

## Note

# An Article I, Section 7 Perspective on Administrative Law Remedies

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## INTRODUCTION

In recent decades, our understanding of the administrative state, and particularly its relationship to political institutions created by the U.S. Constitution, has benefited substantially from game-theoretic analysis.<sup>1</sup> Scholars who apply game theory to policy formation “view[] relationships between political actors, such as the President, Congress, and the Supreme Court, as a sequential game in which each party acts based on its expectations of the other parties’ responses.”<sup>2</sup> Not surprisingly, the familiar sequence created by Article I, Section 7—which sets forth the bicameralism and presentment requirements for federal lawmaking—has attracted particular attention.<sup>3</sup> Scholars applying sequential models have explored how this constitutional game has been transformed by the arrival of a new player, the twentieth-century administrative state.<sup>4</sup> Since federal administrative agencies enjoy significant delegated powers<sup>5</sup> and discretion in statutory interpretation,<sup>6</sup> it is perhaps axiomatic that they may alter federal policy in favor of the President who oversees them.<sup>7</sup> Game theory has added analytic precision to this intuition. It has also permitted legal scholars to recommend specific doctrinal reforms that counteract the pro-President bias created by the federal bureaucracy: reforms in constitutional law, in statutory interpretation techniques, and in judicial deference to administrative decisions (the so-called *Chevron* doctrine).<sup>8</sup>

1. See JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 101-05 (1997).

2. Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1406 (1996). For examples of such scholarship, see John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 1 (1990); and John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992).

3. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992). Article I, Section 7 reads,

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

U.S. CONST. art. I, § 7, cl. 2.

4. See, e.g., Eskridge & Ferejohn, *supra* note 3, at 533-40.

5. See *infra* note 37 and accompanying text.

6. See *infra* notes 82-83 and accompanying text.

7. To claim that the White House has absolute control of the administrative state would, however, ignore nuances discussed *infra* note 40.

8. For a more detailed account of these recommendations, see *infra* Section I.C.

This Note explores another possible compensating strategy. It applies sequential analysis to a judicial function that has not been extensively explored by legal theorists—the choice of remedies in administrative law. When a court finds a legal defect in an agency’s decision, two remedial options are available: It can either vacate the defective rule or remand it back to the agency without vacatur (that is, leave the rule in place for the time being).<sup>9</sup> This Note makes two arguments about this choice, one descriptive and one normative. First, sequential analysis suggests that the two remedies can lead to different lawmaking sequences and may therefore generate distinct policy outcomes. Second, presumptive vacatur would best reflect the original design of Article I, Section 7 in the age of administrative bureaucracy. Remand without vacatur, in comparison, biases policy outcomes in favor of the President. In short, this Note argues that, to the extent that the sequential structure of Article I, Section 7 should inform courts’ remedial choices, vacatur should be the presumptive administrative law remedy. Importantly, this recommendation runs counter to a recent judicial trend: Starting in the early 1990s, courts have increasingly remanded agency rules without vacating them.<sup>10</sup> This Note offers a reason to be wary of this development.

Much of the theoretical analysis that supports this Note’s presumptive vacatur thesis derives from a straightforward sequential model. Admittedly, such a model makes numerous simplifying assumptions and therefore cannot fully replicate the rich dynamics of our political life. This predicament raises two concerns about real-world application of this Note’s recommendation: Can courts implement presumptive vacatur in the context of specific cases? Can the sequential model, on which the rationale for presumptive vacatur rests, accurately predict the aftermath of judicial remedies?

This Note will make a preliminary inquiry into these questions by using the national television station ownership rule as a case study. In 2002, the Court of Appeals for the District of Columbia Circuit found the Federal Communications Commission’s latest iteration of this rule “arbitrary and capricious and contrary” to the Telecommunications Act of 1996.<sup>11</sup> Despite these defects, the court remanded the rule to the FCC without vacating it.<sup>12</sup> This Note’s presumptive vacatur analysis suggests that the court erred: Vacatur, not remand, was the appropriate remedy. More importantly, the

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9. In one prominent case, the majority of an appellate panel chose to remand without vacatur “so as to afford the agency [another] opportunity to set forth its view.” *Checkosky v. SEC (In re Checkosky)*, 23 F.3d 452, 462 (D.C. Cir. 1994). Another judge, in a separate opinion, wrote that he would “go one step further and vacate the [agency’s] order.” *Id.* at 490 (opinion of Randolph, J.).

10. *See infra* Section II.B.

11. *See Fox Television Stations v. FCC*, 280 F.3d 1027, 1045 (D.C. Cir. 2002).

12. *Id.* at 1033.

aftermath of the court's improvident remand proved broadly consistent with the predictions of the sequential model. Of course, no abstract model can be conclusively verified by examining a single administrative policy. Rather, this Note pursues its case study with the less ambitious goal of illustrating its theoretical analysis in a tangible policy context.

Part I introduces sequential analysis of the Constitution's lawmaking process and outlines the normative recommendations that legal scholars have derived from this technique. Part II then applies this Article I, Section 7 game to a new field—administrative law remedies—and makes the theoretical case for presumptive vacatur as an alternative to today's remand-friendly jurisprudence. Finally, Part III turns to the national television ownership rule for a real-life illustration of this Note's analysis.

#### I. METHODOLOGY: PLAYING THE ARTICLE I, SECTION 7 GAME

As a crucial point of departure for their game-theoretic analysis, political theorists have observed that policymaking “has an inherently sequential structure” and that the specifics of this sequence “can have significant implications for the kinds of policy that can be produced.”<sup>13</sup> The reasons a “particular sequential structure has arisen rather than others . . . would seem to lie in the logic of constitutional design”<sup>14</sup>—and Article I, Section 7 specifies one such design. This Part articulates how this constitutional sequence can inform legal doctrine. Section A outlines the Founding ideology behind the bicameralism and presentment requirements. Section B focuses on a sequential model of these requirements developed by William Eskridge and John Ferejohn—a model that traces how the administrative state has altered the Founders' sequential scheme in favor of the President. Section C suggests why jurists—originalists and nonoriginalists alike—might seek to restore the original sequential structure without fundamentally curtailing the scope of the federal bureaucracy. It then summarizes existing proposals for such compensating reforms. This review of existing work will lay the foundation for this Note's main task—developing an Article I, Section 7 perspective on administrative law remedies.

##### A. *The Sequential Structure of Article I, Section 7*

According to the Supreme Court, “the prescription for legislative action” in Article I, Section 7 “represents the Framers' decision that the

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13. Ferejohn & Shipan, *supra* note 2, at 2.

14. *Id.*

legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”<sup>15</sup> This procedure requires that, before becoming law, a bill must be adopted by a majority of both the House of Representatives and the Senate and must then be presented to the President for signature. Should the President veto the bill, it can become law only upon the approval of two-thirds of each legislative chamber.

These fundamental requirements of Article I, Section 7—bicameralism and presentment—reflect the Framers’ insight that “every institution calculated to . . . keep things in the same state in which they happen to be at any given period” is “much more likely to do good than harm.”<sup>16</sup> Diffusion of political power among differently constituted entities came to be seen as “the best defense of liberty,” for “[u]nless individuals and minorities were protected against the power of majorities no government could be truly free.”<sup>17</sup>

Bicameralism and presentment were to serve precisely these purposes. Since “the legislative authority necessarily predominates” in a republic, the Framers required departures from the status quo to gain assent from two separate chambers, which were rendered “as little connected with each other as the nature of their common functions and their common dependence on the society will admit.”<sup>18</sup> Presidential veto, meanwhile, responded to the fear that bicameralism would not alone stem the tide of improvident legislation. The veto, of course, was not absolute (an absolute veto power having “something in the appearance of it more harsh, and more apt to irritate”<sup>19</sup>), but subject to legislative override. The Founders hoped “that it will not often happen that improper views will govern so large a proportion as two thirds of both branches of the legislature at the same time; and this, too, in defiance of the counterposing weight of the executive.”<sup>20</sup> Thus, the drafters of Article I, Section 7 deliberately crafted an elaborate sequential process by which majoritarian institutions could alter the nation’s course through legislation.

Two decades ago, the Court adopted a particularly formalist reading of Article I, Section 7. In *INS v. Chadha*, it rejected the constitutionality of the

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15. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

16. THE FEDERALIST NO. 73, at 444 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

17. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 608-09 (2d ed. 1998).

18. THE FEDERALIST NO. 51, *supra* note 16, at 322 (James Madison). One can analogize the bicameralism requirement (with the two chambers serving different constituencies) to a supermajority requirement. This analogy is not perfect, and its dimensions are explored in JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 233-48 (1962), and Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT’L REV. L. & ECON. 145 (1992).

19. THE FEDERALIST NO. 73, *supra* note 16, at 445 (Alexander Hamilton).

20. *Id.* at 446.

legislative veto, a statutory provision allowing a congressional majority to annul administrative agency decisions without presenting this annulment to the President.<sup>21</sup> The Court held that this procedure violated the “[e]xplicit and unambiguous” policymaking sequence of Article I, Section 7.<sup>22</sup> The requirements of that sequence “are not empty formalities,” the Court warned.<sup>23</sup>

In dissent, Justice White urged the Court to consider bicameralism and presentment in the context of the modern administrative state. The Founders, after all, had not anticipated that a vast federal bureaucracy would become a crucial source of law. Justice White thus argued that the legislative veto is an “important if not indispensable political invention that . . . assures the accountability of independent regulatory agencies, and preserves Congress’ control over lawmaking.”<sup>24</sup> The majority opinion, however, rebuffed Justice White’s foray into functional analysis. Whatever the modern shortcomings of the Constitution’s sequential structure, the Court committed to stand by the precise structure of the Founders’ original plan: “With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.”<sup>25</sup>

Not long after the Court’s decision, political theorists began applying the tools of game theory to Article I, Section 7. These tools permitted a more rigorous approach to the questions posed by Justice White’s dissent: Has the rise of the modern administrative state already altered the original constitutional scheme and, if so, what compensating strategies can restore the Founders’ vision? The next two Sections outline the answers offered by a game-theoretic model of Article I, Section 7.

## B. *Article I, Section 7 as a Sequential Game*

### 1. *Original Rules: Bicameralism and Presentment*

Game theory aids our understanding of separation-of-powers regimes by applying a set of stylized assumptions.<sup>26</sup> Although one may quibble with

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21. 462 U.S. 919 (1983). *Chadha* struck down vetoes by one chamber of Congress; two-house vetoes promptly met the same fate in *United States Senate v. FTC*, 463 U.S. 1216 (1983) (mem.). See also *id.* at 1218 (White, J., dissenting) (providing facts).

22. *Chadha*, 462 U.S. at 945.

23. *Id.* at 958 n.23.

24. *Id.* at 972-73 (White, J., dissenting).

25. *Id.* at 959 (majority opinion).

26. The standard assumptions adopted by game-theoretic models of separation-of-powers regimes include (1) a one-dimensional continuous policy space; (2) preference-maximizing participants with single-peaked and symmetric utility functions; and (3) complete information, in the sense that all players understand the rules of the game and know one another’s preferences

the real-world veracity of these assumptions, they generally succeed in adding a degree of structure and rigor to the study of political institutions. Eskridge and Ferejohn have contributed to this project by analyzing bicameralism and presentment as a sequential game—dubbed the “Article I, Section 7 game”—and drawing normative legal recommendations from their results.<sup>27</sup> The game is played on a one-dimensional policy space that contains the following points:

- $P$  → preference of the President;
- $H_M$  → preference of the median legislator in the House of Representatives;
- $S_M$  → preference of the median legislator in the Senate;
- $H_V$  → preference of the pivotal veto-override legislator in the House;
- $S_V$  → preference of the pivotal veto-override legislator in the Senate; and
- $SQ$  → status quo (i.e., the default policy that prevails in the absence of legislation).

Given the choice between two options, players always prefer the option closest to them on the policy space, regardless of whether it falls to the left or the right of their most favored position.

Figure 1 illustrates four potential interrelationships among these preferences, as well as the legislative outcomes that Article I, Section 7 would predict in each scenario.<sup>28</sup> The only preference point that changes from one scenario to the next is the default policy  $SQ$ . However, because

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(without incurring costs). For a more detailed discussion of these assumptions, see KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 21-28 (1998). To be sure, these assumptions do not fully capture the Founders’ views of human nature. An analysis that treats individual preferences as fixed and exogenous can, for example, “have difficulty accommodating . . . the idea of civic virtue.” David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 103 (2000). But viewing individuals as rational utility maximizers also should not be dismissed as an economic conceit—particularly because this assumption was arguably shared by Madisonian constitutional theory. See, e.g., *id.* at 102-04, 111-12.

