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BENJAMIN B. JOHNSON

A History of Vacatur

ABSTRACT. Vacatur, a seemingly routine appellate tool, has evolved into one of the Supreme Court's most potent instruments for declaring law. This Article offers the first comprehensive historical account of vacatur, tracing its roots from English and early American practice through its twentieth-century transformations to its contemporary uses. Historically, courts used vacatur to manage dockets, correct procedural irregularities, or enforce reversals on the merits. Modern usage has departed markedly from these roots. The Court now frequently employs vacatur to declare binding legal rules without issuing judgments, effectively circumventing traditional limits on judicial power. Taking seriously the Court's own insistence on history as a guide to judicial authority, this Article illuminates the growing tension between the Court's practice and its constitutional and statutory limits.

AUTHOR. Professor of Law, University of Florida Levin College of Law. My thanks to Will Baude, Sam Bray, Peter A. Bruland, Jud Campbell, Charles Capps, Katherine Mims Crocker, Heather Elliott, Jill Fisch, Kellen Funk, Stephen Griffin, Tara Leigh Grove, John Harrison, Linda Jellum, Jeremy Kidd, Gary Lawson, Tyler Lindley, Merritt McAlister, John McGinnis, Haley Proctor, Keith Whittington, and Michael Wolf for helpful discussion and comments. Thanks to John P. Krause and Connor McClay for research assistance.

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INTRODUCTION

At first glance, vacatur is a simple, boilerplate remedy tacked on at the end of an opinion.[1] Yet a closer look reveals that it has become one of the Court's most powerful policymaking tools.[2] As the Justices have increasingly abandoned dispute resolution in favor of law declaration,[3] vacatur has taken on a new function. Vacatur now functions effectively as a cheat code to avoid constitutional limits on judicial power.[4]

Judicial power "is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for

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1. *See* Acheson Hotels, LLC v. Laufer, 601 U.S. 1, 15 (2023) (Jackson, J., concurring in the judgment) ("Vacatur is a remedy that erases a judgment that has already been rendered.").

2. The type of vacatur at issue in this Article affects judicial judgments and decrees rather than administrative actions. There is a robust debate over vacatur under the Administrative Procedure Act. *See, e.g.*, Samuel L. Bray, *The Truth of the Truth of Erasure*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 7, 2024), https://www.yalejreg.com/nc/the-truth-of-the-truth-of-erasure-by-samuel-l-bray [https://perma.cc/TL8R-S3LL]; Jonathan H. Adler, *On Universal Vacatur, the Supreme Court, and the D.C. Circuit*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 1, 2023), https://www.yalejreg.com/nc/on-universal-vacatur-the-supreme-court-and-the-d-c-circuit-by-jonathan-h-adler [https://perma.cc/V8AL-MYK4]; Aditya Bamzai, *The Path of Administrative Law Remedies*, 98 NOTRE DAME L. REV. 2037, 2037 (2023); Emily Bremer, *We Have Been Looking in the Wrong Place for the Meaning of "Set Aside" Under the APA*, YALE J. ON REGUL.: NOTICE & COMMENT (Apr. 1, 2024), https://www.yalejreg.com/nc/we-have-been-looking-in-the-wrong-place-for-the-meaning-of-set-aside-under-the-apa [https://perma.cc/38HG-6ZF2]; John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REGUL. 119, 119-20 (2023); Mila Sohoni, *The Past and Future of Universal Vacatur*, 133 YALE L.J. 2305, 2309-10 (2023); T. Elliot Gaiser, Mathura Sridharan & Nicholas Cordova, *The Truth of Erasure: Universal Remedies for Universal Agency Actions*, U. CHI. L. REV. ONLINE *1 (Aug. 28, 2024), https://lawreview.uchicago.edu/online-archive/truth-erasure-universal-remedies-universal-agency-actions [https://perma.cc/JA3Z-49CW]. Historically, common-law vacatur has played a role as a remedy against administrative errors and overreach. *Cf.* James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 STAN. L. REV. 1269, 1312-13 (2020) (discussing an early New Jersey case). However, there is an important distinction between vacating agency regulations and vacating lower-court judgments.

3. *See, e.g.*, Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 722 (2012) (discussing "the triumph of the law declaration model"); Thomas P. Schmidt, *Orders Without Law*, 122 MICH. L. REV. 1003, 1017 (2024) (noting that the Court has become "predominantly a law-declaration court, not a dispute-resolution court").

4. Scholars are perhaps more familiar with jurisdictional limits as the traditional means to limit judicial power. *See, e.g.*, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."); Ryan C. Williams, *Jurisdiction as Power*, 89 U. CHI. L. REV. 1719, 1727-32 (2022).

decision."[5] This definition implies a conceptual distinction between a court's judgment and any remedy it offers pursuant to the judgment.[6] For any appellate court in the common-law tradition, judgment on the merits of a case usually takes one of two forms: reversal or affirmance. If the appellate court reverses on the merits, it might, as a remedy, vacate the lower court's earlier decision either in whole or in part. Once vacated, lower court "orders are void *ab initio* and thus lack any prospective legal effect."[7] Sometimes, however, an appellate court will observe that some irregularity, like a lack of jurisdiction, has undermined the lower court's proceedings. In such cases, the court will issue vacatur first as a judgment and then as a remedy. Thus, vacatur as a judgment (which makes a statement about process rather than the legal merits of a case)[8] must be carefully distinguished from vacatur as a remedy (which follows a reversal on the merits).

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5. Muskrat v. United States, 219 U.S. 346, 356 (1911) (quoting SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 314 (Albany, Banks & Bros. 1891)).

6. *See* SAMUEL L. BRAY & EMILY SHERWIN, AMES, CHAFEE, AND RE ON REMEDIES 1021 (4th ed. 2024); *see also* Morley v. Lake Shore & Mich. S. Ry. Co., 146 U.S. 162, 178 (1892) (Harlan, J., dissenting) ("The remedy for enforcing a judgment, is the life of a judgment."); Bd. of Comm'rs v. Aspinwall, 65 U.S. (24 How.) 376, 380 (1860) ("All the remedies which any such judgment ordinarily supplies are open to the parties in this case."). This Article uses the language of judgments and remedies, but the phenomenon extends more broadly. Courts offer a series of prejudgment remedies during case resolution; however, such remedies are available only after a prior legal determination. For instance, preliminary injunctions are available only after satisfying a four-factor test. *See* Starbucks Corp. v. McKinney, 602 U.S. 339, 342 (2024). Samuel L. Bray notes that this four-factor test is collapsing into a preliminary view of the merits. *See* Samuel L. Bray, *The Purpose of the Preliminary Injunction*, 78 VAND. L. REV. 809, 827-34 (2025). Even if Bray is correct, the preliminary finding on the merits must precede the preliminary injunction. This Article is interested in this general sequence—a legal determination followed by a remedy—most commonly observed in the context of final judgments.

7. Hewitt v. United States, 606 U.S. 419, 431 (2025); United States v. Ayers, 76 U.S. (9 Wall.) 608, 610 (1870) ("[V]acating the former judgment . . . render[s] it null and void, and the parties are left in the same situation as if no trial had ever taken place.").

8. By federal law, vacatur of arbitration awards is only available when the process was infected by fraud, corruption, or arbitrator misconduct. *See* 9 U.S.C. § 10 (2024). Substantive mistakes (e.g., miscalculations of figures) may lead to modifications. *See id.* § 11. As to the merits, one feature of vacatur is that it erases any precedential power of decisions reached in the matter at hand. *See, e.g.*, Daniel Purcell, Comment, *The Public Right to Precedent: A Theory and Rejection of Vacatur*, 85 CALIF. L. REV. 867, 868 (1997) ("If the court grants vacatur, the judgment ceases to have legal effect on the parties or, in most cases, as precedent. Even though the judgment was in no way defective, it is essentially erased."); Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORN. L. REV. 589, 630 (1991) ("Although a vacated decision may remain in the case reporters, its precedential value is extremely limited." (footnote omitted)).

This distinction matters because a court may only declare substantive law when doing so is necessary to resolve a case on the merits.[9] As Chief Justice Marshall observed, law-declaration power arises only when courts fulfill their obligation to decide particular cases.[10] For a federal appellate judgment to declare law, that judgment must be made on the merits; the court must either reverse or affirm a lower court's ruling. This limitation is the fundamental check on judicial power, which has long been understood to be defined as, and limited to, judgment—a limit that distinguishes the judicial power from the legislative.[11]

In recent years, however, the Court has declared law to govern some of the most controversial legal questions of the day without even pretending to reach a judgment on the merits.[12] For example, in June 2024, the Supreme Court vacated judgments by the First and D.C. Circuits in an opinion that overturned the

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9. The Court has "no charter to review and revise legislative and executive action," unless doing so is necessary to decide the case at hand. Summers v. Earth Island Inst., 555 U.S. 488, 492 (2009). It is not "empowered to decide . . . abstract propositions, or to declare, for the government of future cases, principles or rules of law," unless the question helps the Court give judgment in the case. California v. San Pablo & Tulare R.R. Co., 149 U.S. 308, 314 (1893); *see also* William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 Harv. L. Rev. 153, 183 (2023) ("[T]he federal courts give judgments that redress the injuries of parties, and it is only in the performance of that duty—and not as an independent duty, or a distinct cause of action, or a stand-alone remedy—that federal judges will say what the law is and what it isn't."); Benjamin B. Johnson, *The Supreme Court, Question-Selection, Legitimacy, and Reform: Three Theorems and One Suggestion*, 67 St. Louis U. L. Rev. 625, 626-30 (2023) (arguing that, while the "point of tribunals is to resolve disputes between the parties," which requires "render[ing] judgment in the case" and "answering some or all of the questions," the Court, through the practice of "answer[ing] particular questions instead of deciding cases . . . places itself in real danger" of issuing mere advisory opinions, which would be ultra vires).

10. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803); *see also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("T]his Court will not take jurisdiction if it should not . . . ."). The case-or-controversy requirement instantiated a narrower conception of the judicial power, reflecting growing English skepticism toward resolutions and advisory opinions. *See* Philip Hamburger, Law and Judicial Duty 536-41 (2008); Christian R. Burset, *Advisory Opinions and the Problem of Legal Authority*, 74 Vand. L. Rev. 621, 638-39 (2021). Over time, Americans increasingly understood the judicial role as one of adjudication. Whereas English courts largely drew their jurisdiction from the common law, American courts typically derived theirs from statutes that explicitly granted the power to hear specified "actions, suits, causes, cases, or controversies," thus sharpening the boundaries of judicial authority. Hamburger, *supra*, at 537.

11. The Federalist No. 78 (Alexander Hamilton).

12. This of course raises the important and classic question of whether the Court's opinion is itself binding or merely an explanation of the judgment. *See generally* Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 Cardozo L. Rev. 43 (1993) (arguing that, at least for the executive, opinions are best understood as explanations); Robert Post, *The Supreme Court's Crisis of Authority: Law, Politics, and the Judiciary Act of 1925*, 101 Notre Dame L. Rev. (forthcoming 2026) (manuscript at 29 & n.107, 33 & n.127) (on file with author) (distinguishing the different functions of judgments and opinions).

Chevron doctrine.[13] It also vacated judgments from the Fifth and Eleventh Circuits in cases dealing with statutes passed by Texas and Florida to regulate social media.[14] In each instance, the Court used vacatur to declare law without issuing a judgment on the case's merits.[15]

The Court largely abandoned deciding cases long ago.[16] For decades, it has used its certiorari power to preselect questions that are not always sufficient to justify a judgment in a case.[17] For example, in two of the most contentious cases in recent years—*Dobbs v. Jackson Women's Health Organization*[18] and *Loper Bright Enterprises v. Raimondo*[19]—the Court used its certiorari power to focus review on the Court's preferred concern, excluding several questions presented by the parties.[20] Even as this practice undermined the traditional judicial duty to decide cases, the Justices carefully maintained the fiction that they belonged to a court giving judgments: reversing or affirming the rulings of lower courts. Now,

13. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 413 (2024).

14. Moody v. NetChoice, LLC, 603 U.S. 707, 745 (2024).

15. These are the most prominent, but by no means the only, instances where the Court vacated judgments without ruling on the merits. *See, e.g.*, Bissonnette v. LePage Bakeries Park St., LLC, 601 U.S. 246, 256 (2024); Nat'l Rifle Ass'n v. Vullo, 602 U.S. 175, 199 (2024); Fischer v. United States, 603 U.S. 480, 498 (2024); Harrow v. Dep't of Def., 601 U.S. 480, 490 (2024); Lindke v. Freed, 601 U.S. 187, 204 (2024); Muldrow v. City of St. Louis, 601 U.S. 346, 360 (2024); Chiaverini v. City of Napoleon, 602 U.S. 556, 565 (2024); Starbucks Corp. v. McKinney, 602 U.S. 339, 351 (2024); Cantero v. Bank of Am., 602 U.S. 205, 221 (2024); Gonzalez v. Trevino, 602 U.S. 653, 659 (2024).

16. *See, e.g.*, Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 993-95 (2000) ("For all practical purposes, then, the modern Supreme Court does not resolve disputes between litigants, it does not decide cases, and it does not enforce legal rights or duties. . . . [It] seems to make law in the same way as Congress and other legislatures. . . . [This] appears to be a modern phenomenon."); *see also* Post, *supra* note 12 (manuscript at 47) (observing that in Trump v. United States, 603 U.S. 593 (2024), "the Court did not even bother to resolve the specific controversy in the case before it").

17. *See* Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 801-04 (2022).

18. 141 S. Ct. 2619, 2619-20 (2021) (mem.) (granting certiorari limited to the question of whether all previability prohibitions on elective abortions are constitutional).

19. 143 S. Ct. 2429, 2429 (2023) (mem.) (granting certiorari limited to the question of whether *Chevron* should be overruled or clarified).

20. These are hardly the only examples. A nonexhaustive list of such recent cases includes *Calcutt v. Federal Deposit Insurance Corp.*, 598 U.S. 623, 624 (2023) (per curiam); *Flowers v. Mississippi*, 586 U.S. 985, 985 (2018) (mem.); *Department of Education v. Career Colleges & Schools of Texas*, 145 S. Ct. 1039, 1039 (2025) (mem.); *Kerr v. Planned Parenthood South Atlantic*, 145 S. Ct. 1000, 1000 (2024) (mem.); *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industrial Review Commission*, 145 S. Ct. 1000, 1000 (2024) (mem.); and *Riley v. Garland*, 145 S. Ct. 435, 435 (2024) (mem.). The practice has also been used in many landmark cases. *See* Johnson, *supra* note 17, at 796-97 (collecting examples).

however, that fig leaf is falling away: Justices are abandoning even the pretextual judgments they used to render in favor of vacatur. Just as preselecting questions through certiorari permits the Justices to preselect policy questions ex ante, vacatur allows them to target questions of interest ex post. Vacatur is the latest step in the Court's transformation from a judicial body that resolves discrete cases into a pseudolegislature that picks how and when it will implement new legal rules.

Because the Court has been clear that history is the appropriate guide to the contours and limits of judicial power,[21] this Article takes the Court at its word and assesses this new use of vacatur through a historical lens. Though "[t]he precise origins of vacatur . . . are uncertain" and have been described as "shrouded in ancient lore and mystery,"[22] this Article uncovers this previously unrecognized history[23] to determine if the Court is as faithful to history in deed as it is in word.

A great deal of confusion has festered in the courts about the proper role and definition of vacatur in their ordinary work. But such concerns are easily resolved. Vacatur as a remedy applies in two concrete situations. When a lower court's judgment is infected by some sort of procedural irregularity—such as lack of standing or fraud on the court—the petitioner should seek, and the court should provide, vacatur as a judgment. When a lower court's judgment is wrong on the merits, the proper judgment is reversal. In either situation, the remedy of vacatur is available.

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21. *See, e.g.*, TransUnion LLC v. Ramirez, 594 U.S. 413, 424-25 (2021); eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 390 (2006); *eBay*, 547 U.S. at 395 (Roberts, C.J., concurring); *eBay*, 547 U.S. at 395-96 (Kennedy, J., concurring); Ortiz v. United States, 585 U.S. 427, 439-41 (2018); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 217-25 (1995); Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1213, 1217-18 (2023); William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1814 (2008); Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 846-52 (2008).

22. Acheson Hotels, LLC v. Laufer, 601 U.S. 1, 15 (2023) (Jackson, J., concurring in the judgment) (quoting FED. R. CIV. P. 60(b) advisory committee's note to 1946 amendment).

23. A plethora of views exist regarding vacatur's origins. For instance, Justice Jackson asserts that "[a]ll agree . . . that vacatur extends from the historical practice of equity." *Id.* Justice Clifford, writing after the Civil War, suggested common-law roots. *See Ex parte* Lange, 85 U.S. (18 Wall.) 163, 192 (1873) (Clifford, J., dissenting) ("Courts of common law possessed the power to vacate their judgments during the term in which they were rendered, and the rule is still the same in all courts exercising jurisdiction in common-law cases, whether civil or criminal; and the remark is equally correct whether applied to a State or Federal court."). As this Article shows, both Justices are correct, though the equitable account Jackson later articulated seemed to have prevailed in American courts by the late nineteenth century. *See generally* Recent Cases, *Equity—Judgment—Bill in Equity to Vacate*, 9 HARV. L. REV. 486 (1896) (collecting cases). That view had taken hold at the Supreme Court by 1944. *See, e.g.*, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944).

As for evaluating modern uses of vacatur, even a brief description of these practices raises two obvious, though often overlooked, concerns. First, in each of these modern uses, the Court grants vacatur as a remedy without first making a judgment. This practice is difficult to square with the nature of remedies, which almost by definition require an antecedent judgment.[24] Second, the Court often uses vacatur to target particular legal or policy issues of interest to the Justices, announcing rules that will guide future courts without resolving the dispute at hand. This practice severely strains the boundaries between judicial and legislative powers. It is one thing for a court to declare law while deciding a case; this is a necessary part of judging. It is something else entirely for a court to declare law for others to apply—picking what law it will declare and when—without deciding a case; this is difficult to classify as a judicial function.

This Article evaluates the Roberts Court's recent activity against its own methodology, taking history to be the measuring stick for the remedial powers of federal courts. There is ample historical support for using vacatur to manage cases in the course of deciding them, to provide relief after a judgment of reversal, or to recognize some procedural irregularity in earlier proceedings. The relevant question for the modern Court is whether there is a fourth mode of appellate decision-making, one that allows a court to discuss the merits and proceed to vacatur without reversing the judgment.

This Article proceeds in four Parts. Part I offers a brief sketch of historical and modern vacatur to orient the reader. Part II provides a more detailed history of vacatur from its English roots through the nineteenth century. Part III traces the development of modern vacatur in the twentieth century. And Part IV challenges the legitimacy of this newer practice, based on its inconsistency with the history of vacatur, and considers some counterarguments to this critique. Should this critique hold, it strongly suggests that the Court's repeated and increasing use of vacatur to declare law without reaching judgment is illegitimate on the Court's own terms.

I. A BRIEF OVERVIEW OF VACATUR

Vacatur is like voiding a check. In England, clerks would write *vacat* on the rolls to indicate that a prior judgment was now void. Historically, vacatur could

24. It is worth noting that the grant, vacate, and remand (GVR) raises similar concerns. In many cases, one might think of the GVR as a soft reversal in light of new precedent, yet the Court will sometimes (for example, in the case of circuit splits) GVR even cases from lower courts with which the Court agrees. Even if the lower court incorrectly addresses the question the Court just decided, there may be other grounds on which the respondent could defend the judgment. The GVR denies the respondent the usual right to make such a defense in the Supreme Court.

be used in three ways: as a tool of docket control, as a remedy after reversing a judgment for error, or as a judgment when there was a lack of jurisdiction or other procedural irregularity. These three uses of vacatur predate the Founding. Uncovering their history serves two purposes. First, it clarifies the proper use of vacatur in the ordinary course for most courts. Second, it provides a historical baseline against which scholars and judges should evaluate modern uses of vacatur.

