. 2003).

202 *Id.* at 902.

203 In her response to this Article, Professor Hammond provides a helpful example of when a hypothetical solution may go too far: when it is offered in the rulemaking context yet the court also remands without vacating the rule. Hammond, *supra* note 9, at 176–79 (drawing on series of cases culminating in *Environmental Defense v. EPA*, 489 F.3d 1320 (D.C. Cir. 2007)). As discussed in Part III, courts should be careful in developing (and combining) dialogue-enhancing tools so as to not exceed their constitutional or statutory authority. *See infra* Part III.A. Remand without vacatur—a tool not found in the cases reviewed or otherwise analyzed in this Article—is not without controversy, *see supra* notes 195–96, and may well merit more careful treatment as a dialogue-enhancing tool.

204 *See, e.g.*, Ayele v. Holder, 564 F.3d 862, 872 (7th Cir. 2009); Ucelo-Gomez v. Gonzales, 464 F.3d 163, 172 (2d Cir. 2006) (per curiam); Xue Yun Zhang v. Gonzales, 408 F.3d 1239, 1249 (9th Cir. 2005); El-Sheikh v. Ashcroft, 388 F.3d 643, 648 (8th Cir. 2004); Mendoza Manimbao v. Ashcroft, 329 F.3d 655, 663 (9th Cir. 2003).

tify this question."[205] Such certification process, the Second Circuit explained in *Ucelo-Gomez v. Gonzales*,[206] "serves the convenience of the BIA as well as this Court, and promotes the purposes of the INA" and is justified because "[t]here is a press of cases raising similar questions in this Court, in the BIA, and before immigration judges; and the common project of deciding asylum cases promptly will be advanced by prompt guidance."[207]

The Seventh, Eighth, and Ninth Circuits, by contrast, have not formally certified issues for the agency to decide, but instead have merely listed issues or questions the agency should consider on remand.[208] The Eighth Circuit's approach in *El-Sheikh v. Ashcroft*[209] is particularly instructive. There, the court remanded for further proceedings on a number of factual issues.[210] In an opinion authored by Judge Loken, the court carefully noted that it did "not direct the agency how to proceed on remand," but perceived "the need for a sequence of additional findings by the BIA (or by the IJ on remand from the BIA)," and then proceeded to list four factual questions.[211] After listing the questions, the Eighth Circuit reiterated: "We express no views on these questions, nor do we limit the BIA's discretion to allow the submission of further evidence . . . ."[212]

In many ways, these tools, as utilized by the Second and Eighth Circuits, can be more helpful for enhancing court-agency dialogue on remand than providing hypothetical solutions because they clearly articulate to the agency which issues the court feels are most critical to address on remand. They set the agenda for remand and future dialogue. Judge Loken's approach for the Eighth Circuit in *El-Sheikh* should be a model for other circuits, as it suggests sequencing and provides guidance while reiterating respect for the agency's discretion

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205 *Ucelo-Gomez*, 464 F.3d at 172 (certifying a question along with imposing a time limit and retaining jurisdiction); *accord* Shi Liang Lin v. U.S. Dep't of Justice, 416 F.3d 184, 192 (2d Cir. 2005). Indeed, in *Ucelo-Gomez*, the Second Circuit reminded the agency "that the Court has received no response to its similar request in *Shi Liang Lin* (mandate issued October 12, 2005)." *Ucelo-Gomez*, 464 F.3d at 172 (referring to *Shi Liang Lin*, 416 F.3d 184).

206 Ucelo-Gomez v. Gonzales, 464 F.3d 163 (2d Cir. 2006) (per curiam).

207 *Id.* at 172.

208 *See, e.g.*, *Ayele*, 564 F.3d at 872 (listing issues that the agency should consider on remand); *Xue Yun Zhang*, 408 F.3d at 1249 (listing two discrete issues for the agency to determine on remand); *El-Sheikh*, 388 F.3d at 648 (providing a list of four questions for the agency to answer on remand); *Mendoza Manimbao*, 329 F.3d at 663 (flagging two issues for remand).

209 El-Sheikh v. Ashcroft, 388 F.3d 643 (8th Cir. 2004).

210 *Id.* at 648.

211 *Id.*

212 *Id.*

on remand. In addition to communicating the court's view of the most important issues in a way that helps address the court's perceived Article III concerns, suggesting an agenda for remand helps frame the court-agency dialogue in the event there is subsequent judicial review.

6. Government Concessions at Oral Argument

In addition to offering hypothetical solutions during oral argument or in their written decisions and suggesting issues for agency decision on remand, some courts also attempt to obtain concessions from the government—thus further limiting the issues on remand and focusing the court-agency dialogue.

For instance, in *Sandoval v. Holder*,[213] the Eighth Circuit remanded a case for a third time to the agency because it could not discern the agency's reasoning for denying relief. As Judge Bye colorfully put it: "[A]s the old saying goes, it is better to light a candle than curse the darkness, and the Board must articulate a sufficient basis for its decision to enable meaningful review . . . ."[214] To narrow the issues on remand, the Eighth Circuit utilized a variant of the hypothetical-solutions and suggested-issues tools discussed above by issuing "instructions to clarify the standard [the BIA] uses in applying [the statutory provision] to unaccompanied minors and to articulate the reasons Sandoval deserves no relief under that standard."[215] The Eighth Circuit went one step further and obtained concessions from the government in the hope of narrowing the issues on remand. In particular, the court noted in its opinion that the government had conceded at oral argument that the statute is not unambiguous and "thereby departed from the black-and-white construction of the statute in favor of the case-by-case approach."[216]

Aside from *Sandoval* and a few cases where courts noted that the government had conceded jurisdiction,[217] the cases reviewed reveal no other notices of government concessions at argument. This is thus an underdeveloped tool, and it is not clear why it is not utilized more. After all, obtaining such concessions allows a court to alleviate perceived Article III concerns by focusing the dialogue on the issues actually in dispute and narrowing the issues on remand. Perhaps courts

213 Sandoval v. Holder, 641 F.3d 982 (8th Cir. 2011).

214 *Id.* at 983 (citing *Chenery II*, 332 U.S. 194, 196–97 (1947)).

215 *Id.*

216 *Id.* at 987.

217 *See, e.g.*, Owino v. Holder, 575 F.3d 956, 958–59 (9th Cir. 2009). Cases where the government concedes the court's jurisdiction to review do not seem to enhance court-agency dialogue, but instead implicate whether the court has authority to speak at all.

worry that the concessions are not binding on the agency, even though they are voluntarily made by the legal representative of the agency. But even if not legally binding, the incentives created by the repeated game—or dialogue—in which courts and agencies engage would suggest that agencies would voluntarily bind themselves to such concessions even if they do not believe themselves legally bound. In the event agencies were to unbind themselves on remand, the court-agency dialogue would be enhanced and the issue would be readdressed—by a more hostile court—on post-remand judicial review.