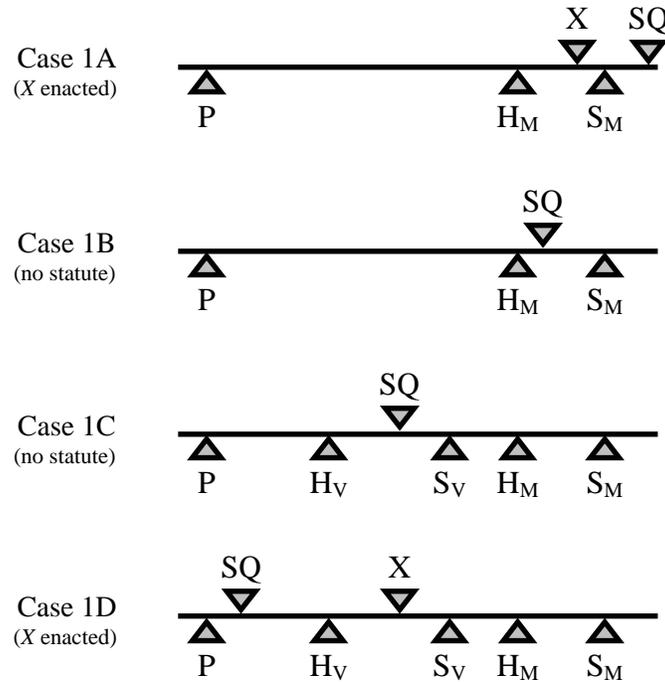
This Note will also assume for simplicity that legislators do not engage in sophisticated voting. A sophisticated voter might strategically vote to replace the status quo with a policy she considers worse than the status quo (for example, by reasoning that the new policy will prove destructive enough to catalyze political reform, eventually generating a policy that improves upon the status quo). One important reason to question whether such sophisticated voting frequently occurs in Congress is that legislators need to explain their discrete votes to constituents “back home.” See Arthur Denzau et al., *Farquharson and Fenno: Sophisticated Voting and Home Style*, 79 AM. POL. SCI. REV. 1117, 1118 (1985). A legislator voting against his preferences (even in anticipation of a sophisticated future payoff) would consider “whether or not he can explain it satisfactorily to his supporters in order to reduce the prospects that it will become a damaging campaign issue.” *Id.* In other words, “principals (constituents) not only induce preferences in agents (legislators) but also constrain their modes of behavior.” *Id.* at 1118-19.

27. Eskridge & Ferejohn, *supra* note 3.

28. Since the bicameralism requirement of Article I, Section 7 treats the chambers of Congress symmetrically, this model holds whether the House’s or the Senate’s preferences are closer to the President’s. Choosing the House aids this Note’s narrative, because such an alignment of preferences matches the FCC case study in Part III.

Article I, Section 7 favors stability, this change generates notable differences in ultimate policy outcomes.

FIGURE 1. ARTICLE I, SECTION 7 GAME WITHOUT ADMINISTRATIVE AGENCIES



In Case 1A, the default policy  $SQ$  rests to the right of the median House and Senate legislators and even further to the right of the President.<sup>29</sup> Each chamber of Congress would prefer an alternative policy that reflects the preferences of its median member. However, because Article I, Section 7 requires bicameral adoption of the same bill, the House and the Senate will be expected to agree on a bill at some compromise point  $X$  between  $H_M$  and  $S_M$ .<sup>30</sup> The President, in response, cannot credibly threaten to veto bill  $X$  because he prefers this bill's policy to the default policy  $SQ$ . Bill  $X$  would thus meet the presentment requirement and become law.

29. Here, and throughout this Note, the phrase "to the right of" means "on the right side of," not "more conservative than."

30. Since the median senator's preferences are closer to the status quo than the median representative's, the Senate would pass new legislation  $X$  only if the distance between  $X$  and  $S_M$  remains shorter than the distance between  $SQ$  and  $S_M$ .

In Case 1B, the median legislators in the House and Senate have opposite directional preferences regarding any changes to the default policy. Thus, no bill would meet the bicameralism requirement. The presentment stage will never be reached, rendering the President's preferences irrelevant. In short, no statute will be enacted in Case 1B.

Case 1C introduces the importance of the presidential veto. Both chambers of Congress could agree on a bill that moves the default policy to the right.<sup>31</sup> However, Congress would expect the President, who prefers the default policy to the new bill, to make a credible veto threat. A pivotal legislator whose vote would be necessary to override the President's veto,  $H_V$ , also prefers the default policy to the new bill.<sup>32</sup> Therefore, no statute can meet both bicameralism and presentment requirements, and no change to the default policy will be enacted.

Finally, in Case 1D, the default policy rests between the preferences of the President and those of the pivotal veto-override legislators. The arrangement of preferences in Case 1D is not as fanciful as it may first appear, for, as Eskridge and Ferejohn note, the Framers of Article I, Section 7 "anticipated many [Case 1D] situations, where the President would oppose Congress's desire to change the status quo."<sup>33</sup> Median legislators in both chambers would support a bill that moves policy to the right of the status quo, but they also anticipate a possible veto threat against such a bill. In the event of a veto, the critical veto-override voter will be  $H_V$ ; consequently, a bill that is more attractive to  $H_V$  than the status quo will survive a veto.<sup>34</sup> Median legislators understand how the game works, so they propose bill  $X$ —their most preferred veto-proof option. Under the rules of Article I, Section 7, bill  $X$  will become law. One lesson of Case 1D deserves emphasis: No new statute at all could be enacted if the status quo were identical to the preferences of the pivotal veto-override legislator  $H_V$ . This renders  $H_V$  the equilibrium position closest to the preferences of the President. The next Subsection's discussion of the administrative state will clarify why this equilibrium point is strategically important.

Thus, the results displayed in Figure 1 graphically represent the carefully crafted design of Article I, Section 7. This design reflects the Framers' balance "between republican liberty, in which popular preferences would generate laws, and stability, in which laws would reflect deliberation

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31. Notably, the House would not approve such a bill unless the distance between the bill and  $H_M$  is shorter than the distance between  $S_Q$  and  $H_M$ .

32.  $S_V$  and  $H_V$  would both support the new bill only if (1) the distance between  $X$  and  $S_V$  is shorter than that between  $S_Q$  and  $S_V$  and (2) the distance between  $X$  and  $H_V$  is shorter than that between  $S_Q$  and  $H_V$ . In Case 1C, any bill to the right of  $S_Q$  would fail the latter condition.

33. Eskridge & Ferejohn, *supra* note 3, at 532.

34. In other words, the distance between bill  $X$  and  $H_V$  would have to be marginally shorter than the distance between  $S_Q$  and  $H_V$ .

among many perspectives and would not yield abrupt changes in social policy.”<sup>35</sup> Section C suggests why courts might attempt to minimize any systemic changes that upset this balance. In the meantime, the next Subsection demonstrates how the rise of the twentieth-century administrative state has arguably already caused such disruptive change.

## 2. *New (Deal) Rules: A Pro-President Bias*

The role of the federal government has expanded dramatically since the days of the Founders, and much of the day-to-day power to interpret and enforce statutes has been delegated to a vast federal bureaucracy. Eskridge and Ferejohn argue that the rise of administrative agencies has effectively altered the rules of the Article I, Section 7 game:

In the modern administrative state, Congress often will not pass a statute setting policy precisely at [X], but will instead pass a statute delegating the policy-setting function to an agency (A), with the expectation that the agency will implement policy at [X], or thereabouts. In that event, the agency can (perhaps over time) set policy virtually anywhere it wants, unless Congress would be stimulated to override the agency’s choice by enacting new legislation.<sup>36</sup>

This understanding of the administrative state rests on three pillars: constitutional law, statutory interpretation, and administrative law. The courts have not meaningfully enforced the so-called nondelegation doctrine—the principle that the Constitution forbids Congress to delegate unbridled authority to agencies—since the New Deal.<sup>37</sup> Meanwhile, canons of statutory construction are sufficiently numerous and indeterminate to permit a range of reasonable interpretations of statutory text.<sup>38</sup> Finally,

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35. Eskridge & Ferejohn, *supra* note 3, at 528.

36. *Id.* at 536. Agency discretion is, of course, also somewhat constrained by congressional oversight and by judicial review. *See infra* notes 40, 42-44.

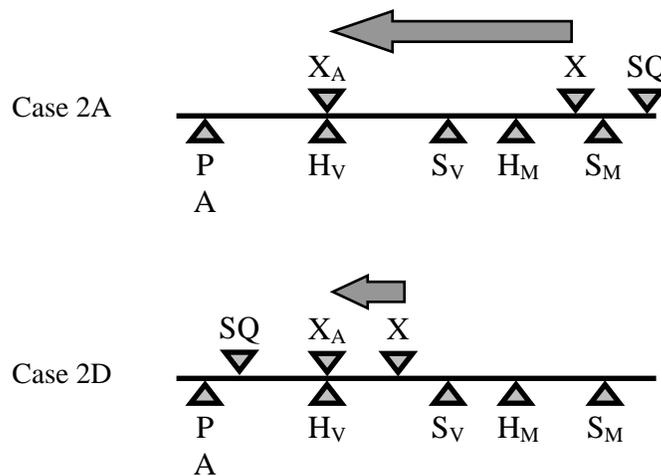
37. Courts have required Congress to provide an “intelligible principle” by which an agency can measure its compliance with statutory guidelines. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). However, cases arising from the New Deal-era National Industrial Recovery Act remain the only instances in which the Court has struck down a statute on nondelegation grounds. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

38. For a classic exposé purporting to show that “there are two opposing canons on almost every point,” see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401, 401-06 (1950) (citing sources that support twenty-eight sets of conflicting canons). While much has been written about judicial interpretation of statutes, developing an accurate picture of agencies’ interpretive practices is a “daunting” task, about which “very little” is currently known. JERRY L. MASHAW, AGENCY STATUTORY INTERPRETATION 20, 27 (Yale Law Sch. Pub. Law & Legal Theory

administrative law doctrine grants agencies significant freedom to interpret statutory guidelines: Where congressional intent is not clear, administrators may act upon any reasonable interpretation.<sup>39</sup>

Figure 2 illustrates the administrative state's impact on the game-theoretic model summarized in the previous Subsection.

FIGURE 2. ARTICLE I, SECTION 7 GAME WITH ADMINISTRATIVE AGENCIES



The preferences of the players replicate Cases 1A and 1D in Figure 1 (the two scenarios where statutes were enacted), but a new player has been introduced—the agency. The model assumes that the agency's preferences are similar to those of the President; thus, points A and P overlap.<sup>40</sup> In other

Research Series, Research Paper No. 33, 2003), available at [http://ssrn.com/abstract\\_id=380483](http://ssrn.com/abstract_id=380483). One recent look at interpretations by the Environmental Protection Agency and the Department of Health and Human Services suggests that these practices are not consistent across agencies. *Id.* at 22-26.

39. See *infra* text accompanying notes 82-83.

40. For an argument that the Clinton Administration made transformative changes to the administrative state, "making the regulatory activity of the executive branch agencies more and more an extension of the President's own policy and political agenda," see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001). Other institutional actors influence the federal bureaucracy, though the precise extent of such influences is difficult to estimate. Congress certainly plays a role. Compare Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983) (reporting evidence of congressional influence on agency decisionmaking), and Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) (exploring the capacity of political actors, primarily Congress, to control bureaucratic behavior through administrative procedure), with Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance'*, 12 LEGIS. STUD. Q. 475 (1987) (critiquing theoretical and empirical arguments for congressional control of bureaucracy). Courts play a role as well. See Kagan, *supra*, at 2269. Moreover, administrators themselves may possess the flexibility to act independently of

words, one expects the agency to use delegated authority and interpretive discretion to shift policy to the left, closer to its own, and the President's, preferences. The agency will not, however, move policy to the left of  $H_V$ , because doing so would invite a veto-proof congressional override. Instead, the agency will seek to move policy to a new equilibrium  $X_A$ —from  $X$  to the preference of the pivotal veto-override legislator  $H_V$ . After all, as the previous Subsection showed, a policy identical to  $H_V$ 's preferences is the President's most preferred equilibrium policy, one that cannot be replaced by a veto-proof statute. The distance between  $X$  and  $X_A$  thus graphically represents the federal bureaucracy's impact on the Article I, Section 7 game. Predictably, in both Case 2A and Case 2D, the rise of the administrative state favors the President.<sup>41</sup>

### 3. Adaptive Responses: Too Little or Too Much

Short of dismantling the administrative state, how can Congress restore the constitutional balance? As the Court emphasized in *Chadha*,

The Constitution provides Congress with abundant means to oversee and control its administrative creatures. Beyond the obvious fact that Congress ultimately controls administrative agencies in the legislation that creates them, other means of control, such as durational limits on authorizations and formal reporting requirements, lie well within Congress' constitutional power.<sup>42</sup>

Congress may also attempt to decouple the agencies' preferences from those of the President, a strategy that may explain why some statutes locate agencies outside the executive branch<sup>43</sup> and why congressional committees

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presidential control. Their ability to do so, however, is limited by the Administrative Procedure Act, as well as by other statutory and judicial requirements; indeed, these procedural restrictions have been blamed for the "ossification" of administrative action. *Id.* at 2266, 2265-67.

41. Although the pro-President bias from agency action is far greater in Case 2A than in Case 2D, the President's advantage in Case 2D is hardly insignificant. After all, as Eskridge and Ferejohn note, the outcome  $X$  in Case 2D already reflects "a particularly striking compromise of congressional preferences, and delegation of lawmaking authority to an agency makes [that] compromise more acute." Eskridge & Ferejohn, *supra* note 3, at 537.

42. *INS v. Chadha*, 462 U.S. 919, 955 n.19 (1983). One might ask why Congress delegates authority to agencies in the first place. Eskridge and Ferejohn point out that statutes granting the broadest delegation to agencies were enacted during the New Deal and the Great Society, when congressional and presidential policy preferences were aligned. Moreover, unrepealed statutes last indefinitely, while Congress's capacity (or willingness) to foresee future preferences is limited. Legislators may also not have appreciated fully the advantages that broad delegation gives the President. *See* Eskridge & Ferejohn, *supra* note 3, at 539. Finally, delegation might itself reflect congressional avoidance of "politically . . . divisive" choices. *Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 687, 685-87 (1980) (Rehnquist, J., concurring).

43. One distinguishing feature of such independent agencies is that their leaders are generally not subject to immediate removal by the President.

exercise oversight authority over the bureaucracy.<sup>44</sup> However, these mechanisms might fall well short of fully aligning agency preferences with those of median legislators. Congressional committees, for example, may be packed with policy outliers,<sup>45</sup> whose preferences may prove more consistent with the President's than with median legislators'.