The contemporary Supreme Court still uses vacatur in the three classical ways, but it has also developed new usages. Just because something is new does not mean it diverges too far from traditional limits; modern vacatur might yet be salvaged if it bears sufficient ties to traditional vacatur. To answer this question, this Article treats the three historical uses of vacatur as distinct analytical sets, with each set containing one traditional use and one modern counterpart. Identifying the current uses of vacatur and linking these modern uses to traditional forms advances this historical inquiry in two ways. First, if modern uses of vacatur are legitimate under the Court's historical tests, they must tie back to some type of vacatur at the Founding. Second, clarifying where the story ends makes it easier to track the various forms and functions that vacatur has taken over the course of history.

Each of the next three Sections pairs a modern practice of vacatur with its closest historical analogue. The first describes how the Court uses vacatur as a tool of docket management through the so-called GVR (*grant* certiorari, *vacate* the judgment below, and *remand* to the lower court). The second introduces the Court's more novel use of vacatur as a means of lawmaking in cases like *Loper Bright*. The third describes modern vacatur as a judgment, which is most prominently observed in *Munsingwear* vacatur cases. After reviewing these three uses, the final Section of Part I establishes the stakes of understanding the history that underlies these practices.

A. Vacatur as Docket Management

Vacatur has often served as a tool to promote efficiency. Traditionally, a court would use vacatur to erase one of its own earlier judgments or rulings upon recognizing that it had made a mistake, that material facts had changed, or that some other development required returning to an earlier stage of litigation. Today, for example, the Court regularly uses vacatur to remove a temporary stay issued by a circuit Justice while the Court considers an emergency application

for a stay.[25] Vacatur as docket management allows a court to clear away earlier decisions and proceedings to facilitate a more efficient pursuit of justice for the parties. There are two primary limitations to this type of vacatur: (1) a court may only vacate its own work, and (2) it cannot do so for cases decided in previous terms. If a court enters a judgment and then the term ends, it may not return the following term and vacate an earlier decision.

The modern variant of this use of vacatur is the so-called GVR, through which the Supreme Court grants certiorari, vacates the lower court's judgment, and remands the case for further consideration. By returning the case to the lower courts—usually to apply a new decision from the Justices—the GVR allows the Court to dispose of many petitions at once without having to consider the merits of any of them. This saves time for the Justices, but it comes at a cost to parties who had hoped to have their disputes finally resolved in the Supreme Court but must now return to a lower court to recommence proceedings and perhaps make a subsequent appeal to the Court.

B. Vacatur as a Remedy

Vacatur as a remedy often follows a reversal on the merits. Reversal is the appropriate judgment when, after reviewing a record from the lower court, the appellate court finds sufficient errors to overturn the lower court's judgment. Reversing a judgment does not require the lower court to enter a judgment for the petitioner; that is one remedial option open to the appellate court, but it is not the natural or most historically common remedy. Rather, reversal simply means that there is some error on the record such that there is insufficient support to sustain a judgment against the petitioner.[26] In England, the case was commonly returned to the lower court for a new trial, and vacatur was the remedy that wiped away the first judgment so a second trial could begin.[27] In the United States, Congress gave the Court greater flexibility to modify a lower court's judgments or to reverse them in part. When the Court observed an error but could not itself correct it—for example, because the necessary evidence or information was not easily accessible in Washington, D.C.—the Court might vacate a small piece of a judgment or decree and remand only that little bit back to the lower court for further work.

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25. *See, e.g.*, Highland Cap. Mgmt. v. NexPoint Advisors, No. 24A1154, 2025 WL 1621149, at *1 (U.S. June 9, 2025) (Alito, J., in chambers) ("[T]he stay heretofore entered by the undersigned on May 29, 2025, is hereby vacated. The application for stay is, in all respects, denied.").

26. Importantly, the mere presence of error is not itself sufficient to justify reversal. The appellant is allowed to defend the judgment below on any grounds available on the record.

27. *See infra* Section II.A.

While vacatur does not fall in the standard list of remedies found in most casebooks (which are usually focused on remedies available to plaintiffs rather than petitioners), vacatur fits the standard definition of a remedy, and the Supreme Court recognizes it as such.[28] Appellate remedies differ from traditional remedies in that they are generally "remedies for losers."[29] Without vacatur, a judgment against the petitioner would remain on the books, potentially enabling the plaintiff to seek execution of that judgment or imposing preclusive effects against the defendant in other litigation. Vacating the judgment removes both possibilities, clearly benefiting the petitioner. This benefit is even clearer in the context of appeals from preliminary injunctions.

As a remedy, vacatur is only available after a judicial finding sufficient to justify it. Ordinarily, this means a judgment,[30] but even prejudgment remedies require certain findings on the merits. For instance, preliminary injunctions are not issued as a matter of course; the court must first reach the necessary conclusions.[31]

In contrast to the traditional use of vacatur as a remedy, many of the Court's recent opinions have simply vacated a judgment without reversing it. This type of direct law declaration through vacatur offers a presumptively binding statement of law without an antecedent judgment on the merits of a case. For example, in *Loper Bright*, the Court vacated judgments from two circuits not because they were wrong but because they applied the wrong standard.[32] The Court declared law, but it did not provide a judgment. Contrary to the rule elaborated in *Marbury*, the Justices did not "apply the rule to [a] particular case,"[33] nor did they "expound and interpret [the] rule."[34] The Court did not even answer the

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28. *See, e.g.*, U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 25-27 (1994); Alvarez v. Smith, 558 U.S. 87, 87 (2009); Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 867 (1988); Acheson Hotels, LLC v. Laufer, 601 U.S. 1, 15 (2023) (Jackson, J., concurring in the judgment). The Court is simply recognizing a longstanding view of vacatur. *See infra* Section II.A.

29. Aaron-Andrew P. Bruhl, *Law and Equity on Appeal*, 124 COLUM. L. REV. 2307, 2324 (2024).

30. Indeed, the leading remedies casebook simply presumes a requisite legal finding on the merits in all instances so that it can give attention to what follows that determination, namely the remedy. DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES 2 (5th ed. 2019) ("In every case, we will assume that the defendant's conduct is unlawful.").

31. *See* Starbucks Corp. v. McKinney, 602 U.S. 339, 342 (2024).

32. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 413 (2024) ("Because the D.C. and First Circuits relied on *Chevron* in deciding whether to uphold the Rule, their judgments are vacated, and the cases are remanded for further proceedings consistent with this opinion."). The Court neither said that the circuit courts reached the wrong result nor decided the cases using the revised standard.

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

34. *Id.*

relevant legal question in the case — the proper interpretation of the statute — and the answers that it did provide were hardly necessary to its resolution of the case. Whatever power the Court used to declare law, it was not the judicial power as described in *Marbury*.

C. Vacatur as a Judgment

In some cases, a lower court acts without jurisdiction, it is hoodwinked by fraud, or some other irregularity renders the earlier proceedings void ab initio. In these cases, reversal is not available: reversal is a judgment on the merits, and if the earlier proceeding is void, there are no merits to review. In such instances, courts have historically declared the earlier proceedings *vacat*. This use of vacatur functions as a judgment. Vacatur as a remedy then follows vacatur as a judgment.

To simplify matters, imagine that, when issuing vacatur as a remedy, the judge takes out a red pen and writes "void" on a lower-court judgment. Writing *vacat* on the record is the remedy that protects the petitioner from any adverse consequences of the previous judgment. But since this use of vacatur is a remedy, some previous finding must justify its use. When a remedy follows a judgment on the merits, the appropriate common-law judgment to trigger this remedy is reversal.[35] But when a court observes some irregularity indicating that the merits should never have been reached in the first instance, the finding that triggers this remedy is vacatur itself. The same word and the same concept are at play in both instances. In the former instance, however, vacatur follows a reversal and works merely as remedy. In the latter instance, vacatur works first as a judgment and then as a remedy.[36]

Perhaps the most contentious use of vacatur as a judgment is so-called *Munsingwear* vacatur. This doctrine deals "with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits"; in these cases, the Court's practice is "to reverse or vacate the judgment below and remand with a direction to dismiss."[37] The Court does not reach the merits, nor does it opine on the underlying substantive law. It uses vacatur as a judgment without finding that the lower court lacked jurisdiction or finding any other procedural irregularity below. Instead, the justification is as follows: (1) the case has become moot; (2) since it is moot, the appellate court lacks jurisdiction; (3) since it lacks jurisdiction, it cannot review the lower court's (otherwise valid) judgment; and (4) it would be unfair to the petitioner to be stuck with the preclusive effects of an unappealable judgment. Most of the

35. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *405; 4 BLACKSTONE, *supra*, at *386.

36. Several historical examples are provided *infra* Section II.A.

37. United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950).

disputes over *Munsingwear* turn on strategic litigants using settlements to vacate unfavorable precedent, but the Court's own use of *Munsingwear* raises issues that have been largely overlooked. Notably, it frequently uses *Munsingwear* to vacate judgments that have already been reviewed by an appellate court and does so in a way that appears to be ideological.[38]

In sum, there are three distinct classical uses of vacatur—case management, remedy, and judgment—and each has a modern sibling: the GVR, direct law declaration, and *Munsingwear* vacatur. Do traditional uses of vacatur support the modern variants? This question can only be answered by examining the history of vacatur over the centuries.

II. VACATUR IN ENGLAND AND EARLY AMERICA

Justice Jackson has recently taken an interest in vacatur. Concurring in *Acheson Hotels*, she ventured several suggestions about vacatur's roots. While "[a]ll agree . . . that vacatur extends from the historical practice of equity,"[39] she indicated that some instances of vacatur might flow from "'supervisory appellate power' to 'make such disposition of the case as justice requires.'"[40] Part II treats Jackson's concurrence as an invitation to search for the origins of vacatur in English and early American legal history.

Answering Justice Jackson's concern about vacatur's origins requires looking beyond equity, since vacatur was also used at common law. Section A of this Part traces the roots of vacatur to both equity and common law in England, while Section B shows how English uses of vacatur carried forward to early American practice.

A. Vacatur in England

Vacatur was used at all levels of the English legal system. The apex of the English judicial hierarchy was the House of Lords,[41] which had final review of

38. *See infra* Section III.B.2.

39. Acheson Hotels, LLC v. Laufer, 601 U.S. 1, 15 (2023) (Jackson, J., concurring in the judgment) (quoting Walling v. James V. Reuter, Inc., 321 U.S. 671, 676 (1944)).

40. *Id.*

41. *See* JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW 358-59 (2009).

cases from common-law courts and equitable causes from Chancery.[42] The Lords, the common-law courts, and Chancery all used vacatur.[43]

Common-law courts operated through a series of writs and made use of juries to find facts. They offered primarily money damages, though certain historically important remedies like habeas corpus, mandamus, and prohibition were also available. Cases were often heard in assizes (local courts designed to hear cases quickly without requiring parties and witnesses to travel to Westminster),[44] and judgments were reviewed by the central common-law courts in London via the writ of error.[45] Review on error encompassed the entire record from

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42. The relationship between these legal systems is endlessly interesting and largely beyond the scope of this Article, but the parts of it that deal with vacatur are worth some attention. Chancery would use vacatur as part of its larger effort to achieve just outcomes. For instance, it vacated a securitized debt where there had been no attempt to execute the securitized interest in over thirty years. *See* Warcopp v. Culpepper (1617), *reprinted in* REPORTS OF CASES DECIDED BY FRANCIS BACON, BARON VERULAM, VISCOUNT ST. ALBANS, LORD CHANCELLOR OF ENGLAND, IN THE HIGH COURT OF CHANCERY (1617-1621), at 69, 70 (John Ritchie ed., 1932) [hereinafter REPORTS OF CASES DECIDED BY FRANCIS BACON]. While the Chancellor could vacate decrees issued from Chancery, he could not vacate judgments from common-law courts even if fraud occurred. The near-functional equivalent, however, was to issue an injunction to prevent the execution of an unjust judgment. *See, e.g.*, Dimmock v. Williams (1618), *reprinted in* REPORTS OF CASES DECIDED BY FRANCIS BACON, *supra*, at 137, 138; 3 BLACKSTONE, *supra* note 35, at *437-38.

    Equity's ability to intervene after a common-law judgment has a long and complex history. Common-law judges complained of the Chancellor's efforts to reopen final legal judgments going back to at least the 1500s. *See* J.H. Baker, *The Common Lawyers and Chancery: 1616*, 4 IRISH JURIST 368, 371 (1969). One of the charges lodged in the successful removal of Lord Chancellor Cardinal Wolsey in 1529 was that he reexamined common-law judgments in equity. *See id.* King James famously decided in favor of Chancery in the dispute. *See* The King's Order & Decree in Chancery (1616) 21 Eng. Rep. 65, 65 (Ch); *see also* Baker, *supra*, at 381-86 (describing the King's speech and subsequent decree); LANGBEIN ET AL., *supra* note 41, at 334-35 (noting that the King's decree secured Chancery supremacy by empowering it to provide relief in equity that conquered common law); JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 116-18 (2019) [hereinafter BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY] (noting that the King's statement was soon to be considered illegal).

43. *See, e.g.*, Order of the House of Lords (Feb. 26, 1640), *in* JOHN NALSON, AN IMPARTIAL COLLECTION OF THE GREAT AFFAIRS OF STATE, FROM THE BEGINNING OF THE SCOTCH REBELLION IN THE YEAR MDCXXXIX, TO THE MURTHER OF KING CHARLES I, at 781, 781-82 (London 1682) (ordering records and rolls from Exchequer, King's Bench, Common Pleas, Star Chamber, and Chancery to be brought to the Lords where "a Vacat shall be made . . . of the several Records"); *Warcopp*, *reprinted in* REPORTS OF CASES DECIDED BY FRANCIS BACON, *supra* note 42, at 69, 70; Collins Case (1594) 72 Eng. Rep. 625, 625 (QB). Well before the Founding, there had also been the Star Chamber, which also used vacatur. *See, e.g.*, Hubert's Case (1596-97) 78 Eng. Rep. 778, 779 (QB).

44. *See* BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY, *supra* note 42, at 252-54.

45. There were three: King's Bench, Exchequer, and Common Pleas, though Exchequer also had some equitable business. *See id.* at 146-48 (describing the different courts of record).

the earlier proceedings, and any material mistake resulted in a reversal after which the case might be retried in the lower court.

In contrast, Chancery operated under the body of law called equity, which stepped in when legal remedies were insufficient. When a plaintiff needed an injunction—an equitable remedy—he had to turn to Chancery.[46] Chancery did not make use of juries, and the Chancellor and his assistants found the facts as necessary to enter a decree. The lack of a jury meant that on appeal—the equitable analogue to the writ of error—review encompassed law and fact.

Whether in law or equity, however, to "vacate" is "to nullify or cancel," "make void," or "invalidate" something.[47] Despite enormous differences between law and equity in both substantive law and procedures, Chancery and common-law courts used vacatur in the three distinct ways described above. Vacatur occasionally functioned as a ministerial device that allowed a tribunal to manage a case on its docket.[48] For present purposes, though, the two most important uses of vacatur were as either a judgment or a remedy.

When employed as a judgment, vacatur recognized fraud or some other irregularity that rendered an earlier proceeding void. Frequently, such findings followed clear instances of fraud or forgery, and in such instances, many legal

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46. Chancery also oversaw the laws regarding trusts and mortgages. *See id.* at 119.

47. *Vacate*, Black's Law Dictionary (12th ed. 2024).

48. Any use of vacatur required some ministerial work. Usually, it entailed writing *vacat* on the roll, which would signal to future courts that the patent or proceedings noted on the roll were void. Sometimes, however, the *vacat* would be entered on the record rather than the roll. *See, e.g.*, Jefferson v. Morton (1670) 85 Eng. Rep. 540, 571 (KB) (noting that a "vacatur . . . was made . . . [and the] old roll was not extracted, but only a vacatur as appears by the roll, which is entered at the foot of the record"). Courts of record (which do not include Chancery) had absolute control of the record during the term the case was before the court, and so that court could vacate a record—even after judgment—during that term. But once the term ended, so did the court's power to vacate. *See* Judgment Vacat Quia Fuit Enter Del Terme Past (1664) 82 Eng. Rep. 1070, 1070 (KB). The physical roll itself remained; it would not be removed and replaced with a new one reflecting the new proceedings. *See, e.g.*, Lee v. Daniel (1738) 94 Eng. Rep. 780, 780 (CP). The record, even with the *vacat*, was still a record. The continuous nature of the record had one other important effect. Parties could not agree to vacate a judgment, "because it [was] a record"; instead, they might acknowledge satisfaction of judgment, which would make the judgment "fruitless." Charles Viner, General Abridgment of Law and Equity 636 (Arkose Press 2015) (1742). *But see* Dr. Witherington's Case (1662-63) 83 Eng. Rep. 1052, 1052 (KB) (recognizing a vacatur upon the consent of the parties).

instruments (not just judgments) might be set aside.[49] However, earlier proceedings might be voided for less mendacious reasons.[50]

Consider three examples. In *Collins Case*, defendants brought an *audita querela*[51] to halt several separate executions stemming from different but related suits. The Queen's Bench initially granted that request, but it subsequently vacated that decision because an *audita querela* cannot be used for multiple suits.[52] In *Gibson v. Bishop of Bath & Wells*, the court initially entered judgment for the plaintiff when it received a warrant of attorney stating that the defendant had abandoned his claim.[53] The defendant contested this, claiming he had done no such thing. The court then ordered a trial to determine whether the warrant was valid or a forgery. The jury determined it was a forgery, and the court ordered the earlier judgment "to be set aside"; a "vacatur hoc judic[] was accordingly entered."[54] Finally, in *Wilson v. Charlesworth*, a successful plaintiff was surprised to discover that someone had filed a witnessed document with the court asserting that "satisfaction had entered" already, apparently in an effort to help the defendant avoid payment.[55] The court examined the original defendant and the two alleged witnesses to the warrant and determined that it was a forgery. The

49. For example, courts would vacate a will after a jury determined it was forged. Noell v. Wells (1685) 84 Eng. Rep. 403, 403-04 (KB). Likewise, "[i]f bail justify in a feigned name, and the plaintiff, on recovering against the principal, obtain judgment on a *scire facias*, against the person personated, a *vacat* shall be entered on the roll, and the judgment on the *scire facias* set aside." Cotton's Case (1610) 79 Eng. Rep. 219, 219 (KB).

50. On at least one occasion, the Chancellor vacated a decree entered ex parte by a master without hearing from the defendant. Parker v. Dee (1674) 36 Eng. Rep. 968, 969-70 (Ch). Similarly, vacatur could be sought if there was an improper removal from Chancery to King's Bench. *Jefferson*, 85 Eng. Rep. at 576 (discussing the availability of this procedure but not removing the instant case).

51. *Audita querela* "allowed petitioners to concede the legal validity of a judgment at the time it was rendered but challenge its continued execution due to inequities at the time of judgment in conjunction with matters that arose after its rendition." Caleb J. Fountain, Note, *Audita Querela and the Limits of Federal Nonretroactivity*, 70 N.Y.U. Ann. Surv. Am. L. 203, 207 (2014). For a more extensive description of *audita querela*, see Cortney E. Lollar, *Invoking Criminal Equity's Roots*, 107 U. Va. L. Rev. 495, 527-33 (2021); and 3 Blackstone, *supra* note 35, at *404-05. For further discussion, see generally Fountain, *supra*.