7. Suggestion to Transfer to a Different Administrative Judge

The final dialogue-enhancing tool uncovered in the cases reviewed deals with changing the agency actor—or, in terms of dialogue, the primary agency speaker—on remand. At least five circuits have suggested that the case be assigned to a new immigration judge on remand.[218]

These suggestions were made in most cases because of fears of partiality,[219] but in some because of questions of adjudicator competence.[220] For instance, Chief Judge McKee, writing for the Third Circuit, justified this suggestion on partiality grounds because of "the appearance of partiality that cannot now be put 'back into the tube.'"[221] Moreover, most courts "suggested," "recommended," "urged," or stated it would be "appropriate" for the case to be reassigned.[222] But the Ninth Circuit in at least one case actually "or-

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218 *See, e.g.*, Abulashvili v. Attorney Gen., 663 F.3d 197, 209 (3d Cir. 2011) ("[W]e strongly recommend that the agency refer the matter to a different IJ . . . ."); Tekle v. Mukasey, 533 F.3d 1044, 1056 (9th Cir. 2008) ("suggesting" a new IJ on remand); Morgan v. Mukasey, 529 F.3d 1202, 1211 (9th Cir. 2008) ("Given the [passionate and biased] involvement of the immigration judge in the case, it would be appropriate to assign it to a different immigration judge."); Mapouya v. Gonzales, 487 F.3d 396, 416 (6th Cir. 2007) ("urg[ing]" that a different IJ hear the case on remand); Shu Ling Ni v. Bd. of Immigration Appeals, 439 F.3d 177, 181 (2d Cir. 2006) (suggesting a new adjudicator on remand); Niam v. Ashcroft, 354 F.3d 652, 660 (7th Cir. 2004) ("[W]e urge the service to refer the cases to different immigration judges."); Bace v. Ashcroft, 352 F.3d 1133, 1141–42 (7th Cir. 2003) ("[W]e urge the BIA to assign a different judge to the [petitioner's] case on remand.").

219 *See, e.g.*, *Morgan*, 529 F.3d at 1211 ("Given the [passionate and biased] involvement of the immigration judge in the case, it would be appropriate to assign it to a different immigration judge.").

220 *See, e.g.*, *Niam*, 354 F.3d at 660 ("In view of the performance of these immigration judges and the criticisms of them that we have felt obligated to make, we urge the service to refer the cases to different immigration judges.").

221 *Abulashvili*, 663 F.3d at 209.

222 *See supra* note 218.

der[ed]" the case to be assigned to a different immigration judge.[223] The propriety of this more aggressive removal order is addressed in Part III,[224] and at least the Seventh Circuit has recognized the impropriety of making such a command (as opposed to a suggestion).[225] Even in cases where the Ninth Circuit has only suggested removal, it has nevertheless made such a suggestion with particular force. For instance, in *Morgan v. Mukasey*,[226] Judge Noonan, writing for the court, reprimanded the "American administrative law officer who bears the noble name 'judge' . . . [for not] conform[ing] to the American ideal of a judge—dispassionate, unbiased, ready to hear each side equally."[227]

Whether the tool is framed as a suggestion, recommendation, or order, the court communicates to the agency its Article III concerns about partiality and fairness of proceedings before the same administrative judge. From a dialogue-enhancing perspective, it does more than just express concern; it attempts to change the speaker on the other end of the line. Moreover, not only does it signal these fairness concerns to the agency, but by publishing the suggestion in its opinion the court communicates to Congress, the Executive, and the public at large the concerns it has regarding the competency and effectiveness of a particular administrative judge. Part III will return to this final point by suggesting two more overt tools that attempt to extend the court-agency dialogue to further engage in a dialogue with the executive branch and Congress.

III. Judicial Toolbox for Enhancing Court-Agency Dialogue

The dialogue-enhancing tools discussed above—as well as *Chenery* and the ordinary remand rule itself—are examples of what Gillian Metzger and others have termed "administrative common law."[228] These tools are "administrative law doctrines and requirements that

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223 Nuru v. Gonzales, 404 F.3d 1207, 1229–30 (9th Cir. 2005) ("[W]e order that the case be assigned to a different immigration judge who will afford [the petitioner] the impartiality to which all applicants are entitled.").

224 *See infra* notes 256–59 and accompanying text.

225 *See* Bace v. Ashcroft, 352 F.3d 1133, 1141–42 (7th Cir. 2003) ("Although the choice of a hearing officer is left to the discretion of the BIA, we urge the BIA to assign a different judge to the [petitioner's] case on remand." (citing 7th Cir. R. 36)).

226 Morgan v. Mukasey, 529 F.3d 1202 (9th Cir. 2008).

227 *Id.* at 1210.

228 Metzger, *supra* note 13, at 1295; *accord* Kenneth Culp Davis, *Administrative Common Law and the* Vermont Yankee *Opinion*, 1980 Utah L. Rev. 3, 3 ("Most administrative law is judge-made law, and most judge-made administrative law is administrative common law."); Cass

are largely judicially created, as opposed to those specified by Congress, the President, or individual agencies."[229] Professor Metzger has argued that administrative common law is "a legitimate instance of judicial lawmaking" and that "[t]he very same factors that support federal common law in other instances—unique federal interests at stake, a need for uniformity, and the impropriety of relying on state law—dominate federal administrative contexts."[230] As the ordinary remand rule and these dialogue-enhancing tools illustrate, it is often the case that administrative common law reinforces or reflects constitutional values, such as separation of powers, due process, or a check on arbitrary government action.[231] Indeed, as discussed in Part II.C, the tools uncovered in the cases reviewed all seem to deal with perceived Article III concerns in a way that avoids intruding on legislative or executive power.[232]

There are, however, constraints on administrative common law, and Part III.A addresses these constraints. Part III.B then assembles the toolbox and suggests several more tools that should be included. Part III.C concludes by returning to a discussion of how these tools enhance court-agency dialogue—and why such dialogue is important even if the concerns courts express in refusing to remand do not really rise to a constitutional level, or even if there is no meaningful court-agency dialogue taking place.

A. Statutory and Vermont Yankee *Constraints*

When creating administrative common law, courts are not working with a blank canvas. Instead, they create common law against a statutory and constitutional backdrop.

The APA establishes the default standards for judicial review of agency action.[233] The APA judicial review standards apply when Congress has made a particular agency action "reviewable by statute" or the action is "final agency action for which there is no other adequate remedy in a court."[234] The statute that authorizes agency action may

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R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 271 (1986) ("Much of administrative law is common law.").

229 Metzger, *supra* note 13, at 1295. Professor Metzger explains that two of the most common examples of administrative common law are the reasoned decisionmaking rule and *Chevron* deference. *Id.* at 1298–1304.

230 *Id.* at 1297.

231 *See id.* (discussing these constitutional values).

232 *See supra* Part II.C.

233 5 U.S.C. § 701 (2012).