Again, game theory can prove helpful in assessing Congress's efforts to systemically increase its power in the Article I, Section 7 game. Consider, for example, the effect of the two-house legislative veto—a statutory provision that allows Congress to void agency action through a bicameral vote without presidential presentment—on the scenarios in Figure 2. In Case 2A, both the House and the Senate will veto the agency's attempt to move policy from  $X$  to  $X_A$ . The agency may still use its discretion to alter statutory policy  $X$ , but its ability to do so will be constrained by the median legislator. To be precise, an agency that anticipates the legislative veto will shift policy only so long as the median legislator closest to the President (in Case 2A, the median House member  $H_M$ ) prefers the outcome to  $SQ$ . Eskridge and Ferejohn thus conclude that, in Case 2A, “[t]he introduction of a two-house legislative veto has the effect of moving policy outcomes back toward those that would occur under the original understanding” of Article I, Section 7<sup>46</sup>—though not all the way back.

Moreover, while the two-house legislative veto partially restores the original constitutional balance in Case 2A, it fails to do the same in Case 2D. There, Congress will not use a legislative veto to annul agency action, since the default policy  $SQ$  is even less attractive to the median legislators than the agency's rule  $X_A$ . Eskridge and Ferejohn describe this as a fundamental limitation of the legislative veto: “[U]nlike override legislation, which can not only negate the agency's rule but can implement the rule Congress wants, the legislative veto merely negates the agency's rule, leaving the status quo in its place.”<sup>47</sup> In short, the two-house veto would only partially, and only in certain scenarios, restore the original design of Article I, Section 7.

If the curative effect of legislative veto is too mild, another congressional practice—attaching override provisions as riders to unrelated must-pass legislation—tilts the balance too far in Congress's favor.

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44. For discussion of congressional control of the bureaucracy, see McCubbins et al., *supra* note 40. With respect to both executive and independent agencies, it is worth adding that the Senate may generally exercise its confirmation power to prevent the appointment of agency leaders whose preferences strongly conflict with those of legislators.

45. See Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 145-46, 149-52 (1988). But see Keith Krehbiel, *Are Congressional Committees Composed of Preference Outliers?*, 84 AM. POL. SCI. REV. 149 (1990).

46. Eskridge & Ferejohn, *supra* note 3, at 543.

47. *Id.* at 541.

Legislators could react to the agency's attempts to move policy to  $X_A$  by enacting an alternative policy (by majority vote of each house) and attaching it as a rider to another bill that, for exogenous political reasons, cannot be vetoed by the President. (Appropriations bills are common examples of such must-pass laws.)<sup>48</sup> Legislative riders differ from a two-house legislative veto in one crucial way: While the legislative veto can only annul agency action, leaving in place the default policy, a rider can replace agency action with a new policy. In other words, legislative riders attached to must-pass legislation arguably evade the presentment requirement of Article I, Section 7.<sup>49</sup>

Not surprisingly, the sequential model shows that, by effectively depriving the President of the veto power, riders grant the legislative branch more power than the original design of Article I, Section 7 would permit. Riders may prove appropriate in Case 2A, where both chambers of Congress would agree to override policy  $X_A$  with policy  $X$ .<sup>50</sup> (Indeed, anticipating such a rider, the agency in Case 2A may think twice before adopting  $X_A$  in the first place.) However, in Case 2D, a rider attached to a veto-proof bill would allow Congress to enact a policy far to the right of  $X$ —for example, a policy between the preferences of the two chambers' median voters,  $H_M$  and  $S_M$ . Thus, the use of riders can bias the original structure of Article I, Section 7—this time *against* the President.

The juxtaposition of the legislative veto with legislative riders is ironic. The legislative veto—which does too little to restore balance to Article I, Section 7—was found unconstitutional in *Chadha*. Meanwhile, legislative riders—which do too much by biasing policy in favor of Congress—remain legal. One cannot help but ask, is there a coherent role for courts in patrolling the lines of Article I, Section 7?

### C. *What if Courts Played Too?*

Thus far, this Note has used a sequential model to generate a descriptive account of bicameralism and presentment in today's

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48. See, e.g., J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 452 (1990); Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 458 (1997) (criticizing the use of appropriations riders to erode environmental protection and proposing a constitutional amendment restricting the use of such riders); see also *infra* Subsection III.C.2.

49. Cf. Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, 972, 971-72 (arguing that the use of riders "seems inconsistent with Article I, § 7 lawmaking requirements and with more general notions of deliberative decisionmaking").

50. That is, assuming the distance between  $X_A$  and  $H_M$  is greater than the distance between  $X$  and  $H_M$ .

administrative state. This Section asks first, why this model should attract the attention of courts and second, how the courts might react to it.

### 1. *Motivating Judicial Participation*

Jurists hardly view the task of conforming contemporary political reality to constitutional expectations through a uniform lens—and perhaps the most significant divide is between originalist and nonoriginalist perspectives.<sup>51</sup> Originalism “accords binding authority to the text of the Constitution or the intentions of its adopters.”<sup>52</sup> While nonoriginalists give the same considerations presumptive weight, this presumption is “defeasible over time in the light of changing experiences and perceptions.”<sup>53</sup> Such definitions hint at the occasionally blurry line between the two modes of constitutional interpretation. In particular, as Lawrence Lessig and Cass Sunstein observe, the term originalism is “decreasingly helpful” when applied in “an effort to maintain fidelity to constitutional commitments in the face of changed circumstances.”<sup>54</sup> Confusion arises because, “[w]hen circumstances have changed, a supposedly nonoriginalist interpretation may well have a stronger claim of fidelity to the original understanding.”<sup>55</sup> The twentieth-century bureaucracy is a paradigmatic example of altered circumstances: In the words of Justice Souter, today’s “administrative state with its reams of regulations would leave [the Framers] rubbing their eyes.”<sup>56</sup> Mindful of this perplexing context, this Subsection nonetheless argues that the results of the Article I, Section 7 game ought to influence the decisions of both originalist and nonoriginalist jurists.

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51. By emphasizing these doctrinal categories, this Note treats judicial decisions primarily as a function of legal merits. One can, alternatively, regard courts in a less doctrine-centric fashion—for example, by emphasizing the ideologies of individual jurists. For a survey and assessment of alternative views from two proponents of the view that Justices’ votes are determined primarily by their ideologies, see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002). Eskridge and Ferejohn explore the implications of the ideological view of judging and demonstrate that this view need not undermine major normative insights of their model. Eskridge & Ferejohn, *supra* note 3, at 548-51; William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORG. 165, 182-86 (1992). This Note, however, maintains a doctrinal focus.

52. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980). Originalism is hardly a monolithic concept, however, and there are both stricter and more moderate varieties. *Id.* at 204-05.

53. *Id.* at 205.

54. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 3 n.3 (1994).

55. *Id.*

56. *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting).

Originalism, in the words of John Hart Ely, empowers the courts to interfere with the decisions of political institutions by making inferences “whose starting point, whose underlying premise, is fairly discoverable in the Constitution.”<sup>57</sup> To the extent that the model developed in Section B persuasively articulates the original design of bicameralism and presentment, the model’s conclusions appeal directly to originalists.<sup>58</sup> The legislative veto debate illustrates how the game-theoretic approach to original meanings can “better account[] for the overall goals of the Constitution in general and of Article I, Section 7 in particular” than the reasoning of *Chadha*.<sup>59</sup> In response to the Court’s assertion that the legislative veto contradicts the Founders’ original intent, Eskridge and Ferejohn argue that

*Chadha*’s focus on the original constitutional understanding is unhelpful because it ignores the ways in which delegation of lawmaking power to agencies has already destroyed the original constitutional balance. To the extent that the Court is concerned with protecting—or restoring—some of the original balance of lawmaking influence suggested by Article I, Section 7, the two-house veto is constitutionally defensible . . . .<sup>60</sup>

The sequential model thus gives courts a richer technique for discerning original meaning.

But can the sequential model of Article I, Section 7—which takes the Founders’ sequential design as its starting point—appeal to nonoriginalists as well? The nonoriginalist approach is hardly unfamiliar to the Court, which, in the words of Justice Brandeis, “has repeatedly sustained the exercise of power by Congress, under various clauses of [the Constitution], over objects of which the Fathers could not have dreamed.”<sup>61</sup> But it is likewise important to emphasize that nonoriginalism does not ignore constitutional text or design. As John Manning recently emphasized, “[T]he Court’s articulated frame of reference . . . virtually always builds upon

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57. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 2 (1980). Ely dubbed the originalist approach “interpretivism.” *Id.* at 1.

58. The structure of bicameralism and presentment may prove particularly important to those constitutional originalists who also favor textualism in statutory interpretation. One important rationale for textualism rests on the proposition that the stringent requirements of Article I, Section 7 render federal legislation a work of compromise. If judges engage in atextual “purposive” statutory interpretation, they are less likely to implement the details of such compromise. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 70-78 (2001).

59. Eskridge & Ferejohn, *supra* note 3, at 556.

60. *Id.* at 541.

61. *Olmstead v. United States*, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting), *overruled in part* by *Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967).

some notion of fidelity to historical or original understanding of the adopted text.”<sup>62</sup> Even a nonoriginalist, therefore, “accord[s] the text and the original history” of the Constitution “presumptive weight.”<sup>63</sup>

The modern experience suggests two reasons to depart from the original design of Article I, Section 7, and the second of these reasons compels an important limitation on the implications of this Note’s sequential model. To begin with, one may question whether the original rationale for bicameralism and presentment—diffusion of political powers among political institutions with distinct constituencies—survives into the twenty-first century. Perhaps the greatest evolution has occurred in the role of the House of Representatives—a body that, from the late-eighteenth-century perspective, “embodied popular desires but threatened stability with its mercurial sentiments.”<sup>64</sup> As Eskridge and Ferejohn acknowledge, political reality no longer supports this depiction: “[W]ith its overwhelming reelection percentages election after election, the House is the least likely body to reflect popular preference changes, while the Presidency is more likely to reflect such changes.”<sup>65</sup> It is important, however, not to overstate the scope of such historical change. Two centuries of political history have not eviscerated the overarching rationale for separation of powers—the protection of minority interests in a diverse nation.<sup>66</sup> Although the precise electoral dynamics of individual institutions might have changed, the House, the Senate, and the President continue to serve different constituencies.<sup>67</sup> (The role of the Senate as a body where states are equally represented may be particularly significant, since federalism perseveres as a matter of prominent national—and judicial—concern today.)<sup>68</sup> By means of its extensive procedure for federal lawmaking, Article I, Section 7 still offers minority constituencies a voice and empowers them to negotiate

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62. John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1696 (2004); see also *id.* at 1696 n.131 (collecting cases).

63. Brest, *supra* note 52, at 205.

64. Eskridge & Ferejohn, *supra* note 3, at 560.

65. *Id.*

66. See *supra* text accompanying notes 16-20; cf. Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 427 (1993) (asserting that the Constitution seeks to establish “fair terms of cooperation among a people of great cultural, religious, and more broadly, moral diversity”).

67. See Eskridge & Ferejohn, *supra* note 3, at 560; see also William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 280-81 (1988) (emphasizing the importance of bicameralism and presentment in controlling factional domination of the legislature).

68. Indeed, the governors of California, Florida, New York, and Texas have recently formed a lobbying group to counteract the “disproportionate clout” of small states in Congress. See Raymond Hernandez & Al Baker, *Governors Join as ‘Big Four’ To Pool Clout*, N.Y. TIMES, July 20, 2004, at B1. For a recent argument that the Court formalistically adheres to separation-of-powers requirements whenever these requirements seek to safeguard federalism, see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

legislative compromises.<sup>69</sup> Moreover, as *Chadha* acknowledged, bicameralism promotes a more deliberative legislative process.<sup>70</sup> A nonoriginalist would not, therefore, possess the compelling evidence necessary to abandon the presumptive validity of bicameralism and presentment.<sup>71</sup>

Nevertheless, and more significantly for this Note's purposes, nonoriginalism can help confine the steps the judiciary should take to restore the original design of Article I, Section 7. In particular, some have criticized the Eskridge-Ferejohn model on the ground that it counsels a dramatic retreat from administrative rulemaking—most likely through the revival of the nondelegation doctrine.<sup>72</sup> Like Eskridge and Ferejohn, this Note declines to go to such extremes in its pursuit of the original lawmaking sequence. A vibrant nondelegation doctrine has been “overtaken”<sup>73</sup> by experience, technology, history, and political reality.<sup>74</sup>

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69. For a recent argument that the “unmistakable emphasis” of bicameralism and presentment was “to give minorities, in general, and the minority consisting of small-state residents, in particular, exceptional power to block legislation,” see Manning, *supra* note 58, at 76, 70-76.

70. *INS v. Chadha*, 462 U.S. 919, 951 (1983) (“The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings.”). On a related note, it is at least plausible that bicameralism limits “wasteful rent-seeking and corruption” more effectively than simple supermajoritarianism: The requirement that “in a bicameral system a proposal must be openly considered in two forums may work to expose misbehavior.” Levmore, *supra* note 18, at 155. Presentment, too, may improve the deliberative process, because the President can prove less susceptible to special interests than legislators. See Richard Pierce, *Institutional Aspects of Tort Reform*, 73 CAL. L. REV. 917, 936 (1985) (“The White House is susceptible to capture from time to time by representatives of broad ideologies that enjoy popular support, but it is less susceptible to capture by representatives of specific vested interests.”).

71. Admittedly, the enduring vitality of the values behind bicameralism and presentment does not validate the precise structure of Article I, Section 7. It is entirely possible that the compromise between liberty and stability would look different if the Philadelphia Convention were held today. But if the presumptive validity of the constitutional text means anything, it surely means that, as long as time has not utterly transformed the nature of constitutional compromises, amendments to such compromises must take place through the procedures of Article V and not through judicial interpretation.

