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## YALE LAW & POLICY REVIEW

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### Calibrating Judicial Scrutiny of Agency Enforcement Decrees

*W. Hamilton Jordan\**

INTRODUCTION .....	57
I. JUDICIAL SKEPTICISM OF AGENCY ENFORCEMENT DECREES.....	61
A. <i>Consent Decrees in Federal Law Enforcement</i> .....	61
B. <i>Rakoff's Revolution: Citigroup I</i> .....	62
C. <i>The Second Circuit Cuts Back: Citigroup II</i> .....	66
D. <i>Additional Judicial Skepticism of Agency Enforcement Decrees</i> .....	68
II. HIDDEN HARD LOOK REVIEW.....	72
A. <i>"Hard Look" Review</i> .....	72
B. <i>Citigroup I: Taking a "Hard Look" at Proposed Enforcement         Decrees</i> .....	75
III. CALIBRATING THE OPTIMAL APPROACH .....	78
A. <i>Citigroup I: How the Court Went Too Far</i> .....	78
B. <i>Citigroup II: How the Second Circuit Overcorrected</i> .....	83
C. <i>A Suggested Middle Ground</i> .....	85
CONCLUSION .....	90

#### INTRODUCTION

Of all the civil law enforcement tools at federal agencies' disposal, perhaps none is more important than the enforcement decree—a court-approved and often injunction-backed settlement between a federal agency and a regulated defendant in a civil suit. Several enforcement agencies, including the Securities

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\* J.D., Class of 2013, The University of California, Berkeley, School of Law. I am grateful to Anne O'Connell, Stephen Bundy, David Feder, Jerry Cedrone, Collin White, Gregory Miller, Corey Laplante, and the staff of the *Yale Law & Policy Review* for their insightful comments.

and Exchange Commission, the Equal Employment Opportunity Commission, and the Federal Trade Commission, resolve most of their enforcement actions this way.<sup>1</sup> This is hardly surprising. Litigation is costly, trials are unpredictable, and agencies have limited funding. Settling enforcement actions allows agencies to preserve their resources and prosecute a broader swath of violations.<sup>2</sup> Settlement is often attractive to regulated parties, too, allowing them to avoid the risk and publicity of trial, often without admitting any wrongdoing.<sup>3</sup>

An agreement to settle an enforcement action is usually memorialized in a consent decree. And a consent decree—unlike a regular settlement, where the parties simply agree to dismiss the case—requires judicial approval. That’s because the decree does something more than commemorate a negotiated resolu-

1. See Brief for Petitioner at 23, *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285 (2d Cir. 2014) (Nos. 11-5227, 11-5375, 11-5242) (representing that the SEC resolved nearly 90% of its recent enforcement actions within the Second Circuit by consent decree); FED. TRADE COMM’N, *THE FTC IN 2010: FEDERAL TRADE COMMISSION ANNUAL REPORT 2* (2010) (cataloging the number of consent agreements in FTC antitrust enforcement actions from 2005 to 2010); P. DAVID LOPEZ, *EQUAL EMP’T OPPORTUNITY COMM’N, OFFICE OF GENERAL COUNSEL FISCAL YEAR 2009 ANNUAL REPORT 62* (2009) (stating that 79.3% of FY2009 EEOC suit resolutions were consent decrees); see also Richard M. Cooper, *The Need for Oversight of Agency Policies for Settling Enforcement Actions*, 59 ADMIN. L. REV. 835, 835 (2007) (“The vast majority of enforcement actions by federal agencies against public companies and other major institutions in our society end in settlements, not in contested proceedings.”); John M. Nannes, *Termination, Modification, and Enforcement of Antitrust Consent Decrees*, 15 ANTITRUST, Fall 2000, at 55 (explaining that the Department of Justice has resolved most of its antitrust enforcement actions by consent decree); Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL F. 327 (“The vast majority of environmental enforcement actions brought by the government is resolved by negotiated settlement.”).
2. See, e.g., *SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983) (“While it gives up a number of advantages when it proceeds by injunction rather than by litigation, including the filing of findings of fact and court opinions clearly setting forth the reasons for the result in a particular case, the SEC is thus able to conserve its own and judicial resources . . . .”); *SEC v. Everest Mgmt. Corp.*, 475 F.2d 1236, 1240 (2d Cir. 1972) (“The SEC can bring the large number of enforcement actions it does only because in all but a few cases consent decrees are entered.”); cf. *Chi. Bd. of Trade v. SEC*, 883 F.2d 525, 531 (7th Cir. 1989) (“Agencies must compare the value of pursuing one case against the value of pursuing another; declining a particular case hardly means that the SEC’s lawyers and economists will go twiddle their thumbs; case-versus-case is the daily tradeoff.”).
3. See, e.g., *Clifton*, 700 F.2d at 748; Cooper, *supra* note 1, at 843 (observing that regulated entities “commonly view the prospect of civil litigation against the government and administrative sanctions as far worse than settling on the government’s terms”); Percival, *supra* note 1, at 335 (explaining that when private defendants settle environmental enforcement actions they “usually agree, without admitting liability, to change their behavior in a particular way”).

## CALIBRATING JUDICIAL SCRUTINY OF AGENCY ENFORCEMENT DECREES

tion to a controversy: it serves as an enforceable court order.<sup>4</sup> This carries significant benefits for the agency, the most obvious being that the decree is enforceable by the court's contempt power. If the regulated party breaks the deal later on, the agency need not file a new suit—it can simply return to the court and seek sanctions.<sup>5</sup>

Despite the prevalence and significance of agency enforcement decrees, federal courts currently do not agree on a uniform standard of review to apply when deciding whether to approve such decrees.<sup>6</sup> For decades, courts mostly relied on the same general framework for review, agreeing that an agency enforcement decree must be fair, adequate, and reasonable to win judicial approval—with the added qualifier that any injunctive relief must accord with (or at least not disserve) the public interest.<sup>7</sup> With occasional exceptions, this frame-

4. See *Kasper v. Chi. Bd. of Election Comm'rs*, 814 F.2d 332, 338 (7th Cir. 1987) (“[A] decree is not exactly a contract; it is an exercise of federal power, enforceable by contempt.”); Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 324-25 (1988) (“[A] consent decree is neither a contract nor a judgment—and it is both.”).
5. See Kramer, *supra* note 4, at 325; see also Anthony DiSarro, *Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation*, 60 AM. U. L. REV. 275, 279-80 (2010) (“This procedure will likely be quicker and simpler—and lead to a more complete and effective remedy—than when the terms are solely put into a settlement agreement.”). *But see id.* at 287 (observing that a movant seeking “[t]o prevail on an application for civil contempt” must satisfy “a higher burden—the ‘clear and convincing evidence’ standard—rather than the ‘preponderance of the evidence’ standard that applies to contract actions”).
6. Note, *Securities Regulation—Consent Decrees—Second Circuit Clarifies That Court’s Review of an SEC Settlement Should Focus on Procedural Propriety*, 128 HARV. L. REV. 1288, 1288 (2015) (“Although the use of consent decrees is an established practice, in most contexts courts have struggled to define the appropriate level of deference due when they review decrees.”). In some contexts—like enforcement of U.S. antitrust law, governed in part by the Tunney Act—Congress has provided a statutory framework for courts to employ when reviewing proposed enforcement decrees. See 15 U.S.C. § 16(e)(1) (2012). Though this Article draws on antitrust cases to highlight the importance and prevalence of agency enforcement decrees, its primary aim is to address how courts should best review consent decrees in the absence of statutory guidance on the matter.
7. See, e.g., *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987) (noting that courts “ha[ve] the duty” to approve a negotiated consent decree “unless it is ‘unfair, inadequate, or unreasonable’”) (quoting *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984)); *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985) (“The district court may not deny approval of a consent decree unless it is unfair, unreasonable, or inadequate.”); *Randolph*, 736 F.2d at 529 (“Unless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved”); see also Brief for Petitioner, *supra* note 1, at 20 (describing the fair, reasonable, and adequate standard as “the *only* standard imposed by federal courts across the country”) (emphasis in original).

work usually led district judges to approve agency enforcement decrees.<sup>8</sup> But in recent years, several district courts have displayed increased skepticism of agency enforcement decrees, sometimes rejecting settlement proposals after concluding that the underlying terms fail to satisfy the well-worn “fair, reasonable, and adequate” standard.<sup>9</sup> One federal court of appeals has reined in these rejections, recently announcing a new framework that removes “adequacy” from the framework of review and ensures district courts play only a minor role in policing proposed enforcement decrees for unreasonableness.<sup>10</sup>

Given these recent shifts in the legal landscape, and considering that the judiciary’s role in reviewing proposed enforcement decrees is still unclear in most circuits, it’s worth asking how courts should best proceed when asked to approve enforcement decrees. This Article furthers that inquiry. Part I examines recent judicial skepticism of proposed enforcement decrees, focusing on one especially notable example: U.S. District Court Judge Jed Rakoff’s rejection of a proposed agreement between the SEC and Citigroup.<sup>11</sup> It then explains how the Second Circuit, in reversing Judge Rakoff, set out a new standard of review that limits judicial oversight of proposed enforcement decrees. It also touches on other recent cases where federal district judges have declined to approve similar enforcement proposals. Part II situates this recent judicial skepticism in a more familiar framework, arguing that these district judges are engaging in something akin to “hard look” review. Part III then encourages a different approach. After contrasting the disparate frameworks used by the district and circuit courts in *Citigroup*, Part III suggests that an optimal approach may lie somewhere in the middle—a place where courts can still police proposed enforcement decrees for

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8. See, e.g., *Randolph*, 736 F.2d at 530 (holding that the district court abused its discretion by rejecting a proposed enforcement decree); Brief of Better Markets, Inc. as Amicus Curiae Supporting Pro Bono Counsel Appointed to Advocate for Affirmance of the District Court’s Order, *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285 (2d Cir. 2012) (Nos. 11-5227, 11-5375, 11-5242), 2012 WL 6965610, at \*3 n.3 (observing that *Randolph*—now thirty years old—may be the most recent prior example of a circuit court reversing a district court for declining to approve an SEC enforcement decree and estimating that “99.9% of such proposed settlements are approved routinely if not perfunctorily”); cf. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1451 (D.C. Cir. 1995) (holding under the antitrust-specific framework for review set out in the Tunney Act, see *supra*, note 6, that the district court abused its discretion by rejecting a proposed enforcement decree).
  9. See, e.g., *SEC v. Van Gilder*, No. 12-CV-02839, 2014 WL 1628474, at \*4 (D. Colo. Apr. 24, 2014); *SEC v. Hohol*, No. 14-C-41, 2014 WL 461217, at \*2 (E.D. Wis. Feb. 5, 2014); *SEC v. Citigroup Global Markets, Inc.*, 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011) (*Citigroup I*).
  10. See *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 294-97 (2d Cir. 2014) (*Citigroup II*); see also Note, *supra* note 6, at 1292 (observing that the Second Circuit’s standard “starkly diverges from [decades of] established practice” in judicial review of enforcement decrees).
  11. See *Citigroup I*, 827 F. Supp. 2d at 328.

## CALIBRATING JUDICIAL SCRUTINY OF AGENCY ENFORCEMENT DECREES

substantive unreasonableness at the margins while assuring that judges give significant deference to agencies' discretionary decisions to settle enforcement actions on particular terms.

## I. JUDICIAL SKEPTICISM OF AGENCY ENFORCEMENT DECREES

A. *Consent Decrees in Federal Law Enforcement*

Consent decrees have a long history in federal civil law enforcement. For more than a century, the Department of Justice has utilized consent decrees to remedy alleged violations of federal antitrust law.<sup>12</sup> And over time these decrees have appeared with greater frequency in many other spheres of federal civil law enforcement: environmental regulation,<sup>13</sup> civil rights enforcement,<sup>14</sup> and financial regulation,<sup>15</sup> to name a few. In each arena the federal government often brings suit against alleged lawbreakers, only then to enter a negotiated resolution instead of fully litigating the merits.