234 *Id.* § 704.

modify the APA's default standards or even purport to prohibit judicial review altogether.[235] Unless so modified, however, the APA provides that a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[236] The APA also requires a court to set aside agency action that is unconstitutional or exceeds the agency's statutory authority.[237] Finally, the APA requires a court to set aside agency action that is "without observance of procedure required by law."[238] Administrative common law cannot displace these or any other express statutory requirements that constrain judicial review.[239]

To be sure, statutes do not provide clear boundaries for judicial review of agency action. To borrow a line from another context, there is "room for play in the joints"[240] between statutory command and administrative common law. For instance, the Supreme Court has even grafted administrative common law onto the APA's arbitrary and capricious standard in the form of hard look review.[241] The administrative common law tools discussed in this Article similarly attempt to play in the joints between express congressional commands and judicial discretion.[242]

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235 *See generally* Hoffer & Walker, *supra* note 78 (discussing how the APA's default judicial review provisions interact with an agency's governing statute).

236 5 U.S.C. § 706(2)(A).

237 *Id.* § 706(2)(B)–(C). In formal rulemaking or adjudication, the reviewing court also sets aside agency action "unsupported by substantial evidence." *Id.* § 706(2)(E).

238 *Id.* § 706(2)(D).

239 *See* Metzger, *supra* note 13, at 1304 & n.50 (citing cases for the proposition that, "[a]t times, the Supreme Court has rejected judicial creativity in administrative law in favor of close adherence to the text of the APA or other governing statutes").

240 Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 669 (1970) (describing interplay between the Establishment Clause and Free Exercise Clause of the First Amendment).

241 *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."). *See generally* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.4 (5th ed. 2009) (explaining that the Supreme Court's "hard look" doctrine requires agencies to discuss all major issues it considered in formulating a major rule to demonstrate that its rule meets the APA's reasoned decisionmaking requirement).

242 Administrative common law has its fair share of critics, including most recently Kathryn Kovacs, who argues that much of administrative common law not only offends separation of powers and political accountability but also the need for public deliberation. Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. (forthcoming 2015), *available at* http://ssrn.com/abstract=2386025. These criticisms of certain administrative common law, however, seem less applicable here. As discussed in this Part, the tools at issue do not conflict

Statutory provisions, however, are not the only restraints on administrative common law. In its seminal decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[243] the Supreme Court held that statutory provisions not only dictate what courts can do when reviewing agency action, but also what they cannot do. There, the D.C. Circuit had overturned a rule issued by the Atomic Energy Commission because it found the agency proceedings to be inadequate.[244] Even though the agency complied with all of the applicable rulemaking procedures required by the APA, the D.C. Circuit faulted the agency for failing to order additional, nonstatutory procedures, such as perhaps depositions and cross-examination.[245]

The Supreme Court reversed and found "this much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."[246] In other words, "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them."[247] This administrative common law rule may reflect sound judgment.

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with the text of the APA (or an agency's governing statute)—either by changing the standard or scope of judicial review or by imposing extrastatutory procedures for the agency to follow on remand in violation of *Vermont Yankee*. *See infra* notes 256–61 and accompanying text.

243 Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978).

244 Natural Res. Def. Council, Inc., v. U.S. Nuclear Regulatory Comm'n, 547 F.2d 633, 653 (D.C. Cir. 1976), *rev'd sub nom.* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978).

245 *Id.* at 653–54. Gillian Metzger has explained that the D.C. Circuit's *Vermont Yankee* "opinion is a masterpiece of obfuscation" on what exactly were the procedures that the agency should have implemented—including, perhaps, cross-examination, discovery, or a more robust record on which to evaluate the agency's reasoned decisionmaking. Gillian E. Metzger, *The Story of* Vermont Yankee, *in* ADMINISTRATIVE LAW STORIES 124, 149–50 (Peter L. Strauss ed., 2006); *accord* Antonin Scalia, Vermont Yankee*: The APA, The D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 356 ("The essential meaning of the opinion below was unclear. Indeed, the first step in the Supreme Court's analysis had to be a determination whether the basis of decision was inadequacy of procedures or inadequacy of record support. (The Supreme Court concluded that it was the former.)" (footnote omitted)).

246 *Vermont Yankee*, 435 U.S. at 543 (internal quotation marks omitted).

247 *Id.* at 524. The rule at issue in *Vermont Yankee* made its way back to the Supreme Court after the D.C. Circuit again found the rule to be arbitrary and capricious, this time for substantive unreasonableness instead of procedural unreasonableness. *See* Natural Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n, 685 F.2d 459 (D.C. Cir. 1982). The Supreme Court again reversed. *See* Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 95–97, 105–06 (1983); *see also* Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 760–64 (2011) (discussing *Baltimore Gas* in more detail).

But it also arguably reflects some deeper constitutional value similar to the ordinary remand rule—i.e., that the judiciary should not interfere in procedures congressionally delegated to federal agencies. For this reason, the *Vermont Yankee* rule may be more aptly labeled "administrative anti-common law."

In all events, *Vermont Yankee* has its fair share of critics and supporters. As for its critics, Richard Stewart, for instance, has argued that "*Vermont Yankee* is myopic in denying courts an adequate role in adjusting and updating the law, and instead leaving the entire responsibility to Congress and administrators."[248] Similarly, Kenneth Davis has argued that *Vermont Yankee* eventually will be overruled, noting that the "opinion is largely one of those ra[re] opinions in which a unanimous Supreme Court speaks with little or no authority."[249]

As for its supporters, Clark Byse has argued that the D.C. Circuit's approach was "both an inappropriate judicial intrusion into the day-to-day deployment of agency resources and a disregard of a congressionally mandated model of rulemaking."[250] Then-law professor Stephen Breyer echoed this sentiment, and only disagreed with the Court's decision to remand the issue to the agency to take a "hard look" at the issue.[251] Then-law professor Antonin Scalia similarly agreed that the Court had gotten it right, but noted that "[i]t is ironic but true that the D.C. Circuit's irreverent approach to the text of the APA . . . [is] closer to what was the expectation in 1946."[252]

More recent scholarship has questioned whether there will be a *Vermont Yankee II* in the form of striking down "hard look" review,[253] or even a *Vermont Yankee III*, *IV*, and *V* that would abolish three other administrative common law doctrines that have been estab-

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248 Richard B. Stewart, Vermont Yankee *and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1820 (1978).

249 Davis, *supra* note 228, at 13–14, 17 (internal quotation marks omitted). Professor Nathaniel Nathanson has even argued that the Court misinterpreted the governing statute in *Vermont Yankee*, which when properly read in light of legislative history mandated on-the-record proceedings. Nathaniel L. Nathanson, *The* Vermont Yankee Nuclear Power *Opinion: A Masterpiece of Statutory Misinterpretation*, 16 SAN DIEGO L. REV. 183 (1979).

250 Clark Byse, Vermont Yankee *and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823, 1832 (1978).

251 Stephen Breyer, Vermont Yankee *and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833, 1840 (1978).

252 Scalia, *supra* note 245, at 375, 381 (footnote omitted).

253 Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for* Vermont Yankee II, 55 TUL. L. REV. 418 (1981); *see also* Richard J. Pierce, Jr., *Waiting for* Vermont Yankee II, 57 ADMIN. L. REV. 669 (2005) (arguing that it violates *Vermont Yankee* to presume a formal adjudication requirement whenever a statute calls for a "hearing").

lished in the rulemaking context.[254] To date, the Supreme Court has not taken up the scholarly calls to invalidate any of these administrative common law doctrines. At the same time, as Professor Metzger has observed, "*Vermont Yankee* has not prevented substantial judicial expansion of [the APA's] minimal procedural demands. The Court appears to have sanctioned these developments, or, at a minimum, has made no effort to rebuff them."[255] Nevertheless, *Vermont Yankee* continues to be relied on by courts, having been cited (per Westlaw KeyCite) in over 1500 judicial decisions to date, including over fifty decisions in 2012 alone.