72. Daniel Rodriguez argues that a rebirth of the nondelegation doctrine “might better illustrate Eskridge and Ferejohn’s basic point” than the return of the legislative veto. Daniel B. Rodriguez, *The Administrative State and the Original Understanding: Comments on Eskridge and Ferejohn*, 8 J.L. ECON. & ORG. 197, 200 (1992). He writes, “Broad delegation reflects the fulcrum of Eskridge and Ferejohn’s concern about the expanding role of the president at the expense of the original constitutional understanding. And yet the Supreme Court has all but abandoned the doctrine.” *Id.*; see also Jack Knight, *Positive Models and Normative Theory: A Comment on Eskridge and Ferejohn*, 8 J.L. ECON. & ORG. 190, 193 (1992) (asking why Eskridge and Ferejohn “did not extend the implications of the model and the related argument to its logical conclusion: the modern regulatory state is unconstitutional”). But, asks Rodriguez, “[c]an it be that original constitutional understanding would be served by the repeated rejection of the legislature’s will and the public interest, an interest presumably served by the various New Deal and post-New Deal regulatory statutes that would potentially run afoul of a serious nondelegation doctrine?” Rodriguez, *supra*, at 200. Given the size and ubiquity of the modern administrative apparatus, Jack Knight suggests one response: “[W]hy waste time on a done deal?” Knight, *supra*, at 193.

73. Eskridge & Ferejohn, *supra* note 3, at 561.

Instead of further contemplating its resurrection, this Note pursues more incremental efforts to square the growth of the administrative state with the original design of Article I, Section 7. The next Subsection summarizes some existing proposals in this vein and the criticisms these proposals have encountered.

## 2. *A Role for Courts: Some Proposals and Critical Responses*

As public choice scholars have readily acknowledged, the Article I, Section 7 game is played in the shadow of the law. It is hardly surprising, then, that a variety of judicial strategies may counteract the pro-President bias of the modern administrative state. Thus far, scholars have focused on three strategies: constitutional law establishing the rules of the legislative game, statutory interpretation norms guiding the implementation of legislative outputs, and administrative law doctrine governing judicial deference to agency statutory interpretation. This Subsection briefly considers these recommendations and draws from the scholarly disputes surrounding them to identify potential drawbacks of this Note's own proposal.

First, courts can apply the lessons of the sequential model in interpreting Article I, Section 7 itself. Thus, Eskridge and Ferejohn argue that the *Chadha* Court's decision to invalidate the legislative veto arguably extinguished an important mechanism for restoring the original balance to federal lawmaking.<sup>75</sup> Political theorists are far from unanimous, however, in their support for the legislative veto. Jessica Korn, among others, cautions against exaggerating the practical value of this procedure relative to less formal congressional oversight tools.<sup>76</sup> The significance of the legislative veto, Korn argues, was primarily symbolic, and it "never functioned as a significant mechanism for affecting policy outcomes."<sup>77</sup>

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74. Arguably, the nondelegation doctrine does survive as an avoidance canon in statutory interpretation. See John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 242-46.

75. See *supra* text accompanying note 59.

76. See Jessica Korn, *The Legislative Veto and the Limits of Public Choice Analysis*, 109 POL. SCI. Q. 873 (1994-1995); see also Peter L. Strauss & Andrew R. Rutten, *The Game of Politics and Law: A Response to Eskridge and Ferejohn*, 8 J.L. ECON. & ORG. 205, 205-08 (1992).

77. Korn, *supra* note 76, at 889. Korn's argument certainly undermines Justice White's assertion that the significance of the veto "can hardly be overstated," *INS v. Chadha*, 462 U.S. 919, 967 (1983) (White, J., dissenting). But this attack proves less persuasive against Eskridge and Ferejohn, whose analysis does not appear to depend on a functional claim that the legislative veto ranks high among congressional oversight tools. They argue instead that a game-theoretic view of Article I, Section 7 would treat the legislative veto as constitutionally defensible. See, e.g., Eskridge & Ferejohn, *supra* note 51, at 167 ("Contrary to *Chadha*, it is not clear that the

Of course, federal courts do not merely arbitrate the structural rules of the lawmaking contest; they also interpret this contest's product—statutory law. The second set of compensating changes proposed by scholars affects this interpretive function. Consistent with the Article I, Section 7 model, Eskridge and Ferejohn have recommended that courts consider legislative history when interpreting statutes, since such background may help “to locate the original equilibrium point, [X],” and thus to expose the agency's efforts to shift policy to  $X_A$ .<sup>78</sup>

In response, Daniel Rodriguez observes that an interpretation that tracks legislative intent may conflict with other conceivable implications of the sequential analysis, such as enforcement of the nondelegation doctrine.<sup>79</sup> He notes that “an interpretation that effectively narrows the scope of the delegation may or may not be good policy, but it is *not* interpretation that is strictly faithful to legislative will.”<sup>80</sup> In short, applying the Article I, Section 7 game to statutory interpretation reveals that efforts to counteract the pro-President bias may themselves become insensitive to congressional directives.

Third, Eskridge and Ferejohn have used game-theoretic analysis to critique administrative law's deferential approach to reviewing agency action. In his work with Charles Shipan, Ferejohn has demonstrated that judicial review “can be a ‘democratic’ device that induces the agency to be more responsive to congressional preferences than it would be without such a mechanism.”<sup>81</sup> However, in *Chevron U.S.A. v. Natural Resources Defense Council*, the Court held that “considerable weight should be accorded [by courts] to an executive department's construction of a statutory scheme it is entrusted to administer.”<sup>82</sup> It thus cautioned the judiciary against “substitut[ing] its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>83</sup> For Eskridge and Ferejohn, *Chevron's* deference represents a missed opportunity to redress

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legislative veto of agency rule-making violates the original understanding if that understanding is viewed structurally.”)

78. Eskridge & Ferejohn, *supra* note 3, at 551.

79. See Rodriguez, *supra* note 72, at 201.

80. *Id.* There are at least two possible responses to Rodriguez's critique. First, the statutory interpretation doctrine *implements* legislative directives, while the nondelegation doctrine *restricts* the permissible range of such directives. One should hardly be surprised that the former is more “faithful to legislative will” than the latter. Second, as Rodriguez acknowledges, Eskridge and Ferejohn refuse to rely on reviving the nondelegation doctrine, perhaps because such revival is politically unlikely. See *supra* notes 72-74 and accompanying text. One can thus hardly fault Eskridge and Ferejohn for exploring more achievable recommendations.

81. Ferejohn & Shipan, *supra* note 2, at 17. As Ferejohn and Shipan acknowledge, they are referring to the statutory preferences of the Congress at the time of judicial review, not of the enacting Congress. *Id.*

82. 467 U.S. 837, 844 (1984).

83. *Id.*

the pro-President bias in constitutional policymaking. After all, “[i]f there is sufficient evidence in the statute or the legislative history for the original policy equilibrium in the statute, and if judges saw their role as enforcing such statutory guidance, then judicial review becomes a powerful mechanism for redressing at least some of the constitutional imbalance.”<sup>84</sup> In other words, if courts could successfully use statutory interpretation techniques to identify point *X* in Figure 2, they could enforce statutory directives by overturning agency interpretations at  $X_A$ .

This criticism of *Chevron* has not received a uniformly warm reception from scholars, some of whom question judicial competence to second-guess agency interpretations. Peter Strauss and Andrew Rutten, for example, respond that agencies are generally “better readers . . . of the state of political play” than judges.<sup>85</sup> Moreover, courts have historically proven to be a reactionary force against regulatory changes to the status quo.<sup>86</sup> Rodriguez likewise warns that the game-theoretic attack on *Chevron* rests “on the claim that the original understanding contemplates that courts will take all deliberate steps necessary to hinder the power of the president to control regulatory policy.”<sup>87</sup> Such hindrance, he warns, may itself be “purchased at the price of other values, such as judicial restraint.”<sup>88</sup>

Whether scholarly critics have successfully repelled the recommendations that Eskridge and Ferejohn draw from their game-theoretic analysis remains uncertain—and this Note does not weigh in on the issue. Instead, these debates are notable for articulating important limiting principles for the normative implications of the Article I, Section 7 game: Proposals for compensating reforms must recognize informal oversight mechanisms, respect congressional will, and acknowledge the boundaries of judicial competence. It is with these constraints in mind that the next Part extends the Article I, Section 7 game to new territory—administrative law remedies.

## II. A NEW PLAYING FIELD: REMEDIAL CHOICE IN ADMINISTRATIVE LAW

Now that the thick methodological brush has been cleared, this Part seeks to expand the list of judicial functions implicated by the Article I, Section 7 game. It argues that courts can advance the sequential structure of bicameralism and presentment when they select remedies to cure administrative law violations. A former chief judge of the D.C. Circuit has

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84. Eskridge & Ferejohn, *supra* note 3, at 548.

85. Strauss & Rutten, *supra* note 76, at 210.

86. *See id.* at 208-09.

87. Rodriguez, *supra* note 72, at 202.

88. *Id.* (emphasis omitted).

succinctly summarized the two remedial options facing the courts: “When an agency rule is remanded because of a faulty explanation, the court is faced with the choice of whether to vacate the rule until an adequate explanation is forthcoming or leave it in place until the new rationale comes up again for review.”<sup>89</sup> (To make matters a bit clearer, this Note will use the word “remand” to describe only the latter remedy.) The legal and policy dimensions of this choice have recently become a subject of scholarly dispute.<sup>90</sup> This Note does not seek to join this dispute directly, but rather to explore how the sequential understanding of Article I, Section 7 might inform it.

Section A analyzes remedial choice in administrative law by applying the sequential model outlined in Part I. As it turns out, the two remedial options—vacatur and remand without vacatur—may lead to systematically different policy outcomes. There is a simple intuition behind this finding: Deciding whether or not to vacate a rule can become the functional equivalent of deciding where to place the default policy. As Subsection I.B.1 demonstrated, the placement of the default policy can affect legislative outcomes; indeed, it can determine whether any statute can muster enough support to meet the requirements of bicameralism and presentment. Applying this sequential understanding to administrative law remedies reveals that, under certain plausible assumptions, vacatur is more likely than remand to elicit a statutory correction to the administrative rule, and thereby to ameliorate the pro-President bias of the Article I, Section 7 game. The structure of bicameralism and presentment therefore counsels in favor of vacatur as the presumptive remedy in administrative law (a presumption that can be rebutted when one of the aforementioned assumptions fails to hold). Section A concludes by assessing this presumptive vacatur approach in light of the criticisms encountered by other proposals to restore the original balance to Article I, Section 7.

Following this theoretical discussion, Section B investigates how today’s courts make their remedial decisions and finds presumptive vacatur decidedly out of sync with recent trends. Courts increasingly choose to remand deficient rules back to agencies without vacatur, under a test developed in *Allied-Signal v. United States Nuclear Regulatory Commission*<sup>91</sup>—a test that does not respond to the original structure of

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89. Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 236 (1996).

90. Compare Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 SETON HALL L. REV. 108 (2001) (arguing that remand without vacatur is illegal under the Administrative Procedure Act), with Ronald M. Levin, “Vacation” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003) (defending the legitimacy of remand without vacatur).

91. 988 F.2d 146 (D.C. Cir. 1993).

Article I, Section 7. Because this Note focuses narrowly on the dynamics of bicameralism and presentment, and thus does not fully engage with other dimensions of remedial choice, it shall not advocate that *Allied-Signal* be abandoned on public policy grounds. However, Section B makes a preliminary effort to link the presumptive vacatur proposal to an important statutory interpretation dispute triggered by remedial choice.

A. *Presumptive Vacatur: A Winning Move in the Article I, Section 7 Game*

To appreciate the game-theoretic significance of the remedial decision, consider again the scenarios illustrated by Figure 2. Assume once more that Congress delegates rulemaking authority to agency *A*, expecting it to adopt policy *X*. Then, for reasons discussed in Subsection I.B.2, the agency adopts policy  $X_A$ . Assume further that a court finds the agency's action arbitrary and capricious, in violation of the Administrative Procedure Act. What remedial options are available? The court may remand the rule back to the agency without vacating it, thus leaving the policy at point  $X_A$  for the time being. Importantly, throughout this period, Congress cannot alter the agency's rule by statute, because as earlier discussion has shown, no veto-proof bill can overturn policy  $X_A$ . Thus, while the rule is awaiting agency reconsideration on remand, policy continues to be biased in the President's favor.

Furthermore, as it reconsiders its rule on remand, the agency faces the same incentives that caused it to select  $X_A$  in the first place. The agency may, of course, shift policy in the direction of *X* in order to avoid repeated judicial reversal.<sup>92</sup> More likely, however, the agency will invest in additional fact-finding and legal ingenuity to end up, on reconsideration, back where it began—policy  $X_A$ .<sup>93</sup> Whichever road the agency takes, the outcome is not likely to be *X*—the policy result anticipated by the original structure of Article I, Section 7. It is perhaps worth noting again that, as long as policy  $X_A$  remains in place throughout the reconsideration process, Congress will be unable to override it by statute.

The game plays out much differently if a court vacates the agency's "arbitrary and capricious" rule. In both Case 2A and Case 2D, the policy

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92. The implied assumption is that the closer administrative policy  $X_A$  stays to statutory guideline *X*, the less likely a court will be to overturn it.