Why have federal regulators come to use these decrees with such frequency? For starters, consent decrees carry many familiar benefits that accompany all manner of pretrial settlements: by entering an agreement instead of proceeding to trial, litigants can conserve financial resources and avoid the risk of an adverse judgment on the merits. When it comes to enforcement actions, settlement allows agencies to spread their limited resources more broadly and prosecute more violations of law than would otherwise be possible if every case were litigated to judgment.<sup>16</sup> Settlement carries benefits for regulated parties, too, allowing them to avoid the publicity of trial and the risk of a costly and stigmatizing adverse judgment—one that, in some cases, might also carry collateral *res judicata* consequences in subsequent private suits.<sup>17</sup>

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12. See, e.g., Consent Decree, *United States v. Otis Elevator Co.*, No. 13884 (N.D. Cal. June 1, 1906); *United States v. Swift & Co.*, 286 U.S. 106, 109 (1932). These decrees are “much more the rule than the exception,” resolving the great majority of civil complaints brought by the DOJ’s Antitrust Division. Michael L. Weiner, *Antitrust and the Rise of the Regulatory Consent Decree*, ANTITRUST, Fall 1995, at 4.

13. See Percival, *supra* note 1, at 328.

14. See generally Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343 (2015); Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887.

15. See Comment, *Equitable Remedies in SEC Enforcement Actions*, 123 U. PA. L. REV. 1188, 1192 (1975).

16. See, e.g., *SEC v. Everest Mgmt. Corp.*, 475 F.2d 1236, 1240 (2d Cir. 1972) (observing that the agency “can bring the large number of enforcement actions it does only because in all but a few cases consent decrees are entered”).

17. See Lynnndon Groff, *Is Too Big to Fail Too Big to Confess?: Scrutinizing the SEC’s “No-Admit” Consent Judgment Proposals*, 54 B.C. L. REV. 1727, 1734-35 (2013).

But consent decrees are different from out-of-court settlements. Most importantly, a consent decree is not a mere contract between litigants—it is a court order. This yields an important enforcement benefit for the prosecuting agency: unlike an out-of-court settlement, a consent decree is backed by the court’s contempt power.<sup>18</sup> The looming threat of the contempt sanction—what with its “stigmatizing effect,” which litigants are often “anxious to avoid,” not to mention the movant’s freedom to seek a “broader range” of potential monetary recoveries than it normally could in a contract action—deters downstream disobedience by the regulated party.<sup>19</sup> And if a defendant strays from the agreement, the agency has a swift and effective enforcement mechanism at its fingertips: it can simply return to court, without filing a new suit, and request judicial enforcement of the prior order.<sup>20</sup> By contrast, a party seeking to enforce an out-of-court settlement must initiate a new lawsuit—a process that is often lengthier and more expensive than requesting sanctions in an ongoing proceeding.<sup>21</sup> Beyond these enforcement advantages, consent decrees might carry optical or political benefits, too. By obtaining judicial approval and memorializing its enforcement agreement in a public proceeding visible to all, the agency can enjoy the cost-saving benefits of pretrial settlement while still projecting to the public that the agency is abiding by its law-enforcement duties and using the courts to vindicate the public interest.<sup>22</sup>

### B. *Rakoff’s Revolution*: Citigroup I

Yet while agencies and regulated parties have many reasons to opt for a negotiated resolution instead of proceeding to trial, in recent years several jurists have pushed back against the notion that this approach—one of law enforcement by consent—carries commensurate benefits for the public.<sup>23</sup> And while

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18. See DiSarro, *supra* note 5, at 279-85.

19. See *id.* (suggesting that parties entering into a consent decree might “take precautions to ensure that their settlement obligations are performed” and “perform tasks that arguably are not even required out of an abundance of caution”); Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291, 292 (1988) (“Greater compliance may result because a court can hold a party in contempt if it fails to live up to the terms of a consent decree, but cannot do so if a party breaches the terms of a private agreement.”).

20. DiSarro, *supra* note 5, at 283.

21. *Id.*

22. See *id.* at 289-93 (explaining how a consent decree, unlike a private settlement, is a public document); Groff, *supra* note 17, at 1734 (noting that the SEC can still “tout a consent judgment as a political victory by exacting at least some form of penalty”).

23. Judges and commentators have long raised similar questions in the related context of rulemaking settlement. See, e.g., *Citizens for a Better Env’t v. Gorsuch*, 718 F.2d 1117, 1136 (D.C. Cir. 1983) (Wilkey, J., dissenting) (decrying the “evil[s] of

## CALIBRATING JUDICIAL SCRUTINY OF AGENCY ENFORCEMENT DECREES

several district courts have rejected proposed enforcement decrees in recent years, one such decision has had the greatest impact on how agencies, regulated parties, and courts now view agency enforcement settlements. In 2011, U.S. District Judge Jed Rakoff rejected a proposed settlement between the SEC and Citigroup.<sup>24</sup> The agency had sued the bank for securities fraud, alleging that in the run-up to the 2008 financial crisis Citigroup created a billion-dollar fund for the purpose of unloading shaky mortgage-backed securities on unwitting investors.<sup>25</sup> According to the complaint, Citigroup misrepresented the safety and quality of the assets in the fund, resulting in a \$160 million gain for the bank and a \$700 million loss for investors.<sup>26</sup> This, the SEC alleged, amounted to a negligent violation of the Securities Act of 1933.<sup>27</sup>

The agency never planned to bring the case to trial. In fact, the parties reached an agreement before the suit was even filed.<sup>28</sup> Alongside the complaint, the SEC lodged a proposed consent judgment that would (1) permanently enjoin the bank from further violations of the Act, (2) require disgorgement of the \$160 million Citigroup earned from the sale, (3) assess a \$95 million civil penalty, and (4) mandate that, for three years, the bank implement new internal procedures to ensure that illegal activity would not recur.<sup>29</sup>

Judge Rakoff rejected the proposal, reasoning that the parties had failed to provide him “with any proven or admitted facts upon which to exercise even a modest degree of independent judgment.”<sup>30</sup> The parties’ thin submissions—a proposed settlement submitted alongside a complaint alleging securities fraud in relatively general terms—left Judge Rakoff unsatisfied that, under a widely cited standard for reviewing proposed enforcement decrees, the agreement was “fair, reasonable, adequate, and in the public interest.”<sup>31</sup>

For Judge Rakoff, this dearth of information proved problematic in several respects. For starters, the parties did not provide adequate evidence to persuade

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government by consent decree,” chief among them “its potential to freeze the regulatory processes of representative democracy”); Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1016, 1025-32 (2001) (arguing that when it comes to rulemaking settlement, agencies face “strong incentives to ignore the interests of important stakeholders—principals who otherwise would be afforded procedural protections—presenting a principal-agent gap”).

24. See *Citigroup I*, 827 F. Supp. 2d at 335.

25. See *id.* at 329.

26. See *id.*

27. See *id.* at 330.

28. See *id.*

29. See *id.*

30. *Id.*

31. *Id.* at 330-31 (quoting *SEC v. Bank of Am. Corp.*, 653 F. Supp. 2d 507, 508 (S.D.N.Y. 2009)).

him that the requested injunction was in the public interest.<sup>32</sup> He was thus unwilling to invoke the court's equitable powers to order a prophylactic change in corporate policy. His reasoning rested on the differing levels of judicial involvement required for private settlements and agency enforcement decrees:

Purely private parties can settle a case without ever agreeing on the facts, for all that is required is that a plaintiff dismiss his complaint. But when a public agency asks a court to become its partner in enforcement by imposing wide-ranging injunctive remedies on a defendant, enforced by the formidable judicial power of contempt, the court, and the public, need some knowledge of what the underlying facts are: for otherwise, the court becomes a mere handmaiden to a settlement privately negotiated on the basis of unknown facts, while the public is deprived of ever knowing the truth in a matter of obvious public importance.<sup>33</sup>

Judge Rakoff also took issue with the SEC's choice to charge Citigroup only with negligence. In a parallel complaint filed the same day against a Citigroup employee, the SEC suggested that the bank *knowingly* misrepresented the safety of its assets to potential investors.<sup>34</sup> "Although [the accusations in the parallel complaint] would appear to be tantamount to an allegation of knowing and fraudulent intent," Judge Rakoff remarked, "the S.E.C., for reasons of its own, chose to charge Citigroup only with negligence."<sup>35</sup>

Finally, Judge Rakoff criticized the settlement agreement for not requiring the bank to admit wrongdoing.<sup>36</sup> He noted that this was a common feature of SEC enforcement settlements, "hallowed by history, but not by reason."<sup>37</sup> Judge Rakoff explained that this combination of agency enforcement choices dealt a "double blow" to would-be civil plaintiffs seeking to recoup their losses from Citigroup: private litigants cannot bring securities claims based on negligence, and the consent decree (lacking any admission from the bank) would carry no collateral estoppel effect for individual plaintiffs. So the SEC's four-year investi-

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32. See *id.* at 331 (citing *eBay v. MercExchange*, 547 U.S. 388, 391 (2006) ("According to well-established principles of equity, a plaintiff seeking a permanent injunction . . . must demonstrate . . . that the public interest would not be disserved by a permanent injunction.")); see also *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.").

33. *Citigroup I*, 827 F. Supp. 2d at 332 (footnote omitted).

34. See Complaint at 10, *SEC v. Stoker*, 2011 WL 4965844 (S.D.N.Y. Oct. 19, 2011) (No. 11-CV-7388).

35. *Citigroup I*, 827 F. Supp. 2d at 333.

36. *Id.* at 332-33.

37. *Id.* at 332.



## CALIBRATING JUDICIAL SCRUTINY OF AGENCY ENFORCEMENT DECREES

gation culminated in a proposal that did nothing to facilitate private litigation.<sup>38</sup> To Judge Rakoff, the SEC's failure to obtain an admission of liability contradicted the agency's stated belief—which it had reaffirmed before Judge Rakoff at oral argument—that private parties serve an integral role in securities law enforcement.<sup>39</sup>

Judge Rakoff's rejection of the SEC/Citigroup deal jolted the financial sector, setting off a wave of unease among regulators and regulated parties alike.<sup>40</sup> The SEC's Director of Enforcement protested that the decision, by "ignor[ing] decades of established practice throughout federal agencies and decisions of the federal courts," would frustrate the Commission's regulatory mission.<sup>41</sup> Members of the business community decried the ruling as impinging on corporate defendants' ability to settle charges without admitting liability—a strategic business choice that allows corporations to manage defense costs, retain insurance coverage, and preserve the ability to "attract and retain qualified directors and officers, access to the capital markets, and other ongoing business decisions that are exogenous to the matter being settled."<sup>42</sup> Meanwhile consumer advocates and commentators, long skeptical about the "cozy nexus" between regulators and big banks, championed Judge Rakoff's decision as a long-overdue dose of judicial oversight for an agency incapable of effectively regulating the banking industry.<sup>43</sup>

38. See *id.* at 334; see also *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976) ("[A] consent judgment between a federal agency and a private corporation which is not the result of an actual adjudication of any of the issues . . . [cannot] be used as evidence in subsequent litigation.").

39. See *Citigroup I*, 827 F. Supp. 2d at 334.

40. See Edward Wyatt, *Congress to Examine S.E.C. Settlement Policy*, N.Y. TIMES: DEALBOOK (Dec. 16, 2011, 8:27 PM), <http://www.dealbook.nytimes.com/2011/12/16/congress-to-hold-hearings-on-s-e-c-settlement-practices/>; Jean Eaglesham & Chad Bray, *Citi Ruling Could Chill SEC, Street Legal Pacts*, WALL ST. J. (Nov. 29, 2011), <http://www.wsj.com/articles/SB10001424052970203935604577066242448635560>.

41. Eaglesham & Bray, *supra* note 40.

42. Brief for Business Roundtable As Amicus Curiae Supporting Appellants at 5, *SEC v. Citigroup Global Markets, Inc.*, 673 F.3d 158 (2d Cir. 2012) (No. 11-5227).