The ordinary remand rule and *Vermont Yankee*, read together, make plain the limits of the administrative common law tools in this context: courts cannot decide a substantive issue of fact, policy, application of law to fact, or law where the agency is the primary decisionmaker under its authorizing statute. And courts should not impose additional procedures on remand that are not required by statute or the Constitution.

Turning to the dialogue-enhancing tools addressed in Part II.C, the most obvious problem is when a court orders the removal of an administrative judge on remand, as that forces a procedure on the agency that no statute authorizes a court to do. The exception, as recognized by the APA[256] and *Vermont Yankee*,[257] would be if the court finds that the Constitution compelled removal. This could be the case if the judge has a direct, personal, substantial, or pecuniary interest in the case—or perhaps even just "the probability of actual bias."[258] Recommending, urging, or suggesting that an administrative judge be

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254 Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 860 (2007) ("There are, however, a significant number of important administrative law doctrines that do seem to fly squarely in the face of all but the most unreasonably narrow understandings of the *Vermont Yankee* decision. These doctrines, ranging from the prohibitions on agency ex parte contacts and prejudgment in rulemakings to the expanded modern conception of the notice of proposed rulemaking, are all ripe for reconsideration."); *see also* Richard J. Pierce, Jr., Response, *Waiting for* Vermont Yankee III*,* IV*, and* V*? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902 (2007).

255 Metzger, *supra* note 13, at 1305 (footnote omitted).

256 5 U.S.C. § 706(2)(B) (2012) (requiring a court to set aside agency action if "contrary to constitutional right, power, privilege, or immunity").

257 Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543 (1978) (noting that courts can impose additional administrative procedures on agencies when "constitutional constraints" so require).

258 *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872 (2009) ("Under our precedents there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975))).

removed, however, causes no such violence under *Vermont Yankee*. A recommendation consists of just words of encouragement for the agency to grant additional procedural protections not required by statute; the agency is free to follow or discard such recommendation. And, of course, "[a]gencies are free to grant additional procedural rights in the exercise of their discretion."[259]

The same can be said of most of the other tools uncovered in the cases reviewed. The clearest examples of proper tools entail suggesting hypothetical solutions and flagging issues for the agency to consider on remand. Neither forces any substantive decision or additional procedures on remand. Similarly, obtaining government concessions during judicial review may well limit the agency's discretion on remand, but the tool does not impose new procedures in violation of *Vermont Yankee* or decide substantive issues in violation of the ordinary remand rule. To the contrary, it is a voluntary action that the government—acting on behalf of the agency—undertakes. Moreover, a panel's decision to retain jurisdiction over the case may appear quite aggressive, but, again, it neither imposes a new administrative procedure on remand nor decides a substantive issue for which the agency has been delegated discretion.

The final two tools—requiring notice of the agency's decision on remand and imposing a deadline for the agency to respond on remand—decide no substantive issues and thus do not violate the ordinary remand rule. But it is a closer question whether they violate *Vermont Yankee*. In both circumstances, the court imposes a procedure on remand that is not required by statute. The notice of agency decision, which is actually required of both parties under the Ninth Circuit's approach,[260] is a minimal intrusion on agency decisionmaking. It merely requires the agency—after reaching its final decision—to notify the court of that decision. That may well violate the letter of *Vermont Yankee*, but surely not its spirit. Nor would it likely draw a serious challenge from the government, much less any interest from the Supreme Court.

The time limit, by contrast, imposes a more severe limitation on the agency's decisionmaking process on remand. Perhaps based on the "extremely compelling circumstances" of a particular case—where, for instance, the delay in the proceeding had been unusual—the imposition of a time limit on remand may be allowed under *Ver-*

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259 *Vermont Yankee*, 435 U.S. at 524.

260 Sinha v. Holder, 564 F.3d 1015, 1026 (9th Cir. 2009) ("The parties are directed to notify the court immediately after the BIA's decision on remand.").

mont Yankee.[261] In all events, it is not clear that the government would seriously challenge such deadlines, so long as the court reasonably applied them and extended the time when appropriate. Moreover, in the event that the government challenged the time limit, the court may have other tools to expedite the remand process. For instance, as discussed in Part III.B.1, the court may be able to exercise its equitable authority to grant preliminary injunctive relief to expedite the agency's process on remand.

Finally, although a court does not have the authority to impose new administrative procedures on remand, it is not without recourse in the event that it believes additional procedures are needed. Again, however, the key is to utilize words instead of force. The court could suggest that the agency adopt additional procedures, and under *Vermont Yankee* the agency would be free to adopt them on remand. If the agency refuses to voluntarily adopt the recommended procedures, the court can utilize additional tools suggested in Part III.B to apply more pressure. For instance, the court can escalate the issue within the executive branch or with Congress and thus engage in a dialogue with either or both branches.[262] Based on the dialogue that occurs, Congress could modify by statute the rules of the game to make agencies adopt additional procedures or to empower courts to conduct more searching review. Similarly, in the context of executive agencies, the President can apply additional pressure on the agency—via intrabranch dialogue or, where appropriate, executive order—to adopt the additional procedures recommended by the court.

B. Assembling the Toolbox and Additional Tools

This Article does not attempt to fill the toolbox with every possible tool that could enhance dialogue. Indeed, the Article's primary purpose is to document the tools discovered in the cases reviewed, explain how these tools enhance court-agency dialogue while preserving a proper separation of powers, and encourage courts to utilize this toolbox and to develop additional administrative common law tools that similarly enhance dialogue. In light of the discussion above, however, this Part sketches out three additional dialogue-enhancing tools not found in the cases reviewed but nevertheless worth further developing and including in any court's toolbox. This Part then concludes by assembling the toolbox in Table 2.

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261 *Vermont Yankee*, 435 U.S. at 543.

262 *See infra* Part III.B.2–3.

1. Preliminary Injunctive Relief

Another tool to consider, based on the court's equitable powers, would be to issue a preliminary injunction pending the agency's decision on remand. This tool would address those circumstances where the court is fairly confident the petitioner is entitled to relief and is concerned about the irreparable harm additional delay on remand would cause. Instead of violating the ordinary remand rule by deciding the merits in the petitioner's favor, the court could preliminarily enjoin the agency from acting in a way that would cause irreparable harm. This tool could be used, for instance, in the immigration adjudication context in lieu of the futility exception to the ordinary remand rule discussed in Part II.A.[263]

In addition to preventing irreparable injury on remand, the issuance of a preliminary injunction enhances court-agency dialogue by more strongly expressing the court's position to the agency and encouraging the agency to act more swiftly on remand. Intuitively, it may seem that the use of this tool would be inappropriate under the ordinary remand rule, *Vermont Yankee*, or perhaps the APA. After all, as the Supreme Court has underscored, "[a] preliminary injunction is an extraordinary remedy never awarded as of right."[264] Each of these arguments will be addressed in turn.