93. Courts have generally permitted an agency that has originally offered inadequate justification for its decision to reach exactly the same decision on remand. *See, e.g.*, *Bowen v. Hood*, 202 F.3d 1211, 1219 (9th Cir. 2000) ("It can hardly be doubted that 'an agency is free on remand to reach the same result by applying a different rationale.'" (quoting *Ariz. Elec. Power Coop. v. United States*, 816 F.2d 1366, 1373 (9th Cir. 1987))); *Peabody Coal Co. v. Helms*, 901 F.2d 571, 574 (7th Cir. 1990) ("Perhaps on remand the agency can demonstrate that its decision really is supported by substantial evidence.").

reverts to the default position  $SQ$  upon vacatur. The results would replicate those in Figure 1, and, as Subsection I.B.1 described, Congress will proceed to enact a new statute at  $X$ .<sup>94</sup> However, anticipating that the agency will subsequently attempt to shift the policy leftward to  $X_A$  (as the agency had done prior to the court's vacatur), Congress will have every incentive to legislate with specificity and limit delegation to the agency.<sup>95</sup> Assuming Congress can legislate with specificity and avoid agency delegation, the new equilibrium will be at  $X$ , precisely where the Founders anticipated. If some agency delegation is unavoidable, we should nonetheless expect Congress to restrict, to the best of its ability, the agency's discretion to move policy  $X$  to the left. This, at least, will reduce the extent to which the administrative state can bias the original design of Article I, Section 7.

Would frequent judicial use of the vacatur remedy force Congress to constantly rewrite administrative rules? Hardly. Not every vacated rule will lead to legislation, nor should it. First, the alignment of preferences may be such that Congress will readily acquiesce to the agency's rule. If no new legislation is enacted, the agency will eventually adopt a new rule, and the vacatur remedy will have little impact. Second, the possibility of an override may alone prove sufficient to deter agencies *ex ante* from enacting rules that do not conform with the congressional mainstream. Finally, Congress may simply choose to prioritize its use of override legislation. The point is that Congress would have the option to enact new legislation overriding the rule—an option that may only be available after a vacatur remedy when the policy returns to the default position  $SQ$ .

Thus, the game-theoretic view of the administrative state suggests that the following remedial paradigm best reflects the design of Article I, Section 7: Courts should treat vacatur as the presumptive remedy whenever agency rulemaking strays from statutory design, and this presumption should be rebutted only when one of the assumptions underlying the

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94. This assumes that the distribution of congressional preferences remains unchanged since the enactment of the original statute at  $X$  and that Congress can act before the agency replaces the default policy with its own new rule. Given the extensive rulemaking requirements of the Administrative Procedure Act—requirements that do not, of course, apply to statutory lawmaking—the latter assumption should not appear farfetched. And, as the case study in Part III illustrates, salient regulatory policies can sometimes attract immediate attention from Congress.

95. Recent work on legislative overrides of judicial decisions suggests that, on balance, congressional overrides prove significantly more precise than original statutes. See JEB BARNES, *OVERRULED?: LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS* 90 (2004) (reporting a fivefold increase in judicial consensus on statutory interpretation following a legislative override). In his recent defense of remand without vacatur, Ronald Levin suggests that the actual likelihood of congressional override is “usually remote.” Levin, *supra* note 90, at 343. Estimating Congress's capacity for override legislation is difficult, but some observers suggest that overrides are gaining popularity. For example, a recent study reports that the ratio between overrides of judicial decisions and judicial appointments has climbed since the mid-1970s “from 1 to 6.5 to about 1 to 3.” BARNES, *supra*, at 44.

foregoing analysis does not hold. The court, for example, may have reasons to remand without vacatur if it believes that the agency's new rule on remand will not simply reenact policy  $X_A$ —perhaps because the court's remand order requires the agency to consider a specific issue or fact that makes  $X_A$  untenable. Alternatively, the court may find that the substantive policy at hand is one that makes it impossible for Congress to legislate with more specificity or to further limit agency delegation.<sup>96</sup> In all other cases, a defective rule must be vacated. For simplicity, this Note will call this approach to remedies “presumptive vacatur.” The case study in Part III illustrates the presumptive vacatur proposal further—this time in the less abstract context of a specific regulatory problem.

Before concluding this theoretical discussion of administrative law remedies, it is worth inquiring whether presumptive vacatur is susceptible to the same criticisms encountered by other efforts to restore balance to the Article I, Section 7 game. The first of these criticisms suggests that proposed compensating strategies operate at a high level of abstraction and therefore ignore informal political tactics. A version of this critique can be waged against the presumptive vacatur proposal: In particular, some may consider this Note's assertion that an administrative agency can defend policy  $X_A$  on remand to be politically naive. After all, the initial judicial finding that the agency's rule is defective will focus congressional attention on the agency's pro-President machinations.<sup>97</sup> Legislative opponents of policy  $X_A$  would then use judicial disapproval as an excuse to wield their informal oversight tools and pull the agency's post-remand rule toward statutory policy  $X$ .

Although this criticism is certainly plausible, this Note's sequential model suggests that quite the opposite may happen: In Case 2D, the remand can perversely give the agency political cover for maintaining its policy at  $X_A$  despite informal political pressure. Suppose that the agency conducts additional fact-finding and, on reconsideration, proposes a new rule on remand, which (consistent with the agency's initial incentives) remains substantively identical to its original rule  $X_A$ . Suppose also that Congress responds by urging, through its oversight authority, that the agency issue a

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96. In other words, the court would question the assumption of the sequential model in Section I.A that statutory enactment is costless. Courts, of course, are not in the business of predicting congressional reactions, but a case can be made that judges remain attuned to the preferences of legislators. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (arguing that the intentions of the current Congress are more likely to influence the Court's statutory interpretation decisions than are the intentions of the enacting Congress and exploring the normative implications of this finding).

97. This congressional reliance on “fire alarms” would not necessarily signal legislative abrogation of oversight responsibility; instead, it appears consistent with one classic approach to oversight. See Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

different rule, one closer to  $X$ . To this request, the agency may offer an important rejoinder. Any changes to the proposed rule will cause substantial delay, the agency will argue. And time is of the essence on remand, since the original rule  $X_A$  is fast becoming “unenforceable”—that is, the courts may soon begin to refuse enforcement of a rule they have already declared contrary to administrative law.<sup>98</sup> If courts stop enforcing (that is, effectively vacate)  $X_A$  before the new remand rule is enacted, policy will default to  $SQ$ . Importantly, as unappealing as the new rule appears to most members of Congress, it is still superior to  $SQ$ .<sup>99</sup> Congress may consequently prove reluctant to use its oversight tools aggressively and will therefore acquiesce in the agency’s proposed new rule.<sup>100</sup> It is worth recalling that, throughout this interaction, policy remains at  $X_A$ . Congress therefore cannot enact a specific statute requiring the agency to adopt policy  $X$  because no such statute will be veto proof. (Its efforts to override the agency decision through stand-alone legislation frustrated, Congress may resort to passing an appropriations rider. As Subsection I.B.3 argued, this solution is inconsistent with Article I, Section 7 and should be avoided.) This political cover story is, of course, highly abstract, and it will benefit from a concrete illustration in Part III. For now, it merely suggests that the dynamics of informal oversight may sometimes strengthen, rather than undermine, the presumptive vacatur proposal.

What of the charges that compliance with the original design of Article I, Section 7 “is purchased at the price of other constitutional values, such as judicial restraint and fidelity to Congress’s will”?<sup>101</sup> Concerns about obeying congressional will are easier to answer: This Note advocates presumptive vacatur precisely because it invites specific statutory guidance from the legislature. Arguably, presumptive vacatur may advance judicial restraint as well. At first blush, remand seems to be the remedy more characteristic of a deferential judiciary than vacatur.<sup>102</sup> However, vacatur implicitly recognizes the limits of judicial competence by leaving Congress

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98. See Levin, *supra* note 90, at 385, 384-85 (collecting cases where the courts have accompanied remands with implementation timelines and “other techniques” to prevent “unduly dilatory bureaucratic behavior”).

99. Because the same dynamic will not occur in Case 2A (where  $SQ$  is located further to the right), this analysis is limited to Case 2D.

100. Notably, this analysis relies on the assumption that political actors do not engage in sophisticated voting: That is, members of Congress will not seek to replace  $X_A$  with the less-favored default policy  $SQ$  in order to later override  $SQ$  with  $X$ . See *supra* note 26.

101. Rodriguez, *supra* note 72, at 202 (emphasis omitted).

102. Jerry Mashaw, however, dispels such notions in the context of the judicial avoidance canon, the rule that courts should construe statutes to avoid constitutional problems. This canon, he argues, “may be precisely backwards”: “[E]ven if [the court] invalidates the law, it at least returns the legislature to the status quo ante and gives the legislature a more realistic chance of concocting a constitutional policy that is close to its most-preferred position.” MASHAW, *supra* note 1, at 105.

every option: Congress may legislate with more specificity, steering the agency closer to policy X; Congress may do nothing, allowing the agency to enact a new rule (even if it is functionally identical to the old rule  $X_A$ ); or Congress may grant the agency authority to apply its new rule retroactively.<sup>103</sup> By contrast, as the Article I, Section 7 game reveals, judicial remand without vacatur can take the first of these three congressional options off the table. In that sense, the presumptive vacatur proposal can be squared with the value of judicial restraint.<sup>104</sup> The proposal does not, therefore, appear to fall under the weight of criticisms made against other efforts to rid Article I, Section 7 of its pro-President bias. But the discussion has so far proceeded on a theoretical level, and the time has come to juxtapose presumptive vacatur with the current doctrine of administrative law remedies.

### B. *Leaving the Allied-Signal Test Behind*

The current trend in federal courts' remedial approach bears little resemblance to the recommendations of this Note's sequential model. Vacatur indeed served as the presumptive remedy in administrative law until the early 1990s,<sup>105</sup> but more recent jurisprudence, particularly in the D.C. Circuit, has shifted toward more frequent remands without vacatur.<sup>106</sup>

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103. An alternative formulation of this argument is that presumptive vacatur advances the "fire alarm" mode of congressional oversight. See McCubbins & Schwartz, *supra* note 97, at 166. When the court sounds an alarm by finding a rule arbitrary and capricious, Congress should enjoy all its oversight options.

104. Judge Sentelle of the D.C. Circuit has likewise recently argued that remand without vacatur represents an excess of judicial discretion, though he emphasized usurpation of executive, rather than legislative, prerogatives. See *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 758 (D.C. Cir. 2002) ("[W]hen we hold that the conclusion heretofore improperly reached should remain in effect, we are substituting our decision of an appropriate resolution for that of the agency to whom the proposition was legislatively entrusted."). For a critique of Judge Sentelle's position, see Levin, *supra* note 90, at 371-73.

105. See Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 75 (1995); Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805, 819-20 (1999). For further discussion of the pre-1990s practice, see Prestes, *supra* note 90, at 111-14.

106. See, e.g., *United Mine Workers v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990) ("As the record affords us no basis for concluding that the deficiencies of the order will prove substantively fatal, we remand the case but do not vacate."). For other examples, see cases collected in Levin, *supra* note 90, at 299-300 nn. 30-31. See also Prestes, *supra* note 90, at 111 (calling remand without vacatur the new "standard operating procedure"); cf. Wald, *supra* note 89, at 236 (stating that, when it comes to choosing between vacating a rule or remanding it for agency reconsideration, the "wait-and-see modus operandi"—that is, the pro-remand camp—"appears in the lead" (emphasis omitted)). Other scholars have acknowledged this trend but expressed doubt that it has reached the status of "standard operating procedure." See Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. CHI. L. REV. 1763, 1821-22 (2002). Courts appear more likely to vacate when an agency rule improperly interprets a statute, see, e.g.,

The judiciary's unfavorable treatment of vacatur has been traced to the effects of the Supreme Court's 1988 holding in *Bowen v. Georgetown University Hospital* that "a statutory grant of legislative rulemaking authority [to an agency] will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."<sup>107</sup> After *Bowen*, an agency rule enacted in Year 1 and vacated by a court in Year 2 could no longer be made retroactive after the agency cured the defect in Year 3—at least not without explicit congressional authorization. As a result, concluded Richard Pierce, the perceived "increased disruptive effects [of vacatur] convinced the D.C. Circuit to adopt its new preference for the remand without vacation remedy."<sup>108</sup> This Section critiques this preference from the Article I, Section 7 perspective.

The D.C. Circuit articulated its leading test for selecting a remedy in *Allied-Signal*: "The decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'"<sup>109</sup> For several reasons, this two-pronged test proves unhelpful in preserving the original design of Article I, Section 7.

To begin with, the *Allied-Signal* test reflects a presumption *against* vacatur. Most administrative rules, even those found to be arbitrary and capricious, can meet the first prong of this test because there exists a possibility that the agency will cure their defects on remand. As Pierce observed,

I am not sure I have ever encountered a case in which a court held that an agency failed to comply with the duty to engage in reasoned decisionmaking in some respect, . . . and in which the court could reach a good faith conclusion that there is no "serious possibility that the [agency] will be able to substantiate its decision on remand."<sup>110</sup>

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Sierra Club v. EPA, 992 F.2d 337, 343 (D.C. Cir. 1993), than when the rule is found "arbitrary and capricious."

107. 488 U.S. 204, 208 (1988). For one scholar's discussion of the influence of *Bowen*, see Levin, *supra* note 90, at 300 (citing Pierce, *supra* note 105, at 76-78).

108. Pierce, *supra* note 105, at 77.

109. *Allied-Signal v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (quoting *United Mine Workers*, 920 F.2d at 967); see also Revesz, *supra* note 105, at 820 ("The move toward a somewhat liberal use of remands without vacation is generally traced to *Allied-Signal v. NRC* . . ."). For recent decisions citing the *Allied-Signal* test with approval, see, for example, *Louisiana Federal Land Bank Ass'n v. Farm Credit Administration*, 336 F.3d 1075, 1085 (D.C. Cir. 2003); and *Milk Train*, 310 F.3d at 755-56.

110. Pierce, *supra* note 105, at 76 (quoting *Allied-Signal*, 988 F.2d at 151) (alteration in original).

In the words of another commentator, the problem is not intellectual dishonesty on the part of appellate courts,

but rather that given the lax standard applied in these cases, a rigorous consideration of the myriad justifications for a given rule will often turn up explanations sufficient to create a serious possibility that an agency will be able to substantiate its decision on remand. This is especially true when any conceivable explanation counts as evidence of a serious possibility.<sup>111</sup>

Nor does the second prong of the test erect a substantial barrier against remands without vacatur: After the *Bowen* holding, vacating any purposive rule can potentially cause “disruptive consequences.”<sup>112</sup> In short, the *Allied-Signal* test effectively reverses the presumptive vacatur approach suggested by the structure of Article I, Section 7.