43. Brief for Securities Law Professors as Amicus Curiae Supporting District Court at 14, *SEC v. Citigroup Global Markets, Inc.*, 2013 WL 460424 (2d Cir. 2013) (No. 11-5227); see Brief of Occupy Wall Street—Alternative Banking Group as Amicus Curiae Supporting The Public Interest and Against Appellant and Appellee, *SEC v. Citigroup Global Markets, Inc.*, 2012 WL 2131928 (2d Cir. 2012) (Nos. 11-5227, 11-5375, 11-5242); Groff, *supra* note 17, at 1728; Joe Palazzolo, *Law Professors Jump in Rakoff's Corner*, WALL ST. J.: L. BLOG (Aug. 17, 2012, 9:54 AM), <http://blogs.wsj.com/law/2012/08/17/law-professors-jump-in-rakoffs-corner/>; Matt Taibbi, *Finally, a Judge Stands up to Wall Street*, ROLLING STONE (Nov. 10, 2011), <http://www.rollingstone.com/politics/news/finally-a-judge-stands-up-to-wall-street-20111110>.

The SEC and Citigroup jointly appealed Judge Rakoff's order, arguing that the district court had abused its discretion in rejecting the proposal. The Second Circuit stayed the order pending appeal, finding the appellants were likely to succeed in their challenge.<sup>44</sup> That prediction was correct.

C. *The Second Circuit Cuts Back: Citigroup II*

The Second Circuit rejected Judge Rakoff's approach for reviewing proposed enforcement decrees.<sup>45</sup> While acknowledging that federal courts cannot simply rubber-stamp a stipulated request for injunctive relief, the panel held that a reviewing court's role is mostly limited to seeing that a proposed decree is "procedurally proper."<sup>46</sup> Setting out a new framework, the Second Circuit held that a district court is *required* to approve a proposed enforcement decree unless there is "a substantial basis in the record" for concluding that the proposal (1) is not fair, (2) is not reasonable, or (3) would disserve the public interest.<sup>47</sup> The panel further held that courts must give "significant" deference to an agency's assessment that a proposed decree serves the public interest.<sup>48</sup> That determination, the court emphasized, "rests squarely with the S.E.C."<sup>49</sup>

This standard boasts four distinct features, each marking a change from the district court's more searching approach. First, it places an onus on district courts to ferret out any reasons for rejection: "Absent a substantial basis in the record" for finding that the proposed decree is unfair, is unreasonable, or would disserve the public interest, "the district court is *required*" to approve the decree.<sup>50</sup> Given that the average district court docket is busy enough with disputed motions between adversaries, and considering that the agency has no incentive to flag any shortcomings or flaws in the proposed decree, this burden heightens

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44. See SEC v. Citigroup Global Markets, Inc., 673 F.3d 158 (2d Cir. 2012).

45. *Citigroup II*, 752 F.3d at 285.

46. *Id.* at 294.

47. *Id.* The panel explained that the third requirement is applicable only to consent decrees involving injunctive relief. See *id.* For practical purposes, we can assume that most (if not all) proposed enforcement decrees will involve some measure of injunctive relief—even if only a provision enjoining the defendant from further violations of the law. Cf. *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996) ("The consent decree is an injunction. A judgment issued by a court in the exercise of its equitable or admiralty jurisdiction is called a decree, and when a decree commands or prohibits conduct, it is called an injunction.").

48. *Citigroup II*, 752 F.3d at 296.

49. *Id.*

50. *Id.* at 294 (emphasis added).

## CALIBRATING JUDICIAL SCRUTINY OF AGENCY ENFORCEMENT DECREES

an already-strong presumption that the district court will approve the proposal.<sup>51</sup>

Second, the standard makes clear that courts should focus generally on procedure, not substance, when assessing whether a proposed decree is “fair” and “reasonable.” The panel directed courts to weigh fairness and reasonableness by considering several procedural factors: (a) the “basic legality of the decree,” (b) whether the decree’s “terms . . . are clear,” (c) whether the decree “reflects a resolution of the actual claims in the complaint,” and (d) whether the decree “is tainted by improper collusion or corruption of some kind.”<sup>52</sup> Though reviewing courts can look to other factors, too, the Second Circuit explained that the “primary focus . . . should be on ensuring the consent decree is procedurally proper, using [similarly] objective measures.”<sup>53</sup> An emphasis on procedure will, the panel suggested, help ensure that reviewing courts “take[] care not to infringe on the S.E.C.’s discretionary authority to settle on a particular set of terms.”<sup>54</sup>

Third, the standard omits “adequacy” from the inquiry altogether. According to the Second Circuit, asking whether a proposed agreement is “adequate” only makes sense in the context of class action settlements that would bar future claims by individual plaintiffs.<sup>55</sup> In those cases, where numerous third parties are bound by the decree, a court should “rightly be concerned that the settlement be adequate.”<sup>56</sup> The panel reasoned that an SEC enforcement decree does not raise the same worries:

[I]f there are potential plaintiffs with a private right of action, those plaintiffs are free to bring their own actions. If there is no private right of action, then the S.E.C. is the entity charged with representing the victims, and is politically liable if it fails to adequately perform its duties.<sup>57</sup>

This approach is novel. By eschewing adequacy entirely, the Second Circuit is at odds not only with Judge Rakoff and his more skeptical colleagues, but also with every other federal court to have considered the standard of review for agency enforcement decrees in the last several decades.<sup>58</sup>

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51. See, e.g., SEC v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984) (“Unless a consent decree is unfair, inadequate, or unreasonable, it *ought* to be approved.” (emphasis added)).

52. *Citigroup II*, 752 F.3d at 294-95.

53. *Id.* at 295.

54. *Id.*

55. *Id.* at 294.

56. *Id.*

57. *Id.*

58. See *supra* note 7.

Finally, though a consent decree must not disserve the public interest, the Second Circuit's approach ensures that the judiciary will normally have little input on that score. The court emphasized that "[t]he job of determining whether the proposed S.E.C. consent decree best serves the public interest . . . rests squarely with the S.E.C., and its decision merits significant deference."<sup>59</sup> The panel did not explain what "significant deference" might look like. It did, however, offer one example of a rare consent decree that would disserve the public interest—one that "barred private litigants from pursuing their own claims independent of the relief obtained under the consent decree."<sup>60</sup> By contrast, the panel explained that a court cannot find the public interest disserved just because the court disagrees with an agency's decision "on discretionary matters of policy, such as deciding to settle without requiring an admission of liability."<sup>61</sup>

*D. Additional Judicial Skepticism of Agency Enforcement Decrees*

While *Citigroup II* bars Judge Rakoff and his colleagues in the Second Circuit from undertaking a thorough substantive review of proposed enforcement decrees, it does not, of course, similarly bind district judges in other circuits. This matters because several judges across the country, some explicitly taking a cue from Judge Rakoff, have declined to approve agency enforcement decrees in recent years.

One example is Judge John Kane of the District of Colorado. In a recent SEC enforcement action against an individual accused of insider trading, it took the agency three tries to come up with a consent decree that Judge Kane was willing to approve.<sup>62</sup> To Judge Kane, the parties' initial submissions suffered several flaws. First, the parties asked the court to enter judgment without first issuing findings of fact and conclusions of law. In Judge Kane's view, such a waiver would contravene Federal Rule of Civil Procedure 52 and undermine an

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59. *Citigroup II*, 752 F.3d at 296. The panel proceeded to invoke *Chevron*'s principle of deference to the political branches: "[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . ." *Id.* (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984)). Though the court did not explain what "significant" deference looks like, its allusion to *Chevron* suggests that courts are powerless to second-guess an agency's reasonable view that a proposed decree doesn't disserve the public interest.

60. *Id.* at 297.

61. *Id.*

62. See Final Judgment, Findings of Fact, and Conclusions of Law as to Defendant Michael Van Gilder and Relief Defendant Stephen Diltz, SEC v. Van Gilder, No. 12-CV-02839 (D. Colo. Oct. 17, 2014) (approving the SEC's third unopposed motion for judgment).

## CALIBRATING JUDICIAL SCRUTINY OF AGENCY ENFORCEMENT DECREES

important reason for findings of fact: “that trial courts are public institutions with a duty to make their decisions available so the public can be informed.”<sup>63</sup> Second, the parties sought to waive any right to appeal the decree. Acknowledging that litigants are always entitled to forge an out-of-court agreement dismissing their case and promising not to seek review, Judge Kane held that “a public agency [asking] a court to maintain continuing jurisdiction over its enforcement action has no such license or authority.”<sup>64</sup> Third, tipping his hat to Judge Rakoff, Judge Kane criticized the defendant’s unwillingness to admit any wrongdoing.<sup>65</sup> Finally, he took issue with the parties’ request for a meager injunction that would only bar the defendant from further violations.<sup>66</sup> To Judge Kane, such an order would be “oxymoronic” and “gratuitous” because there is already an adequate remedy at law: the SEC can lodge additional claims under the statute.<sup>67</sup> Though Judge Kane had several objections to the proposed decree, most of them revolved around one overarching concern: the parties’ failure to

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63. SEC v. Van Gilder, No. 12-CV-02839, 2014 WL 1628474, at \*2 (D. Colo. Apr. 24, 2014). Federal Rule of Civil Procedure 52(a)(1) provides that “[i]n an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately.” FED. R. CIV. PRO. 52(a)(1). The rule does not address whether findings of fact are required before a consent decree can issue. Most have taken this to mean that such findings are not needed. See, e.g., United States v. Scholnick, 606 F.2d 160, 166 (6th Cir. 1979); 9 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 52.11[2] (3d ed. 2014) (“Factfinding is often unnecessary when the judgment does not follow a trial upon the facts, but merely incorporates the terms of a consent decree. Findings are not required under these circumstances because there has been no trial on the merits, and the parties ordinarily cannot attack the decree on appeal.” (footnote omitted)); 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2574 (3d ed. 2008) (“[T]he entry of a consent decree or judgment does not require court findings under Rule 52(a).”).
64. Van Gilder, 2014 WL 1628474, at \*2. But cf. United States v. Vanderwerff, 788 F.3d 1266 (10th Cir. 2015) (finding an abuse of discretion where the district court rejected a plea agreement in a criminal case solely because the agreement contained an appellate waiver).
65. Van Gilder, 2014 WL 1628474, at \*2 (citing *Citigroup I*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011)). Two years earlier, Judge Kane voiced similar criticisms of a proposed decree between the SEC and Bridge Premium Finance, a corporation accused of defrauding investors in a Ponzi scheme. Because the defendant had “remain[ed] defiantly mute as to the veracity” of the SEC’s allegations, Judge Kane concluded that the defendant’s options were “binary: he may admit the allegations or he may go to trial.” Order Denying Entry of Final Judgments at 1, SEC v. Bridge Premium Fin. LLC, No. 1:12-CV-02131-JLK-BNB (D. Colo. Jan. 17, 2013).
66. Van Gilder, 2014 WL 1628474, at \*3.
67. *Id.* Judge Kane is not alone in questioning the enforceability of injunctions that merely require a party to obey the law. See, e.g., SEC v. Smyth, 420 F.3d 1225, 1233 n.5 (11th Cir. 2005) (“This Circuit has held repeatedly that ‘obey the law’ injunctions are unenforceable.”).

provide the court with a sufficient factual record to enable “independent judgment” of the settlement’s propriety.<sup>68</sup>

Judge Richard Leon of the District of Columbia has displayed a similar reluctance to approve SEC enforcement decrees. He recently refused to sign off on a proposed decree between the SEC and IBM, reasoning that the agency failed to secure adequate injunctive relief in a civil suit alleging the company violated the Foreign Corrupt Practices Act (FCPA) by bribing foreign officials in order to secure government contracts.<sup>69</sup> Like in *Citigroup I*, the SEC submitted a proposed decree that would require disgorgement, a civil penalty, and an injunction barring the corporation from further violations of the law. But Judge Leon wanted more. Due to IBM’s documented history of FCPA violations, he decided the decree should also require that the company alert both the agency and the court whenever it learns of a reasonable likelihood that its employees have committed further FCPA infractions.<sup>70</sup> IBM refused, claiming the requirement would be “too burdensome.”<sup>71</sup> So Judge Leon rejected the proposed decree. “I’m not just going to roll over like the S.E.C. has,” he told IBM, explaining he would “need data” before being satisfied that additional reporting obligations would truly be too burdensome.<sup>72</sup> Observing that he was one of “a growing number of [d]istrict judges in the country who have grown increasingly concerned” about “simply signing off on consent decrees,” Judge Leon emphasized that it was his responsibility to see that the proposal served the public interest.<sup>73</sup> “I guess you want that \$10 million judgment on your list of achievements this year,” he told the SEC during an approval hearing.<sup>74</sup> “Well, it’s not going to happen.”<sup>75</sup>

Judges Rakoff, Kane, and Leon aren’t alone. Other federal district judges have similarly pushed back against proposed enforcement decrees, either demanding more information from the parties or declining to approve the decrees

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68. *Van Gilder*, 2014 WL 1628474, at \*3.