First, the use of a preliminary injunction pending the agency's action on remand would not violate the ordinary remand rule because the court does not decide a substantive issue. This is evident from the standard for granting preliminary injunctive relief: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[265] The court does not decide that the petitioner has prevailed on the merits, but only that she "is likely to succeed on the merits." The agency has full discretion to decide the merits anew on remand, subject to judicial review post-remand.

Second, a preliminary injunction does not seem to violate *Vermont Yankee* because it does not impose any additional procedures on remand. That said, the Supreme Court in *Nken v. Holder*[266] distin-

263 *See supra* notes 142–43 and accompanying text.

264 Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008).

265 *Id.* at 20 (discussing the standard for a preliminary injunction in the administrative law context).

266 Nken v. Holder, 556 U.S. 418 (2009).

guished a preliminary injunction from a stay pending appeal in the agency context.[267] The two mechanisms have "some functional overlap . . . . Both can have the practical effect of preventing some action before the legality of that action has been conclusively determined."[268] Notwithstanding these similarities, the *Nken* Court noted critical differences, in that "a stay achieves this result by temporarily suspending the source of authority to act—the order or judgment in question—not by directing an actor's conduct."[269] In other words, "[a] stay 'simply suspend[s] judicial alteration of the status quo,' while injunctive relief 'grants judicial intervention that has been withheld by lower courts [or, here, the agency].'"[270]

If this proposed tool were considered a preliminary injunction as that term is defined in *Nken*, it is a much closer call whether its use would violate *Vermont Yankee* because it directs the agency's action on remand. On the other hand, to enjoin agency action pending the agency's final decision on remand may well be more appropriately characterized as a stay pending appeal. Just like a stay pending appeal, a stay pending the agency's decision on remand is used to "temporarily suspend[ ] the source of authority to act."[271] In all events, courts routinely consider and issue preliminary injunctions in other administrative contexts, so *Vermont Yankee*—in practice—does not appear to be a real obstacle to this dialogue-enhancing tool.[272]

Third, the issuance of a preliminary injunction does not violate the APA's default standards. The APA expressly provides that "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."[273] Accordingly, if the phrase "pending conclusion of the review proceedings" were to encompass further judicial review after a remand, then the APA would expressly allow a preliminary injunction as part of a remand order. If that is not the case, how-

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267 *Id.* at 428–29.

268 *Id.* at 428.

269 *Id.* at 428–49.

270 *Id.* at 429 (second alteration in original) (quoting Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n, 479 U.S. 1312, 1313 (Scalia, Circuit Justice 1986)).

271 *Id.* at 428–29.

272 *See, e.g.*, Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 12 (2008) (considering the standard for a preliminary injunction in the context of the Navy conducting sonar training where the Navy had not prepared an environmental impact statement as required in certain situations by the National Environmental Policy Act of 1969).

273 5 U.S.C. § 705 (2012).

ever, the APA is silent on the remedies available, and it would arguably fall within the court's inherent equitable powers.[274]

Importantly, though, the agency's authorizing statute may place additional restrictions on the type of relief a reviewing court could issue. In the immigration adjudication context, for example, Congress has limited injunctive relief to, among other things, the petitioner before the court, and provides that "no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law."[275]

In sum, the availability of a preliminary injunction pending a remand decision may, as John Duffy has suggested in a related administrative law context, require that "the plaintiffs put forward convincing reasons to justify supplementing congressionally mandated remedies."[276] Whether a preliminary injunction pending a remand decision is permissible in the immigration context—or any other agency context, for that matter—exceeds the ambitions of this Article. But if a court concludes that it is permissible in the matter under consideration, the issuance of a preliminary injunction can play a powerful role in enhancing court-agency dialogue.

2. Escalation of an Issue Within the Executive

A second additional dialogue-enhancing tool involves escalating the issue within the executive branch. This tool can be implemented in a number of ways.

First, the court can order the government at oral argument to confirm in writing the agency's position on a particular issue. This is not the most common approach, but in the author's experience clerking on the Ninth Circuit and working on the Justice Department's Civil Appellate Staff, courts on occasion ask for written confirmation of an agency's position on a particular issue. Such a request differs

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274 *See, e.g.*, Ryan v. Gonzales, 133 S. Ct. 696, 708 (2013) (explaining in the federal habeas context that a court retains its inherent power to utilize equitable remedies unless the statute commands otherwise); *accord* Enelow v. N.Y. Life Ins. Co., 293 U.S. 379, 382 (1935) (stating that a court may stay a case "pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice"). *But see* 5 U.S.C. § 702 ("Nothing [in the APA] (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.").

275 8 U.S.C. § 1252(f)(2) (2012).

276 John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 152 (1998).

from merely seeking a concession from the government at argument because it escalates the issue to more senior officials at the Justice Department and at the agency. In so doing, it enhances dialogue between the court and agency during the pendency of the appeal. It violates neither the ordinary remand rule nor *Vermont Yankee* because it decides no substantive issue and imposes no additional procedures on remand.

Second, and related, the court can order supplemental briefing on a particular issue. That way, the court receives the agency's official answer during the appeal, which like government concessions at argument can narrow the agency's discretion on remand. Moreover, if it continues to have concerns after reviewing the supplemental briefing, the court can order additional argument to explore the issues before remanding to the agency. Again, this dialogue-enhancing tool is appropriate, as it neither decides substantive issues nor imposes additional administrative procedures on remand. Instead, it takes advantage of the pending appeal to have a repeated dialogue with the agency about an issue that concerns the court.

Finally, a court can escalate an issue within the executive branch by the messages it sends to the agency via its published opinions. For instance, in the early 2000s, a number of circuits in a number of different opinions expressed serious concerns about the quality, competence, and caseloads of immigration judges across the country.[277] In August 2006, the Attorney General responded to these concerns and took a number of formal measures to address the problem, including implementation of annual performance reviews of immigration judges.[278] In announcing these changes, the Attorney General expressly indicated that these changes were in response to "serious complaints coming from the Courts of Appeals, the press, and a host of other observers."[279]

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277 *See, e.g.*, Guchshenkov v. Ashcroft, 366 F.3d 554, 556 (7th Cir. 2004) ("The petitions reflect the continuing difficulty that the board and the immigration judges are having in giving reasoned explanations for their decisions to deny asylum."). *But see id.* at 560 (Evans, J., concurring) ("Although I join the majority in voting to remand these two consolidated asylum petitions for further proceedings, I write separately to express my concern, and growing unease, with what I see as a recent trend by this court to be unnecessarily critical of the work product produced by immigration judges who have the unenviable duty of adjudicating these difficult cases in the first instance.").