Moreover, each prong of the *Allied-Signal* test presents additional concerns. The first prong—the seriousness of the agency rule’s deficiencies—generates results opposite of those suggested by the Article I, Section 7 game. It would remand the rule to an agency precisely when, in the judgment of the court, the agency will find it easiest to reinstate policy  $X_A$  through additional justification. From the Article I, Section 7 perspective, this is precisely the biased outcome to be avoided. Worse yet, Congress would be unable to halt this reinstatement by enacting a more specific statute  $X$ , because such a statute will not survive a veto. This Note proposes to turn the first *Allied-Signal* prong on its head: When the deficiency of the agency rule is such that  $X_A$  would likely be reinstated on remand, the court should vacate that rule. By disturbing the equilibrium outcome, vacatur opens the door for Congress to issue more specific guidance. The sequential model in Part I suggests that this new statutory guidance will reflect policy  $X$ —the policy that the original structure of Article I, Section 7 anticipated.

The second prong of the *Allied-Signal* test, which urges courts to remand defective rules whenever vacatur might cause “disruptive consequences,” fares little better. It reflects a fear that, by vacating agency rules, courts create a temporary regulatory vacuum and open the door to opportunistic behavior by the regulated industry—a danger that has been made more salient by *Bowen*.

However, the threat of disruption looks less worrisome once Article I, Section 7 dynamics are taken into account. While the *Allied-Signal* test treats agency decisions deferentially, this Note’s sequential analysis charges

111. Prestes, *supra* note 90, at 121 (footnotes and internal quotation marks omitted).

112. See Pierce, *supra* note 105, at 76.

courts with a different responsibility—restoring the constitutional design for federal lawmaking. Vacatur is effective precisely because it threatens to reinstate the potentially disruptive default position. The possibility of disruption, in turn, shakes Congress from its equilibrium-induced slumber, allowing it to legislate with specificity. Put differently, the disruptive effect of the court's remedy is directly related to the probability of a specific (and veto-proof) congressional response. In order to encourage the latter, courts must risk the former.

Indeed, post-*Bowen* concerns prove less salient when courts vacate administrative rules in anticipation of a congressional response. As the *Bowen* Court acknowledged, an agency may apply its rules retroactively if expressly authorized to do so by Congress.<sup>113</sup> Since the vacating court expects Congress to enact a (more specific) statute before the agency issues further rules, legislators will have an opportunity to cure disruptive interim transactions by adopting a statutory retroactivity provision.<sup>114</sup> Regulated industries, in turn, are sophisticated political players; they anticipate that taking advantage of a regulatory vacuum will merely invite retroactive legislation. Thus, in light of an anticipated congressional response, the danger of interim disruption is not a persuasive justification for avoiding vacatur. Besides, policy solutions to disruptive events are best designed by the legislature, not the judiciary. To put this point differently, the main risk of vacating the rule is not an overly disruptive default policy but an insufficiently responsive legislature. The second prong of the *Allied-Signal* test is flawed because it concerns itself with preventing disruption without inviting courts to consider the crucial question of the likely congressional response.

So far, this Part has argued that presumptive vacatur is the remedial approach most consistent with the original structure of Article I, Section 7—and that the *Allied-Signal* test is not. As a statement of constitutional principle, this argument has independent legal significance. One may, however, argue that its practical usefulness in a court of law is hampered by the fact that the language of the Constitution itself is predictably silent about administrative law remedies.<sup>115</sup> Is there an easier legal “hook” on

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113. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

114. Moreover, an agency may shortcut the statutory notice-and-comment process when it demonstrates that doing otherwise would be “impracticable, unnecessary, or contrary to the public interest,” 5 U.S.C. § 553(b)(B) (2000). For contrasting perspectives on whether such a shortcut can prevent post-vacatur disruptions, compare Prestes, *supra* note 90, at 127-28, with Levin, *supra* note 90, at 303-04.

115. In particular, one may object that Article I, Section 7 is a precisely worded constitutional provision, and thus judges should not use its broader purposes to inform policies that, like administrative law remedies, are not explicitly addressed in its text. John Manning recently articulated such a “precise constitutional text” argument as a critique of modern sovereign immunity doctrine. See Manning, *supra* note 62. This Note’s use of Article I, Section 7 to inform

which one can hang the presumptive vacatur proposal? This theoretical Note is not the place to explore this question fully, but this Section will conclude by exploring one argument based on section 706 of the Administrative Procedure Act (APA).<sup>116</sup>

Section 706, which governs judicial review of administrative decisions, states that “[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>117</sup> One member of the D.C. Circuit has prominently argued that the courts’ failure to vacate agency rules after finding them “arbitrary and capricious” contradicts the plain language of section 706. In a separate opinion in *Checkosky v. SEC*, Judge Randolph wrote,

Once a reviewing court determines that the agency has not adequately explained its decision, the Administrative Procedure Act requires the court—in the absence of any contrary statute—to vacate the agency’s action. The Administrative Procedure Act states this in the clearest possible terms. Section 706(2)(A) provides that a “reviewing court” faced with an arbitrary and capricious agency decision “shall”—*not may*—“hold unlawful and set aside” the agency action. Setting aside means vacating; no other meaning is apparent.<sup>118</sup>

Judge Randolph’s analysis has not so far been adopted by a majority of his fellow jurists<sup>119</sup>—indeed, it stands in stark contrast to the *Allied-Signal* test. Perhaps Article I, Section 7 can help. While this Note’s analysis is methodologically distinct from Judge Randolph’s textualist reading of the APA, their conclusions converge. If, as this Note argues, the vacatur

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administrative law remedies can, however, elude this critique. Manning disparages efforts to expand the scope of sovereign immunity beyond the text of the Eleventh Amendment because the text reflects its drafters’ choice to go “so far and no farther.” *Id.* at 1665. Sovereign immunity was, of course, a matter of some salience in the late eighteenth century. The same cannot be said of administrative law remedies, and one can hardly treat the Founders’ failure to mention these remedies in Article I, Section 7 as a conscious omission. Indeed, it is telling that, in his other scholarship, Manning himself uses Article I, Section 7 to inform statutory interpretation doctrine. See Manning, *supra* note 58, at 70-78.

116. 5 U.S.C. § 706.

117. *Id.* § 706(2)(A).

118. *Checkosky v. SEC (In re Checkosky)*, 23 F.3d 452, 491 (D.C. Cir. 1994) (opinion of Randolph, J.) (citation and footnote omitted); see also Prestes, *supra* note 90, at 129-50 (analyzing the text and legislative history of the APA to show that the remedy of remanding without vacatur is unlawful). For a critique of Judge Randolph’s position, see Levin, *supra* note 90, at 309-15.

119. However, it has recently been echoed by Judge Sentelle. See *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757 (D.C. Cir. 2002) (Sentelle, J., dissenting). Moreover, Levin, a persuasive advocate of remand without vacatur, has recently highlighted deliberations among Supreme Court Justices, at least some of whom appear “likely to entertain some doubts about” that remedial practice. Levin, *supra* note 90, at 352-53, 351-54.

remedy best supports the original structure of Article I, Section 7, then Judge Randolph's position should receive the benefit of an additional thumb on the scales in statutory construction of the APA. After all, the Court has held that statutes should not be interpreted in derogation of certain constitutional norms unless Congress has required such derogation with unambiguous language.<sup>120</sup> Judge Randolph's interpretation of the APA may prevail when aided by a similar clear-statement rule favoring the original design of Article I, Section 7.

In summary, the structure of Article I, Section 7 can inform courts' remedial choices in administrative law. Its dynamics favor a presumption in favor of vacating defective agency rules. This presumption is not simply a punitive measure designed to improve agency compliance with administrative law, though this is certainly one virtue of vacatur.<sup>121</sup> Instead, this Note uses a simple sequential model to show that vacatur also advances the original structure of constitutional lawmaking by giving Congress incentives to replace defective agency rules with specific legislation. The presumption in favor of vacating arbitrary and capricious rules should only be lifted in limited circumstances, and the reigning *Allied-Signal* test fails to identify these circumstances properly.

But theory is not enough: This Note's proposal for selecting administrative law remedies should prove workable outside the hypothetical world of formal models (and the entourage of simplifying assumptions that accompanies such models). In an effort to assess the practicability of the proposal, Part III poses two questions: Is the presumptive vacatur proposal operational enough to guide a court in any given case? Can the game-theoretic model on which the proposal rests accurately predict the consequences of judicial remedies? In an inquiry that is more preliminary and illustrative than conclusive, Part III pursues these questions through a case study of national television station ownership regulation.

### III. MEDIA-OWNERSHIP RULES: A CASE STUDY OF REMEDIAL ERROR

In June 2003, the Federal Communications Commission announced a sweeping relaxation of the nation's media-ownership rules. "[L]ike a distant echo from the past," the existing rules did not address the reality of modern

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120. Perhaps the best known of these clear-statement rules relates to federalism principles. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

121. Pierce, who supports the *Allied-Signal* test, acknowledges that "agencies will take the duty to engage in reasoned decisionmaking less seriously in the absence of a significant risk of vacation" and that "the cost of the [*Allied-Signal*] doctrine will take the form of loss of some portion of the benefits of compelling agencies to comply with that duty." Pierce, *supra* note 105, at 78.

communications markets and technologies, the agency argued.<sup>122</sup> It took particular aim at a rule limiting television networks' ability to own affiliates nationwide—the so-called national television station ownership (NTSO) rule—and lifted this cap from the statutory ceiling of thirty-five percent<sup>123</sup> to forty-five percent.<sup>124</sup>

The FCC's conclusion hardly reflected a national consensus; in fact, an unorthodox coalition had campaigned vocally against relaxing ownership rules. Several liberal groups ran a dramatic advertisement in the *New York Times*: four television screens, each representing a major network, all broadcasting the face of Rupert Murdoch. The ad declared, "This Man Wants to Control the News in America. The FCC Wants to Help Him."<sup>125</sup> Meanwhile, members of the National Rifle Association, concerned about domination by "gun-hating media giants,"<sup>126</sup> barraged the FCC with 300,000 postcards.<sup>127</sup> As the five commissioners prepared to vote on the media-ownership rules, the *Washington Post* reported that the agency's "voice- and e-mail systems were temporarily shut down by a deluge of public comments."<sup>128</sup>

The mayhem that preceded the FCC's decision merely foreshadowed the chaos that followed. Members of both chambers of Congress attempted to repeal the rule, using new legislation, a form of the legislative veto, and the appropriations process. In the meantime, the Bush Administration threatened to veto any congressional interference with the Commission's decision. Eventually, an eleventh-hour compromise on the NTSO rule brought the interbranch stalemate to an end. Figure 3 highlights key events between the FCC's decision and this compromise.

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122. In the Matter of 2002 Biennial Regulatory Review, 18 F.C.C.R. 13,620, 13,623 (June 2, 2003) [hereinafter 2002 Biennial Regulatory Review].

123. See *infra* note 142 and accompanying text.

124. The newly issued NTSO rule read, in relevant part, "No license for a commercial television broadcast station shall be granted . . . if the grant . . . would result in such party . . . having a cognizable interest in television stations which have an aggregate national audience reach exceeding forty-five (45) percent." 47 C.F.R. § 73.3555(d)(1) (2003) (emphasis added).

125. For an image of the advertisement, see [http://www.dvmx.com/Murdoch\\_nyt.pdf](http://www.dvmx.com/Murdoch_nyt.pdf) (last visited Oct. 17, 2004).

126. Editorial, *Who Can Own Media?*, WASH. POST, May 31, 2003, at A18 (internal quotation marks omitted).

127. See Frank Ahrens, *FCC Plan To Alter Media Rules Spurs Growing Debate*, WASH. POST, May 28, 2003, at A1.

128. Frank Ahrens, *FCC Set To Vote on Easing Media Ownership Rules*, WASH. POST, June 2, 2003, at A6.

FIGURE 3. NTSO CASE STUDY CHRONOLOGY

June 2, 2003: FCC adopts new media ownership rules, including relaxation of NTSO ceiling to 45%

June 4, 2003: Senate resolution to rescind FCC's new rules introduced

June 12, 2003: House bill to invalidate FCC's new rules introduced

June 19, 2003: Senate Commerce Committee favorably reports bill that would restore NTSO ceiling to 35%

July 15, 2003: Senate "resolution of disapproval" of FCC's new rules submitted

July 16, 2003: House Appropriations Committee amends appropriations bill to reinstate 35% ceiling

July 22, 2003: OMB statement indicates that Bush Administration will veto appropriations bill that reverses FCC's new rules

July 23, 2003: House approves appropriations bill reinstating 35% ceiling

September 16, 2003: Senate adopts "resolution of disapproval" toward FCC's new rules

November 2003: Compromise 39% ceiling included in appropriations legislation

This Part discusses the political fallout from the FCC's decision as it relates to administrative law remedies. The agency promulgated its June 2003 rule on remand from the D.C. Circuit. That court had found the FCC's earlier action on the NTSO rule arbitrary and capricious in *Fox Television Stations v. FCC*, but declined to vacate it.<sup>129</sup> Applying the sequential model of Article I, Section 7, this Part argues that the court chose its remedy improvidently.

Section A provides basic background on media-ownership rules, focusing on the NTSO rule's history prior to the *Fox* decision. Section B critically examines the choice of remedies in *Fox*. It applies the test developed earlier in this Note and finds that the court erred by remanding the rule to the FCC without vacating it. Finally, Section C explores the aftermath of *Fox*. It finds subsequent events broadly consistent with the predictions of the sequential model.