52. Collins Case (1594) 72 Eng. Rep. 625, 625 (QB). The case presages the eventual use of vacatur as a method for policing standing doctrine. If the remedy is unavailable, the courts cannot provide redress, and there is no standing. Thus, one might anachronistically observe something like a lack of standing as the reason that earlier proceedings were void.

53. (1733) 94 Eng. Rep. 895, 895 (KB).

54. *Id.*

55. (1729) 94 Eng. Rep. 217, 217 (KB).

court then "instantly vacated the entry of satisfaction" and handed the forgers over to criminal authorities.[56]

All three examples demonstrate how vacatur as a judgment was usually followed by vacatur as a remedy. When a reviewing court found some irregularity in the process, it adjudged the previous decision as void and then used vacatur as a remedy. Yet one must be careful to avoid making this relationship too exclusive. Vacatur as a judgment might lead to additional remedies, and vacatur as a remedy might follow a judgment of reversal,[57] allowing the possibility of a new trial.[58] Thus, either of two judgments, reversal or vacatur, might precede vacatur as a remedy. The key difference between the two judgments is that reversal was a statement about the merits; vacatur was a statement about the process.

B. Vacatur in Early American Practice

Unsurprisingly, the direct descendants of English courts were frequent users of vacatur.[59] This Section first establishes the continuity between English

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56. *Id.* What makes *Wilson* doubly interesting is that the entry in the reporter concludes by noting the court's observation that, even without fraud, vacatur would have been proper because the warrant of attorney permitted recompense of less than half of the value of the judgment. *Wilson* also demonstrates that other remedial options might follow vacatur as a judgment. Likewise, if a defendant lost a case and paid damages but was subsequently able to show irregularities in the proceedings, vacatur was entered on the roll and further constituted a judgment for restitution of the money paid previously. *See* Felgate v. Tourner (1675) 83 Eng. Rep. 1264, 1264 (KB).

57. 4 Blackstone, *supra* note 35, at *386 ("But when judgment, pronounced upon conviction, is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused . . . .").

58. *See* John Palmer, Practice in the House of Lords, on Appeals, Writs of Error, and Claims of Peerage 117-18, 175-76 (London, Saunders & Benning 1830); Aaron-Andrew P. Bruhl, *The Remand Power and the Supreme Court's Role*, 96 Notre Dame L. Rev. 171, 187 (2020).

59. *See* Bruhl, *supra* note 29, at 2315-31 (discussing the historical use of vacatur and other equitable remedies in Anglo-American appellate practice). Examples of Supreme Court uses of vacatur include *Vowles v. Craig*, 12 U.S. (8 Cranch) 371, 372 (1814), which concerns contracts; *Bank of Alexandria v. Herbert*, 12 U.S. (8 Cranch) 36, 37 (1814), which pertains to deeds; *Marine Insurance v. Hodgson*, 10 U.S. (6 Cranch) 206, 207 (1810), which involves insurance policies; *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 659 (1838), which concerns charters; *United States v. Morrison*, 29 U.S. (4 Pet.) 124, 133 (1830), which involves fraudulent conveyances; *Skillern's Executors v. May's Executors*, 8 U.S. (4 Cranch) 137, 138 (1807), which relates to bond; and *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 216 (1818), which pertains to grants. Usually, some sort of underlying illegality explained why the object was void, but for the federal courts to declare it so, the illegality had to be legally cognizable in the federal courts. For instance, in 1795, the Court observed that certain action might make a French sailor "amenable to punishment in our courts, but it could not vacate his *French* commission." Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 147 (1795); *see also id.* at 168 (opinion of Cushing, J.) (finding that the lack of

foundations and subsequent American practice, then considers the American statutory innovation in vacatur rooted in the First Judiciary Act.

The U.S. Supreme Court retained all three traditional uses of vacatur. For example, the procedural limits for vacatur as a tool of case management remained consistent. As in England, American courts could set aside their own judgments so long as the judgment was still in the power of that court.[60] If the court caught mistakes during the term, it was able to vacate its own judgment.[61] If the term ended before the mistake became known, the judgment was no longer within the court's power, and so the judge could not vacate.[62] The appellate court might provide relief on a writ of error, but once those proceedings were concluded, the only remaining recourse was equity.[63]

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authority rendered the capture of a vessel void). Likewise, an insurance policy for a trading voyage that was unlawful under a foreign sovereign's law was not to be vacated, "although a policy upon a trading voyage made illegal by our own laws, might be vacated." Church v. Hubbart, 6 U.S. (2 Cranch) 187, 199 (1804).

60. *See, e.g.*, The Hiram, 14 U.S. (1 Wheat.) 440, 444-45 (1816).

61. *See, e.g.*, Doss v. Tyack, 55 U.S. (14 How.) 297, 312-13 (1852); Caldwell v. Texas, 141 U.S. 209, 209 (1891) (mem.). A different and fascinating example is *Snow v. United States*, 118 U.S. 346, 347 (1886). In *Snow*, the Court considered a conviction under the federal polygamy statute on a writ of error but discovered it lacked jurisdiction. *Snow*, 118 U.S. at 354-55. It was pointed out that the Court had affirmed a similar conviction earlier in the term in *Cannon v. United States*, so the Court vacated that earlier affirmance, writing

> as the case was decided at the present term, and the want of jurisdiction in it is clear, we have decided to vacate our judgment, and recall the mandate and dismiss the writ of error for want of jurisdiction, in order that the reported decision may not appear to be a precedent for the exercise of jurisdiction by this court in a case of the kind.

Snow, 118 U.S. at 354-55; *see also* Cannon v. United States, 118 U.S. 355, 355 (1886) (outlining the reasoning employed to justify the Court's reasoning in *Snow*).

62. *See, e.g.*, Cameron v. McRoberts, 16 U.S. (3 Wheat.) 591, 593 (1818).

63. *See, e.g.*, *The Hiram*, 14 U.S. (1 Wheat.) at 444-45. The Court expounded upon this possibility in *Walker v. Robbins*, 55 U.S. (14 How.) 584 (1852). In that case, it appeared to recognize an equitable power to vacate legal judgments when there were procedural problems. Three individuals—Walker, Puckett, and Lang—asked a circuit court in the Southern District of Mississippi (sitting in equity) for a permanent injunction against various defendants who had previously secured a judgment at law against the three. *Walker*, 55 U.S. (14 How.) at 584. The primary basis for the injunction was the claim that Walker had not been served with notice to the earlier lawsuit. Ten years after the initial judgment, the deputy assigned to serve Walker with notice testified that he did not notify Walker. Instead, the deputy claimed that he "indorsed the writ executed, intending to execute it after the indorsement was made, and therefore he let it stand, although he never did notify Walker." *Id.* The Court agreed that such relief was possible. A court exercising equitable powers could, the Court said, "vacate judgments, where the tribunal rendering the same would refuse relief, either on motion, or on a proceeding by *audita querela*, where this mode of redress is in use." *Id.* at 585. Since courts of law could not provide such relief, equity was the place to look.

America further maintained the English tradition of vacating a lower-court decision for irregularities.[64] For the most part, it also continued the traditional remedial use of vacatur following a reversal on the merits.[65] After a judgment of reversal or vacatur, errant judgments might be "revoked, reversed and annulled";[66] "revoked and annulled, and altogether held for nought";[67] or perhaps just "set aside" when the judgment "cannot be affirmed but in violation of law."[68]

American legal practice did, however, introduce an important innovation when using vacatur as a remedy following reversal. Recall that in England, reversal on the merits would result in a new trial or a directed judgment for the plaintiff-in-error.[69] Unlike its English forebears, the Supreme Court could enter a judgment or decree that would dispose of the case instead of affirming, reversing for a new trial, or vacating for irregularity.[70]

Ultimately, the Court did not grant the relief. It decided that Walker had waived notice by meeting with attorneys and participating in the defense in the earlier suit. The Court also disposed of the plaintiffs' other grounds for the injunction by noting that all the proffered reasons could have been—but were not—used as defenses at the earlier trial. The Court upheld the longstanding rule "that whenever a competent defence shall have existed at law, the party who may have neglected to use it, will never be permitted to supply the omission and set it up by bill in chancery." *Id.* at 586.

64. *See* Bank of the U.S. v. Ritchie, 33 U.S. (8 Pet.) 128, 133 (1834) ("[W]here the original proceedings are infected with fraud, an original bill lies to vacate them on that ground."); Kempe's Lessee v. Kennedy, 9 U.S. (5 Cranch) 173, 180-81 (1809) ("The words '*shall hereafter be reversed or made void*,' refer to some measure afterwards to be resorted to, to accomplish the reversal of *existing* judgments or proceedings, for error, or irregularity. The term 'crroneous' [sic] being the appropriate word to describe errors apparent on the record, and '*void*,' to describe *irregularities*."); Slacum v. Simms, 9 U.S. (5 Cranch) 363, 367-68 (1809); United States v. Gomez, 64 U.S. (23 How.) 326, 340 (1860). The Court would later vacate if it appeared the suit was collusive. *See* Gardner v. Goodyear Dental Vulcanite Co., 131 U.S. app. at ciii (1873).

65. *See* 4 BLACKSTONE, *supra* note 35, at *386 ("But when judgment, pronounced upon conviction, is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused.").

66. Glass v. The Betsey, 3 U.S. (3 Dall.) 6, 16 (1794). This phrasing dates back to when the Court of Appeals convened under the Articles of Confederation. *See, e.g.*, Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54, 100 (1795) (opinion of Iredell, J.); *cf.* Wilson v. Mason, 5 U.S. (1 Cranch) 45, 102-03 (1801) (employing the phrase "reversed and annulled"); Head & Amory v. Providence Ins. Co., 6 U.S. (2 Cranch) 127, 170 (1804) (same).

67. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 285 (1796). In *Ware*, individual Justices wrote seriatim opinions and said that the lower court's judgment should be reversed. *Id.* at 220-85.

68. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

69. *See supra* Section II.A.

70. Patents appeared to fall in something of a liminal space. The Patent Act of 1793 expressly gave courts the power to declare certain patents void or to repeal them. *See* Patent Act of 1793, ch. 11, § 10, 1 Stat. 318, 323. While the Court vacated patents pursuant to a statute, it was clear that Congress and the courts "adopted . . . the rules of the common law, as applied to patents in England; and that by the common law, a patent, when defective, may be surrendered to the

Congress embedded this new flexibility into the First Judiciary Act (discussed below), enabling greater judicial economy. Yet many fixtures remained unchanged in the appellate process. Whether the appeal came from equity or the writ of error at law, Congress required the Supreme Court to review the entire case for error.[71] The possibility of reversing in part or modifying a judgment did not imply that the Court could satisfy its judicial obligations by a partial review of the record.[72] That is, Justices could not simply preselect part of the record, offer thoughts, and vacate. While Justices did not have the flexibility to avoid a complete review of the record, the Court did have flexibility in how to resolve a case after comprehensive review. Indeed, the Court went to great pains not only to fulfill its obligation to render judgment in the entire case but also to maintain the formal requirement that vacatur was only appropriate after a procedural irregularity or a reversal, even in extreme cases.

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granting power, which vacates the right under it." Shaw v. Cooper, 32 U.S. (7 Pet.) 292, 314 (1833).

There was an obvious English predecessor to this practice, as English courts regularly vacated letters patent. *See, e.g.*, The Master & Chaplains of the Savoy's Case (1587) 74 Eng. Rep. 609, 609 (Exch. Div.); Kempe v. Makewilliams (1561) 73 Eng. Rep. 429, 429 (QB). Thus, there was a clear common-law background against which federal courts could operate. Justice Story, writing as the Circuit Justice for the Circuit Court in the District of Massachusetts, discussed at some length conditions under which a patent would be void, though he never mentioned the Patent Act. The case, *Odiorne v. Winkley*, involved two inventors who built similar machines. 18 F. Cas. 581, 581 (C.C.D. Mass. 1814) (No. 10,432) (Story, Circuit Justice). Story noted that, given the facts in the case, if the jury found the machines were "constructed substantially upon the same principles, and upon the same mode of operation . . . then [the] patent is void." *Id.* at 582. The Supreme Court would follow this traditional line four years later in *Evans v. Eaton*. 16 U.S. (3 Wheat.) 454, 514 (1818) ("[I]f the thing . . . had been in use, or had been described in a . . . public work, anterior to the supposed discovery . . . the patent [is] declared void."). The reporter notes that the plaintiff eventually abandoned the claim and "judgment was entered upon the records of a vacatur of the patent." *Odiorne*, 18 F. Cas. at 583. *See generally* James E. Pfander & Mary E. Zakowski, *Nonparty Protective Relief in the Early Republic: Judicial Power to Annul Letters Patent*, 120 NW. U. L. REV. 623 (2025) (showing how federal courts discharged nonparty protective relief in patent-cancellation proceedings during the early Republic).

Likewise, in 1832, Chief Justice Marshall recognized that a jury was necessary to justify "a judgment of *vacatur*." Grant v. Raymond, 31 U.S. (6 Pet.) 218, 247 (1832). In the same case, Daniel Webster argued to the Court that "vacating and cancelling the record of a patent is in its nature a judicial act." *Id.* at 229.

71. Writing more than a century later and in the wake of the Evarts Act that gave the Court discretionary jurisdiction through certiorari, the Court would observe that "[f]rom the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error . . . have been . . . to have the whole case and every matter in controversy in it decided in a single appeal." McLish v. Roff, 141 U.S. 661, 665-66 (1891) (citing Forgay v. Conrad, 47 U.S. (6 How.) 201, 204 (1848)).

72. *See, e.g.*, Garland v. Davis, 45 U.S. (4 How.) 131, 143 (1846) ("[I]t is the duty of the court to give judgment on the whole record, and not merely on the points started by counsel.").

These expanded remedial powers represented a conscious policy decision by Congress in the First Judiciary Act of 1789,[73] functioning as a premerger of law and equity. As the Court explained in 1796, "The judiciary act of the *United States* had greatly innovated upon the old system of Admiralty and Chancery proceedings, the forms and principles of the common law were interwoven with, and in many cases, entirely substituted for those of the *Roman* jurisprudence."[74] Such interweaving affected the Supreme Court in several ways, including how it became aware of the facts in cases,[75] the legal devices it used to effectuate its appellate jurisdiction, and the options it had available when deciding appeals. Specifically, Congress gave the Court flexibility to modify common-law judgments or to reverse in part.[76] This flexibility facilitated a more efficient resolution of cases, since the Court was able to provide a final judgment on most issues even if it felt obligated to send some fact-intensive questions back to the lower courts for further consideration.

Formally, the First Judiciary Act channeled equitable review through the writ of error, or the appellate writ for common-law cases.[77] This posed a significant

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73. Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 73, 88-90. There was an important difference, though, in the Court's powers to enter or to modify judgments depending on the origin of the case. The Court could act immediately in federal cases, but it could only enter its own judgment in cases emerging from state courts if the case had already been remanded once. *See id.* § 25, 1 Stat. at 85-87.

74. Hills v. Ross, 3 U.S. (3 Dall.) 184, 185 (1796). For a more comprehensive account of the relationship between law and equity in early America, see Kellen Funk, *Equity's Federalism*, 97 Notre Dame L. Rev. 2057, 2058-64 (2022).

75. The First Judiciary Act made oral testimony — not depositions — the default method of providing testimony in causes in both equity and admiralty. Judiciary Act, § 30, 1 Stat. at 88-90. One consequence of reordering the equitable fact-finding process to match more closely the common-law process — with the absence of a jury remaining the key difference between the two processes — was that much of the relevant evidence became unavailable for an appellate court to review directly. *See id.* § 9, 1 Stat. at 77. As a result, it was left to the judge to write down the necessary factual findings for the eventual decree and add them to the record. *Id.* § 19, 1 Stat. at 83. This imposed a limit on the Supreme Court's ability to review the facts. Perhaps unsurprisingly, then, the First Judiciary Act denied the Supreme Court the power to overturn the factual determinations of the lower courts even in equitable causes. *Id.* § 22, 1 Stat. at 84-85.

76. *Id.* § 24, 1 Stat. at 85.

77. This left fact-finding in equity to the lower courts. *See Hills*, 3 U.S. (3 Dall.) at 185 ("It was clear, that the intention of Congress [in the First Judiciary Act] was to vest the power of trying matters of fact in . . . Equity cases, in the [trial courts] exclusively."). In the opinion, the Court immediately recognized Congress's decision to deploy common-law tools in equitable actions. "Like the verdict of a jury," the lower court's factual determinations were "final and conclusive, as to fact . . . . Therefore an *appeal* did not lie to them, but only a writ of error, as at common law." *Id.* The postscript to *Hills* is unusual. The Justices unanimously agreed that there were insufficient grounds to reverse the lower-court decree and urged the parties "to come to some agreement, which might bring the matters in controversy fairly before them." *Id.* at 187. As a

problem, since a common-law appellate court on a writ of error could not reconsider the facts, nor could it partially reverse or affirm judgments at law.[78] Reversal on error was total.

By contrast, equitable review encompassed facts and allowed for modification of decrees. If Congress had removed equity's ability to modify decrees in favor of the all-or-nothing nature of common-law error, this shift would have been dramatic.[79] Thus one might reasonably conclude that Congress did not intend to constrain the Court's equitable powers to revise decrees. Instead, it wanted to expand the Court's common-law powers to enter new judgments.

The Court made this expansion clear in the 1795 case *Penhallow v. Doane's Administrators*.[80] Justice Iredell's opinion recognized an important innovation in the First Judiciary Act: giving the Court power to rewrite judgments and

result, the lawyers for both parties agreed "the cause should be continued to the next term; and that, in the mean time, new evidence might be taken on both sides, and the whole matter of fact, as well as the law, brought before the Supreme Court of the *United States*, as upon an appeal." *Id.* at 187-88. The Court did take up the case the following Term, but once again only on error. It is not clear whether the Court permitted the parties to present new facts. *See* Hills v. Ross, 3 U.S. (3 Dall.) 331, 331 (1796).

Congress would eventually reintroduce more traditionally equitable processes, however. The Court was still not allowed to take new evidence in equitable cases, though it could in admiralty and prize cases. *See* Act of Mar. 3, 1803, ch. 40, § 2, 2 Stat. 244, 244. The new statute, however, did give the Court final say over facts as well as law on such equitable appeals. *See id.* However, this statute did not fully end the practice of reviewing equitable decrees on error. *See, e.g.*, Skillern's Ex'rs v. May's Ex'rs, 8 U.S. (4 Cranch) 137, 137 (1807) ("Error to the district court of the United States for the district of Kentucky, in chancery.").

78. *See* Bruhl, *supra* note 58, at 188 & nn. 79-80.

79. In Chancery, the Chancellor made the decision according to equity and based on the facts. The legal powers of equity and the ability to make factual determinations were always with the Chancellor so that "appeals" would encompass both law and fact. Further, the Chancellor was not in the position of a common-law appellate court limited to reversing or affirming a lower court on a writ of error. Since the decision was his own, he could revise it if he chose.