278 Nina Bernstein, *Immigration Judges Facing Yearly Performance Reviews*, N.Y. TIMES, Aug. 10, 2006, at A14.

279 *Id.* (quoting then-Attorney General Alberto R. Gonzales).

3. Escalation of an Issue to Congress

A third and related dialogue-enhancing tool is to escalate the issue to Congress. Because Congress delegated the authority to the agency in the first instance, it may be productive to raise issues with Congress if a court is concerned about an agency's procedures, substantive decisions, or both.

Perhaps the most famous recent example of such escalation comes from outside the administrative law context. In *Ledbetter v. Goodyear Tire & Rubber Co.*,[280] the Court interpreted Title VII of the Civil Rights Act of 1964[281] to require the time limit for filing a pay discrimination claim to begin when the pay-setting decision is made and to not restart with each paycheck.[282] Justice Ginsburg dissented and took the unusual additional step of calling for a congressional override of the Court's interpretation: "Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."[283] As Martha Chamallas has observed, "Congress did indeed take up [Justice Ginsburg's] challenge by passing the Lilly Ledbetter Fair Pay Act—the first bill signed into law by President Obama in January 2009."[284]

The effect of this dialogue-enhancing tool, however, is not limited to congressional action, and much can be learned from Justice Ginsburg's example. Professor Chamallas explains:

> The moral of this story is that Justice Ginsburg has a way of mobilizing other institutions and organizations into action. Her *Ledbetter* dissent not only prompted a swift response by Congress, but had an impact on the behavior of private employers and raised awareness among employees and advocacy groups. She may have been the only woman on the High Court when *Ledbetter* was decided, but her voice was heard loudly and clearly and to great effect.[285]

Courts can and should consider escalating issues to Congress in the administrative law context as well. Even in situations not quite as

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280 Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

281 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012).

282 *Ledbetter*, 550 U.S. at 621.

283 *Id.* at 661 (Ginsburg, J., dissenting).

284 Martha Chamallas, Ledbetter*, Gender Equity and Institutional Context*, 70 OHIO ST. L.J. 1037, 1038 (2009) (citing Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5).

285 *Id.* at 1051.

public and controversial as gender discrimination under Title VII, this dialogue-enhancing tool may well affect agency behavior.[286]

And Congress does not need to enact legislation to affect agency behavior. Congressional oversight committees can apply pressure, committee hearings can be held, the Government Accountability Office (Congress's investigative arm) can probe and issue a report, or members of Congress can request an investigation by the agency's inspector general—just to name a few alternative means of congressional influence.[287] This is an underdeveloped judicial tool for enhancing dialogue, yet it is perhaps one of the more powerful ways to encourage interbranch dialogue and address judicial concerns about agency decisionmaking.

* * *

The tools identified in the cases reviewed and discussed in Part II—along with the additional three tools suggested above—merely illustrate the variety of tools courts can and should use to enhance their dialogue with federal agencies. Courts should continue to experiment and innovate—adding more tools to this toolbox and adapting the toolbox to different agency adjudication and rulemaking contexts. Based on the circumstances of the particular case, courts should likewise consider combining tools to encourage even more effective court-agency dialogue on remand. Table 2 lists the ten tools identified in

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286 Another example is when the Supreme Court held "that prior judicial approval is required for the type of domestic security surveillance involved in this case and that such approval may be made in accordance with such reasonable standards as the Congress may prescribe." United States v. U.S. Dist. Court for the E. Dist. of Mich., S. Div., 407 U.S. 297, 324 (1972). It took six years for Congress to debate and propose these standards, but it ultimately responded by enacting the Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978). David S. Eggert, Note, *Executive Order 12,333: An Assessment of the Validity of Warrantless National Security Searches*, 1983 DUKE L.J. 611, 626. For exhaustive empirical work on congressional overrides of the Supreme Court's statutory interpretations, see Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317 (2014); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

287 A number of these congressional tools are explored in the context of independent financial regulators' failure to adequately conduct cost-benefit analysis in PAUL ROSE & CHRISTOPHER J. WALKER, THE IMPORTANCE OF COST-BENEFIT ANALYSIS IN FINANCIAL REGULATION 9–16 (2013), *available at* http://ssrn.com/abstract=2231314. Many of these forms of congressional influence—including oversight committees and inspectors general—are among the tools Jack Goldsmith includes in his "synopticon" for "watching and checking the presidency." JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 92–93, 99, 206–07 (2012).

this Article, along with a brief summary of their effects on the court-agency dialogue.

TABLE 2. THE ADMINISTRATIVE COMMON LAW TOOLBOX

The Tool	**The Dialogue-Enhancing Effect**
Notice of Agency Decision on Remand	Signals that court is interested in outcome and continued dialogue
Panel Retention of Jurisdiction	Sends message that the panel itself is interested in continuing dialogue in the event the agency denies relief
Time Limit on Remand	Communicates strong interest in continuing dialogue by speeding up that conversation
Hypothetical Solutions	Not only facilitates dialogue on remand, but expressly starts the dialogue before remand
Certification of an Issue for Remand	Suggests an agenda for remand, which helps frame dialogue in the event of subsequent judicial review
Government Concessions at Oral Argument	Limits issues on remand and focuses court-agency dialogue
Suggestion to Transfer to Different Administrative Judge	Attempts to change the primary agency speaker in the dialogue
Preliminary Injunctive Relief	Expresses court's strong opinion on issue and encourages expedited remand/dialogue
Escalation of Issue Within Executive Branch	Attempts to extend dialogue beyond agency to the executive branch more broadly to apply more pressure on agency
Escalation of Issue to Congress	Attempts to extend dialogue beyond agency to Congress to change agency rules or behavior

C. Proper Focus on Dialogue-Enhancing Tools

A cynical observer may question whether these dialogue-enhancing tools are really necessary or helpful. On the one hand, if the perceived Article III concerns do not really rise to a constitutional level, why should courts resort to such dialogue-enhancing tools? Instead, absent a constitutional or statutory obligation to do more, the court should just adhere to the ordinary remand rule.

On the other hand, if the Article III constitutional concerns are legitimate, do these tools really enhance dialogue and in turn ameliorate the constitutional tensions? And, as a more fundamental question, is there a meaningful court-agency dialogue taking place—i.e., a "conversation in which the participants strive toward learning and understanding to promote more effective deliberation and outcomes"?[288] Professor Metzger has remarked:

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288 Hammond, *supra* note 8, at 1773.

> [T]he cynic in me was left wondering whether a more accurate description than court-agency dialogue is straightforward compromise, with both agencies and courts deviating from their real views of the best answer, perhaps significantly, in order to put an end to litigation that clearly has gone on way too long.[289]

This Article does not pretend to provide a full—or fully satisfactory—answer to these questions. Part of the problem is that, as Professor Hammond has noted, there is a "rich literature on dialogic considerations in constitutional law," but "there has been no real examination" of these considerations "in the analogous administrative law context."[290] And because agency decisions on remand often are not readily and publicly available—and even when available, do not always cite the judicial decisions to which they respond—it is difficult empirically to measure and evaluate the court-agency dialogue.[291] Notwithstanding these limitations, some preliminary observations can be made with respect to these questions.