69. Transcript of Dec. 20, 2012 Status Conference at 9, SEC v. Int’l Bus. Machs. Corp., No. 1:11-CV-00563-RJL (D.D.C. Mar. 22, 2013); Complaint, SEC v. Int’l Bus. Machs. Corp., No. 1:11-CV-00563-RJL (D.D.C. Mar. 18, 2011).

70. Transcript of Dec. 20, 2012 Status Conference at 4-5, SEC v. Int’l Bus. Machs. Corp., No. 1:11-CV-00563-RJL (D.D.C. Mar. 22, 2013).

71. *Id.* at 16.

72. *Id.* at 9; *see also id.* at 18 (“Now, you are not going to just stand before this Court and make summary conclusory statements . . . . You are going to need affidavits from accountants who might have to sit in that chair right there under oath and satisfy this Court that it would be too burdensome.”).

73. *Id.* at 9, 20.

74. *Id.* at 10.

75. *Id.*

## CALIBRATING JUDICIAL SCRUTINY OF AGENCY ENFORCEMENT DECREES

altogether.<sup>76</sup> To be sure, not every rejection is based on identical reasons—Judges Rakoff, Kane, and Leon expressed varied concerns in the cases described above. But this judicial pushback shares a unifying theme: in each case, the underlying record lacked sufficient information (in the court’s view) to support a finding that the proposed decree was reasonable, adequate, and fair.<sup>77</sup> Though *Citigroup II* will likely curb this sort of pushback within the Second Circuit, and while that decision may also influence how judges in other circuits deal with these enforcement proposals going forward, it is clear that Judge Rakoff’s approach has had ripple effects on courts and regulators alike.<sup>78</sup>

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76. See *SEC v. Hohol*, No. 2:14-CV-00041-RTR, 2014 WL 461217, at \*4 (E.D. Wis. Feb. 5, 2014) (rejecting a set of proposed consent decrees and ordering the SEC to “provide a written factual predicate for why it believes the Court should find that the proposed final judgments are fair, reasonable, adequate, and in the public interest”); *SEC v. CR Intrinsic Investors, LLC*, 939 F. Supp. 2d 431, 437 (S.D.N.Y. 2013) (rejecting a “minimalist conception” of “the judiciary’s function in passing upon these settlements as illusory, as a predetermined rubber stamp for any settlement put before it by an administrative agency, or even a prosecutor”); *FTC v. Circa Direct LLC*, No. 1:11-CV-02172-RMB-AMD, 2012 WL 2178705, at \*7 (D.N.J. June 13, 2012) (requesting a second round of supplemental briefing from the FTC to address how, despite the agency’s failure to obtain an admission of liability, the proposed consent decree serves the public interest); Letter from Hon. Rudolph T. Randa, U.S. Dist. Court Judge, to Andrea R. Wood & James A. Davidson, SEC (Dec. 20, 2011), <http://www.wlrk.com/docs/kossletter.pdf> (“The Court requests that the SEC provide a written factual predicate for why it believes the Court should find that the proposed final judgments are fair, reasonable, adequate, and in the public interest.” (citing *Citigroup I*, 827 F. Supp. 2d 328, 328 (S.D.N.Y. 2011))).
77. There is another (and even more apparent) theme to this recent judicial pushback: it has occurred overwhelmingly in the context of SEC enforcement cases. See *supra* note 76. This suggests numerous district judges are concerned that the SEC’s Enforcement Division hasn’t been doing its job. See also text accompanying notes 111-115, *infra*. But while this judicial pushback may (currently) be largely agency-specific, that does not make this Article’s review-calibration question a provincial one. When the Second Circuit used *Citigroup II* to announce a new standard for judicial review of proposed enforcement decrees, it made clear that its holding applies to “enforcement agenc[ies]” generally, not just to the agency that happened to be before it at the time. See *Citigroup II* 752 F.3d at 294. Indeed, several district courts have since invoked the *Citigroup II* standard when reviewing non-SEC enforcement proposals. See, e.g., *CFPB v. Sprint Corp.*, No. 14CV9931, 2015 WL 3395581, at \*1 (S.D.N.Y. May 19, 2015); *United States v. Int’l Bus. Machs. Corp.*, No. 14-CV-936 KMK, 2014 WL 3057960, at \*4 (S.D.N.Y. July 7, 2014).
78. See Ben Protess & Matthew Goldstein, *Overruled, Judge Still Left a Mark on S.E.C. Agenda*, N.Y. TIMES, June 5, 2014, at B1 (explaining that after *Citigroup I*, the SEC “reversed its longstanding yet unofficial policy of allowing companies to neither ‘admit nor deny wrongdoing,’ signaling that it would force admissions in particularly egregious cases”). Professor Jill Fisch predicts that Judge Rakoff’s order will have longstanding effects—“[t]he Second Circuit can’t put the genie back in the lamp.” *Id.* Professor John Coffee agrees, claiming that the SEC “will not be able to return to its former system of equivocal enforcement without

## II. HIDDEN HARD LOOK REVIEW

Though these recent decisions suggest judicial skepticism of agency enforcement decrees is (slowly) on the rise, the theoretical or doctrinal basis for this skepticism is unclear. But a closer look reveals that this judicial pushback—especially as seen in *Citigroup I*—is strikingly similar to a more well-known form of judicial oversight over federal agency decisionmaking: “hard look” review.

### A. “Hard Look” Review

The Administrative Procedure Act (APA) provides that judges should set aside agency actions that are “arbitrary, capricious, or an abuse of discretion.”<sup>79</sup> As the Supreme Court explained in *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, courts applying APA Section 706(2)(a) will find an agency action arbitrary and capricious if the agency has: (1) “relied on factors which Congress has not intended it to consider,” (2) “entirely failed to consider an important aspect of the problem,” (3) “offered an explanation for its decision that runs counter to the evidence,” or (4) “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>80</sup> This approach, known as “hard look” review, encourages agencies to engage in reasoned decisionmaking.<sup>81</sup> To avoid having its decision set aside, an agency must explain to a reviewing court how, in light of the available evidence and the input of interested parties, it decided to make that decision.<sup>82</sup> Though a court cannot—in theory, at least—substitute its own judgment for the agency’s complex policymaking decisions, the agency “must explain the evidence which is available, and must offer a rational connection between the facts found and the choice made.”<sup>83</sup>

This framework for arbitrary and capricious review emerged in the 1960s and 1970s after several federal judges grew concerned that agencies had been captured by the industries they were tasked to regulate.<sup>84</sup> In an effort to ensure that agencies were still fulfilling their statutory obligations, several D.C. Circuit

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incurring the scorn of the press and the public.” Sasha Abramsky, *Jed Rakoff and the Lonely Fight for Wall Street Justice*, NATION (June 14, 2014), <http://www.thenation.com/article/jed-rakoff-and-lonely-fight-wall-street-justice/>.

79. 5 U.S.C. § 706(2)(A) (2012).

80. 463 U.S. 29, 43 (1983).

81. RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 44 (2007).

82. *Id.*

83. *State Farm*, 463 U.S. at 52 (internal quotation marks omitted).

84. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 15-16 (2009).



## CALIBRATING JUDICIAL SCRUTINY OF AGENCY ENFORCEMENT DECREES

judges cultivated a more rigorous approach to applying Section 706(2)(a)—one that polices agency action for both procedural and substantive shortcomings.<sup>85</sup> Because it is born from judicial skepticism of agency decisionmaking, hard look review recognizes that an agency's processes are sometimes animated by bureaucratic, political, or resource-driven considerations that are at best irrelevant, and at worst contrary, to the particular guidelines enacted by Congress.<sup>86</sup> By forcing the agency to show its work and engage in a decisionmaking process that hews to statutory guidelines, hard look review seeks to “guard against precisely the kinds of infidelities that lie at the core of the agency cost problem in administrative law.”<sup>87</sup>

Many commentators have accordingly described hard look review as bearing an “information-forcing” effect: it requires the agency to furnish more information supporting its decision.<sup>88</sup> This, in turn, can bring about more deliberative and reasoned actions—an attendant “expertise-forcing” effect.<sup>89</sup> Professor Catherine Sharkey suggests that requiring agencies to develop more robust records “is desirable to the extent that it is expertise forcing and thus leads to better regulatory outcomes, including forcing agencies to look for less costly ways to fulfill their statutory mandates.”<sup>90</sup>

But all this information and expertise forcing comes at a cost. By prompting more deliberative decisionmaking (or at least more thorough recordkeep-

85. See Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 542 (1985) (explaining how the Supreme Court in *State Farm* “effectively adopted . . . [a] substantive” approach to arbitrary and capricious review); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 771 (2008) (explaining that *State Farm* “endorse[s] both procedural and substantive aspects of the hard look doctrine”).

86. See Richard A. Nagareda, *Turning From Tort to Administration*, 94 MICH. L. REV. 899, 944-45 (1996); Watts, *supra* note 84, at 15-16; see also Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 570 (2011) (“Hard look review . . . recognizes that agencies will not always vigorously represent the interests of victims in a settlement.”).

87. Nagareda, *supra* note 86, at 945.

88. See, e.g., Catherine M. Sharkey, *State Farm “With Teeth”: Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1605 (2014) [hereinafter *State Farm “With Teeth”*]; Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1859 (2012); Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753, 754 (2006); see also Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125, 2181 (2009) (explaining that hard look review serves as a tool “to ensure that agencies disclose relevant data and provide reasoned responses to material objections raised during the rulemaking process”).

89. Sharkey, *State Farm “With Teeth,” supra* note 88, at 1605; see also Garland, *supra* note 85, at 542; Miles & Sunstein, *supra* note 85, at 771.