80. 3 U.S. (3 Dall.) 54 (1795). In *Penhallow*, Justice Iredell made clear that the Act did not, simply by linking equitable review to the writ of error, impose all the ancient common-law limitations upon equitable review. *Id.* at 107-08 (opinion of Iredell, J.). The writ-of-error nomenclature only reflected Congress's judgment that the Court should not review facts. The Court was still free, in his mind, to "modify a decree upon an appeal, as the justice of the case requires" and to "render such a decree as [the lower court] ought to have rendered." *Id.* at 108 (noting that the Court "affirmed in part").

decrees,[81] a power far closer to traditional equity than to traditional common law.[82] Iredell observed:

> In a civil law court . . . it is the constant practice to modify a decree upon an appeal as the justice of the case requires, and in this instance it appears to me, under the 24th section of the Judicial Act, we are to render such a decree as in our opinion the district court ought to have rendered.[83]

Iredell's opinion correctly observed that the First Judiciary Act empowered the Court to correct mistakes in judgments and decrees rather than simply reversing or affirming the whole judgment.

The ability to modify judgments was a strong and intentional departure from the traditional common-law approach to reversal, which was to send the entire case back to the lower court to start anew. Such an all-or-nothing approach would have been incredibly inefficient. Sending the case back to the trial court to redo the entire matter, with the risk that it might return again to the appellate court, wasted considerable time and resources. After all, the original thirteen colonies covered land fifteen times more expansive than England and Wales—the reach of England's Chancery and King's Bench—combined. Sending cases back and forth between the lower courts and the Supreme Court, given the vast distances involved, would have ground the justice system to a near halt. Such inefficiencies would only be exacerbated when circuit courts had to wait for a Supreme Court Justice to sit on the circuit bench. Thus, if the Supreme Court had all the necessary information to enter the proper judgment, it was more efficient to allow it to do so, whether operating in equity or in law.[84] If discrete issues

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81. *Id.* at 107-08. Congress imposed an extra duty on appellate courts: "[W]hen a judgment or decree shall be reversed . . . such court shall proceed to render such judgment or pass such decree as the [lower] court should have rendered or passed." Judiciary Act of 1789, ch. 20, § 24, 1 Stat. 73, 85. A famous example is *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 437 (1819).

82. Reversals were not unheard of in equity; the House of Lords could reverse the Chancellor, though this was rare. In England, appeals from Chancery to the Lords were available, but "few appeals were taken to the Lords . . . chiefly, no doubt, because the Lord Chancellor himself presiding in the Lords was little likely to reverse his own previous deliberate decision." Langbein et al., *supra* note 41, at 359 (quoting D.M. Kerly, An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery 168 (Cambridge, Cambridge Univ. Press 1890)).

83. *Penhallow*, 3 U.S. (3 Dall.) at 108 (opinion of Iredell, J.).

84. An example in a common-law case is *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). There, the Supreme Court reversed the judgment of the Circuit Court of Virginia and awarded the plaintiff-in-error "two thousand nine hundred and seventy-six pounds, eleven shillings and sixpence, good British money" less $596 already paid. *Id.* at 285. Notice that the Court did not enter the judgment in full. It did not have enough factual information to calculate the proper damages, so it remanded to the lower court. The 1789 Act expressly provided for this

required information unavailable to the Justices, the Court could enter judgment on all other issues and send only the odd bits back to the lower court for further consideration. This was a great boon to judicial efficiency, and Justices were not shy to use it in both law and equity.[85]

The judicial efficiency created by the ability to reverse and enter partial judgment is exemplified by *Finley v. Bank of the United States*, which involved a bank's sale of land that had been offered as security on a loan.[86] Chief Justice Marshall, though he noted some mistakes by the circuit court, refused to deem that court's decree erroneous.[87] He did, however, observe that "in the disposition of the money produced by the sale, a small mistake appears to have been made" involving the calculation of interest.[88] Thus, the Court's final decree declared the circuit court's judgment "erroneous so far as respects the computation of interest . . . and is so far REVERSED, and is in all other respects AFFIRMED."[89] The

possibility, commanding that "where the reversal is in favour of the plaintiff, or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain, . . . [the Justices] shall remand the cause for a final decision." Judiciary Act, § 24, 1 Stat. at 85.

85. *See, e.g.*, Higginson v. Mein, 8 U.S. (4 Cranch) 415, 420 (1808) ("[T]he cause remanded to that court, with instructions to direct an issue to determine whether the bond in the bill mentioned has been paid . . . ."); Livingston v. Md. Ins. Co., 10 U.S. (6 Cranch) 274, 281 (1810) (remanding for the jury to determine in a new trial whether the Spanish papers on board the ship were "material to the risk, and that it was not the regular usage of the trade insured to take such papers on board"); Crocket v. Lee, 20 U.S. (7 Wheat.) 522, 528-29 (1822) (remanding to determine the agreement of a land survey and an entry in the surveyor's office for a settlement right).

86. 24 U.S. (11 Wheat.) 304, 305 (1826). There, the bank brought a bill in chancery to "obtain a decree for the sale of property mortgaged for the security of a debt due to the bank." *Id.* at 305. The borrower (Finley) consented to the sale, and the Circuit Court for the District of Kentucky entered the decree, ordering the marshal to sell the property and pay the bank out of the proceeds. The total amount owed was $6,240 plus interest. The term ended without a final decree being entered. The following term, one William Coleman petitioned the court to join the suit, claiming that he held a prior mortgage on the land. The court denied the petition, so Coleman filed in state court. While that case was pending, the federal court entered its final decree. Finley, the original borrower, then appealed, claiming that the original lender (Coleman) had been kept out of the case. Writing for the Court, Chief Justice Marshall agreed that Coleman should have been included in the federal case, but he declined to say that the circuit court's decree was erroneous. *Id.* at 306-08.

87. Chief Justice Marshall reasoned that the circuit court had not been made aware of Coleman's mortgage until after "the decree was completely executed." *Id.* at 308.

88. *Id.* Coleman owed the bank money on some previous debts that the circuit court added to its final award. The land was, it appears, offered as security for these debts, but there was no record that the land was available as security for interest on those previous debts. The only interest covered by the land was for the mortgage itself. The circuit court erred by including interest on those previous debts in the total to be paid out of the sale of the land. *Id.*

89. *Id.* at 309.

Court then "remanded to the said circuit court, that the said decree may be reformed so far as it is herein declared to be erroneous."[90]

This partial reversal is almost certainly the result of this case's origins in Kentucky.[91] The evidence showed that there were previous accounts, but there was not enough information in Washington, D.C., to discover what portion of the interest owed was from those accounts—that information was only available in Kentucky. Speedy resolution of the case was also impeded by the lawyers involved. While the trial lawyers likely knew the answers to these factual questions, clients usually hired Washington-based practitioners to argue at the Supreme Court,[92] and these local counsel had neither the facts nor the resources to obtain this information quickly.

Once the Court began the practice of partial reversals, it did not restrict this practice to equity.[93] Although Justice Iredell had initially justified the practice as consistent with Chancery, as opposed to common-law error review that required either complete reversal or complete affirmance, the Court apparently found the efficiency of partial reversals too good to pass up in other circumstances. So, for instance, in 1891, the Court went point by point through a judgment, approved some elements, rejected others, and concluded by remanding the case to the lower court with an order to vacate its initial judgment and enter a new one consistent with the Supreme Court's opinion.[94]

The practice likewise carried over to the criminal context. Take, for instance, *Reynolds v. United States*.[95] The Court initially affirmed the lower court's judgment and sentence.[96] But upon rehearing, the Court recognized a sentencing error[97]: the district court had imposed hard labor despite the statute calling only

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90. *Id.*

91. *Finley* was not, however, the first time the Court had reversed in part. *See, e.g.*, Clark's Ex'rs v. Van Riemsdyk, 13 U.S. (9 Cranch) 153, 163-64 (1815). Such partial judgments had been relatively common in admiralty cases going back to the pre-Constitution Federal Court of Appeals. *See* Miller v. The Ship Resol., 2 U.S. (2 Dall.) 19, 33 (1781). The Supreme Court continued the practice in admiralty. *See, e.g.*, Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54, 108 (1795) (opinion of Iredell, J.); The St. Nicholas, 14 U.S. (1 Wheat.) 417, 432 (1816).

92. The parties were represented by two of the more famous and frequent Supreme Court advocates: George Bibb and Daniel Webster. *Finley*, 24 U.S. (11 Wheat.) at 304.

93. *See* Bruhl, *supra* note 58, at 191-93 (observing a variety of approaches in common-law cases).

94. United States v. McDermott, 140 U.S. 151, 160 (1891) ("It results that the action of the circuit court must be sustained except in regard to the two items for docket fees and instructions to supervisors, and that its judgment should be reduced by the amount disallowed of those two items.").

95. 98 U.S. 145 (1879). The case is most famous for its decision regarding the criminalization of polygamy.

96. *Id.* at 168.

97. *Id.* at 168-69.

for imprisonment.[98] The Court vacated its affirmance, reversed the sentence on this narrow point, and remanded for correction, preserving the verdict while addressing the legal flaw.[99]

Such examples are illustrative of the flexible approach the Supreme Court took in its judgments. Congress confirmed its acceptance of the Court's approach by passing a new statute dealing with appellate judgments that specifically allowed for modification of judgments and largely restated existing practices.[100] However, this flexibility never justified using vacatur to review only part of the record.

A continuing and important part of these practices was the Court's ongoing obligation to consider entire cases rather than merely answering preselected questions. The Justices might remand to the lower court to vacate an old judgment and enter a new one, but the judgment to be entered was dictated by the Court. In some instances, such as *Finley*, the lower court needed to augment the Court's work by evaluating the value of certain items, adjusting the judgment's value,[101] or changing the criminal sentence (as in *Reynolds*). However, such work was almost entirely ministerial and fact-bound.[102] The Court never left substantive legal issues unresolved; it decided the full case, and it certainly never treated vacatur as a freestanding power to dispose of a case without judgment. The Court observed this formalism even in extreme cases. This history reveals a new level of flexibility in American practice relative to England, but nothing in early American vacatur practice presages the sort of extreme lawmaking uses the Court would later develop.

One useful example of the Court's commitment to rendering judgment is *Gulf, Colorado & Sante Fe Railway Co. v. Dennis*.[103] There, the Court found itself

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98. *Id.*

99. *Id.* at 169 ("[W]e . . . reverse the judgment of the court below for the purpose of correcting the only error which appears in the record, to wit, in the form of the sentence.").

100. *See* Act of June 1, 1872, ch. 255, § 2, 17 Stat. 196, 197; Bruhl, *supra* note 58, at 192-93.

101. *See* United States v. McDermott, 140 U.S. 151, 160 (1891).

102. For instance, in *Ware v. Hylton*, the Court gave the circuit court the interest rate to use and the date from which to start in calculating interest. 3 U.S. (3 Dall.) 199, 285 (1796).

103. 224 U.S. 503 (1912). The petitioning railroad had been ordered to pay seventy-five dollars "for the killing of a cow by one of its trains in Milam County, Texas," plus twenty dollars in attorneys' fees. *Id.* at 504. At the Supreme Court, the railroad company claimed the Texas statute allowing recovery of the fees was "repugnant to the due process of law and equal protection clauses of the Fourteenth Amendment." *Id.* At the Supreme Court, the railway had six lawyers on its side, including two prominent Supreme Court practitioners: Alexander Britton and Evans Browne. *Id.* The farmer did not send an attorney to represent his interest in the twenty dollars. *Id.*

The Court decided *Dennis* in 1912. The date of the cow's untimely demise is lost to history, but the litigation over the cow ended sometime before 1910. We know this because Justice Van

in a dilemma of appellate procedure. The Court had a longstanding rule that it must "decide all the questions presented by the record [but not] pass upon any question in the record which turns upon the common law of a State."[104] In *Dennis*, there was no reversible error of federal law, but the judgment relied on an interpretation of state law that was no longer valid.[105] The Court found itself in a situation where the decision below rested on a mistaken legal decision, but that mistake was not before the Court. The Court believed the writ of error should not "be dismissed, because that would leave the judgment to be enforced as rendered, which the intervening decision shows ought not to be done."[106] To reach the substantive decision it was duty bound to reach, the Court could break either the rule that reversal required error on the record before the Court or the rule that vacatur must follow reversal. The Court chose to violate the former rule, holding the line that vacatur was not a judgment on the merits.[107] Such vacatur could only follow a reversal.[108]

Devanter's opinion notes that the county court's judgment—the highest court in Texas that would hear a case involving a ninety-five-dollar dispute—reflected the prevailing law at the time, namely that the attorneys' fees statute was valid under the Texas Constitution. *Id.* at 504. By the time it took up the case, the Supreme Court of Texas had decided that the statute violated the state constitution. *Id.* at 505.

104. Murdock v. City of Memphis, 87 U.S. 590, 607-12 (1874). A pedantic reader might attempt to distinguish *Dennis* from other Court rulings on the ground that the Texas decision was one of state judicial review of a state statute rather than general common law. But if anything, the federalism concerns would weigh more strongly against intervention in matters of state constitutions and statutes.

105. *Dennis*, 224 U.S. at 505.

106. *Id.* at 509. Since 1801, the Court had held to the idea that if federal law changes while the case is moving through the courts, the Court should apply the law at the time of decision (the law now) as opposed to the law at the time the conflict emerged (the law then). *See* United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801). *Dennis* fell into an unexplored crack, since the law that changed was a state law outside the Court's jurisdiction.

107. The Court decided that it was its "duty to vacate the judgment, so that the state court may apply the decision by awarding a new judgment in conformity" with the new understanding of the state law. *Dennis*, 224 U.S. at 509. But the Court did not stop with this observation. It reversed the judgment below, even though the error justifying reversal was not properly before the Court. *Id.* The reason is plain: when there was no irregularity in the process, the only way to vacate a judgment below was first to reverse it. Vacatur in such an instance was a remedy, not a judgment.

108. *Dennis* would turn out to be a useful precedent for the Court when faced with appeals from state courts where the law had changed or where state courts did not fully explain their reasons for reaching answers to federal questions. *See, e.g.*, Villa v. Van Schaick, 299 U.S. 152, 155-56 (1936). However, as Part III *infra* demonstrates, the Court would develop a more flexible approach to vacatur in the following decades and would not always reverse before vacating. *See* Patterson v. Alabama, 294 U.S. 600, 607 (1935) ("[T]he Court is bound to consider any change, either in fact or in law . . . . [It] may recognize such a change . . . by setting aside the judgment and remanding the case . . . . [T]o do this is not to review, in any proper sense of

Similarly, in a dispute over "a grade crossing of the Wabash Railway Company at Delmar Boulevard in the City of St. Louis,"[109] the Court reversed without finding any errors so that it could vacate the judgment below and return the case to the state court. As in *Dennis*, the relevant state law had changed.[110] So, even though the federal questions at issue in the appeal were "not difficult of solution,"[111] the Court did not answer them, believing the new state law should govern.[112] Since the Justices did not consider any questions, they could not find any errors. But for the new state law to provide the rule of decision, the earlier judgment needed to be vacated. Since the Court could not offer the remedy without a judgment, it reversed and vacated, as in *Dennis*.[113]

Thus, for more than a century, the Supreme Court highly prioritized the necessity of rendering judgment in order to exercise vacatur. In the last century, however, the Court has proven to be less motivated by this principle than it was in the years immediately following passage of the First Judiciary Act. First, under the First Judiciary Act, the Court would decide as much of the case as it could and send only those parts it could not resolve back to the lower courts for further work. When the Court limits review on certiorari to preselected questions, it ignores all parts of the case that do not interest the Justices. Second, Congress gave the Court the flexibility to modify judgments; the Court gave itself the power to preselect questions. Third, the power to modify judgments *facilitated* the Court's obligation to decide cases and controversies, while the power to preselect questions denies that there is any such obligation and facilitates the legislative task of making law instead of the judicial task of resolving disputes. Vacatur initially served the Court in fulfilling its obligation to decide cases. As will be seen below, the Justices have distorted this judicial tool to better suit their legislative ambitions.

III. VACATUR IN THE TWENTIETH CENTURY: THREE NEW USES

The twentieth-century Court continued to use vacatur in the traditional ways: managing its own cases,[114] voiding judgments that suffered from

the term . . . ."); New York *ex rel.* Whitman v. Wilson, 318 U.S. 688, 690 (1943). *But see* Bell v. Maryland, 378 U.S. 226, 242 (1964) (reversing, vacating, and remanding).

109. Missouri *ex rel.* Wabash Ry. Co. v. Pub. Serv. Comm'n, 273 U.S. 126, 127 (1927).

110. *Id.* at 130-31.

111. *Id.* at 130.

112. *Id.* at 130-31.

113. *Id.* at 131.

114. *See, e.g.*, Pa. R.R. Co. v. W.F. Jacoby & Co., 239 U.S. 631, 631 (1915) (per curiam); United States v. Moscow Fire Ins. Co., 309 U.S. 697, 697 (1940).

irregularities,[115] and extending a remedy after finding reversible error.[116] But that century also witnessed an explosion of novel uses of vacatur as the Court reacted to the effects of new procedural rules and the New Deal. Many of these uses reflected the Court's emergent role as manager of the larger federal judicial apparatus[117] and its growing concern for standing guardrails.[118] Three twentieth-century developments in vacatur are particularly noteworthy. First, the GVR expanded on vacatur as a tool of case management. Second, the doctrine that came to be known as *Munsingwear* vacatur offered a new use of vacatur as a judgment. Finally, and perhaps most importantly, the Court began to use vacatur as a freestanding remedy to declare law without deciding cases on the merits. Each of these shifts facilitated the Court's growing tendency to view its primary role as that of lawmaker.

These three new uses of vacatur have facilitated the Court's increasing interest in policymaking, but they also raise new concerns. Frequently, they treat the parties as means to an end—that is, law declaration—which exacerbates litigation's costs in both time and money. Often, these uses of vacatur provide a remedy without a judgment—a sort of *Alice in Wonderland* approach difficult to square with the traditional judicial obligation to reach a judgment in the case.[119] These concerns will be considered in greater depth in Part IV.

A. Modern Vacatur and Docket Management: The GVR

Those who follow the Court today will likely be familiar with the GVR: "grant, vacate, and remand." In a GVR order, the Court simultaneously grants a petition for certiorari, vacates the judgment below, and remands for further consideration. When several petitions raise similar issues, the Court will often hold some of the petitions pending its decision in others. In the Court's view, the held cases involve—and perhaps depend upon—the question to be answered in a

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115. *See, e.g.*, Pullman Co. v. Croom, 231 U.S. 571, 577 (1913); Williams v. Del. & Hudson R.R. Corp., 317 U.S. 600, 600 (1942) (per curiam); Yasui v. United States, 320 U.S. 115, 117 (1943); McLaren v. Nierstheimer, 329 U.S. 685, 685 (1946) (per curiam); Shelton v. United States, 346 U.S. 270, 270 (1953) (per curiam); Carter v. United States, 350 U.S. 928, 928 (1956) (per curiam).

116. *See, e.g.*, Doud v. Hodge, 350 U.S. 485, 487 (1956); Seaboard Air Line R.R. Co. v. United States, 382 U.S. 154, 156-57 (1965) (per curiam).

117. For an example of vacatur's use to send a case back to the lower court to make modifications to a judgment consented to by the parties, see *NLRB v. Keystone Steel & Wire Co.*, 332 U.S. 833, 833 (1947) (per curiam). For an example of vacatur's use to vacate the stays of lower-court decisions, see *Meredith v. Fair*, 83 S. Ct. 10, 11 (1962).

118. *See, e.g.*, *Pullman Co.*, 231 U.S. at 577 (vacating for want of a proper appellee).

119. *See* LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 187 (Chi., VolumeOne Publ'g 1998) (1865) ("Sentence first—verdict afterwards.").

forthcoming opinion. Once that opinion has issued, the Court uses the GVR to send the cases back to the lower courts.[120]

In 1996, the Court located the power of GVR in 28 U.S.C. § 2106, which grants it the power to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order" and states that the Court "may remand . . . or require . . . such further proceedings to be had as may be just under the circumstances."[121] As authority, the Court cited instances in which it had issued GVRs dating back to 1945.[122] This Section first traces the history of the GVR and then considers some questions raised by this practice.