First, the cases examined in this Article shed some light on the court-agency dialogue. Of the 239 cases remanded, Westlaw KeyCite reports that 20 (8 percent) returned to the court of appeals after remand.[292] Of those 20 cases, 14 (70 percent) were denied. In other words, the reviewing court agreed that the agency had acted within its lawfully delegated authority on remand. In contrast, six cases (thirty percent) resulted in a subsequent reversal of the agency's decision on remand. Four of those cases were remanded on a different issue,[293] and only in one case did the court reverse on the same issue again (and the court there decided not to remand again but granted relief

289 Gillian Metzger, *Serial Litigation in Administrative Law: What Can Repeat Cases Tell Us About Judicial Review?*, JOTWELL (June 25, 2012), http://adlaw.jotwell.com/serial-litigation-in-administrative-law-what-can-repeat-cases-tell-us-about-judicial-review/.

290 Hammond, *supra* note 8, at 1724–25 & nn.3–5 (citing literature).

291 *See* Margaret Gilhooley, *The Availability of Decisions and Precedents in Agency Adjudications: The Impact of the Freedom of Information Act Publication Requirements*, 3 ADMIN. L.J. 53, 53 (1989).

292 These statistics are current as of February 2013. For a follow-up research project, the agency remand decisions have been requested via the Freedom of Information Act. That request was sent in June 2013. In August 2014, the agency began to release, on a rolling basis, highly redacted copies of these agency decisions.

293 *See* Montes-Lopez v. Holder, 694 F.3d 1085, 1094 (9th Cir. 2012) (finding due process violation in immigration hearing on remand); Valdiviezo-Galdamez v. Attorney Gen., 663 F.3d 582, 612 (3d Cir. 2011) (remanding on different question of statutory interpretation); Castañeda-Castillo v. Holder, 638 F.3d 354, 363 (1st Cir. 2011) (remanding on different legal question); Ramirez-Peyro v. Holder, 574 F.3d 893, 906 (8th Cir. 2009) (remanding to the BIA to resolve additional factual issues).

outright).[294] The court in the remaining decision entered final judgment and dismissed the petition because the agency had granted the relief requested.[295]

Albeit a small sample, these twenty cases suggest that the conversation can take various forms. For example, the agency can reach the same conclusion based on different reasoning, and the court may agree with this subsequent determination. In *Ucelo-Gomez*, the Second Circuit remanded to not reach a determination of the immigration judge's decision in the first instance.[296] On remand, the BIA reached the same determination as the immigration judge, and the panel subsequently denied the petition.[297] The court apparently felt the agency had meaningfully responded.[298] In *Yusupov v. Attorney General*,[299] by contrast, the Third Circuit noted that the typical process required remand, but ruled that another remand was not necessary because there was only one outcome as a matter of law.[300]

Finally, even when a court disagrees with the agency, grants the petition, and remands for a second time, judges use concurrences to articulate concerns beyond those specifically requiring remand. For example, in *Valdiviezo-Galdamez v. Attorney General*,[301] Judge Hardiman concurred in the Third Circuit's second remand order but expressed concern about the BIA's factfinding.[302] Utilizing the hypothetical-answer dialogue-enhancing tool, he suggested: "Should the BIA choose to adopt new requirements for 'particular social group,' I believe that it must also remand to the IJ for further factual development."[303]

The length of dialogue also varies, as does how suggestive the court is on specific outcomes. For instance, in *Ramirez-Peyro v. Gonzales*,[304] the Eighth Circuit initially remanded.[305] On remand, the BIA

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294 *See* Yusupov v. Attorney Gen., 650 F.3d 968, 993 (3d Cir. 2011).

295 Castañeda-Castillo v. Holder, 676 F.3d 1, 3 (1st Cir. 2012).

296 Ucelo-Gomez v. Gonzales, 464 F.3d 163, 165 (2d Cir. 2006) (per curiam).

297 Ucelo-Gomez v. Mukasey, 509 F.3d 70, 72 (2d Cir. 2007).

298 *See id.* ("The BIA has fulfilled the terms of our remand by rendering a timely opinion as to whether affluent Guatemalans constitute a particular social group for asylum purposes. We retained jurisdiction to decide the issues set forth by the petition, and upon further consideration in light of the BIA's opinion, we now deny the petition.").

299 Yusupov v. Attorney Gen., 650 F.3d 968 (3d Cir. 2011).

300 *Id.* at 993.

301 Valdiviezo-Galdamez v. Attorney Gen., 663 F.3d 582 (3d Cir. 2011).

302 *Id.* at 612, 618 (Hardiman, J., concurring) ("We did not authorize the BIA to usurp the IJ's role as factfinder.").

303 *Id.*

304 Ramirez-Peyro v. Gonzales, 477 F.3d 637 (8th Cir. 2007).

305 *Id.* at 642 (remanding because "[t]he Board should be given the opportunity to dis-

once again denied relief, and on further review the Eighth Circuit once again disagreed.[306] However, in what has now become an ongoing dialogue, the court remanded again to the BIA on a different issue.[307] This time, Judge Melloy, writing for the Eighth Circuit, found fault in the BIA's narrow interpretation of the statute and "remand[ed] the case to the BIA to allow the agency to properly apply the IJ's factual findings to the correct under-color-of-law standard, as outlined above."[308]

The longest dialogue found in the cases reviewed is the First Circuit trilogy—or tetralogy if one counts an en banc decision that superseded the first panel decision—in *Castañeda-Castillo*.[309] There, the case was pending before the First Circuit for eighteen years—involving three panel decisions, one en banc decision, and two remands to the agency on two separate legal issues.[310] Ultimately, the petitioners obtained the relief sought, and the First Circuit entered final judgment and dismissed the petition it had retained jurisdiction over pending the second remand.[311]

To be sure, these twenty cases where Westlaw's KeyCite has tracked subsequent history provide only a glimpse into the dialogue that occurs on remand. As a preliminary matter, not all subsequent court action shows up in the KeyCite database. For instance, in *Sinha*, the Ninth Circuit remanded and required the parties to notify the court immediately after the agency's final decision.[312] The agency granted relief on remand, but the parties failed to timely provide notice. The court sua sponte took judicial notice of the agency's decision and, in a subsequent order, even admonished the parties for failing to provide notice as required by the court.[313] KeyCite does not report this dialogue, apparently because the short orders were not published.

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charge its statutory duty to review the IJ's factual findings for clear error and remand to the IJ for further proceedings if appropriate").

306 Ramirez-Peyro v. Holder, 574 F.3d 893, 897–98 (8th Cir. 2009).

307 *Id.* at 904.

308 *Id.*

309 Castañeda-Castillo v. Gonzales (*Castañeda I*), 464 F.3d 112 (1st Cir. 2006), *vacated and remanded on reh'g en banc*, *Castañeda II*, 488 F.3d 17 (1st Cir. 2007) (en banc); Castañeda-Castillo v. Holder (*Castañeda III*), 638 F.3d 354 (1st Cir. 2011); Castañeda-Castillo v. Holder (*Castañeda IV*), 676 F.3d 1 (1st Cir. 2012).