90. Sharkey, *State Farm “With Teeth,” supra* note 88, at 1605.

ing), hard look review generally hampers the pace and flexibility of an agency's regulatory choices.<sup>91</sup> Following *State Farm*, a common behavioral pattern emerged: agencies often documented their decisionmaking processes more thoroughly.<sup>92</sup> Many commentators believe this made regulatory action more expensive.<sup>93</sup>

Hard look review might in practice carry other, more insidious, problems. Despite the Supreme Court's caution in *State Farm* that a reviewing court cannot "substitute its judgment for that of the agency,"<sup>94</sup> one study suggests that judicial policy preferences sometimes play a significant role in hard look review.<sup>95</sup> Noting that hard look review was not intended to allow federal judges "to impose their own policy preferences on the administrative state," Professors Thomas Miles and Cass Sunstein studied a cross-section of cases examining National Labor Relations Board and Environmental Protection Agency actions over a ten-year span.<sup>96</sup> Their findings identified a "strong possibility that in

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91. See Stephenson, *supra* note 88, at 766-77; Miles & Sunstein, *supra* note 85, at 809 ("[J]udicial review increases the costs of decisions, simply because it adds an additional layer, and possibly more than that, of decisional burdens on all sides.").
  92. See Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 156 (2012); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 164-165 (2010) (claiming that *State Farm's* "bite lies in its requirement that agencies explain themselves").
  93. See Seidenfeld, *supra* note 92, at 156 ("As numerous articles have noted, hard-look review increases an agency's cost of adopting a rule and slows down the agency decision-making process, sometimes quite markedly."); Stephenson, *supra* note 88, at 764-65 (describing cost-based critiques of hard look review).
  94. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); see also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) ("The court is not empowered to substitute its judgment for that of the agency.").
  95. Miles & Sunstein, *supra* note 85, at 768.
  96. *Id.* at 762, 766; see also Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1246 (1999) (describing hard look review as an "aggrandizing" doctrine); Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 422 (2009) ("[A]dministrative law doctrines for judicial review of agency rulemaking have become a judicially created obstacle course that gives judges far too much leeway to reach results based on their partisan policy preferences." (citation and internal quotation marks omitted)); Richard J. Pierce, Jr., *The Appropriate Role of Costs in Environmental Regulations*, 54 ADMIN. L. REV. 1237, 1264 (2002) (observing "a powerful tendency for judges to act in accordance with their partisan political preferences when they apply [hard look review] to the EPA's actions"); Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110, 1120 (1995) ("*State Farm* transformed a weak, determinate doctrine into a doctrine so indeterminate that any judge could manipulate it to obtain her preferred outcome"); Cass R. Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J.L. & PUB. POL'Y 51, 53 (1984) ("Most crudely, [the hard look doctrine] can

## CALIBRATING JUDICIAL SCRUTINY OF AGENCY ENFORCEMENT DECREES

many cases, judges are voting to invalidate agency decisions as arbitrary when they would not do so if their own predilections were otherwise.<sup>97</sup> And if that claim is correct, the hard look framework, which was designed “to police agency decisions for genuine arbitrariness,” is not working as it should.<sup>98</sup>

*B. Citigroup I: Taking a “Hard Look” at Proposed Enforcement Decrees*

Although Judge Rakoff’s *Citigroup I* order does not explicitly allude to hard look review, it embodies the same information-forcing spirit and echoes many common concerns present in typical Section 706 cases.

Information forcing. In rejecting the proposed enforcement decree, Judge Rakoff explained that the “[m]ost fundamental[]” problem with the proposal was its slender evidentiary foundation.<sup>99</sup> This shortcoming informed every step of the court’s analysis: the proposal was deemed unreasonable because “[it cannot] ever be reasonable to impose substantial relief on the basis of mere allegations”; it was judged unfair because of the “potential for abuse” that accompanies the imposition of penalties “on the basis of facts that are neither proven nor acknowledged”; it was ruled inadequate because the court “lack[ed] a framework for determining adequacy”; and the proposal was found not to serve the public interest “because it ask[ed] the Court to employ its power and assert its authority” without “know[ing] the facts.”<sup>100</sup> By rejecting the proposal, Judge Rakoff engaged in an especially robust degree of information forcing: if the SEC wants a judicially enforceable settlement, it must show why the decree is justified—possibly even by procuring an admission of liability from the defendant.

Reliance on extra-statutory factors and infidelity to the statutory mandate. Judge Rakoff voiced skepticism that the SEC’s actions aligned with its statutory mandate. Remarking that it was difficult to “discern . . . what the S.E.C. is getting from this settlement other than a quick headline,” Judge Rakoff questioned whether the decree, which promised no restitution to defrauded victims, could support the agency’s claimed “devot[ion] . . . to the protection of investors.”<sup>101</sup> He also emphasized the SEC’s duty, “inherent in its statutory mission, to see that the truth emerges.”<sup>102</sup> In Judge Rakoff’s eyes, the SEC failed to live up to

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be a device for the achievement of straightforwardly ‘political’ ends—either to prevent regulation, or to promote it.”).

97. Miles & Sunstein, *supra* note 85, at 810.

98. *Id.* at 762; *see also id.* at 768 (“[I]f Democratic appointees are especially inclined to find conservative decisions to be arbitrary, and if Republican appointees are especially likely to find liberal decisions to be arbitrary, something is seriously amiss.”).

99. *Citigroup I*, 827 F. Supp. 2d at 332.

100. *Id.* at 335.

101. *Id.* at 333-34.

102. *Id.* at 335.

this obligation, leaving the “truth” behind its investigation obscured. His order also insinuated that the agency relied on factors Congress had not intended it to consider—the quick publicity benefit of a \$285 million win and the relative ease of obtaining a settlement instead of proceeding to trial against a well-lawyered global bank.<sup>103</sup>

*Failure to account for the evidence before the agency.* Hard look review also looks askance at decisions that “run counter to the evidence before the agency,”<sup>104</sup> and in Judge Rakoff’s view the SEC’s enforcement choices were inconsistent with the evidence before it.<sup>105</sup> Throughout the order, he emphasized that the SEC chose “only” to charge Citigroup with negligence, despite the agency’s suggestions in a parallel complaint that the corporation had acted knowingly in misrepresenting the safety of its securities.<sup>106</sup> He also expressed doubt as to the deterrent value of the proposed sanctions, stating that the \$95 million penalty was mere “pocket change” to a “recidivist” Securities Act violator like Citigroup.<sup>107</sup>

*Failure to consider an important aspect of the problem.* By casting doubt on the agency’s refusal to pursue more serious charges or secure an admission of liability, *Citigroup I* could be read as finding that the SEC failed to consider alternative courses of action. Or that the agency failed to consider an important aspect of the problem<sup>108</sup>—its obligation to, “in any case like this that touches on the transparency of financial markets whose gyrations have so depressed our economy and debilitated our lives,” account for the public’s “overriding” interest in knowing the truth about Citigroup’s alleged misdeeds.<sup>109</sup>

*Potential substitution of a reviewing judge’s policy views.* If we accept the Miles/Sunstein theory that hard look review sometimes allows judges to substitute their policy views for those of the agency—despite *State Farm*’s contrary admonition—then *Citigroup I* perhaps parallels the hard look framework in that respect, too. After all, hard look review came about at a time when numerous federal judges were concerned that federal agencies had become captured by the very industries they were tasked to regulate.<sup>110</sup> And Judge Rakoff, a for-

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103. *Id.* at 333-34; see *State Farm*, 463 U.S. at 43 (observing that an agency action will “normally” fail judicial review “if the agency has relied on factors which Congress has not intended it to consider”).

104. *State Farm*, 463 U.S. at 43.

105. *Citigroup I*, 827 F.Supp. 2d at 333.

106. *Id.* at 330, 333-34.

107. *Id.* at 333-34.

108. See *State Farm*, 463 U.S. at 43 (explaining that an agency action would “[n]ormally” fail judicial review if the agency “entirely failed to consider an important aspect of the problem”).

109. *Citigroup I*, 827 F. Supp. 2d at 335.

110. See *supra* text accompanying notes 84-87.

## CALIBRATING JUDICIAL SCRUTINY OF AGENCY ENFORCEMENT DECREES

mer federal prosecutor with experience prosecuting financial crimes in the Southern District of New York, has made clear his views that the federal government has failed sufficiently to police and punish financial industry malfeasance in the wake of the Great Recession.<sup>111</sup> Perhaps these views informed his decision to reject the proposal in *Citigroup I*.<sup>112</sup> For example, he took the SEC to task for its policy of settling enforcement actions without requiring the defendant to admit any wrongdoing.<sup>113</sup> That policy is surely controversial, but is it entirely unreasonable?<sup>114</sup> As Judge Rakoff acknowledged, an admission of liability in a case like *Citigroup I* would open the door to private lawsuits seeking collateral estoppel benefit from the company's admission.<sup>115</sup> The SEC may well want to help private litigants by procuring such concessions, but surely some defendants would simply refuse to settle on those terms.

Perhaps hard look review was not meant to allow judges to engage in policy policing of this sort. After all, *State Farm* described arbitrary and capricious review as a "narrow" inquiry—one that precludes a court from "substitut[ing] its judgment for that of the agency."<sup>116</sup> But at the same time, as Professor Sharkey observes, in *State Farm* itself the Supreme Court "enthusiastically mines the agency record on its own and is hardly deferential at all."<sup>117</sup> Courts and com-

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111. See Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/> (positing that if the 2008 financial crisis was in part the result of intentional fraud, "the failure to prosecute those responsible must be judged one of the more egregious failures of the criminal justice system in many years").
  112. Certain of Judge Rakoff's public statements in recent years seem to suggest as much. See Abramsky, *supra* note 78 (in which Judge Rakoff comments that agencies are "too cozy" with regulated parties and that "in a society in which the regulatory agencies play such a huge role, there is a need for greater review and greater oversight than currently exists").
  113. *Citigroup I*, 827 F. Supp. 2d at 332.
  114. See Priyah Kaul, *Admit or Deny: A Call for Reform of the SEC's "Neither-Admit-Nor-Deny" Policy*, 48 U. MICH. J.L. REFORM 535, 542 (2015); Groff, *supra* note 17; Andrew Ackerman, *SEC's Khuzami Defends "Admit Nor Deny" Settlements*, WALL ST. J. (Dec. 1, 2011), <http://www.wsj.com/articles/SB10001424052970204012004577072462404708198>; Eaglesham & Bray, *supra* note 40; Edward Wyatt, *Congress to Examine S.E.C. Settlement Policy*, N.Y. TIMES: DEALBOOK (Dec. 16, 2011), <http://www.dealbook.nytimes.com/2011/12/16/congress-to-hold-hearings-on-s-e-c-settlement-practices/>.
  115. *Citigroup I*, 827 F. Supp. 2d at 334.
  116. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 462 U.S. 29, 43 (1983).
  117. Sharkey, *State Farm "With Teeth," supra* note 88, at 1611; see also *id.* ("Does *State Farm* itself support a more demanding '*State Farm* with teeth' standard? The Court's language would seem to say 'no'; whereas the Court's actions—at least with respect to finding NHTSA's view of automatic seatbelts arbitrary and

mentators alike have puzzled over these mixed signals, wondering how deferential courts should be when examining agency decisionmaking for arbitrariness. Some view *State Farm* as “provid[ing] a light guiding hand, blocking only the most illegitimate or irrational agency actions.”<sup>118</sup> Others think it plays a more rigorous role in practice, “[n]otwithstanding the Court’s aspirations.”<sup>119</sup> But regardless of who is correct in theory, there is evidence on the ground that—in some cases, at least—hard look review leaves space for judges to displace reasonable (if debatable) agency policy decisions. And in this way, too, Judge Rakoff’s order fits the bill, offering another example of the spirit of hard look review permeating judicial skepticism of agency enforcement decrees.

### III. CALIBRATING THE OPTIMAL APPROACH

This final Part proceeds with three aims. First, it argues that a rigorous hard look approach is too burdensome for ex ante review of all proposed agency enforcement decrees. Second, it explains how the Second Circuit’s response in *Citigroup II* marked too strong a swing in the other direction, all but guaranteeing that nearly any proposed enforcement decree will earn judicial approval. Third, it suggests that an optimal level of deference lies somewhere in the middle—a place where courts can still police proposed enforcement decrees for substantive unreasonableness while minimizing the chance that judges will displace agency decisions that conflict with their policy preferences.

#### A. *Citigroup I: How the Court Went Too Far*

Courts should not apply *Citigroup I*’s more searching brand of review to proposed agency enforcement decrees. For starters, the APA appears not to authorize ex ante review of such decrees. To be sure, the absence of an enabling statute does not bar review outright—at least not in the consent decree context, where courts have an independent obligation to assure themselves that the judicial power should be invoked—but it still suggests that full-blown arbitrary and capricious review, which grew out of Section 706 of the APA, is not proper here. Second, *Citigroup I* demonstrates that hard look review might allow judges to displace an agency’s reasonable policymaking decisions based on their own policy views. Third, if courts invoke hard look review to ask whether the agency properly weighed the evidence and considered alternative courses in pursuing the enforcement action, they run the risk of second-guessing an agency’s discre-

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capricious in light of the Court’s probe of the underlying empirical evidence—suggest ‘yes.’”).

118. *Id.* at 1607; see also, e.g., *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003) (describing arbitrary and capricious review as “highly deferential”).

119. Miles & Sunstein, *supra* note 85, at 782.

## CALIBRATING JUDICIAL SCRUTINY OF AGENCY ENFORCEMENT DECREES

tionary prosecutorial choices to bring certain charges instead of others. And decades of case law strongly suggests that is not allowed.