1. The History of the GVR

In truth, one might trace the foundation of the GVR to a series of summary vacatur orders that go back to the 1920s and were, at least initially, consistent with traditional uses of vacatur. The first of these occurred in *Claussen v. Curran*, which involved a failure by the plaintiff to substitute the proper party when the initial defendant left office.[123] In the coming years, the Court would summarily vacate lower-court judgments (or order the lower courts to vacate their own judgments) for similar reasons and simply point back to *Claussen*.[124] With

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120. Formally, the remand neither decides the case nor implicitly states the correct resolution, nor does it indicate that the newly decided case is dispositive. *See, e.g.*, Evola v. United States, 375 U.S. 32, 33 (1963) (Clark, J., concurring in part and dissenting in part).

121. *See* Lawrence *ex rel.* Lawrence v. Chater, 516 U.S. 163, 166 (1996) (per curiam).

122. *Id.* at 166-67 (collecting cases).

123. 276 U.S. 590, 590-91 (1928) (per curiam). In February 1926, a district court denied Niels Peter Claussen's writ of habeas corpus against Henry H. Curran, the Commissioner of Immigration. Claussen, trying to avoid deportation, was allowed to appeal on February 9, and the Second Circuit affirmed on December 14. The Court granted certiorari the following March. Between the appeal and the circuit court's judgment, Curran resigned and was succeeded in office by Benjamin M. Day.

Nearly two years after granting certiorari, on January 9, 1928, the Court issued its order. Apparently, Claussen had made no motion to allow the case to continue against Day, the new Commissioner. As Claussen's six-month window to make such a motion had lapsed, the Court "vacate[d] the judgments entered in the District Court and in the Circuit Court of Appeals and remand[ed] the cause to the District Court with a direction to dismiss the cause as abated." *Id.* at 591.

The subsequent history of the case is somewhat confusing. The order requiring lower courts to vacate their judgments issued in January. In October, the Court once again granted certiorari to the Second Circuit. *See* United States *ex rel.* Claussen v. Day, 278 U.S. 592, 592 (1928). The Court then reached the merits. I can find no record of further proceedings in the lower courts entering new orders in the interim.

124. *See, e.g.*, Matheus v. United States *ex rel.* Cunningham, 282 U.S. 802, 802 (1930); Whitmer v. Lucas, 285 U.S. 529, 529 (1932).

abatement and similar cases dealing with mootness,[125] the Court summarily vacated lower-court judgments. As with the early *Munsingwear*-style cases discussed below, these cases could be considered fraught with the sort of procedural irregularities that justify vacatur rather than reversal.[126] However, the cursory nature—or entire absence—of analysis or explanation in these cases stands out as a departure from past practice and a step toward the modern GVR.

The Court's decision in *Earwood v. United States* served as its next step toward reshaping vacatur.[127] Louise Earwood received a judgment against the government related to an insurance policy.[128] The Fifth Circuit reversed, interpreting the contemporary statutory regime to disallow such suits.[129] Soon after, Congress amended the statute.[130] The Supreme Court granted certiorari, writing: "In view of the provisions of [the new law] . . . the judgment of the Circuit Court of Appeals is vacated and the cause is remanded to that Court with instructions to determine whether the District Court should have directed a verdict on the merits, and to enter judgment accordingly."[131]

Earwood is the first instance in which the Court observed a potentially relevant change in law, vacated the lower court's decision without reversing, and sent it back to that court for a new judgment.[132] This approach stands in stark contrast to *Dennis*, described above. There, the Supreme Court explicitly considered the effect of a change in state law and reversed before vacating the judgment below. In *Earwood*, the Court said nothing about the new statute other than to note its existence, nor did it reverse the judgment below. It simply vacated and remanded, offering the remedy without the antecedent judgment.[133]

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125. *See* C.M. Patten & Co. v. United States, 289 U.S. 705, 705 (1933) (collecting cases).

126. *See infra* Section III.B.

127. 294 U.S. 695 (1935) (per curiam).

128. United States v. Earwood, 71 F.2d 507, 507 (5th Cir. 1934).

129. *Id.* at 508.

130. *Earwood*, 294 U.S. at 695.

131. *Id.*

132. *Id.* It would not be the last. *See, e.g.*, Molsen v. Young, 340 U.S. 880, 880 (1950); Breaton v. United States, 361 U.S. 117, 117 (1959).

133. Compare *Earwood*, 294 U.S. at 695, with *New York City v. Goldstein*, 299 U.S. 522, 522 (1937), which was decided two years later. In *Goldstein*, the Court observed a new decision by the New York Court of Appeals—*In re* Atlas Television Co., 6 N.E.2d 94 (N.Y. 1936)—and so reversed the Second Circuit and remanded to the district court for further proceedings. *Goldstein*, 299 U.S. at 522. As in *Earwood*, but differently from *Dennis*, the Court declined to explicitly consider the effect of a change in state law. As in *Dennis* but differently from *Earwood*, the Court reversed.

In *Dorchy v. Kansas*, 264 U.S. 286, 291 (1924), the Court considered a state statute that was, at least in part, unconstitutional under a relatively recent precedent. The Kansas Supreme Court dealt with the new precedent, but upon appeal, the United States Supreme Court found

The Court issued more recognizable GVRs in the 1930s and 1940s. Many appear to be of the now-standard variety, where the Court simply sends the case back to the lower courts to render a new judgment in light of new Supreme Court precedent or statutory developments.[134] But some of these GVRs merit particular attention: they represent not simply an early use of the GVR power but also the combination of that power with the question-selection authority the Court had recently granted itself, along with a pinch of the "arbitrary" power the Court was beginning to gather.

Consider the order granting certiorari in *Okin v. SEC*.[135] This order grants certiorari "limited to the question whether [the relevant] part of the Commission's order . . . can be reviewed only under [a particular statutory provision]."[136] This much is entirely normal, as is the Court's decision to vacate the judgment and remand to the lower court. What is odd is the condition the Court placed on the remand—solely for consideration of the statutory question it had identified. That is, the Court did not merely limit its own review; it also effectively redefined the jurisdiction of the lower court with respect to the case.

On one view, this order might not seem especially novel. We have already seen how the Court would sometimes, in reviewing full cases, affirm in part and then remand parts of a case where error occurred, since the lower courts often had greater access to the facts necessary to render the correct answer. But *Okin* differs from those cases in important ways. First, in earlier cases, the Court reviewed the entire case, affirmed some parts, reversed and gave its own judgment on other parts, and remanded with directions to the lower court on the rest. In *Okin*, the Court's certiorari grant was limited to a single question, and the Justices did not address any other part of the judgment below, either to reverse or to affirm. Second, in those earlier instances, the Court remanded when the lower court had access to better information than the Justices, but the Court gave clear guidance on the law that would guide the lower court in making use of those facts. Here, the lower court was not tasked with applying any facts—much less facts to which it alone had access—nor did the Court provide any legal guidance. The Court vacated an entire judgment—and thus all answers to any other legal

that the Kansas Supreme Court had not determined whether the unconstitutional parts of the statute were severable from the rest of its provisions. Thus, a GVR to consider the effect of recent precedent intersected with the *Dennis* line of cases aimed at allowing state courts to take the first crack at deciding state-law questions. The obvious difference between *Dorchy* and *Dennis* is that in the latter, the change was in state law, whereas in the former, the change was in federal law.

134. *See, e.g.*, Mut. Benefit, Health & Accident Ass'n v. Bowman, 304 U.S. 549, 549 (1938); Busey v. District of Columbia, 319 U.S. 579, 580 (1943).

135. 325 U.S. 840, 840 (1945).

136. *Id.*

questions in the case — and remanded it back to the lower court with instructions to answer only one question, as though that question alone would be sufficient to render judgment.[137]

2. *Considering the GVR*

The GVR's current form mixes together all of the traditional usages of vacatur, such that this form is no longer consistent with any single use. Historically, it began with summary orders recognizing a procedural problem present in a lower-court proceeding. In such cases, the GVR used vacatur as a judgment. Soon, however, the Court began to use the GVR as a ruling resembling a soft reversal on the merits. Such a GVR identified no irregularity in the proceedings below, so vacatur did not operate as a judgment. Nor did the GVR reverse a judgment based on an identified mistake on the record. At most, the current GVR suggests the Court's speculation that if the Justices were to look at the record, they would find something leading them to reverse and then vacate the judgment.[138] This speculation allowed the Justices to avoid reviewing the cases on the merits and therefore facilitated the Court's larger interest in managing its docket. At this point, the GVR began to depart from its historical foundations.

This nascent form of the GVR raises a series of difficult questions. First, how should this type of vacatur be classified? Even if viewed as a soft reversal, the

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137. *See also* Wilson v. United States, 328 U.S. 823, 823 (1946) (per curiam) (granting certiorari on one question, vacating the judgment in full, and remanding to the lower court for resentencing); Marr v. A.B. Dick Co., 329 U.S. 680, 680 (1946) (per curiam) (vacating the entire Court of Appeals decision and remanding to answer one question); Sioux Tribe v. United States, 329 U.S. 684, 684 (1946) (per curiam) (vacating judgment and remanding to the Court of Claims with instructions to determine whether an act gave rise to a claim); Edward G. Budd Mfg. Co. v. NLRB, 332 U.S. 840, 840 (1947) (per curiam) (vacating the lower court's judgment on the validity of part of an NLRB order and remanding with instructions to address that discrete legal question); Woods v. Durr, 336 U.S. 941, 941 (1948) (per curiam) (vacating the decision in full and remanding with instructions to address the effect of a recent law on the case's outcome); Mitchell v. White Consol., 336 U.S. 958, 958 (1949) (per curiam) (vacating the appellate court's judgment and remanding with instructions to determine whether applying FED. R. CIV. P. 86(b) "would work injustice"). Another questionable instance was *Burns v. Ohio*, 360 U.S. 252 (1959). In *Burns*, the clerk of the Supreme Court of Ohio refused to file the paperwork for Burns's notice of appeal because he did not (and could not) pay the fees. *Burns*, 360 U.S. at 254. The Court treated this refusal as a final judgment, expressed disapproval, and observed that after such chastening, it was "confident that the State will provide corrective rules to meet the problem which this case lays bare." *Id.* at 258 (quoting Griffin v. Illinois, 351 U.S. 12, 20 (1955)). This done, the Court vacated and remanded. *Id.*

138. *See* Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs — and an Alternative*, 107 MICH. L. REV. 711, 735-36 (2009) ("[T]he GVR practice involves merely *potential* error and *possible* correction, because the Court does not identify error and does not actually reverse; instead, it simply notes the need for reconsideration.").

GVR is not a final judgment, nor does the Court purport to give direct guidance on how law should operate in a given case. The petitioner does receive temporary relief—namely, the removal of a judgment—but the case is not resolved by this remedy. Instead, the dispute is prolonged in the lower courts, and any victory may prove fleeting.

Thus, the real beneficiary of the GVR is the Court itself, which uses this tool to avoid giving judgment in cases properly before it. For instance, driven largely by *United States v. Booker*,[139] the Court used the GVR 819 times during its 2004 Term alone.[140] While 2004 is an outlier, the Court uses the GVR in dozens of cases every Term.[141] But while the GVR is functionally useful for managing the Court's workload, it operates quite differently from vacatur's traditional ministerial function. In the past, courts would use vacatur to manage a case. The Court now uses the GVR to manage its docket. Historically, a court would vacate its own work to facilitate its resolution of a case. The GVR, in contrast, vacates a different court's judgment and then remands the case back to the lower court, enabling the Justices to avoid ever reviewing the case at all.

Taken together, the GVR voids an otherwise valid judgment on the merits without offering any reasoning or judgment. The Court does not set aside earlier work so it can proceed with deciding the case, nor does it identify a problem with the process earlier in the case. As such, it appears the GVR is unmoored from traditional forms of vacatur.

This novel use of vacatur would be far less disconcerting if it were a creation of statute rather than a judicial invention. As noted above, the Court in *Lawrence v. Chater* located the power of GVR in 28 U.S.C. § 2106.[142] In that same case, Justice Scalia argued in dissent that Article III imposed "implicit limitations" on the Court's GVR power.[143] The majority disagreed.[144] It explicitly decided that Congress not only *could* eliminate but *had* eliminated any constitutional limitations on its vacatur power.[145] This claim raises immediate questions: would such a grant be constitutional? Did Congress really attempt to eliminate any constitutional limitations on the Court's judicial power to vacate judgments? These constitutional questions will be considered in Section IV.A below. But a more

139. 543 U.S. 220 (2004).

140. *See* Jonathan P. Kastellec & Anthony R. Taboni, *Database Version 1.0*, SUP. CT. SHADOW DOCKET DATABASE (June 2025), https://www.shadowdocketdata.com/data [https://perma.cc/XRT3-W5QY].

141. *Id.*

142. 516 U.S. 163, 166 (1996) (per curiam).

143. *Id.* at 178 (Scalia, J., dissenting).

144. *Id.* at 166-67 (majority opinion).

145. *Id.* at 166.

immediate and relevant historical concern questions whether Congress intended to give the Court the GVR power at all, especially in light of potential constitutional concerns.

The statutory history of vacatur is straightforward. Congress first specified vacatur as a remedial option in its recodification efforts in 1948.[146] There, Congress added to the traditional list of remedial options the options to "vacate" or to "set aside."[147] Since this addition obviously postdates the early emergence of the GVR, it is possible that Congress intended to sanction this burgeoning practice.

Yet such an argument is complicated by the absence of evidence that the practice had come to Congress's attention at all. Insofar as Congress in the late 1940s considered vacatur, its understanding of the device appears to mirror classical uses.[148] And if Congress meant to do anything by adding an explicit power to "'vacate' [or] 'set aside'" in its recodification, it only meant to codify existing practice.[149] Congress clearly recognized that the Court had begun to use vacatur to deal with cases where the Court discovered a lack of jurisdiction.[150] This practice was, as observed above, a relatively obvious extension of the traditional use of vacatur as a judgment when lower courts lacked jurisdiction. Thus, no evidence exists that the Court knew of or meant to endorse the emergent use of vacatur to avoid rendering any judgment.

A statutory defense of the GVR, then, must proceed as an argument from silence. Such an argument is strongly disfavored in contexts like these[151] and requires showing that Congress has considered the matter "in great detail."[152] Thus, the modern GVR seems to lack the strong statutory support the Court

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146. *See* Bruhl, *supra* note 58, at 194-95 (citing H.R. Rep. No. 80-308, app. at 173-74 (1947) (Reviser's Note referring to 28 U.S.C. §§ 344, 876, 877 (1940))).

147. *Id.*

148. For instance, Congress spoke of vacatur as an appropriate remedy in several familiar circumstances: for instance, after a court determined that a regulation or order was invalid, and that regulation or order was the basis of a judgment in a previous proceeding, 93 Cong. Rec. 10175 (1947), or after a court determined a criminal conviction had been tainted by the mental incompetence of the defendant, 94 Cong. Rec. 7707 (1948).

149. *See* Bruhl, *supra* note 58, at 195 & n.111. An alternative theory, suggested to me by Peter Bruland but as yet unexplored in the literature, is that Congress added "vacate" and "set aside" to statutorily overturn *Realty Acceptance Corp. v. Montgomery*, 284 U.S. 547, 550-51 (1932), which held that an appellate court lacks power, after final judgment and competition of the judicial term, to remand to allow the trial court to consider previously unknown evidence.

150. *See* Bruhl, *supra* note 58, at 195 & n.111.

151. *See* Girouard v. United States, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.").

152. *See* NLRB v. Gullett Gin Co., 340 U.S. 361, 366 (1951).

suggested, and so the ahistorical practice can only be understood as the product of judicial invention.

B. Modern Vacatur as a Judgment: Munsingwear

While the GVR, which is about docket management, is the most common use of vacatur for the modern Court, the "leading case on vacatur"[153] deals with vacatur as judgment.[154] That 1950 case, *United States v. Munsingwear*, involved a civil action by the government against a company for violating regulations establishing maximum prices for certain goods.[155] The government sought both an injunction and treble damages.[156] The parties agreed to hold the damages question in abeyance while going to trial on the injunction.[157] The district court found the pricing scheme to be lawful, and the government appealed to the circuit court.[158] While waiting for the appeal, the regulations governing maximum prices for the commodity ceased to govern such sales, which made any request for an injunction moot. Accordingly, the circuit court dismissed the appeal for mootness.[159] Importantly, the government conceded to dismissal rather than moving to vacate the judgment below.[160]

The case then returned to the district court to consider treble damages. The company moved that the government's damages claim was barred by res judicata due to the substantive decision on the injunction.[161] The district court agreed and dismissed, and the circuit court affirmed.[162] The Supreme Court observed,

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here

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153. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 22 (1994).

154. *See also* James E. Pfander & David R. Pekarek Krohn, *Interlocutory Appeal by Agreement of the Parties: A Preliminary Analysis*, 105 NW. U. L. REV. 1043, 1086 (2011) (citing *Munsingwear* for the proposition that "[f]indings of mootness on appeal in the federal system have long given rise to the practice of remanding the action with a directive that the lower court vacate its prior judgment and dismiss the case").

155. 340 U.S. 36, 37 (1950).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 40.

161. *Id.* at 37.

162. *Id.*

> or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.[163]

In *Munsingwear*, however, the government's failure to seek vacatur of the earlier judgment meant it had voluntarily neglected its rights and had to live with the earlier judgment.[164]

Justices on the left and right have observed that *Munsingwear* vacatur departs from the statutory path.[165] Since federal courts may only act when constitutionally permitted and statutorily authorized, such an admission seems deeply problematic. However, vacating a judgment for jurisdictional defects, such as mootness, is consistent with the longstanding use of vacatur to void judgments infected with procedural irregularities. Nonetheless, the history of *Munsingwear* vacatur, like the history of vacatur broadly, reveals a relatively recent transition from a stable mechanism for meting out justice to a novel method for making policy. This Section begins with the history of *Munsingwear* and proceeds to certain puzzles generated by the practice.

1. *The History of* Munsingwear

The *Munsingwear* opinion cited a string of cases dating back to 1896.[166] The first case in which the Court vacated a lower-court decision for mootness was *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft* in 1916.[167] In *Gesellschaft*, the underlying legal issue was whether an agreement between various shipping companies violated antitrust law.[168] The lower court decided it did not, but when the appeal reached the Court, the Justices held that the case had been rendered moot by World War I.[169] The Court explicitly refused to countenance the possibility that the agreement might resume as grounds for consideration in the postwar period, since entertaining this possibility would be

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163. *Id.* at 39.

164. *Id.* at 41.

165. *See* U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 27 (1994); Chapman v. Doe *ex rel.* Rothert, 143 S. Ct. 857, 858 (2023) (Jackson, J., dissenting) ("*Munsingwear* vacatur is an exception to the statutorily prescribed path for obtaining relief from adverse judgments (namely, appeals as of right and certiorari) . . . .").

166. *Munsingwear*, 340 U.S. at 39 n.2. The oldest of these, *New Orleans Flour Inspectors v. Glover*, is inapposite because the Court vacated its own order in that case, not the decision of a lower court. 161 U.S. 101, 103 (1896). Interestingly, in 1895, the Court dismissed an appeal (which is technically a merits decision) for mootness. *See* Mills v. Green, 159 U.S. 651, 653 (1895).

167. 239 U.S. 466, 478 (1916).