310 *See Castañeda IV*, 676 F.3d at 1–3 (recounting procedural history).

311 *Id.*

312 Sinha v. Holder, 564 F.3d 1015, 1026 (9th Cir. 2009).

313 Sinha v. Holder, No. 07-72289 (9th Cir. Dec. 23, 2010). The court excused the parties for failure to comply with this requirement. *See* Sinha v. Holder, No. 07-72289 (9th Cir. Feb. 11, 2011).

Moreover, dialogue frequently ends on remand because either the agency grants relief, and thus there is no subsequent judicial review, or the agency denies relief, and the petitioner does not seek further review. The Supreme Court's immigration trilogy is illustrative. On remand, the agency granted relief in *Ventura*, and thus no further review was required.[314] By contrast, in *Thomas*, the agency denied relief, and the petitioner did not seek further review.[315] Agency decisions on remand are seldom publicly available, and even when obtainable via the Freedom of Information Act,[316] the decisions are often released in highly redacted format. Moreover, many of the cases reviewed likely have not reached a final agency decision. For instance, as of November 2012, the Justice Department reported that there was still no final agency decision in *Negusie*[317]—a decision that the Supreme Court issued in March 2009[318] and that the Fifth Circuit remanded to the agency in April 2009.[319] To put the cases reviewed in perspective, 73 of the 239 cases remanded (31 percent) were decided in 2009 or later. Accordingly, it may be too soon to observe the dialogue in roughly a third of the cases remanded.

Second, that the perceived Article III concerns courts express may not actually rise to the constitutional level does not diminish the importance of courts utilizing dialogue-enhancing tools when remanding issues to agencies. As Dan Coenen has observed in the constitutional law context of courts communicating to Congress, dialogic tools help safeguard constitutional values[320] and thus reinforce constitutional principles even if the Constitution does not mandate their use. These tools help courts communicate constitutional values to agencies and, in turn, hopefully help agencies avoid reaching unconstitutional or otherwise unlawful decisions on remand. Helping agencies to act within their congressionally delegated discretion on remand is an end

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314 Letter from Exec. Office for Immigration Review, U.S. Dep't of Justice, to Matthew S. Cooper, Moritz Law Librarian (Dec. 3, 2012) (on file with author).

315 The agency's December 27, 2007 decision was received through a Freedom of Information Act request. *See id.* At a minimum, the BIA dismissed the appeal; however, the board's reasoning remains unclear as the decision released is highly redacted.

316 Freedom of Information Act, 5 U.S.C. § 552 (2012).

317 According to the Executive Office for Immigration Review, "the matter is [still] pending before the Board of Immigration Appeals." Letter from Exec. Office for Immigration Review, U.S. Dep't of Justice, to Matthew S. Cooper, Moritz Law Librarian (Nov. 19, 2012) (on file with author).

318 Negusie v. Holder, 555 U.S. 511 (2009).

319 Negusie v. Holder, No. 06-60193 (5th Cir. Apr. 13, 2009) (per curiam).

320 Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1587–88 (2001).

in itself, even if there are no constitutional implications. Moreover, as Professor Hammond has remarked, these dialogue-enhancing tools can encourage swifter resolution of cases on remand to the agency—addressing one of the greatest concerns of the ordinary remand rule and agency decisionmaking more generally.[321]

Third, whether there is a meaningful dialogue taking place *between* courts and agencies does not diminish the importance of courts utilizing dialogue-enhancing tools. Even if it were true that courts talk to agencies but agencies do not talk back, this one-sided dialogue still would serve the constitutional, administrative law, and efficiency values discussed above. Moreover, even if agencies may not respond with words, they respond with actions—and hopefully actions that reflect listening to the courts and following their guidance where appropriate.

By respecting agencies' authority via adherence to the ordinary remand rule yet adopting a number of dialogue-enhancing tools, courts also contribute to a properly functioning administrative state where all three branches of government interact and influence agency action. As Professor Hammond has remarked, "asking agencies to be equal partners in a dialogue enhances participation, deliberation, and legitimacy because . . . interested parties, Congress, and the courts can more easily understand and respond to their reasoning."[322] As discussed in the Introduction, the appellate review model of administrative law has evolved to embrace a number of administrative common law doctrines that require courts to defer greatly to agency decisionmaking. Aside from comparative expertise justifications, this judicial deference is ultimately based on the fact that Congress has delegated such authority to federal agencies. As the appellate review model of administrative law further evolves, however, it must reinforce the political (i.e., executive and legislative) controls on agency action. Just as "requiring that agencies explain and justify their actions also arguably reinforces political controls by helping to ensure that Congress and the President are aware of what agencies are doing,"[323] so too do these dialogue-enhancing tools.

Finally, whether or not there is a meaningful court-agency dialogue taking place now, for the reasons discussed above there should be such dialogue in the modern administrative state. And the tools uncovered in the cases reviewed—coupled with the additional tools

321 Hammond, *supra* note 8, at 1775.

322 *Id.* at 1780.

323 Metzger, *supra* note 15, at 492.

suggested in Part III.B—constitute a crucial development in courts attempting to more seriously engage in dialogue with agencies, as well as with Congress and the executive branch. These tools help courts to fulfill their oversight role, to encourage agencies on remand to act within their delegated powers, and to make agency decisionmaking more transparent to the public and other interested government actors.

CONCLUSION

Separation of powers plays an important role in the modern administrative state, and the appellate model of judicial review in administrative law has evolved to address these constitutional values. This Article has examined one of these evolutions—the ordinary remand rule—and concludes that the remand rule applies broadly: except when there are minor errors as to subsidiary issues that do not affect the agency's ultimate decision, or the agency ultimately lacks statutory or constitutional authority to act, a court should never decide questions of fact, policy, application of law to fact, or law when such questions fall within the space delegated to an agency. Notwithstanding, a review of 342 published court of appeals decisions that have addressed the remand rule since 2002 through the end of 2012 reveals that courts fail to follow the rule in roughly one in five cases, and that courts demonstrate little appreciation of the separation of powers values that motivate the rule.

A more intriguing finding emerges from the cases reviewed, however. The cases reveal that the appellate review model of administrative law has evolved yet again. Courts have begun to develop certain dialogue-enhancing tools in light of their understanding of Article III authority in the separation of powers framework. This Article documents the evolution and importance of dialogue in the modern administrative state more generally, but much more work needs to be done. Scholars need to focus more on the dialogic considerations in administrative law, similar to the work that has been done on these considerations in constitutional law. Courts and scholars need to focus on how these tools and others can be adapted to other agency adjudication and rulemaking contexts. And courts and litigants should develop and experiment with additional tools that enhance court-agency dialogue while preserving a proper separation of powers.

But what courts should *not* do—as some courts have done in the cases reviewed—is ignore the ordinary remand rule. Instead, courts should utilize the dialogue-enhancing toolbox assembled in this Arti-

cle to address perceived Article III problems in remanding issues to the agency while preserving the balance of powers between courts and agencies via the ordinary remand rule.