The APA appears not to authorize judicial review of proposed agency enforcement decrees. That's because an agency's request for a consent judgment is likely not, as the Act requires, "final agency action for which there is no other adequate remedy in court."<sup>120</sup> It is merely a proposal—a request, supported by written argument, for judicial action. Of course, this does not mean that courts are powerless to review proposed enforcement decrees.<sup>121</sup> Just the opposite—courts have an obligation, separate and apart from anything the APA might provide, to assure themselves that the decree "is consistent with the Constitution and laws, does not undermine the rightful interests of third parties, and is an appropriate commitment of the court's limited resources."<sup>122</sup> Still, this should tell us something. Because hard look review is merely a judicial "gloss" on Section 706,<sup>123</sup> and because that statute likely doesn't apply here, perhaps the

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120. 5 U.S.C. § 704 (2012); see Rossi, *supra* note 23, at 1056 ("The APA does not expressly provide for ex ante review of settlements and their terms outside of the context of judicial stays, suggesting that the textual support for such review is shaky." (citation omitted)). Neither, in most cases, is a proposed consent decree "[a]gency action made reviewable by statute." 5 U.S.C. § 704. *But see* 15 U.S.C. § 16(e)(1) (2012) (providing a framework for judicial review of antitrust consent decrees). Some courts have even held that, "final[ity]" of the parties' proposal aside, see 5 U.S.C. § 704, the entry of a consent decree is not "agency action" to begin with. See, e.g., *Home Builders Ass'ns of N. Cal. v. Norton*, 293 F. Supp. 2d 1, 5 (D.D.C. 2002) (observing that because a consent decree "is not only a contract between the parties to the decree, but . . . also a 'judicial act' . . . adoption of a consent decree is not an agency act under the APA" (citation omitted)); *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 834 F. Supp. 2d 1004, 1013-14 (D. Hawaii 2011) (same), *aff'd*, 672 F.3d 1160 (9th Cir. 2012).
121. Final agency enforcement decrees, by contrast, might well be entirely unreviewable. According to the D.C. Circuit—the only federal appellate court to weigh in on the issue—an agency's decision to enter into a settlement is "committed to agency discretion" and thus insulated from subsequent review under 5 U.S.C. § 701(a)(2) (2012). *Schering Corp. v. Heckler*, 779 F.2d 683, 686 (D.C. Cir. 1985); see also *N.Y. State Dep't of Law v. FCC*, 984 F.2d 1209, 1216 (D.C. Cir. 1993) (holding that an FCC decision to enter into a consent decree was unreviewable). It bears emphasizing that these decisions only bar downstream, ex post challenges to finalized agency settlements. They do not preclude ex ante judicial review of proposed enforcement decrees.
122. *Kasper v. Chi. Bd. of Election Comm'rs*, 814 F.2d 332, 338 (7th Cir. 1987); see also *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987) ("When a public agency requests that a judicial stamp of approval be placed on a negotiated consent decree, the court . . . must not let judicial inertia take hold. The court, rather than blindly following the agency's lead, must make its own inquiry into the issue of reasonableness before entering judgment.").
123. 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, 419.

same sort of full-blown arbitrariness review designed for *final* agency action should not apply *ex ante* to an agency's request for judicial approval of a consent decree.<sup>124</sup>

Second, *Citigroup I*'s approach leaves room for judges' policy preferences to influence their review of proposed enforcement decrees. As explained above, Judge Rakoff criticized the SEC for making arguably reasonable (if surely controversial) policy choices. He critiqued the agency's long-held policy of allowing defendants to settle without admitting liability. And he questioned the agency's decision not to charge Citigroup with more serious statutory violations.

Above all else, *Citigroup I* is a decision concerned with extracting more information from the SEC about its decisionmaking process. To be sure, that is not a bad thing—as this Article explains below, courts arguably should engage in *more* information forcing than the Second Circuit's framework would seem to allow. And even the Second Circuit, situated at the other end of the deference spectrum, acknowledges that courts must sometimes pry more information from litigants before approving an enforcement decree.<sup>125</sup>

But information forcing should not be boundless, and courts reviewing proposed decrees should require only enough information to facilitate review. It is difficult, of course, to say how much information forcing is "optimal" as a general matter.<sup>126</sup> A court's informational needs will naturally differ from case to case. But murky as that general question may be, one thing seems plain when it comes to enforcement decrees: where the agency is necessarily seeking a *compromise* with the defendant, the court does not, as Judge Rakoff suggested, need to know "the real truth"—embodied in "cold, hard, solid facts, established either by admissions or by trials"—to assess whether it should approve a decree.<sup>127</sup> A consent decree is, by definition, an agreement.<sup>128</sup> The parties, forging a compromise, usually "each give up something they might have won had they

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124. See Rossi, *supra* note 23, at 1056.

125. See *Citigroup II*, 752 F.3d at 296 ("On remand, if the district court finds it necessary, it may ask the S.E.C. and Citigroup to provide additional information sufficient to allay any concerns the district court may have regarding improper collusion between the parties."); see also *id.* at 295 ("As part of its review, the district court will necessarily establish that a factual basis exists for the proposed decree.").

126. Sharkey, State Farm "With Teeth," *supra* note 88, at 1604.

127. *Citigroup I*, 827 F. Supp. 2d at 335; see *id.* (stating that, "in any in any case like this that touches on the transparency of financial markets whose gyrations have so depressed our economy and debilitated our lives, there is an overriding public interest in knowing the truth"). But see *Citigroup II*, 752 F.3d at 295 ("Trials are primarily about the truth. Consent decrees are primarily about pragmatism.").

128. BLACK'S LAW DICTIONARY 441 (Bryan Garner ed., 8th ed. 2004) (defining a consent decree as "[a] court decree that all parties agree to").



## CALIBRATING JUDICIAL SCRUTINY OF AGENCY ENFORCEMENT DECREES

proceeded with the litigation.”<sup>129</sup> For the prosecuting agency, this often means forfeiting the chance to prove its allegations. Requiring the parties to reveal “the real truth” underlying the agency’s complaint would likely bring this sort of negotiated law enforcement to a grinding halt. Perhaps that is a desirable outcome.<sup>130</sup> Maybe it is a terrible one.<sup>131</sup> But either way, it is not an outcome for the judiciary to direct.

Third, the *Citigroup I* approach opens the door to another troubling possibility. By critiquing the SEC’s choice to charge Citigroup only with negligence, *Citigroup I* suggests that federal courts can second-guess an agency’s prosecutorial charging decisions.<sup>132</sup> But a long line of cases suggests that is not allowed.

The most prominent member of that long line is *Heckler v. Chaney*.<sup>133</sup> There, the Supreme Court strongly signaled that federal courts are powerless to review an agency’s discretionary decision not to pursue a given criminal or civil

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129. *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971); *see id.* at 681-82 (“Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms . . . . Naturally, the agreement reached normally embodies a compromise . . . . Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.”); *cf. Gautreaux v. Pierce*, 690 F.2d 616, 631 (7th Cir. 1982) (“Although the district court must clearly set forth in the record the reasons for approving [a class action] settlement in order to make meaningful appellate review possible, the court’s reasoning need not be so specific as to amount to a judgment on the merits . . . . It is not the burden of the proponents or the duty of the district court to support individual elements of the decree under some evidentiary standard akin to that for findings of fact.” (citations omitted)).

130. *See Kaul*, *supra* note 114 at 558-64 (arguing that the SEC should require admissions in all enforcement actions); *see also id.* at 562 (“Admittedly, the SEC will likely have to drop some cases and devote more resources to each case it does pursue . . . . However, the trade-off will encourage greater quality in enforcement practices.”).

131. *See Peter Lattman, Court Hears Arguments on Judge’s Rejection of S.E.C.-Citigroup Deal*, N.Y. TIMES: DEALBOOK (Feb. 8, 2013), <http://www.dealbook.nytimes.com/2013/02/08/appeals-court-hears-arguments-over-judge-rakoffs-rejection-of-citigroup-settlement/> (quoting Brad Karp, a lawyer for Citigroup, as claiming that “[t]he federal regulatory enforcement regime would screech to a grinding halt” if the SEC required admissions of wrongdoing); Robert Khuzami, Director, Div. of Enforcement, SEC, *Public Statement by SEC Staff: Court’s Refusal to Approve Settlement in Citigroup Case* (Nov. 28, 2011), <https://www.sec.gov/news/speech/2011/spch112811rk.htm> (“Refusing an otherwise advantageous settlement solely because of the absence of an admission . . . would divert resources away from the investigation of other frauds and the recovery of losses suffered by other investors not before the court.”).

132. *See Citigroup I*, 827 F. Supp. 2d at 330.

133. 470 U.S. 821 (1985).

prosecution.<sup>134</sup> Though *Heckler* only concerned reviewability under the APA, the Court's reasoning is still instructive here. The Court held that an agency's decision not to enforce the law is "general[ly] unsuitab[le]" for review for several reasons.<sup>135</sup> First, the agency must engage in a "complicated balancing of factors" before deciding to prosecute an alleged violation: whether it has the requisite resources, whether it should expend those resources on the violation in question, whether the prosecution is likely to be successful, and whether the enforcement action would align with the agency's general policies.<sup>136</sup> Those factors fall squarely within the realm of the agency's expertise.<sup>137</sup> Second, agencies cannot possibly prosecute every violation of the statutes they are tasked to enforce, and reviewing courts are relatively ill-equipped to decide how agencies should best expend their limited resources.<sup>138</sup> Finally, an agency's reluctance to institute an enforcement proceeding is akin to a prosecutor's decision not to indict—a choice that "has long been regarded as the special province of the Executive Branch."<sup>139</sup>

For all these reasons, a district court is in a poor position to question an enforcement agency's charging choices. And to the extent that *Citigroup I* also questions the SEC's decision to settle in the first place, there is a strong argument that the court is ill-equipped for that task, too. Indeed, several lower courts applying *Heckler* have held that an agency's decision to settle an enforcement action is no different from an agency's choice not to bring a proceeding at all.<sup>140</sup> The same multitude of factors is at play: Are there adequate resources, and should those resources be spent this way? Will the prosecution be

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134. *Id.* at 831.

135. *Id.*

136. *Id.*

137. *Id.* at 831-32.

138. *Id.*; *see also id.* at 842 (Marshall, J., concurring) ("As long as the agency is choosing how to allocate finite enforcement resources, the agency's choice will be entitled to substantial deference, for the choice among valid alternative enforcement policies is precisely the sort of choice over which agencies generally have been left substantial discretion by their enabling statutes.").

139. *Id.* at 832 (majority opinion).

140. *See, e.g.,* Schering Corp. v. Heckler, 779 F.2d 683, 686 (D.C. Cir. 1985) (holding that a third party could not challenge an agency's prior decision to settle an enforcement action against a regulated entity); *see also* N.Y. State Dep't of Law v. FCC, 984 F.2d 1209, 1216 (D.C. Cir. 1993) (holding that an FCC decision to enter into a consent decree was unreviewable). *N.Y. State Dep't of Law* held that "[w]here an agency determines, for whatever reason, that it has a greater chance of recovery under one measure alone or that its resources are best devoted to pursuing recovery under that measure, it should be free to proceed under that calculation, absent a statutory requirement to the contrary." *Id.*

## CALIBRATING JUDICIAL SCRUTINY OF AGENCY ENFORCEMENT DECREES

successful? Would enforcement align with the agency's current policies?<sup>141</sup> There is little reason to think a that court is any more competent to weigh in under these slightly different circumstances.