168. *Id.* at 468.

169. *Id.* at 473, 476.

"merely . . . a prophecy as to future conditions [that] invokes the exercise of judicial power not to decide an existing controversy, but to establish a rule for controlling predicted future conduct."[170]

Instead, Chief Justice White's unanimous opinion affirmed the standard view that

> [t]he duty of this court . . . is limited to determining rights of persons or of property . . . in the particular case before it. When in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions.[171]

The Justices denied that the Court was "empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."[172]

Since the original case was moot, the Court reasoned that "[a]lthough it thus follows that there are no issues on the merits before us which we have a right to decide, it yet remains to be determined what our order should be."[173] The Court's conclusion must, of course, "be reached without at all considering the merits of the cause, and must be based solely upon determining what will be 'most consonant to justice' in view of the conditions and circumstances of the particular case."[174] The Court held that "in view of the nature and character of the conditions which have caused the case to become moot . . . the judgment below should not be permitted to stand when . . . there is no power to review it upon the merits."[175] *Gesellschaft* set the tone that continues to this day: vacatur in *Munsingwear*-type cases is not a decision on the merits.

Two features of *Gesellschaft* warrant further attention. First, the case came to the Court as a mandatory appeal.[176] Therefore, no intermediate court had heard an initial appeal. If such an appeal becomes moot before the Court can act, leaving the judgment or decree in place would bind a party without recourse to any appeal, rendering such cases different from appeals that are first heard by a circuit court. If a circuit court decides a case, and the appeal is then mooted before it reaches the Justices, there is no risk that the petitioner would be bound by a

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170. *Id.* at 475.

171. *Id.* (quoting California v. San Pablo & Tulare R.R. Co., 149 U.S. 308, 314 (1893)).

172. *Id.* at 475-76 (citing *San Pablo & Tulare R.R. Co.*, 149 U.S. at 314).

173. *Id.* at 477.

174. *Id.* at 477-78 (quoting S. Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U.S. 300, 302 (1892)).

175. *Id.* at 478.

176. *Id.* at 466.

judgment without the benefit of any appeal. This reduces the justice concerns underlying *Munsingwear* vacatur.

Second, in *Gesellschaft* and all such cases of that era, the Court did not vacate the judgment or decree from the lower court. It reversed.[177] As in *Dennis* above, the Court would not provide vacatur as a judgment absent a showing of fraud or irregularity that undermined the proceedings below.[178] Vacatur, in such cases, is a remedy that first requires a judgment; historically, that judgment was reversal, even if (as in *Dennis*) there was no legal error.

In every case prior to 1926 that is cited by the *Munsingwear* Court, these two features—mandatory jurisdiction and reversal of judgment or decree—are present. The Taft Court was the first to use vacatur (instead of reversal) when cases had become moot prior to appeal,[179] and it usually did so only when it was the only federal appellate court available.[180] Further, the recourse to vacatur was still rare. The Court ordinarily maintained the traditional procedure of reversing and remanding in cases rather than moving straight to vacatur.[181]

One case from the 1930s is noteworthy in this regard. In *Hammond Clock Co. v. Schiff*, the parties requested—and the Court ordered—a reversal of the circuit court's judgment and a remand to the district court with instructions to "vacate its decree and to dismiss the bill of complaint . . . without prejudice."[182] This appears to be the first instance of parties rendering a case moot through settlement after the circuit court issued judgment and the Court ordered vacatur. Thus, *Hammond Clock* is perhaps the first case where the Court vacated a circuit-court opinion for mootness even though the case had not been moot when decided by the circuit.[183] In such cases, the Supreme Court would recognize that the circuit

177. *Id.*

178. The Court adhered even more closely to *Dennis* in 1934 when it reversed a circuit court's decision in light of a change in state law. *See* O'Ryan v. Mills Novelty Co., 292 U.S. 609, 609 (1934).

179. *See* Alejandrino v. Quezon, 271 U.S. 528, 536 (1926).

180. *See, e.g.*, *id.* at 529 (reviewing an original action first brought in the Supreme Court of the Philippines); United States *ex rel.* Norwegian Nitrogen Prods. Co. v. U.S. Tariff Comm'n, 274 U.S. 106, 112 (1927) (reviewing a case within the Court's mandatory jurisdiction); Hargis v. Bradford, 283 U.S. 781, 781 (1931) (same); R.R. Comm'n v. MacMillan, 287 U.S. 576, 576 (1932); Hodge v. Tulsa Cnty. Election Bd., 335 U.S. 889, 889 (1948).

181. *See, e.g.*, United States v. Anchor Coal Co., 279 U.S. 812, 812 (1929); Alexander Sprunt & Son, Inc. v. United States, 281 U.S. 249, 260-61 (1930); Mahan v. Hume, 287 U.S. 575, 576 (1932); Coyne v. Prouty, 289 U.S. 704, 704 (1933); Danciger Oil & Refin. Co. of Tex. v. Smith, 290 U.S. 599, 599 (1933).

182. 293 U.S. 529, 530 (1934).

183. *See, e.g.*, *Norwegian Nitrogen Prods.*, 274 U.S. at 110. Consistent with the traditional use of vacatur, the Court had previously vacated a circuit-court opinion if the case had been moot when

courts lacked jurisdiction and that, consistent with traditional uses of vacatur, the judgment was therefore void. For *Munsingwear* purposes, *Hammond Clock* is most significant as the first in a long line of cases where the Court facilitated settlements by vacating judgments, a practice that drew significant commentary and criticism over the ensuing decades due to a concern that parties could use strategic settlements to manipulate prevailing law.[184] These strategic concerns came to a head in 1994 in *Bonner Mall*, which held that "mootness by reason of settlement does not [ordinarily] justify vacatur of a judgment under review."[185]

Bonner Mall played an important role in shaping the future trajectory of vacatur. Per the majority opinion, vacatur may be available from the Supreme Court even when the case is moot when it reaches the Justices, so long as it was not moot when the circuit court issued its judgment. This use of vacatur was, as we have seen, of only recent vintage. Even so, assuming this use to be within its judicial power, the Court was clear about the limits of vacatur in these circumstances. While vacatur might be on the table if a case is moot, "this Court may not consider its merits."[186] Thus, whatever else one takes from the *Munsingwear* line of cases, it is clear that, on its own, this form of vacatur does not give the Court license to reach the merits of the legal questions in the case.

Since *Munsingwear* vacatur avoids the merits of a case, it might seem to be of little importance as a matter of policymaking. But the power to wipe away precedent with a selective use of vacatur is still a power to shape policy. Consider the Chrysler bankruptcy in the early 2000s. The federal government used bankruptcy courts to save Chrysler and bail out politically connected creditors.[187] The plan Chrysler and the government implemented violated traditional priority rules and would, in a normal case, "be prima facia improper."[188] The process used

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the lower court gave judgment. In such instances, the lower court lacked jurisdiction, and so the judgment was void.

184. *See* Fisch, *supra* note 8, at 610-24, 629-32; Jill E. Fisch, *Captive Courts: The Destruction of Judicial Decisions by Agreement of the Parties*, 2 N.Y.U. ENV'T L.J. 191, 201-08 (1993); Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1477-1501 (1994); Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2473 (1998).

185. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 29 (1994).

186. *Id.* at 21; *see also id.* at 27 ("It seems to us inappropriate, however, to vacate mooted cases, in which we have no constitutional power to decide the merits, on the basis of assumptions about the merits.").

187. *See* Todd J. Zywicki, *The Chrysler and General Motors Bankruptcies*, *in* RESEARCH HANDBOOK ON CORPORATE BANKRUPTCY LAW 298, 303 (Barry Adler ed., 2019); Jared A. Ellias & George Triantis, *Government Activism in Bankruptcy*, 37 EMORY BANKR. DEV. J. 509, 523-30 (2021).

188. Mark J. Roe & David Skeel, *Assessing the Chrysler Bankruptcy*, 108 MICH. L. REV. 727, 733 (2010).

by the bankruptcy court constituted a reversion to "undesirable mechanisms that federal courts and Congress struggled for decades to suppress."[189] Instead of upholding traditional bankruptcy doctrine, the Second Circuit affirmed the bankruptcy court and adopted its reasoning.[190] Soon after, the government bailed out General Motors, and that bankruptcy court considered itself bound by the Second Circuit's opinion.[191]

The Supreme Court, perhaps reacting to the politics of the moment, did not stay the Chrysler deal.[192] But given the capital market's hostile reaction[193] and the reasonable desire not to walk back more than a century of hard-won gains in bankruptcy doctrine, the Court did not want to leave the case as binding precedent in the Second Circuit. It needed some way to undo the Second Circuit's precedent without undoing the bailouts. *Munsingwear* vacatur fit the bill.

The Court denied the stay and allowed the deal to close, since it would have been impossible to undo. As such, when the Court considered the petition for certiorari, the case was moot. The Court was thus able to vacate the Second Circuit opinion under *Munsingwear* and erase its staying precedential power. In this way, the Court employed vacatur to give the government the judicial equivalent of a ticket good for one ride only.

2. *Considering* Munsingwear

As with the GVR, *Munsingwear* vacatur appears to be more about empowering the Court's policymaking agenda than facilitating the efficient and just resolution of cases. Also like the GVR, it emerges at the intersection of different traditional uses of vacatur,[194] and as before, it is difficult to recognize traditional vacatur in current practice. There is no problem with the lower-court proceedings; the Justices find no error and do not reverse; and the Court is not vacating its own work to facilitate its own future judgment.

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189. *Id.* at 729.

190. *In re* Chrysler LLC, 576 F.3d 108, 111 (2d Cir. 2009).

191. *In re* Gen. Motors Corp., 407 B.R. 463, 487-88, 497, 518-19 (Bankr. S.D.N.Y. 2009).

192. Ind. State Police Pension Tr. v. Chrysler LLC, 556 U.S. 960, 960 (2009).

193. *See* Roe & Skeel, *supra* note 188, at 765 & n.91 (noting the significant market pushback).

194. The *Munsingwear* opinion cited *New Orleans Flour Inspectors v. Glover*, 161 U.S. 101 (1896), as an early precedent for this use of vacatur, but the *Glover* Court vacated its own action, not that of a lower court. Insofar as *Munsingwear* flows from *Glover*, it emerges from vacatur as case management. However, *Munsingwear* itself spoke to the practice of protecting parties from the preclusive effects of unappealable judgments. This use of vacatur appears to concern remedy rather than case management, because it benefits the petitioner. The problem with assessing *Munsingwear*'s use of vacatur as a remedy is that, absent a reversal on the merits or a procedural irregularity in earlier proceedings, remedial vacatur is difficult to justify.

Munsingwear is thus not justified by its relation to history but by the end it serves—namely, fairness. It reflects a determination that the unavailability of any appeal renders the entire judicial process unfair to the petitioner and that voiding the lower court's judgment is the outcome "most consonant to justice."[195] Following such a recognition, remedial vacatur follows as the natural tool to effectuate the judgment of *Munsingwear* vacatur.

The harder questions for *Munsingwear* vacatur arise when petitioners have had an appeal in the circuit court, but the case becomes moot while waiting for the Supreme Court to consider the case. In these cases, *Munsingwear* vacatur cannot be justified by the unavailability of any appeal. Instead, it can only be justified by the unavailability of a particular appeal: to the Supreme Court.[196] Yet, from the perspective of the petitioner, the unavailability of a Supreme Court appeal due to mootness has the same effect as the Justices denying certiorari. It is thus difficult to see how the former could be so unfair that vacatur is required while the latter is unobjectionable. Concerns about fairness to the petitioner should lead to a consistent view regardless of whether the lack of appeal is due to mootness or certiorari. Such consistency would require the Court either to abandon *Munsingwear* vacatur for appeals decided by the courts of appeals before they became moot or to vacate the judgments below when they deny certiorari. Since the second option would effectively destroy the possibility of final judgments in lower courts, it must be rejected out of hand. Thus, if *Munsingwear* vacatur is really about fairness to parties, the Court should not provide it in cases where the circuit court had jurisdiction when it gave judgment. If it is not really about fairness, it cannot be justified on those grounds.

This logic undercuts the view of *Munsingwear* vacatur as a fairness-driven device. Justices tend to view the Court's primary work as declaring law to govern lots of cases. *Munsingwear* does not make new law, but it does erase law—at least at the circuit level. Thus, in practice, the purpose of *Munsingwear* may not be to protect particular parties from suffering the res judicata effects of a judgment but to tend the garden of law and keep certain precedents from taking hold in the lower courts.

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195. United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft, 239 U.S. 466, 477-78 (1916) (quoting S. Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U.S. 300, 302 (1892)).

196. In cases where Supreme Court review is mandatory, one might reasonably claim that it is unfair for parties to be bound by res judicata if they were not able to avail themselves of all appeals to which they are rightfully entitled. However, such cases are entirely hypothetical at this point, since the Court's only mandatory jurisdiction comes from direct appeals from three-judge district courts. Since such appeals bypass the circuit courts, there are no cases where parties have consecutive rights of appeal to the circuit court as well as the Supreme Court. *See* 28 U.S.C. § 1253 (2024).

This interpretation of *Munsingwear*'s purpose is not without evidence. Recent empirical work shows that the Court has been using *Munsingwear* more often in recent years and has been using it disproportionately to target progressive precedents in the lower courts.[197] These uses effectively wipe away progressive law in the circuits without even considering the merits of individual cases. The Roberts Court also used *Munsingwear* to shield Presidents from precedent that might have made it easier to sue the executive for certain constitutional offenses. Specifically, the Court used *Munsingwear* to vacate two suits complaining that President Trump, during his first term, violated the Emoluments Clause.[198] Lower courts allowed the suits to proceed, but the Court decided to hold the President's request for emergency relief until after President Biden took office and then to vacate the lower-court decisions under *Munsingwear*. President Trump's second term has raised several new instances that might invite similar litigation, but those precedents allowing such suits to proceed are now wiped from the books.[199]

C. Modern Vacatur as a Remedy (Without Judgment)

The remedial use of vacatur after reversal continued in the twentieth century.[200] In addition to this established practice, a new remedial use developed: vacatur as a remedy without an antecedent judgment. This novel remedial use came in two forms. First, the Court used vacatur at times to *avoid* making law. If the Court had reached a judgment, the Justices would have been forced to declare law in the course of deciding the case, an outcome the Justices occasionally seek to avoid. Second, the Court sometimes used vacatur without judgment to *facilitate* lawmaking—to make new law without having to do the work of deciding a

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197. *See generally* Lisa A. Tucker & Michael Risch, *Canceling Appellate Precedent*, 76 FLA. L. REV. 175 (2024) (empirically examining the recent rise of *Munsingwear* vacatur).

198. Trump v. Citizens for Resp. & Ethics in Wash., 141 S. Ct. 1262, 1262 (2021) (mem.) (per curiam); Trump v. District of Columbia, 141 S. Ct. 1262, 1262 (2021) (mem.) (per curiam).

199. There is no reason to assume that the Court deployed *Munsingwear* to help President Trump out of partisan motivation. It seems just as plausible that the Justices had a general concern about partisan litigation distracting Presidents regardless of party. Indeed, none of the more progressive Justices raised concerns at the time. Regardless of motive, however, the Justices used *Munsingwear* to prune disfavored precedents from the books.

200. A slight innovation was the use of vacatur to avoid time bars when appeals took too long. *See, e.g.*, Rorick v. Bd. of Comm'rs, 307 U.S. 208, 213 (1939) ("Since the time for appeal to the Circuit Court of Appeals has expired, and since the jurisdictional problem determined in this case had not been fully settled prior to this decision, we will not terminate the litigation by dismissing the appeal but . . . will order the decree vacated and the cause remanded to the district court for further proceedings . . . .").

full case. In either instance, the Court refuses to undertake the fundamental obligation of a federal court: to render judgment in the case properly before it.

1. Vacatur to Avoid Law Declaration

The 1940s ushered in novel uses of vacatur as a tool to manage growing chaos in the federal courts. In 1940, the Court sat atop a federal judiciary newly rocked by at least four seismic events: (1) the collapse of federal common law in *Erie*,[201] (2) the New Deal,[202] (3) the merger of law and equity, and (4) the transition to notice pleading.[203] The Court used vacatur in an attempt to bring order to this chaos. Sometimes, the Court would vacate a judgment to see if new facts should change outcomes.[204] At other times, the Court used vacatur to help parties, who would otherwise be time-barred due to confusing federal procedures, regain the ability to appeal[205] or to add new issues to an existing appeal.[206] The

201. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). One consequence was that cases involving questions where circuits had split on "general" law were now understood to involve state law. The Court used vacatur to sidestep deciding matters of state law. *See* Ruhlin v. N.Y. Life Ins. Co., 304 U.S. 202, 207-09 (1938).

202. One way the Court addressed this confluence was through changes in the doctrine of standing. Standing doctrine arguably got its start in the early twentieth century. *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1375-78, 1422-24 (1988); Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine?: An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 595-96, 605 (2010). Justice Frankfurter transformed the doctrine during the 1940s in response to the New Deal. *See* Robert J. Pushaw, Jr., *The Court Continues to Confuse Standing: The Pitfalls of Faux Article III "Originalism,"* 31 GEO. MASON L. REV. 893, 896-97 (2024).

203. FED. R. CIV. P. 1-4, 8; *see also* Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283 (1988) (referring to "the merger of law and equity, which was accomplished by the Federal Rules of Civil Procedure").

204. *See, e.g.*, Centers v. Sanford, 315 U.S. 784, 784 (1942) (mem.) (per curiam); McGuire v. Hunter, 322 U.S. 710, 710 (1944) (mem.) (per curiam); NLRB v. E.C. Atkins & Co., 325 U.S. 838, 838-39 (1945) (mem.) (per curiam); NLRB v. Jones & Laughlin Steel Corp., 325 U.S. 838, 838 (1945) (mem.) (per curiam).

205. *See, e.g.*, United States v. Belt, 319 U.S. 521, 523 (1943) ("The judgment appealed from is vacated and the cause is remanded to the District Court so that it may enter a new judgment from which the United States may, if it wishes, perfect a timely appeal . . . ."); Moody v. Flowers, 387 U.S. 97, 104 (1967); Wilson v. City of Port Lavaca, 391 U.S. 352, 352 (1968) (mem.) (per curiam); *see also* Columbia Gas & Elec. Corp. v. Am. Fuel & Power Co., 322 U.S. 379, 384-85 (1944) (collecting cases showing that because the appellant had appealed to the circuit court, the Supreme Court did not need to vacate in order to permit a proper appeal).

206. *See, e.g.*, Holmes v. United States, 314 U.S. 583, 583 (1941) (mem.) (per curiam).

Court also began, for the first time, to vacate lower-court judgments for having records insufficient to satisfy judgment.[207]

Accompanying these transitions were significant ambiguities regarding exactly what must be shown to justify a judgment. Cut off from traditional common-law forms of action, confused by the merger of law and equity, awash in new and convoluted federal legislation, and having abandoned general federal common law, the federal judiciary struggled at times to identify the metes and bounds of causes of action. When traditional forms of action had dominated, the lower courts were in little danger of sending up a record insufficient to justify a judgment. The forms were standard, and the legal requirements had been well established for decades, if not centuries.[208] But it became less clear in the 1940s what must be shown to justify judgment on an ill-defined cause of action.