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129. 280 F.3d 1027, 1045 (D.C. Cir. 2002).

A. *Before Fox: A Brief Regulatory History*

Regulation of national television ownership began at the dawn of the industry itself. In 1940, the Commission decided that no more than three stations nationwide could be owned by the same entity.<sup>130</sup> Although the number of television stations expanded dramatically following World War II,<sup>131</sup> the FCC continued to favor “an absolute numerical limit of stations under common ownership, without regard to population served, size of station, or changes in the media market.”<sup>132</sup> By the early 1950s, this limit rose to seven stations,<sup>133</sup> where it remained for thirty years.

By 1984, broader deregulatory trends compelled the FCC to revisit its media regulation regime. The seven-station rule, argued the Commission, had been made anachronistic by the “explosive growth and change” in the mass media market and by the broad availability of cable television.<sup>134</sup> More generally, it found that “group owners do not impose a monolithic editorial viewpoint on their stations, but instead permit and encourage independent expression by the stations in response to local community concerns and conditions.”<sup>135</sup> On the basis of this evidence, the Commission decided to phase out the NTSO rule.<sup>136</sup>

But the Commission was unable to persuade Congress, which used an appropriations bill to block implementation of the FCC’s report.<sup>137</sup> On reconsideration, the Commission increased the numerical cap on television station ownership from seven to twelve, but decided the cap would no longer be phased out.<sup>138</sup> Moreover, in addition to the numerical cap, the FCC imposed a limit on “the aggregate ownership interests in TV stations to those which penetrate a maximum of 25 percent of the national audience.”<sup>139</sup> These rules remained in place for over a decade, until the Telecommunications Act of 1996 ushered in a new era of communications

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130. See 1941 FCC ANN. REP. 34.

131. See Herbert H. Howard, *Multiple Broadcast Ownership: Regulatory History*, 27 FED. COMM. B.J. 1, 9 (1974).

132. Report and Order, In the Matter of Amendment of Section 73.3555, [formerly Sections 73.35, 73.240, and 73.636] of the Commission’s Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C.2d 17, 22 (1984).

133. *Id.*

134. *Id.* at 18.

135. *Id.* at 20.

136. *Id.* at 18.

137. Second Supplemental Appropriations Act, Pub. L. No. 98-396, tit. III, § 304, 98 Stat. 1369, 1423 (1984).

138. Memorandum Opinion and Order, In the Matter of Amendment of Section 73.3555, [formerly Sections 73.35, 73.240, and 73.636] of the Commission’s Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C.2d 74, 97 (1984).

139. *Id.*

regulation—or, as the political forces rallying behind the Act contended, of communications deregulation.<sup>140</sup>

Consistent with its overall deregulatory mission, the Act made two changes to the NTSO rule. It directed the FCC to eliminate restrictions on the number of television stations an entity may own nationwide.<sup>141</sup> The Act also relaxed, without eliminating, the national audience-reach limitation from twenty-five percent to thirty-five percent.<sup>142</sup> Finally, Congress directed the FCC to “review its . . . ownership rules biennially . . . and determine whether any of such rules are necessary in the public interest as the result of competition.”<sup>143</sup>

The FCC’s first biennial review took four years to complete, and comments submitted to the agency aligned predictably. On the one hand, major broadcast networks urged it to eliminate the NTSO rule, predicting that consolidation would lead to economies of scale and greater programming diversity.<sup>144</sup> By contrast, local affiliates asked the Commission to maintain the thirty-five percent rule. Further industry concentration, they argued, would enhance the bargaining power of networks in negotiations over local programming.<sup>145</sup> Also supporting the NTSO rule were artists’ unions.<sup>146</sup>

Finally, in March 2000, the then-Democrat-controlled agency decided not to alter the thirty-five percent national audience-reach cap established by the Act.<sup>147</sup> It cited a number of reasons with a shared theme: caution. First, “prudence dictates that we should monitor the impact of our recent decisions” relaxing restrictions on television duopolies and television-radio combinations, argued the Commission.<sup>148</sup> Second, the agency observed a flurry of media consolidation since 1996, and thought it best to proceed cautiously.<sup>149</sup> The decision to maintain the cap was not uncontroversial, with the two Republican commissioners, Harold Furchtgott-Roth and Michael Powell, dissenting.<sup>150</sup>

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140. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.). The purpose clause of the Act begins with the phrase, “[t]o promote competition and reduce regulation.” *Id.* at 56.

141. *Id.* § 202(c)(1)(A), 110 Stat. at 111.

142. *Id.* § 202(c)(1)(B), 110 Stat. at 111.

143. *Id.* § 202(h), 110 Stat. at 111-12.

144. See Biennial Review Report, In the Matter of 1998 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 15 F.C.C.R. 11,058, 11,070-71 (2000).

145. See *id.* at 11,071-72 (discussing comments by the National Association of Broadcasters).

146. See *id.* (discussing comments by the American Federation of Television and Radio Artists).

147. *Id.* at 11,072.

148. *Id.* at 11,073.

149. *Id.* at 11,074.

150. *Id.* at 11,131 (dissenting statement of Comm’r Furchtgott-Roth); *id.* at 11,140 (separate statement of Comm’r Powell).

But the FCC's biennial review, already two years behind schedule, was not quite over yet. Several networks challenged the decision to maintain the NTSO rule in court, where the battle continued until February 2002—that is, for about two additional years. Then, in *Fox*, the D.C. Circuit held that the Commission's decision to retain the NTSO rule was “arbitrary and capricious and contrary” to the Telecommunications Act.<sup>151</sup> The court then remanded the rule to the FCC, which led to its reconsideration in June 2003. The next Section applies the decision rules developed in Part II to the D.C. Circuit's choice of remedy.

### B. *A Critical Look at Fox Remedies*

This Note's sequential analysis suggested that courts should treat vacatur as the presumptive remedy when agency rules prove “arbitrary and capricious.”<sup>152</sup> This presumption may be rebutted (1) when the agency is likely to improve the defects of its rule on remand (for example, because it had insufficient opportunity to develop the rule in the first place or because the court will require the agency to consider a theretofore-ignored decisive factor), or (2) when Congress is unlikely to legislate with specificity on the subject matter of the agency's rule. Applying this methodology to the *Fox* decision reveals that the court improperly failed to vacate the NTSO rule before remanding it to the FCC.

Consistent with the recent trend, the *Fox* court did not adopt the presumption recommended by this Note's analysis. Instead of treating vacatur as the default remedy, it asserted that the remedial “question is one of degree.”<sup>153</sup> The court also applied the *Allied-Signal* test, which favors remanding agency rules without vacatur.<sup>154</sup>

Of course, an incorrect presumption will not necessarily lead to an incorrect decision. A court should decline to vacate a rule if it suspects that the agency will adopt a more appropriate rule on remand, if only that agency has a chance to consider all the facts again. The *Fox* court, however, had no reason to expect a different outcome on remand. The FCC did not appear to have overlooked critical factors by acting too quickly; by contrast, the agency took four years to render its decision, two years longer than the Telecommunications Act anticipated. Indeed, both Republican

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151. *Fox Television Stations v. FCC*, 280 F.3d 1027, 1045 (D.C. Cir. 2002).

152. Of course, this presumption is inoperable if federal courts are prohibited by statute from vacating the agency's action. However, the D.C. Circuit explicitly ruled in *Fox* that no such prohibition existed. *Id.* at 1048. The judges therefore faced a genuine choice between vacating the agency's action and remanding it without vacatur.

153. *Id.* (“[V]acatur is not necessarily indicated even if an agency acts arbitrarily and capriciously in promulgating a rule.”).

154. *See supra* Section II.B.

commissioners had mentioned in their dissents that the Commission had accumulated ample data.<sup>155</sup>

Furthermore, the *Fox* court did not affirmatively require the FCC to consider any facts that the agency could have reasonably missed in its initial review. Indeed, it declared the NTSO rule arbitrary and capricious based largely on the Commission's inattention to *its own* 1984 report<sup>156</sup>—hardly the stuff of accidental omissions. Nor did the court anticipate that the report would necessarily compel the FCC to reach a different outcome. All the court required the agency to do was to “state the reason(s) for which it believes its contrary views set out in the 1984 Report were incorrect or are inapplicable in the light of changed circumstances.”<sup>157</sup> Such a conclusion, according to the *Fox* court, “is by no means inconceivable; the Report is, after all, now almost 20 years old.”<sup>158</sup> In short, the court gave no indication that the agency should avoid reaching the same outcome again.

This Note suggests one other reason why a court might avoid vacating an agency rule—concern that Congress will prove unable to legislate with specificity on the matter at hand, leaving in place the disruptive default policy. The *Fox* court, however, did not appear to possess persuasive evidence on this account. Enacting a new NTSO rule effectively requires legislators to identify a single data point—the national audience cap, expressed in percentage terms. Six years earlier, Congress had demonstrated its capacity to enact such legislation when it raised the cap from twenty-five percent to thirty-five percent in the Telecommunications Act—and did so in about thirty words.<sup>159</sup> In practice, Congress may still have failed to answer the D.C. Circuit's vacatur with specific legislation, but the judges had few reasons to suspect that Congress was incapable of such action. Therefore, if the FCC's decision to maintain the NTSO rule was indeed “arbitrary and capricious,” the court should have vacated it.

### C. *After Fox: Testing Predictions*

This Note's sequential model has yielded several predictions about the consequences of judicial remedies in administrative law. In order to illustrate these predictions, this Section examines the aftermath of the *Fox*

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155. See Biennial Review Report, *supra* note 144, at 11,135 (dissenting statement of Comm'r Furchtgott-Roth); *id.* at 11,154 (separate statement of Comm'r Powell).

156. See *Fox*, 280 F.3d at 1045.

157. *Id.* at 1048 (emphasis omitted).

158. *Id.* (emphasis omitted).

159. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(c)(1)(B), 110 Stat. 56, 111 (“The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555) by increasing the national audience reach limitation for television stations to 35 percent.”).

court's failure to vacate. Figure 2 from Part I approximates the relative preferences of the President, the House, and the Senate after the D.C. Circuit's ruling (preferences on the left side of the spectrum representing looser restrictions on media ownership). In other words, the Bush Administration and FCC Chairman Michael Powell favored the least stringent NTSO rule, the Senate favored greater restrictions, and the House held an intermediate position.<sup>160</sup> The default policy in the absence of any legislation—a policy of no specific caps on media mergers—was on the left side of the policy spectrum. Thus, the dynamics following the *Fox* decision resembled Case 2D.

Section II.A made three theoretical predictions about the consequences of a failure to vacate in Case 2D. First, on remand, the agency would adopt the policy closest to the President's preferences, constrained only by the threat of a veto-proof congressional override. This outcome, as Subsection I.B.2 showed, biases the formal Article I, Section 7 process in favor of the President. Second, if congressional efforts to override the agency's action encounter a credible veto threat, legislators might evade the constitutional presentment requirement by attaching override provisions to must-pass appropriations bills. This strategy, too, undermines the process outlined by Article I, Section 7, this time in Congress's favor. Third, legislators would use their informal oversight tools to control administrative action. The court's remand remedy would, however, offer the agency a rhetorical defense: The agency could urge Congress to acquiesce to its proposal quickly, warning that the courts might react to agency delay by restoring the default policy. Subsections 1, 2, and 3, respectively, argue that the aftermath of *Fox* appears consistent with each of these three predictions.

At the outset, it is important to note that no single case study can endeavor to confirm the predictions of a theoretical model. The aftermath of the NTSO rule is no exception, for this case study has several possible drawbacks. Perhaps the unique political salience of media-ownership rules distinguishes them from the typical agency decision. Additionally, since the FCC issued its new NTSO rule along with five other changes to media-ownership regulation, the subsequent congressional actions may have reflected some tradeoffs within this package of policies.<sup>161</sup> The particular preferences of congressional committee chairs likewise complicate any efforts to model congressional action. Finally, it is worth recalling that the

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160. For example, the President had to threaten a veto when Congress tried to restore the preexisting stringent caps. See *infra* text accompanying notes 171-175. For a comparison of the House and Senate, see *infra* text accompanying notes 167-170.

161. While the controversy over the NTSO rule was resolved in legislative compromise, the FCC's other reforms to media-ownership regulation encountered further difficulties in the courts. See *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

D.C. Circuit remanded an action of a Democrat-controlled FCC, while the 2003 changes were adopted by the Commission's Republican majority. Thus, this Section falls short of offering definitive proof and is best viewed as an illustration of this Note's theoretical model.

1. *Prediction 1: Agency Action on Remand*

Section II.A predicted that, on remand, an agency would adopt policies most favorable to the President, provided that Congress would prove unable to override them with veto-proof legislation. Thus, in Case 2D, the agency would adopt policy  $X_A$ , which mirrors the preference of the pivotal veto-override legislator. It is, alas, impossible to determine definitively whether the FCC indeed chose this precise point after the *Fox* remand—after all, we do not know exactly which member of Congress would have been the pivotal legislator, much less what her preferences were. Nonetheless, considerable evidence exists that, as Section II.A predicted, the FCC's forty-five percent rule was a policy that would have narrowly escaped a veto-proof legislative override in both chambers of Congress.

Shortly after the FCC announced changes to media-ownership rules on June 2, 2003, both chambers of Congress launched overhaul measures. Immediate outcry in the Senate came not only from Democrats, but also from former Majority Leader Trent Lott and Appropriations Committee Chairman Ted Stevens.<sup>162</sup> In early June, a "sense of the Senate" resolution sponsored by sixteen senators sought to rescind all the new media-ownership rules.<sup>163</sup> The Senate Commerce Committee also issued an unprecedented rebuke to Powell<sup>164</sup> by endorsing a bill that would reinstate the thirty-five percent cap.<sup>165</sup> In July, a coalition of nine senators also launched a resolution "disapproving the rule"<sup>166</sup>—a form of legislative veto codified as part of the mid-1990s "Contract with America" agenda.<sup>167</sup> (If successful, this would have marked the second time this form of legislative veto was ever invoked—and the first time by a Republican Congress

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162. See Yochi J. Dreazen, *Democrats Seize on FCC Rule*, WALL ST. J., June 4, 2003, at A4.