*B. Citigroup II: How the Second Circuit Overcorrected*

In reversing the district court and setting out a new framework, the Second Circuit overcorrected and allowed the deference pendulum to swing too far in favor of presumptive approval. The Second Circuit's approach may optimize regulatory flexibility by giving agencies significant leeway to enforce the law as they see fit. But it also places an unrealistic obligation on district courts to ferret out impropriety, and it may leave them unequipped to provide any meaningful oversight of those agency decisions that, while apparently untainted by "corruption" or "collusion," are still not the product of reasoned decisionmaking.<sup>142</sup>

Above all else, *Citigroup II* is concerned with procedural reasonableness. It holds that district courts should "primar[ily] focus" on whether proposed enforcement decrees are procedurally proper.<sup>143</sup> It instructs courts to use "objective measures" to assess things like (1) the agreement's basic legality, (2) its clarity, (3) whether it resolves the claims in the complaint, and (4) whether it is "tainted by improper collusion or corruption of some kind."<sup>144</sup> These requirements are surely important, and other courts would be wise to demand that consent decrees satisfy them. But the opinion leaves little room for courts to assess enforcement decrees for *substantive* reasonableness. While the court acknowledged that "additional inquir[ies]" beyond those four factors may be warranted in some circumstances, it made clear that any such inquiries must focus on an enforcement decree's procedural validity, not its substance.<sup>145</sup>

This blinkered focus on procedure is problematic. It will likely allow—or even require—courts to approve enforcement decrees that may appear substantively unreasonable. For example, imagine an agency brings separate enforcement actions against three similarly situated entities, each with comparable resources, and each accused of the same illegal conduct under similar circumstances. The first two actions settle the same week on identical terms, with those entities remitting \$100,000 and promising never to break the law again. Courts approve enforcement decrees in both cases. But the third action settles on much harsher terms a week later. The entity agrees to pay \$1 million and consents to an injunction requiring years of costly internal corporate restructuring. The agency offers no explanation for why the third settlement is so different from the first two. Under *Citigroup II*, a court is mostly powerless to

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141. See *Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1035 (D.C. Cir. 2007).

142. *Citigroup II*, 752 F.3d at 295 (2d Cir. 2014).

143. *Id.*

144. *Id.* at 294-95.

145. *Id.*

figure out why there's such a significant disparity between these hypothetical actions. The court might wonder, for example, if the earlier agreements were relatively lax because the agency is cozier with those particular parties. But the Second Circuit's "collusion or corruption" mechanism won't be helpful here—the prior settlements are not before the court, and there is no apparent basis for thinking the third, harsher settlement is "tainted" by improper influence.<sup>146</sup>

*Citigroup II* also places an unrealistic onus on district courts to seek out reasons for rejection: absent a "substantial basis" in the record to conclude that the proposal is unfair, is unreasonable, or disserves the public interest, the district court *must* approve the enforcement decree.<sup>147</sup> As a practical matter, this means judicial pushback—whether through additional information forcing or outright rejection—will be extremely rare. First, bear in mind that an enforcement decree starts with a joint proposal. Unless some third party seeks to intervene and object, the court will hear no adversarial argument on whether the proposal is fair, reasonable, and in the public interest.<sup>148</sup> It is difficult, then, to imagine how or why any such joint submission might reveal a "substantial basis" for concern.<sup>149</sup> If anything, the parties will be incentivized to gloss over any problems lurking in the proposal, thereby minimizing any information that might raise a specter of unfairness or unreasonableness. Second, district courts are busy. Though one hopes judges will take time to scour the limited record for potential red flags, approval will always be the easier path. To be sure, approval may generally be easier *any* time a court confronts an unopposed joint request for relief—but ordinarily the parties still bear the burden of convincing the court to act.<sup>150</sup> By contrast, here a court *must* approve a proposed consent decree unless it somehow finds a "substantial" reason not to do so.<sup>151</sup> When lay-

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146. *Id.* at 295-96.

147. *Id.* at 294.

148. Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 926-27 ("[U]nlike settlements of private suits against the government, which frequently attract input from a variety of interested parties, courts may review heavy-handed settlements of government suits against private parties without the benefit of this critical outside perspective because the only party with an incentive to object has promised to remain silent.").

149. *See Citigroup II*, 752 F.3d at 294.

150. *See, e.g., Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1239 (11th Cir. 2011) ("The proponents of class action settlements bear the burden of developing a record demonstrating that the settlement distribution is fair, reasonable and adequate." (alterations and internal quotations marks omitted)); *In re Cendant Corp. Litig.*, 264 F.3d 201, 232 (3d Cir. 2001).

151. *Citigroup II*, 752 F.3d at 294.

## CALIBRATING JUDICIAL SCRUTINY OF AGENCY ENFORCEMENT DECREES

ered atop a framework that myopically focuses on procedural sufficiency, this burden makes for an excessively high presumption of approval.<sup>152</sup>

C. *A Suggested Middle Ground*

The approaches taken by the district and circuit courts in *Citigroup* embody different visions of a judge's role in policing agency enforcement actions. In the eyes of the Second Circuit, judges should not meddle with the terms of a proposed enforcement decree unless the agreement is unlawful or procedurally improper. But Judge Rakoff and those who have followed his lead believe that federal judges cannot play regulatory "handmaiden" and take the agency at its word each time—they must instead exercise independent judgment to assess whether a proposal is grounded in fact and properly aligned with the agency's statutory duties.<sup>153</sup> These divergent visions seem to contemplate two different worlds: one where we generally trust all enforcement agencies to fulfill their duties and achieve desirable results with minimal oversight, and another where we assume enforcement agencies will stray too far from their statutory tasks absent robust judicial involvement. Neither vision is complete.

In light of the flaws in these disparate approaches, this Article offers a few suggestions for courts that have yet to calibrate a framework for reviewing proposed agency enforcement decrees. But I tread carefully in doing so. Barely a year has passed since the Second Circuit decided *Citigroup II*, and to date only a handful of district courts have applied its new standard.<sup>154</sup> It may turn out that *Citigroup II* allows for more substantive review than the court's opinion suggests. But unless and until it becomes apparent that *Citigroup II* provides the optimal degree of judicial oversight, other courts may wish to consider some alternatives.

*Burden the parties, not the court.* Instead of requiring that district judges approve an enforcement decree whenever the parties' joint submissions do not evince "substantial" signs of a problem<sup>155</sup>, courts should require the parties to show that their proposal is up to snuff. Under *Citigroup II*, settling parties have little reason to come forward with more than bare, minimal claims that their

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152. See Note, *supra* note 6, at 1291 (arguing that the Second Circuit's "purely procedural test . . . will, practically speaking, result in the rubber-stamping of consent decrees").

153. See *Citigroup I*, 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011); SEC v. Van Gilder, No. 12-CV-02839, 2014 WL 1628474, at \*3 (D. Colo. Apr. 24, 2014) ("Like Judge Rakoff, I will not be a mere handmaiden to a settlement negotiated on unknown facts.") (internal quotation mark omitted).

154. See, e.g., SEC v. CR Intrinsic Inv'rs, LLC, 26 F. Supp. 3d 260, 264 (S.D.N.Y. 2014) (approving proposed enforcement decree); *United States v. Int'l Bus. Machs. Corp.*, No. 14-CV-936 KMK, 2014 WL 3057960, at \*1 (S.D.N.Y. July 7, 2014) (same).

155. *Citigroup II*, 752 F.3d at 294.

settlement is fair, is reasonable, and does not disserve the public interest. Indeed, in its initial proposal to Judge Rakoff, the SEC devoted less than one double-spaced page to explaining why the proposal satisfied these requirements.<sup>156</sup> Now that the Second Circuit has reversed Judge Rakoff and implicitly endorsed that very proposal, judges can expect similarly sparse requests moving forward.<sup>157</sup> This will make it hard for courts to assess the propriety of proposed enforcement decrees.<sup>158</sup>

Requiring more of the parties might result in a desirable, but not unduly onerous, information-forcing effect. For example, courts could take a cue from the class action settlements context and simply require that the parties develop and furnish a record that allows the reviewing court to consider the requisite factors.<sup>159</sup> If the record doesn't enable the court to assess fairness, reasonableness, and the public interest, the proposal will not be approved unless and until the parties remedy the information problem. This is very different from what Judge Rakoff seemed to do: require that the parties reveal "the truth" underlying the agency's accusations.<sup>160</sup> As the Second Circuit observed, "Consent decrees are primarily about pragmatism," whereas "[t]rials are primarily about the truth."<sup>161</sup> This proposed burden shifting, by contrast, would merely require a slightly more robust front-end showing before the parties can convince the court that a consent judgment—backed by the "drastic and extraordinary" remedy of injunctive relief—is appropriate.<sup>162</sup>

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156. Memorandum by Plaintiff SEC in Support of Proposed Settlement at 6-7, *Citigroup I*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011) (No. 11-CV-07388).

157. The panel did not expressly approve the proposed decree. It remanded and allowed Judge Rakoff to reconsider the proposal under the new standard of review. *Citigroup II*, 752 F.3d at 294, 298. One panel member wrote separately to say that he would order Judge Rakoff to approve the proposal. *Id.* at 298 (Lohier, J., concurring). On remand, Judge Rakoff found he had no choice under "the very modest standard imposed by the Court of Appeals" but to approve the proposed decree. *SEC v. Citigroup Global Markets, Inc.*, 34 F. Supp. 3d 379, 380 (S.D.N.Y. 2014).

158. See James B. Stewart, *Reassessing Reversal of Adversary to S.E.C.*, N.Y. TIMES, June 14, 2014, at B1 (quoting Professor Erik Gerding as suggesting the Second Circuit "is basically making it next to impossible to review any kind of [SEC] settlement").

159. See, e.g., *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1239 (11th Cir. 2011).

160. *Citigroup I*, 827 F. Supp. 2d at 335.

161. *Citigroup II*, 752 F.3d at 295 (emphasis added); see also *supra* notes 104-109 and accompanying text.

162. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). Though inverting the burden could increase the price of winning judicial approval, higher decisionmaking costs might carry attendant benefits. Cf. Sharkey, *State Farm "With Teeth," supra* note 88, at 1605 ("[P]rompting agencies to develop a robust record is desirable to the extent that it . . . leads to better regulatory outcomes, including forcing agencies to look for less costly ways to fulfill their statutory

## CALIBRATING JUDICIAL SCRUTINY OF AGENCY ENFORCEMENT DECREES

Allow for limited substantive review based on objective considerations. In reacting to Judge Rakoff's order, the Second Circuit was preoccupied with crafting a framework that leaves little room for a reviewing judge's policy preferences to enter the mix. This led to an opinion that is virtually silent as to whether judges can ever question the substantive reasonableness of a proposed enforcement decree.

Courts should clarify that parties seeking enforcement decree approval must still account for *substantive* as well as *procedural* reasonableness and fairness. By requiring the agency to offer some explanation of its decision to settle on the proposed terms, the judiciary can still serve as a backstop against enforcement decrees that, while procedurally sound, are substantively suspect.

Importantly, the judiciary can enforce this requirement while still guarding against the possibility that judges will displace an agency's reasonable policy-driven prosecutorial choices. The key, I suggest, is requiring that courts limit their review to a few objective considerations that, consistently applied, might expose or discourage unreasonable agency action. Recall *Citigroup II*'s emphasis on using "objective" measures to ensure that courts "tak[e] care not to infringe on the S.E.C.'s discretionary authority to settle on a particular set of terms."<sup>163</sup> By hewing to this limitation instead of engaging in a freewheeling assessment of reasonableness and fairness, reviewing courts can draw from a wider palette of considerations—one that includes *some* substantive factors—without engaging in judicial policymaking.

The agency seeking court approval can allude to concrete, verifiable considerations like whether and how the proposal differs from recent settlements with similarly situated defendants. Agency consistency has long influenced how courts assess agency action. After all, "[g]overnment is at its most arbitrary when it treats similarly situated people differently."<sup>164</sup> If an agency proposes a decree that differs remarkably from recent settlements with similarly situated defendants, *and* if the agency then fails to explain that difference, a court may

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mandates."); Stephenson, *supra* note 88, at 777 ("Greater judicial skepticism of regulation . . . generally leads to better records, less agency action, and greater average expected benefits for the actions that the agency undertakes.").

163. *Citigroup II*, 752 F.3d at 295.