163. S. Res. 159, 108th Cong. (2003).

164. See Sean Marciniak & Yochi J. Dreazen, *Senate Panel Votes To Override FCC on Recent Ruling*, WALL ST. J., June 20, 2003, at A4.

165. Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003, S. 1046, 108th Cong. (2003).

166. S.J. Res. 17, 108th Cong. (2003).

167. Unlike the two-house legislative veto discussed in Subsection I.B.3, this form of legislative veto required presentment to the President. See Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 251, 110 Stat. 847, 868-74 (codified at 5 U.S.C. §§ 801-808 (2000)).

against a Republican Administration.)<sup>168</sup> Opposition to the FCC's new rules faced somewhat greater obstacles in the House, where Energy and Commerce Committee Chairman Billy Tauzin supported the FCC's approach.<sup>169</sup> Not surprisingly, a House bill seeking to invalidate the FCC's new rules languished in committee, despite attracting ninety-eight sponsors by the end of July.<sup>170</sup>

Apparently, these legislative efforts to roll back the FCC's rulemaking—as well as parallel developments in the appropriations process, described in the next Subsection—raised alarms at the White House. Before Congress departed for its August recess, the Administration issued a written veto threat.<sup>171</sup> (If levied, this would have marked the first time the Bush Administration used its veto power against the Republican Congress.)<sup>172</sup> Yet congressional action did not grind to a halt. Upon returning in September, the Senate formally adopted its “resolution of disapproval.”<sup>173</sup> By November, 205 members of the House had signed a letter to Speaker Dennis Hastert requesting a floor vote on the resolution.<sup>174</sup> Some legislators openly suggested that the President's threatened veto could be overridden.<sup>175</sup>

Ultimately, the Bush White House was never forced to levy the veto. By fall, the thrust of legislative efforts to override the FCC's rulemaking shifted to the appropriations process. On balance, however, the trajectory of legislative response supports the predictions of the game-theoretic model: Opposition to the FCC's forty-five percent rule in the Senate (which passed a resolution to override this rule) and the House was substantial enough to invite a veto threat. The very fact that Congress chose to switch to the appropriations strategy suggests that this veto was unlikely to be overridden. Thus, the FCC's forty-five percent rule appears to have

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168. The first occurred in 2001, when Republican majorities in Congress used the veto to annul rules adopted by the Clinton Administration's OSHA. See Ron Orol, *House Dems Rally Against FCC Media Regulations*, DAILY DEAL, June 6, 2003, at 1.

169. See, e.g., Marciniak & Dreazen, *supra* note 164.

170. Protect Diversity in Media Act, H.R. 2462, 108th Cong. (2003). For the list of sponsors, see Bill Summary and Status, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR02462:@@P> (last visited Oct. 17, 2004).

171. See OMB, Statement of Administration Policy: H.R. 2799 (July 22, 2003), available at <http://www.whitehouse.gov/omb/legislative/sap/108-1/hr2799sap-h.pdf>.

172. For a record of presidential vetoes, see Office of the Clerk, Presidential Vetoes, [http://clerk.house.gov/histHigh/Congressional\\_History/vetoes.html](http://clerk.house.gov/histHigh/Congressional_History/vetoes.html) (last visited Oct. 17, 2004).

173. S.J. Res. 17, 108th Cong. (2003). For a breakdown of the vote, see U.S. Senate, Roll Call Vote, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=108&session=1&vote=00348#top](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00348#top) (last visited Oct. 17, 2004).

174. See Press Release, Representative Maurice Hinchey, Bipartisan Coalition of House Members Demand Vote on FCC Media Regulations (Nov. 5, 2003), available at [http://www.house.gov/apps/list/press/ny22\\_hinchey/fcc\\_media\\_regulations\\_110503.html](http://www.house.gov/apps/list/press/ny22_hinchey/fcc_media_regulations_110503.html).

175. See Ron Orol, *Lawmakers Weigh Veto of Media Regs Against Bush Threat*, DAILY DEAL, Sept. 12, 2003, at 1.

displayed the essential characteristics of policy  $X_A$ —it was substantially more favorable to the President than to Congress, but it was not so pro-President as to invite veto-proof legislation.

## 2. *Prediction 2: Congressional Use of Appropriations Process*

Earlier discussion also suggested that Congress may respond to agency rulemaking by attaching an override provision to a must-pass appropriations bill, thereby evading the presentment requirement. From the perspective of Article I, Section 7, this is an overreaction, for it shifts policy further from the President's preferences than the Founders' deliberate design permits.<sup>176</sup> The aftermath of the *Fox* remand reveals that the danger of such overreaction is not merely theoretical: As regular legislative efforts to annul the FCC's rules encountered a veto threat, Congress aggressively pursued an appropriations rider.

Talk of using the appropriations process to annul the FCC's action began in the Senate as early as June.<sup>177</sup> The crucial breakthrough, however, came from the House Appropriations Committee—a surprise, given its chairman's support for the FCC.<sup>178</sup> In mid-July, eleven Republican members of that panel joined their Democratic colleagues in attaching to the Commerce, Justice, and State appropriations bill a rider that would have reinstated the thirty-five percent cap.<sup>179</sup> The President then threatened to veto any measure that reversed the FCC's media-ownership rule, but the House nonetheless approved the appropriations bill with its rider<sup>180</sup> by a vote of 400 to 21.<sup>181</sup> Senate approval was expected to follow.<sup>182</sup>

The appropriations process picked up steam again in the fall, just as the other legislative efforts to reverse the FCC's rules bogged down. Although some FCC allies had hoped that the thirty-five percent rider would eventually die in conference committee, the House-Senate negotiators vowed as late as November 19 to maintain it.<sup>183</sup> Once congressional overhaul of the forty-five percent rule appeared inevitable, the White House

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176. See *supra* Subsection I.B.3.

177. See Jaret Seiberg, *Lott, Hollings Threaten FCC*, DAILY DEAL, June 3, 2003, at 1.

178. See Ron Orol, *House Panel Backs Repeal of New TV Ownership Cap*, DAILY DEAL, July 17, 2003, at 1.

179. See David Rogers, *House Panel Opposes Easing Media-Limit Rule*, WALL ST. J., July 17, 2003, at A4.

180. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2004, H.R. 2799, 108th Cong. (2003).

181. See Yochi J. Dreazen & Joe Flint, *In Blow to FCC, House Votes To Reverse Media Deregulation*, WALL ST. J., July 24, 2003, at A1.

182. See Christopher Stern & Jonathan Krim, *House Votes To Prevent Change in Media Rule*, WASH. POST, July 24, 2003, at A1.

183. See David Rogers, *Spending Bill Would Restore Tighter Media-Ownership Cap*, WALL ST. J., Nov. 20, 2003, at B2.

backed down and cut a last-minute deal with the Senate's powerful Appropriations Chairman Stevens.<sup>184</sup> The compromise solution was a thirty-nine percent NTSO rule—just enough to protect News Corp., Murdoch's media conglomerate, from having to divest its properties.<sup>185</sup> (Although other FCC critics cried out against the compromise, Stevens's support would have been essential to accomplishing any appropriations-based overhaul.)<sup>186</sup> Notwithstanding Stevens's eleventh-hour defection, the appropriations strategy allowed Congress to win concessions despite the White House veto threat—as the sequential model generally predicted.

### 3. *Prediction 3: Agency Responses to Informal Congressional Pressure*

Needless to say, not all the instruments in the congressional toolkit have the bluntness of appropriations riders. Legislators can use their authority to persuade an agency that its decision is wrong on the merits. Section II.A predicted that a judicial remand would allow administrators to respond to this informal pressure by pointing the finger at courts. As this Subsection briefly argues, that is precisely the rhetorical strategy the FCC followed.

Even before its June announcement, the FCC attempted to prevent legislators from previewing the new rules—and it blamed the courts for an expedited timeline. When several moderate senators asked the FCC to delay its rulemaking on media ownership,<sup>187</sup> Powell balked, noting that “judicial sustainability is a key objective of this proceeding.”<sup>188</sup> More importantly, Powell argued that courts left him no choice but to update the media-ownership rules without any delay. “When the judiciary reverses our rules, . . . it is incumbent on us to repair the shortcomings as quickly as possible,” he wrote to the FCC's two Democratic commissioners, who had requested more time to deliberate about the new rules.<sup>189</sup> At times, Powell's language swung from urgency to alarm: “[T]he public interest is presently

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184. See Ron Orol, *FCC Opponents Protest White House Interference*, DAILY DEAL, Nov. 26, 2003, at 1.

185. See *id.* For codification of the compromise, see Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. B, tit. VI, § 629, 118 Stat. 3, 99 (2004).

186. See Orol, *supra* note 184.

187. See Letter from Senators Wayne Allard, Olympia Snowe, and Susan Collins to Michael Powell, Chairman, FCC (Mar. 19, 2003), available at [http://www.fcc.gov/commissioners/powell/chairmans\\_response/Snowe\\_March19.pdf](http://www.fcc.gov/commissioners/powell/chairmans_response/Snowe_March19.pdf).

188. Chairman Michael K. Powell Responds to Members Regarding Upcoming Biennial Review of Media Ownership, [http://www.fcc.gov/commissioners/powell/chairmans\\_response/mkp\\_response.htxx](http://www.fcc.gov/commissioners/powell/chairmans_response/mkp_response.htxx) (last visited Oct. 17, 2004) [hereinafter Powell Response].

189. See Press Release, FCC, FCC Chairman Responds to Request for Delay on Media Ownership Proceeding (May 15, 2003), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-234583A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-234583A1.pdf).

being ill-served by a body of rules that have been severely wounded and rendered substantially ineffective by withering judicial fire. Survival demands action.”<sup>190</sup> Thus, the appearance of judicially imposed time pressure on remand was used to keep legislative and administrative critics at bay.

Once the new media rules were released, the FCC blamed the courts for the substance of the decision as well. When legislators criticized him for relaxing NTSO caps, Powell replied that he had done precisely the opposite: “reinstate[d] legally enforceable” caps.<sup>191</sup> “Keeping the rules exactly as they are . . . was not a viable option. Without today’s surgery, the rules would assuredly meet a swift death” in courts, he argued.<sup>192</sup> Some commentators noted with irony that Powell—a known ideological crusader for media deregulation—had suddenly adopted a “courts-made-me-do-it” stance toward his own deregulatory decisions.<sup>193</sup> But even as the appropriations bill reinstating the thirty-five percent cap progressed through Congress, Powell insisted that courts had left him little choice but to loosen this regulation.<sup>194</sup>

Only when the White House struck its eleventh-hour thirty-nine percent deal, effectively rewriting the FCC’s NTSO rule, did the Chairman stop blaming the courts. The unrepentant ideological deregulator was back in action, telling the *Wall Street Journal* on the day the compromise story broke, “As a regulatory exercise, we did what we thought was best.”<sup>195</sup> Yet, during the preceding six months, when Congress had attempted to roll back the FCC’s new media rules, the agency had been telling a different story—that it had done what *the courts* thought was best.

This Section has sought to demonstrate that the remand remedy in *Fox* had the following three consequences, broadly consistent with this Note’s game-theoretic analysis: (1) The FCC issued the forty-five percent rule, which narrowly escaped legislative override under the protection of a presidential veto; (2) Congress subsequently pursued the appropriations process as its primary means of reversing the rule; and (3) the agency used the judicial remand to deflect congressional criticism. One must reemphasize that no single case study can serve as conclusive proof of an abstract theory. This discussion is no exception, and it is best seen as an

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190. Powell Response, *supra* note 188.

191. Ron Orol, *Pols Lay Siege to Media Rules*, DAILY DEAL, June 5, 2003, LEXIS, News & Business, The Daily Deal (internal quotation marks omitted).

192. Press Release, FCC, Press Statement of Chairman Michael Powell 1 (June 2, 2003), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235047A3.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A3.pdf).

193. See Jaret Seiberg, *Tactical Strike*, DAILY DEAL, June 9, 2003, LEXIS, News & Business, The Daily Deal (internal quotation marks omitted).

194. See Dreazen & Flint, *supra* note 181.

195. Yochi J. Dreazen & Anne Marie Squeo, *Reshaping Powell’s Vision*, WALL ST. J., Nov. 28, 2003, at A4.

illustration of the Note's theoretical proposal. But the FCC's experience does raise the optimistic possibility that—despite their many simplifying assumptions—sequential models can contribute important insights about our political institutions.

#### CONCLUSION

Public choice scholarship has recognized “that legislatures, executives, and courts act within an interconnected system; and that it is impossible to assess the actions of one constitutional actor without contemplating the reactions of the others.”<sup>196</sup> The bicameralism and presentment requirements of Article I, Section 7 govern this lawmaking game between Congress and the President. A decade ago, a simple sequential model demonstrated how the emergence of the administrative state has biased the policy outcomes of this process. Scholars have argued that the courts can change constitutional law, statutory interpretation, and the *Chevron* doctrine to cure this bias. This Note adds administrative law remedies to the list of possibilities. By choosing to vacate arbitrary and capricious rules, courts could give Congress opportunities to legislate with specificity, helping to preserve the original design of Article I, Section 7. Unfortunately, courts have moved in the opposite direction by increasingly remanding deficient agency rules without vacatur. The sequential structure of bicameralism and presentment offers reasons to reconsider this trend.

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196. Ferejohn & Weingast, *supra* note 2, at 566.