164. *Etelson v. Office of Personnel Mgmt.*, 684 F.2d 918, 926 (D.C. Cir. 1982); *see also* *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis." (quoting *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1971) (internal quotation marks omitted))); *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996) ("An agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so." (citation omitted)); *Doubleday Broad. Co. v. FCC*, 655 F.2d 417, 423 (D.C. Cir. 1981) (explaining that the agency "may not decide a case one way today and a substantially similar case another way tomorrow" without offering a reasonable explanation).

be justified in rejecting the proposal.<sup>165</sup> To be sure, agencies should not be required to handle similar enforcement actions the same way in every instance. Neither should agency decisionmakers be restricted by the discretionary enforcement choices of their predecessors. But if an agency's enforcement decisions are demonstrably, remarkably inconsistent within a short period of time, it is at least reasonable to expect the agency to explain those disparities when seeking an enforcement decree.<sup>166</sup>

Reconsider the "adequacy" requirement. Third, and finally, courts might consider keeping "adequacy" as part of the inquiry. The Second Circuit omitted adequacy from its standard, correctly observing that the requirement—though present in SEC consent decree cases for decades—appears to have been appropriated from the class action settlement context.<sup>167</sup> But it is far from clear that this adoption was improper or mistaken. After all, public law litigation is unique in "its tendency to affect individuals and groups who are not parties to the litigation."<sup>168</sup> All federal enforcement agencies take actions that, however

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165. The federal district courts' decades of experience with the Federal Sentencing Guidelines suggests that this sort of comparative inquiry is an administrable one. When sentencing criminal defendants, courts must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6) (2012). Just as courts can explain why comparable criminal defendants are not really similarly situated, or why any disparities between similarly situated defendants are not unwarranted, see, e.g., *United States v. Soto*, 660 F.3d 1264, 1270 (10th Cir. 2011), federal agencies can account for consistency when seeking enforcement decrees by explaining whether, how, and why the decree differs from similar recent agreements with comparable regulated parties.

166. In *Citigroup I*, for example, the court asked the SEC to explain a notable disparity between (a) the \$95 million penalty it sought from Citigroup and (b) the \$535 million penalty it exacted from Goldman Sachs in a comparable consent decree entered the prior year. 827 F. Supp. 2d 328, 334 n.7 (S.D.N.Y. 2011); see Consent Judgment, *SEC v. Goldman Sachs & Co.*, No. 1:10-CV-03229-KBF (S.D.N.Y. July 20, 2010). To Judge Rakoff, *Goldman* "involved . . . similar but arguably less egregious" allegations, but there the agency sought significantly higher monetary penalties than it did against Citigroup. *Citigroup I*, 827 F. Supp. 2d at 334 n.7.

167. *Citigroup II*, 752 F.3d at 294.

168. Kramer, *supra* note 4, at 321; see also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281 (1976) ("Because of its regulatory base, public law litigation will often, at least as a practical matter, affect the interests of many people."); Nancy P. O'Brien, *Arbitration Allocates Costs of Hazardous Waste Cleanup Claim Under Superfund*, 1991 J. DISP. RESOL. 347, 360 ("One hallmark of public-law litigation is its tendency to affect third parties."); cf. Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 30 ("[C]onsent decrees often are designed to affect the rights of strangers."); Justin P. Gunter, *Dual Standards for Third-Party Intervenors: Distinguishing Between Public-Law and Private-Law Intervention*, 66 VAND. L. REV. 645, 647 (2013) ("[I]n public-law litigation, third parties have a far greater justification for [intervening].").



## CALIBRATING JUDICIAL SCRUTINY OF AGENCY ENFORCEMENT DECREES

remote, impact third parties. The spectrum of third-party impacts is vast. Sometimes the effect is exceedingly attenuated, as in an SEC enforcement action against an individual accused of insider trading.<sup>169</sup> At the other end of the spectrum, when the agency litigates on behalf of a class otherwise barred from further relief, third-party interests run especially high.<sup>170</sup> But what about the wide swath of cases in the middle? Cases where, like in *Citigroup*, the agency isn't litigating on behalf of a class, yet outside parties might stand to benefit directly—such as via restitution—from the enforcement action?<sup>171</sup> One where only the agency, and not private litigants, can bring claims for certain violations?<sup>172</sup> Perhaps adequacy matters there, too.

Instead of applying *Citigroup II*'s binary framework—which assumes that adequacy matters *only* when the agency is actually litigating on behalf of individual plaintiffs directly entitled to relief—courts should demand adequacy in *all* enforcement decrees, each time accounting for whether and how the decree may impact third parties.<sup>173</sup> When third-party interests run relatively low, as in

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169. Even in those cases, the SEC has historically acknowledged that *some* judicial assessment of adequacy is still in order. See, e.g., Plaintiff SEC's Second Unopposed Motion for Entry of Proposed Final Judgment as to Defendant Michael Van Gilder and Relief Defendant Stephen Diltz at 10, SEC v. Van Gilder, No. 1:12-CV-02839-JLK (D. Colo. May 5, 2014) (requesting that the court find a proposed enforcement decree "adequate" in an action against individuals accused of insider trading). Indeed, in appealing Judge Rakoff's order, neither the agency nor the bank challenged the widely-used "fair, reasonable, and adequate" framework. See Brief of Citigroup Global Markets Inc., Defendant-Appellee Cross-Appellant at 15, *Citigroup II*, 752 F.3d 285 (2d Cir. 2014) (Nos. 11-5227-cv (L); 11-5375-cv(con); 11-5242-cv(xap.)) (arguing that Judge Rakoff's approach implicitly departed from the "fair, reasonable, and adequate" rubric, which the agency described as "the standard uniformly applied by hundreds of federal district courts . . . over the past several decades"); see also *id.* at 20 (referring to it as "the *only* standard imposed by federal courts across the country") (emphasis in original).

170. See, e.g., *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990) (acknowledging a court's "heightened responsibility" to protect the public interest when a consent decree affects the public interest or third parties).

171. See Zimmerman, *supra* note 86, at 504 (explaining that in recent decades federal agencies have played an increasingly significant role in seeking restitution for victims outside of the class action context); see also Kaul, *supra* note 114, at 564 ("The monetary penalties obtained in SEC settlements are typically divided between the U.S. Treasury general fund and a 'fair fund' set up to compensate harmed investors.").

172. See *Citigroup I*, 827 F. Supp. 2d 328, 334 (S.D.N.Y. 2011) (explaining that private investors cannot bring securities claims based on negligence).

173. A recent student note in the *Harvard Law Review* makes the related point that "it is not clear how a district court could consider [any] substantive factors—such as deterrence—if adequacy is beyond its purview." Note, *supra* note 6, at 1292. The author goes on to argue that the "adequacy" requirement—which perhaps is

the insider trading example, it will be easier for a proposal to meet the requirement. But when third-party impacts loom larger—like where, as in *Citigroup*, the agency had the power to forge an agreement guaranteeing restitution to victims otherwise powerless to recover via private litigation—the agency should at least acknowledge those potential effects and explain whether and how the proposal will serve or frustrate third-party interests.

Though this Article suggest that courts still examine “adequacy” and keep other substantive considerations in the mix, this proposed framework is still different from Judge Rakoff’s approach. It allows for only limited substantive review guided by objective considerations like agency consistency. Hard look review, by contrast, permits a more searching inquiry guided by open-ended questions: Did the agency fail to account for “an important aspect of the problem”?<sup>174</sup> Did it rely on factors it was not supposed to?<sup>175</sup> Did its decision “run[] counter to the evidence before” it?<sup>176</sup> If courts ask these sorts of questions when reviewing proposed enforcement decrees, they run the risk of “infring[ing] on the [agency’s] discretionary authority to settle on a particular set of terms.”<sup>177</sup>

To be sure, any framework that permits substantive review of agency enforcement proposals will leave open the possibility that judges will improperly interfere with the executive branch’s policymaking authority. But as *Citigroup II* demonstrates, federal appellate courts are capable of checking occasional over-policing by district courts. And under this proposed framework—which allows district judges to exercise a more constrained degree of substantive oversight—such over-policing would likely be comparatively rare.

## CONCLUSION

Enforcement decrees are highly important to federal agencies, regulated parties, and the public at large. Agencies rely on enforcement decrees to secure more efficient resolutions of enforcement actions. Regulated parties can use such settlements to resolve allegations of wrongdoing at a lower price, and often without admitting liability. And the public benefits from, but also bears the consequences of, agency law enforcement via private negotiation. So the scrutiny courts give to proposed enforcement decrees matters tremendously.

Calibrating judicial review in the absence of statutory guidance requires that courts make foundational assumptions about how deference facilitates (or frustrates) desirable outcomes. The disparate frameworks employed by the district and circuit courts in *Citigroup* suggest two divergent visions of the judi-

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impossible to sever from the “fair” and “reasonable” requirements in the first place—is administrable and “well within judicial competency.” *Id.*

174. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

175. *Id.*

176. *Id.*

177. *Citigroup II*, 752 F.3d at 295.

## CALIBRATING JUDICIAL SCRUTINY OF AGENCY ENFORCEMENT DECREES

ary's relationship with the "fourth branch"<sup>178</sup>: one skeptical that enforcement agencies will adhere to statutory mandates absent the looming threat of substantive judicial oversight and another concerned that unelected judges will do more harm than good by engaging in substantive ex ante review of agency enforcement decrees. In advancing a third framework drawing from both approaches, this Article suggests that courts can still play a limited role in policing agency enforcement decrees for substantive unreasonableness while leaving discretionary policy-driven decisions to politically accountable agencies.

The approach proposed here might still permit the majority of reasoned, routine, and expertise-driven agency enforcement decrees to earn judicial approval with minimal scrutiny. Of course, when compared to the Second Circuit's approach in *Citigroup II*, this framework will require slightly more front-end process from agencies seeking judicially backed settlements. Though process makes decisionmaking more expensive, this framework's attendant costs might well be minimal—and, in any event, they could prove a worthy price for Article III backing.<sup>179</sup> After all, agencies like the SEC have a panoply of other enforcement tools at their disposal.<sup>180</sup> If an agency decides that seeking a consent decree would be too onerous, it can always settle out of court. Some agencies, like the SEC, are even statutorily authorized to prosecute enforcement actions in administrative proceedings.<sup>181</sup> But if an agency wants a court decree enforceable by the contempt power, it must explain why that result would be procedurally and substantively sound.

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178. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (remarking that administrative bodies "have become a veritable fourth branch of the Government").
179. See Sharkey, State Farm "*With Teeth*," *supra* note 88, at 1655 (explaining that additional process can serve as a "'price' for judicial deference to agency policy-making").
180. See, e.g., *Citigroup II*, 752 F.3d at 297 ("[T]o the extent that the S.E.C. does not wish to engage with the courts, it is free to eschew the involvement of the courts and employ its own arsenal of remedies instead.").
181. See, e.g., 15 U.S.C. §§ 77h-1(a), 78u-3(a) (2012). These tools may, however, be troubling for other reasons. See Peter J. Henning, *S.E.C. Faces Challenges Over the Constitutionality of Some of Its Court Proceedings*, N.Y. TIMES DEALBOOK (Jan. 27, 2015), [dealbook.nytimes.com/2015/01/27/s-e-c-faces-challenges-over-the-constitutionality-of-some-of-its-court-proceedings](http://dealbook.nytimes.com/2015/01/27/s-e-c-faces-challenges-over-the-constitutionality-of-some-of-its-court-proceedings); Jean Eaglesham, *S.E.C. Is Steering More Trials to Judges It Appoints*, WALL ST. J., Oct. 21, 2014, [www.wsj.com/articles/sec-is-steering-more-trials-to-judges-it-appoints-1413849590](http://www.wsj.com/articles/sec-is-steering-more-trials-to-judges-it-appoints-1413849590) (reporting that the SEC is bringing more and more enforcement actions before its own administrative judges, where the agency enjoys a "considerably higher" success rate than it does in federal jury trials); see also *SEC v. Citigroup Global Markets, Inc.*, 34 F. Supp. 3d 379, 380 n.8 (S.D.N.Y. 2014) ("One might wonder: from where does the constitutional warrant for such unchecked and unbalanced administrative power derive?") (approving proposed decree on remand).