Further, as the new rules allowed parties to present various (and often contradictory) theories of the case, the number of legal questions involved in each action multiplied. This shift led to a new problem for the Court. In the past, because the forms of action limited parties to a single legal theory in a case, lower courts would answer all the legal questions necessary to a judgment. But once different theories were allowed to converge in the same litigation, the lower court might answer the questions sufficient for judgment on only one theory, leaving other questions unnecessary to the resolution of the case unresolved.[209]

Unsurprisingly, then, the Court looked for ways to avoid giving judgment in such cases. At times, traditional reversal could serve this purpose. For instance, if a lower court misunderstood the law in ways that undermined the judgment, the Court would note this error and reverse. In many instances, such misunderstandings prevented the lower courts from finding facts that became necessary

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207. *See, e.g.*, United States v. Pyne, 313 U.S. 127, 130 (1941) ("Failure of the Court of Claims to make a specific finding on this ultimate and determinative issue deprives that court's judgment of support."); Kelley v. Everglades Drainage Dist., 319 U.S. 415, 418, 422 (1943); Standard-Vacuum Oil Co. v. United States, 339 U.S. 157, 160-61 (1950).

208. Robert Pushaw, in his deeply researched historical account of the Article III case-or-controversy requirement, suggests that the historical definition of a case was "a cause of action requesting a remedy for the claimed violation of a legal right." Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 Notre Dame L. Rev. 447, 449 (1994). A necessary element of a case was that the "plaintiff's claim fit within a recognized form of action." *Id.* at 473. With the move to notice pleading, the forms of action were abandoned, and the boundary markers of the courts' jurisdiction were obscured.

209. One should not overstate the novelty of this type of problem. Defendants had long been able to argue multiple avenues to victory since they could defend on every element of a claim and present alternative defenses (e.g., that the court lacked jurisdiction). Similarly, new statutory claims were not subject to the same limits of form pleading that concentrated all issues to a single claim. Finally, as more states moved toward notice pleading, the federal courts faced multiple theories from plaintiffs in diversity cases.

after the Supreme Court's judgment. In such cases, vacatur was the obvious remedy.[210]

At other times, the Justices dodged questions that were squarely presented. Consider *United States v. Malphurs*, which involved a prosecution under the Hatch Act against Florida officials for election impropriety in a party primary. The defendants demurred, arguing that the Hatch Act did not apply to primaries, and the district court sustained the demurrer.[211] The Supreme Court then faced the case on appeal, where the government proposed new statutory foundations for the indictment.[212] The Justices noted that they had the authority to adjudicate the correctness of the demurrer, but they declined to do so. Instead, they vacated and remanded—without addressing the Hatch Act at all—to the district court to consider new arguments proffered by the government.[213]

Given its procedural posture, the Court's refusal to enter judgment did not matter much to the litigants.[214] Things were different in *Bates v. United States*.[215] There, the circuit court sustained a conviction, but the government admitted at the Supreme Court that the grounds relied upon by the circuit court would not hold.[216] The Justices, citing *Malphurs*, then vacated the circuit court's judgment and sent the case back to the lower court for further consideration.[217] Whereas *Malphurs* involved a pretrial effort to quash an indictment, *Bates* involved an appeal of a conviction. All the legal arguments used to justify the criminal conviction were therefore on the record. The government could not go back and offer a new statutory basis for charges, and everything necessary to review the conviction was available for the Justices to consider. Instead, as in *Malphurs*, the Justices sent the case back to the circuit without giving a judgment. This decision

210. *See, e.g.*, Maggio v. Zeitz, 333 U.S. 56, 77 (1948).

211. United States v. Malphurs, 316 U.S. 1, 2 (1942).

212. *Id.* at 3.

213. *Id. Malphurs* is itself odd, since the Court could have sustained the demurrer and allowed the government to pursue a fresh indictment on an alternative theory. Instead, it simply avoided the question.

214. The Court effectively refused to allow the government to present novel legal justifications for the first time at the Supreme Court. Quashing the indictment would not have prevented the government from refiling charges based on new arguments.

215. 323 U.S. 15 (1944).

216. *Id.* at 17.

217. *Id.* The Court also cited *Manufacturers Finance Co. v. McKey*, 294 U.S. 442 (1935). In *McKey*, the Court remanded to let the lower court figure out the size of appropriate attorneys' fees, a traditional use of vacatur that effectively requires fact-finding. 294 U.S. at 453-54.

cost the litigants time and money, but it kept the Justices from having to declare law when they were uncomfortable doing so.[218]

Today, eighty years later, the *Bates* Court's decision that it was "more appropriate that the Court of Appeals consider [the government's alternative grounds] in the first instance" seems obvious.[219] However, the notion that the Court should not weigh in on legal questions unaddressed by the circuit courts was new at the time.[220] It made little sense in the Court's first 150 years, because the traditional forms ensured that lower courts answered all of the legal questions in the case. But in the new world of notice pleading, this new use of vacatur offered the Justices a way to avoid wading into an ever-expanding thicket of novel legal questions. This practice facilitated the Court's growing role as a national policymaker, but it impinged upon individual parties' ability to seek justice before the Court in their individual cases.[221]

Cases like *Bates* demonstrate a consequence of the dramatic change faced by federal courts in the 1940s. Abandoning the old forms at the trial level put pressure on the Court to abandon the old formalities at the appellate level. This departure had two immediate implications. First, foundational limits on vacatur

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218. *Bates* is not the only such example. *See, e.g.*, Calmar S.S. Corp. v. United States, 345 U.S. 446, 454-56 (1953); Calmar S.S. Corp. v. Scott, 345 U.S. 427, 443-44 (1953).

219. *Bates*, 323 U.S. at 17. However, the statement is obviously incorrect. The first instance would have been in the "court of first instance" (i.e., the district court).

220. This idea originated with Justice Brandeis in the late 1920s in a dissenting opinion. *See* R.R. Comm'n v. L.A. Ry. Corp., 280 U.S. 145, 164 (1929) (Brandeis, J., dissenting). Justice Brandeis cited his earlier majority opinion in *City of Hammond v. Schappi Bus Line, Inc.*, 275 U.S. 164, 169 (1927), for support. *L.A. Ry. Corp.*, 280 U.S. at 164 & n.1.

221. Take *McCabe v. Boston Terminal Co.*, 309 U.S. 624 (1940) (mem.), as an example. After the plaintiff-employee won a judgment for negligence, the Massachusetts Supreme Court reversed on the theory that the claim was preempted by the Federal Employers' Liability Act (FELA) and that it was then too late to refile under FELA. The Supreme Court declined to say whether the plaintiff (who was working on a train line that only made intrastate runs) was engaged in interstate transportation at the time of the injury, but it did vacate to say that the plaintiff should be allowed to amend his complaint. *See* McCabe v. Bos. Terminal Co., 22 N.E.2d 33, 33-38 (Mass. 1939); *McCabe*, 309 U.S. at 624. *McCabe* predates *Wickard v. Filburn*, 317 U.S. 111 (1942), so whether interstate commerce was sufficiently broad to capture the plaintiff was an open question the Court could have reached and grounds on which the respondent should have been allowed to defend the judgment below.

One might also consider the way the Court handled habeas petitions. For every case where the Court stepped in to order relief for a wrongly convicted defendant, *see, e.g.*, Sapir v. United States, 348 U.S. 373, 373 (1955), there were others where the Court would merely note a problem and remand for generic "further proceedings," *see* McLaren v. Nierstheimer, 329 U.S. 685, 685 (1946) (mem.); Marino v. Ragen, 332 U.S. 561, 564 n.2 (1947) (describing *McLaren*, 329 U.S. at 685); Shelton v. United States, 346 U.S. 270, 270 (1953) (mem.); Carter v. United States, 350 U.S. 928, 928 (1956) (mem.); Marvich v. California, 320 U.S. 712, 712 (1943).

suddenly fell away. For instance, the ancient limit that a court could only vacate its judgment during the same term was ignored as early as 1956[222]—and suddenly vacatur was available, for the first time, as interim relief.[223] Second, fulfilling the traditional judicial obligation to give judgment in the case became increasingly optional. As such, the Court would more frequently identify a problem with a lower court's reasoning rather than with the lower court's judgment. It might also, as is the case with the GVR, identify a potential (rather than actual) problem with the lower court's approach as a justification to vacate and remand. In cases like *Malphurs* and *Bates*, the Court used this flexibility to avoid law declaration.[224] In other instances, such judicial modesty was inverted, and vacatur became the means of lawmaking.

2. *Making Law Through Vacatur*

Vacatur's twentieth-century evolution can mostly be explained as part of the Court's response to the upheaval caused by the transformation of federal civil procedure and the Court's recommitment to a more robust standing doctrine, especially as it relates to mootness. The Court has, as shown above, often decided cases on the merits and vacated only after (sometimes implicitly) reversing the lower court's judgment. In contrast, *Munsingwear* vacatur explicitly denies the Court the opportunity to reach the merits (and thus the policy questions) involved in a case. This does not mean, of course, that such vacatur has no policy consequences. In addition to this form of passive policymaking, modern vacatur also allows for two types of more direct policymaking. First, the Court might grant new procedural rights and then vacate a judgment—usually a conviction—for failing to follow the newly announced process requirement.[225] Second, as this Section will discuss, the Court might employ vacatur as a pseudojudgment, characterized by the absence of any identified reversible error.

The first, albeit not the clearest, example of this judicial policymaking is the 1938 criminal case *Kay v. United States*,[226] involving an appeal from a conviction under the Home Owners' Loan Act of 1933.[227] In *Kay*, the Court neither reversed

222. *See* Florida *ex rel.* Hawkins v. Bd. of Control, 350 U.S. 413, 414 (1956).

223. *See* Carter v. W. Feliciana Par. Sch. Bd., 396 U.S. 226, 228 (1969).

224. Vacatur was also occasionally deployed to help develop the Court's abstention doctrine, keeping federal courts from declaring law under certain circumstances. *See, e.g.*, United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134, 135-36 (1962).

225. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 12 (1956); Johnson v. United States, 352 U.S. 565, 565 (1957); Farley v. United States, 354 U.S. 521, 521 (1957).

226. 303 U.S. 1 (1938).

227. *Id.* at 3-4. Kay was found guilty on eight counts and sentenced to a year and a day in prison for seven of the counts, with the sentences to run concurrently, and sentenced to probation

nor affirmed the lower court's judgment.[228] Instead, it vacated the judgment below because the panel had acted prior to two recent Supreme Court decisions that gave lower courts greater flexibility with filing deadlines.[229] While the Court answered many questions—thus declaring quite a bit of law—in its opinion, it skipped over or sidestepped questions that might have resolved the case without addressing the constitutional issues that interested the Justices.[230] Thus, the *Kay* Court not only purported to declare law without giving a judgment, it also violated the last-resort rule.[231] The resulting opinion gave a purportedly binding

on the eighth. *Id.* at 4. She initially pled guilty to one count, but after receiving permission to do so, withdrew her plea and went to trial. *Id.* After conviction, Kay did not file her appeal within the permitted time frame, so the Second Circuit limited its review of her case to the sufficiency of the indictment and the constitutional validity of the Home Owners' Loan Act. *Id.*

228. *Id.* at 10.

229. *Id.* The Court might have used a GVR in this context, allowing it to avoid declaring law; however, the Court had granted certiorari because of "the importance of the questions presented," *id.* at 3, so the Justices were apparently disinclined to take that route. Note that the Court granted certiorari, which signals that review was discretionary. While the Court still had a robust mandatory docket in the 1930s, criminal appeals like Kay's were not part of it.

230. For example, the Court could have affirmed Kay's sentence by noting that her constitutional objections to certain counts filed pursuant to one statute did not apply to a different count filed under an earlier statute. The conviction on this last count would have been sufficient to justify the sentence, and it could have resolved the case. The Justices noted this argument and then ignored it so they could address the constitutional questions. *See id.* at 6-7.

The Court also refused to consider the government's contention that because Kay had pled guilty and had not changed her plea within the ten-day deadline, the guilty plea should stand and would have required the full sentence Kay was to serve. Kay had received permission to withdraw her plea late (she changed her plea after eleven days), but the government took the position that the ten-day deadline was mandatory. Thus, the government argued, the permission was invalid, and the guilty plea still remained in force. If so, Kay owed the year and a day for that crime, and there was therefore no reason to reconsider the rest of the case. *Id.* at 4-5. Kay countered that the government was estopped from such an argument because it had gone to trial (and won a conviction) on the revised plea. The Court disposed of this dispute by noting (rather implausibly) that "[t]he point does not appear to have been raised [below] and it is based solely upon the dates of certain entries in the criminal docket without any supporting proof. We are not disposed to deal with a question of that importance presented in this manner." *Id.* at 5.

231. Federal courts follow a longstanding "last-resort rule" that requires Justices to decide constitutional questions only in the last resort. If a case can be decided on nonconstitutional grounds, it should be. *See Ex parte* Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558) (opinion of Marshall, Circuit Justice); Chi. & G.T. Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892); Gulf Oil Co. v. Bernard, 452 U.S. 89, 99 (1981) (citing Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)); *see also* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. Rev. 1003, 1004 (1994) (clarifying the nature of the last-resort rule); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Tex. L. Rev. 1549, 1575 (2000) (same); Michael L. Wells, *The "Order of Battle" in Constitutional Litigation*, 60 SMU L. Rev. 1539, 1547 (2007) (discussing the last-resort rule

answer to several constitutional questions that did not relate to any judgment. Vacatur served as the Court's license to make law without deciding the case itself. This novel use of vacatur turned out to be very useful to a Court that was becoming more interested in making law and less interested in resolving cases.

Kay is distinguishable from more recent lawmaking uses of vacatur in the sense that the *Kay* Court still provided a comprehensive review of the record. The Justices therefore could have affirmed the lower court's ruling without creating any procedural irregularity. The Court could also have exercised (or declined to exercise) the discretion to permit amended pleadings.[232] Instead, they skipped that work and passed the buck back to the circuit court, a phenomenon that has become a recurring feature in lawmaking through vacatur.

In future years, the Court would greatly expand its use of the vacate-and-remand procedure to make law without giving judgment.[233] At least at first, however, the Court maintained its obligation to review the entire record.[234] That sense of obligation evaporated in the 1970s. For instance, in *Miller v. California*, the Court reflected on the possibility of constitutional obscenity statutes and vacated a judgment below without ever discussing whether the statute at issue in the case was permissible.[235]

Echoes of *Miller* appear in cases like *Moody v. NetChoice, LLC*,[236] which explicated the Court's views on the relationship between the First Amendment and the regulation of social media. Two pages into Justice Kagan's opinion, the Court observed that it would "vacate . . . for reasons separate from the First Amendment merits, because neither [lower court] properly considered the facial

in the context of *Ashwander*); Matthew Lambertson, The Last Resort Rule at the Court of Last Resort 12-21 (unpublished manuscript) (on file with author).

232. In fact, the Court noted that appellate courts possessed this discretion. *Kay*, 303 U.S. at 9.

233. *See, e.g.*, Bailey v. Patterson, 369 U.S. 31, 34 (1962) (involving racial segregation); United States v. Lowe's, Inc., 371 U.S. 38, 56 (1962) (involving issues of antitrust); ICC v. N.Y., New Haven & Hartford R.R., 372 U.S. 744, 764 (1963) (involving Interstate Commerce Commission-ordered rates); Camara v. Mun. Ct., 387 U.S. 523, 540 (1967) (involving the Fourth Amendment); California v. Green, 399 U.S. 149, 170 (1970) (involving the Confrontation Clause); Cardona v. Power, 384 U.S. 672, 674 (1966) (involving voting rights).

234. *See, e.g.*, Pecheur Lozenge Co. v. Nat'l Candy Co., 315 U.S. 666, 667 (1942) (per curiam). Here the Court added a question to the certiorari petition about whether federal or local law should apply in a diversity case. Lower courts had applied federal law. The Supreme Court disagreed but refused to apply the local law and vacated. *Id.* at 667.

235. 413 U.S. 15 (1973). In 1980, the Court decided that the United States could be held liable for a breach of an implied contract, but it did not want to consider whether any such contract existed, so it announced law and vacated without judgment. *See* Hatzlachh Supply Co. v. United States, 444 U.S. 460, 461 (1980).

236. 603 U.S. 707 (2024).

nature" of the respondent's challenge.[237] This statement describes an entirely typical use of vacatur. However, what follows in the next twenty-seven pages of Kagan's opinion is far from typical. The opinion primarily addresses the First Amendment issues the Court was explicitly not deciding, effectively declaring First Amendment law without even pretending to make a judgment on the First Amendment merits.[238] In this way, vacatur was the skeleton key that unlocked an opportunity to declare new First Amendment law.

Groff v. DeJoy provides another illustration of this practice.[239] The dispute hinged on the proper interpretation of Title VII's requirement that employers accommodate employees' religious practices unless such accommodation imposes an "undue hardship on the conduct of the employer's business."[240] Lower courts, following earlier Supreme Court precedent, interpreted this requirement to include anything more than a de minimis burden.[241] Groff sued the Postal Service for punishing him for his refusal to work on Sundays because of his religious objections.[242] The district court granted summary judgment against Groff, and the circuit court affirmed.[243] The Supreme Court granted certiorari and announced that undue hardship requires more than a de minimis harm; it requires a showing that "a burden is substantial in the overall context of an employer's business"[244] or that accommodations "would result in substantial increased costs in relation to the conduct of its particular business."[245] The natural way for the Court to proceed, and the necessary step to fulfill its duty to decide the case, would have been to apply this new rule to the case before it. Yet the Court declined to do so. Instead, it "[left] it to the lower courts to apply our

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237. *Id.* at 717.

238. Not all of her colleagues were pleased by this. *See id.* at 749 (Jackson, J., concurring in part and concurring in the judgment) ("I would not go on to treat either like an as-applied challenge and preview our potential ruling on the merits. Faced with difficult constitutional issues arising in new contexts on undeveloped records, this Court should strive to avoid deciding more than is necessary." (citing Ashwander v. TVA, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring))); *id.* (Thomas, J., concurring in the judgment) ("I cannot agree . . . with the Court's decision to opine on certain applications of those statutes. The Court's discussion is unnecessary to its holding."); *id.* at 766 (Alito, J., concurring in the judgment) (arguing that the Court's "broader ambition of providing guidance on whether one part of the Texas law is unconstitutional as applied to two features of two of the many platforms that it reaches . . . is unnecessary and unjustified").

239. 600 U.S. 447 (2023).

240. *See* 42 U.S.C. § 2000e(j) (2024).

241. *Groff*, 600 U.S. at 454.

242. *Id.* at 456.

243. *Id.*

244. *Id.* at 468.

245. *Id.* at 470.

clarified context-specific standard,"[246] on the view that it was "appropriate to leave the context-specific application of [the] clarified standard to the lower courts."[247]

Cases like *Groff* show a significant departure from the Court's traditional understanding of its duties, in which Justices "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."[248] The *Groff* Court had jurisdiction to decide the case, and it did not do so. By leaving the "context-specific application" of the law to the lower court, the Justices fundamentally undermined the power of "the judicial department to say what the law is," since that power attaches to judges "who apply the rule to particular cases [and] must of necessity expound and interpret that rule."[249] The Justices did not apply the rule.[250] In modern cases, they often do not.[251]

Often, the Court does not even pretend to satisfy its obligation to render judgment.[252] Doing so would require the Court to ask whether the judgment below was correct or whether an error on the record requires a reversal. The Court often fails to do this. Instead, it asserts that the lower court has asked the wrong question or applied the wrong standard. That is, the Court reviews the lower courts' questions, not their answers and subsequent judgments.[253] The

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246. *Id.* at 473.

247. *Id.* This is akin to what Bruhl calls a "law-shepherding remand." *See* Bruhl, *supra* note 58, at 233-45.

248. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

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

250. The Court could have considered the record, determined whether summary judgment was appropriate under the new standard, and then reversed or affirmed as appropriate, but it did not. Perhaps the Court recognized that, had it done so and determined that the Postal Service should prevail on summary judgment on some other grounds, it would have reduced the Court's discussion of the correct interpretation of undue hardship to mere dicta. Indeed, the district court had also found that the Postal Service had offered Groff reasonable accommodations. *See* Groff v. DeJoy, No. 19-1879, 2021 WL 1264030, at *13 (E.D. Pa. Apr. 6, 2021). The circuit court disagreed. *See* Groff v. DeJoy, 35 F.4th 162, 173 (3d Cir. 2022). The disagreement concerned whether the Postal Service's (sometimes unsuccessful) effort to facilitate shift swaps between Groff and his coworkers was or was not a reasonable accommodation. The Supreme Court did not consider this disagreement in its opinion. The Court simply vacated without finding any irregularity or error. *Groff*, 600 U.S. at 473.

251. For example, in one recent case, the Court vacated "[t]o allow the Fifth Circuit to revise its precedent." Ysleta del Sur Pueblo v. Texas, 596 U.S. 685, 708 (2022).

252. *See* Post, *supra* note 12 (manuscript at 46-47).

253. *See, e.g.*, Hughes v. Nw. Univ., 595 U.S. 170, 176-77 (2022); Morgan v. Sundance, 596 U.S. 411, 417-19 (2022); Cassirer v. Thyssen-Bornemisza Collection Found., 596 U.S. 107, 117 (2022); Ruan v. United States, 597 U.S. 450, 456-57, 468 (2022); Slack Techs. v. Pirani, 598 U.S. 759, 770 (2023); Abitron Austria GmbH v. Hetronic Int'l, Inc., 600 U.S. 412, 428 (2023); Gonzalez

Court thus issues opinions that say things like, "To the extent that this test differs from the one applied by the Sixth Circuit, we vacate its judgment and remand the case for further proceedings consistent with this opinion."[254] Notice, however, that none of these steps applies law to a case to reach a judgment. The Court asserts the power to remake law, but it does so without exercising the judicial power to decide particular cases.[255]

Taken together, cases like *Moody* and *Groff* demonstrate how modern vacatur practice has expanded the Court's lawmaking abilities even as it puts pressure on its Article III obligations. As a formal matter, the Court has an obligation to decide the case before it, but as in *Groff*, it frequently refuses to do so. Likewise, the Court is only allowed to declare law — especially constitutional law — when doing so is necessary to rendering judgment. Yet in cases like *Moody*, the Court reaches well beyond its actual decision to write new law. The Court appears to be doing both too little of what it must and too much of what it must not, with vacatur as its tool toward that end.

IV. CONSEQUENCES AND COUNTERARGUMENTS

Modern vacatur generates a series of puzzles that extend to the core of the Article III judicial power. This Part considers the most vital of these puzzles. Different modern usages of vacatur raise different concerns, each of which will be considered in one of the following Sections. The first Section considers the practical consequences of the Court's increasing failure to issue judgment — that is, to decide the case before it. The second Section considers the doctrinal consequences of that failure with particular attention to precedent. The third Section evaluates two possible counterarguments to the account offered in this Article: (1) modern vacatur is much like question selection through certiorari, and (2) vacatur should not be overly limited by its historical boundaries.

A. The Court Failing in Its Obligation to Issue Judgment

When using the GVR or vacating a lower-court decision without judgment, the Court falls short of its obligation to issue judgment. This obligation is

v. Trevino, 602 U.S. 653, 657-59 (2024); Bissonnette v. LePage Bakeries Park St., LLC, 601 U.S. 246, 256 (2024); Fischer v. United States, 603 U.S. 480, 498 (2024); Starbucks Corp. v. McKinney, 602 U.S. 339, 351 (2024); Muldrow v. City of St. Louis, 601 U.S. 346, 359-60 (2024); *cf.* T.S. ELIOT, MURDER IN THE CATHEDRAL 44 (1935) ("The last temptation is the greatest treason: To do the right deed for the wrong reason.").

254. *See* Lindke v. Freed, 601 U.S. 187, 204 (2024); O'Connor-Ratcliff v. Garnier, 601 U.S. 205, 208 (2024) (companion case).

255. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

universally acknowledged.[256] Chief Justice Marshall famously asserted that declining the exercise of the Court's jurisdiction is "treason to the constitution."[257] The modern Court has softened this language a bit, but it still recognizes that federal courts have a "virtually unflagging" obligation to hear and decide cases within their jurisdiction.[258] Scholars recognize that federal judges are "bound by their oaths to decide cases."[259] By definition, in the two types of modern vacatur considered in this Section, the Court does not reach judgment and therefore fails in this duty. This failure has two practical effects: it harms the parties, and it infects the practices of the lower courts.[260]

In many modern cases, the Supreme Court does not seem concerned about meting out justice for the parties; cases function as mere vehicles for policymaking, allowing the Court to drive the law where the Justices want it to go.[261] Unfortunately, it is the litigants who must pay for the ride. Much of this problem stems from the Court's unwillingness to consider the validity of the lower court's judgment as a whole. In failing to undertake a more holistic review, the Court refuses to consider all the questions relevant to the judgment. Vacatur

256. It is perhaps particularly important in cases involving judicial review. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959).

257. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

258. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976); *see* Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77 (2013) (quoting *Colorado River Water Conservation District* favorably); FBI v. Fikre, 601 U.S. 234, 240 (2024) (same).

259. *See, e.g.*, Baude, *supra* note 21, at 1810.

260. All but two circuits have adopted the practice of declining to consider the case before them and instead remanding to lower courts to consider the legal issues they highlight. *See, e.g.*, Fanning v. City of Shavano Park, 853 F. App'x 951, 951-52 (5th Cir. 2021) (citing Montano v. Texas, 867 F.3d 540, 546-47 (5th Cir. 2017)); Hunter v. McMahon, 75 F.4th 62, 73 n.15 (2d Cir. 2023) (quoting Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005)); Lovelace v. Lee, 472 F.3d 174, 203 (4th Cir. 2006) (same); Childers v. Crow, 1 F.4th 792, 801 (10th Cir. 2021) (same); Capitol Servs. Mgmt., Inc. v. Vesta Corp., 933 F.3d 784, 789 (D.C. Cir. 2019) (same); United States v. McKinnie, 839 F. App'x 1016, 1017 (6th Cir. 2021) (same); Pearson v. Kemp, 831 F. App'x 467, 470 (11th Cir. 2020) (same); Payne v. McDonough, 855 F. App'x 763, 764 (Fed. Cir. 2021) (same); O'Hanlon v. Uber Techs., Inc., 990 F.3d 757, 762 n.3 (3d Cir. 2021) (quoting Frank v. Gaos, 586 U.S. 485, 493 (2019)); MPAY Inc. v. Erie Custom Comput. Applications, Inc., 970 F.3d 1010, 1021 (8th Cir. 2020) (quoting Eighth Circuit precedent that itself quotes *Cutter*, 544 U.S. at 718 n.7); Stewart v. City & County of San Francisco, No. 22-16018, 2023 WL 2064162, at *1 (9th Cir. Feb. 17, 2023) (citing Jennings v. Rodriguez, 583 U.S. 281, 312 (2018), which in turn quotes *Cutter*, 544 U.S. at 718 n.7). The two circuits that have not succumbed are the First and the Seventh Circuits.

261. *See* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 221 (1991) (noting that, for the Justices, "it is the issue, not the case that is primary"); Bruhl, *supra* note 138, at 735 ("[F]ew if any observers today—and the Justices themselves probably least of all—believe that ensuring justice in individual cases should be a priority of the Supreme Court in particular.").

exacerbates this problem when used as a tool to justify answering only a subset of questions rather than reviewing entire judgments.

Consider the potential impact of this practice on respondents. A baseline rule of appellate proceedings is that the respondent should be allowed to defend the judgment below on any ground available in the record.[262] If the Court refuses to let the respondent do so, the respondent must return to the lower court again. This added litigation costs time and money that would not be spent if the Court provided a comprehensive review in the first instance and allowed the respondent to defend the judgment.

A recent example of this phenomenon occurred in *Thompson v. United States*,[263] which vacated a Seventh Circuit judgment affirming a conviction for knowingly making a "false statement" to the Federal Deposit Insurance Corporation to influence the repayment of a loan. The relevant circuit precedent insisted that misleading statements that are not false may still be false for purposes of the statute. The Court disagreed, holding that "[s]ection 1014 does not criminalize statements that are misleading but true. Under the statute, it is not enough that a statement is misleading. It must be 'false.'"[264]

Nonetheless, given the particular facts of the case, the Seventh Circuit's incorrect reading of the law would not change the outcome of the case.[265] The jury had, in fact, not been told that the statute criminalizes misleading statements. Instead, it had been properly charged that a finding of guilt required finding that Thompson "made the charged false statement[s]."[266] Writing in concurrence, Justice Jackson observed that upon remand "there is little for the Seventh Circuit to do . . . but affirm . . . . Whether Thompson's statements were, in fact, false is a question for the jury—and here, one the jury has already answered."[267] Indeed, as is its right on appeal, the government argued that the Court should affirm on the grounds that the statements the petition made were, in fact, false. The Court

262. *See, e.g.*, Smith v. Phillips, 455 U.S. 209, 215 n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted.").

263. 604 U.S. 408, 418 (2025).

264. *Id.*

265. Concurring in the judgment, Justice Alito noted that upon remand, the proper test was "whether, viewing the evidence in the light most favorable to the Government, any rational finder of fact could conclude beyond a reasonable doubt that petitioner's statements were false in context." *Id.* at 421 (Alito, J., concurring).

266. *Id.* at 421-22 (Jackson, J., concurring) (citing Petition for Writ of Certiorari app. at 157-58, *Thompson*, 604 U.S. 408 (No. 23-1095)).

267. *Id.*

declined to do so.[268] This failure to render a judgment delayed the inevitable, forcing the parties to spend more money and time to eventually reach the outcome the Court plainly knew was required.

The Court's refusal to render judgments can have deleterious effects on the petitioners as well as the respondents. In some cases, a party who would have prevailed if the Court had looked at the entire judgment will lose because of the Court's selective consideration. The Court's failure to review the judgment—even after it has granted certiorari—is, in such cases, a but-for cause of an adverse judgment. Further, any questions the Court did not consider that the lower court decided wrongly will stand as circuit precedent in at least one (if not more) circuits.

The consequences of the Court's refusal may extend even beyond lower-court precedents and unlucky losers. Consider the fates of the fishermen petitioners in *Relentless v. Department of Commerce*, the companion case to *Loper Bright*.[269] The case involved the Magnuson-Stevens Fishery Conservation and Management Act,[270] which authorized the National Marine Fisheries Service (NMFS) to require that fishing boats "carry" federal monitors on board to prevent overfishing. The agency later reinterpreted "carry" to mean "pay for."[271] The fishermen sued; lower courts, applying *Chevron* deference, ruled for the NMFS.[272] The Supreme Court used the case as an opportunity to overturn *Chevron*. Having done so, it vacated the circuit court judgment "[b]ecause [it] relied on *Chevron* in deciding whether to uphold" the NMFS rule.[273]

This use of vacatur tells the parties that the lower court applied the wrong standard, but it does not say whether the lower courts reached the wrong judgment. The parties still need to know whether the agency could lawfully use its

268. One can only speculate as to why the Court so clearly avoided its traditional obligation to reach the merits of this case, especially because the outcome was so clear. The most likely answer, however, is that, if the Court had reached the merits, it would have had to affirm the judgment. If it affirmed the judgment on the ground that the statements were false, it would not possess the power to answer the question of whether only misleading statements trigger criminal liability under the statute. Such a statement would be extraneous to the Court's judgment and thus, on the traditional account, not part of the holding and not subject to stare decisis effect. The Court neatly sidestepped this problem by simply vacating rather than reaching a judgment. Writing for the Court, Chief Justice Roberts noted that "neither the District Court nor the Seventh Circuit answered that question, and 'we are a court of review, not of first view.'" *Id.* at 418 (majority opinion) (citing Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005)).

269. Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

270. *Id.* at 413; *see* 16 U.S.C. §§ 1801-1882 (2024).

271. *Loper Bright*, 603 U.S. at 381-82.

272. *Id.* at 382-83.

273. *Id.* at 413.

power to require fishermen to "pay for" monitors they are required to "carry." That question was clearly a part of the judgment below, but the Justices did not answer it. They simply vacated without reversing or affirming the judgment, without noting any fraud on the courts or lack of jurisdiction, and without noting anything else that would traditionally justify a judgment of vacatur. As a result, the case went back to the circuit court.

Here the second consequence of the Court's new-style vacatur becomes evident: the circuit panel adopted the same tool as the Court. When the case returned to the First Circuit and the district court's judgment was once again before the panel, that panel declined to review the judgment. The panel vacated and sent the case back to the district court, where the process started all over.[274] Instead of getting a resolution, the parties were sent down the chute to relitigate in the district court.

This outcome is almost certainly not what Congress expected when it gave vacatur to the Court as a tool to help modify judgments.[275] Indeed, the original justification for expanding the Court's remedial powers was to facilitate faster resolution of cases.[276] Questions that could be answered in the Supreme Court would be answered, and only those (almost universally factual) issues that required local knowledge would be vacated and remanded. Congress expanded the Court's remedial power to facilitate more efficient justice for the parties. In contradiction of this priority, the Court now uses vacatur to slow the provision of justice and to increase its expense. Circuit courts are now following in the Court's footsteps, exacerbating this pernicious problem.

One defense of the Court's practice is the now-common refrain that the Court is "a court of review, not of first view."[277] That is, the Supreme Court reviews other courts' work; it does not make a first attempt to answer a question. This expression is both trite and puzzling. It is of recent vintage, which is to say that it represents a relatively new conception of the Court. It is also not clear why such a conception would be beneficial.

The Court will review most legal determinations de novo, entirely unconstrained by circuit-court precedent and barely constrained by its own precedent. The Justices can and will give whatever answer they want if and when they take up the question. It is not obvious why a first look is meaningfully different from looking at the case anew. Moreover, the Justices have already sunk time and resources into learning about this case and this record. It is difficult to imagine that

274. *See* Relentless, Inc. v. U.S. Dep't of Comm., No. 21-886, 2024 WL 3647769, at *1 (1st Cir. July 31, 2024).

275. *See supra* Section II.B; Bruhl, *supra* note 58, at 185-92.

276. *See supra* Section II.B.

277. *See supra* note 260.

the Court will ever be better positioned to give a final answer to the questions included in the case at bar.

One might point to the purported benefits of percolation, but by the time the broader issue comes to the Court, the issue has usually been kicked around enough that marginal percolation would likely be of only marginal benefit. Even assuming there are instances where the Court would benefit from percolation, those should be quite rare. And in every instance, the parties are left spending more time and money to reach a resolution the Court could—and under the Court's own statements about judicial obligations, should—have provided.

In response to this conception of the Court, circuit courts have begun to reframe their own self-conception; they too are now "courts of review, not of first view."[278] The *Relentless* case provides one example. There, the circuit court sent the case back to the district court; the district judge then wrote an opinion that Relentless promptly appealed, and the circuit will now review the question de novo, potentially rendering the stop at the district court pointless.[279] It is unclear why the circuit court needed a fresh opinion from the district court before it could answer a purely legal question from a case with which it was already quite familiar.

Taken together, the argument that the Supreme Court is a special "court of review, not of first view" runs into several problems: it is historically inaccurate,[280] prescriptively tenuous, normatively dubious, and descriptively misleading. The Court was not historically shy about providing the first answer to questions when these questions facilitated a just judgment. It is not clear that legal development or judicial efficiency are improved by this conception of the Court. The Court's reluctance to fulfill its duty to render judgment ultimately treats the parties as means rather than ends. And, now that circuit courts have adopted this same attitude toward their own purpose, the Supreme Court is no longer "special" in this regard.

A helpful contrast to the Court's growing and questionable use of new-style vacatur is the recent age-verification case *Free Speech Coalition v. Paxton*,[281] where the Court proceeded in a more traditional manner. The district court had granted a preliminary injunction after determining that the age-verification statute fell

278. *See supra* note 260 (collecting examples).

279. *See Relentless*, 2024 WL 3647769, at *1 (remanding to the district court); Relentless, Inc. v. U.S. Dep't of Comm., No. 20-108, 2025 WL 1939025, at *4-6 (D.R.I. July 15, 2025) (applying *Loper Bright*'s new standard and concluding that the Magnuson-Stevens Fishery Conservation and Management Act authorized the agency's action), *appeal filed*, No. 25-1845 (1st Cir. Sep. 11, 2025).

280. As observed above, the idea originated in dissenting opinions in the 1920s. *See supra* note 220.

281. 606 U.S. 461 (2025).

under strict-scrutiny review.[282] The Fifth Circuit disagreed, applied rational-basis review, and vacated the preliminary injunction.[283]

The Supreme Court determined that both lower courts had applied the wrong test; they should have used intermediate scrutiny. Since the lower courts used the wrong test, this case represents exactly the kind of situation in which the Court has increasingly turned to vacatur to avoid making a decision. Instead, the Court performed its own intermediate-scrutiny analysis to uphold the statute. Thus, it affirmed the judgment below, as the lower court had reached the correct judgment even as it used the wrong reasoning.[284]

Regardless of the merits of the case, *Paxton* is notable because the Court reached a judgment. As a result, the issues at hand were resolved with finality, and there was no need to relitigate the same question in multiple lower courts. This saved the parties time and money, and it brought quicker resolution to an important legal question.

B. Precedent Without Judgment

As previously noted, there is general agreement that courts have an obligation to render judgment in the cases before them. Indeed, this duty comprises the judicial power.[285] Further, the power to declare law is located in the giving of judgment;[286] so, it is only through giving judgment—not "an independent duty, or a distinct cause of action, or a stand-alone remedy—that federal judges will say what the law is and what it isn't."[287] If the Court does not provide judgment

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282. *Id.* at 469.

283. *Id.* at 469-70.

284. *Id.* at 499. Interestingly, the dissenting opinion, written by Justice Kagan, does not seem entirely convinced that the circuit court's judgment was wrong. Instead, it objects to the standard applied by the majority. Kagan would have applied strict scrutiny, but she observed that "[a] law like H.B. 1181 might well pass the strict-scrutiny test, hard as it usually is to do so." *Id.* at 501 (Kagan, J., dissenting). Unlike the Court, she did not apply her proposed test. Justice Kagan simply thought that Texas ought to do the work to demonstrate that its age-verification statute "has limited no more adult speech than is necessary to achieve its goal." *Id.* at 509. Thus, one reads the dissent and understands that it disagrees with the majority's opinion, but it is not clear that it disagrees with the majority's judgment.

285. *See, e.g.*, Baude, *supra* note 21, at 1811 ("[T]he judicial power is the power to issue binding judgments."); James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1441 (2015) ("[T]he power of federal courts grows out of their duty, in any case properly before them, to provide parties with the relief to which applicable law entitles them.").

286. Muskrat v. United States, 219 U.S. 346, 356-62 (1911); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

287. Baude & Bray, *supra* note 9, at 183.

in the particular case, then — according to the traditional view — it lacks the power to declare law. This principle presents a real challenge for the Court as it continues to grant certiorari (bringing a case into its jurisdiction), declare law, and vacate without reaching a judgment. When it does so, it appears to be acting without power.

A related but more technical problem arises on the heels of this one: if the Court makes law through stare decisis,[288] what exactly is the stare decisis effect of a Court decision rendered without judgment? Stare decisis requires that the *holding* in an earlier case must bear on the decision in a subsequent case,[289] but

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288. *See* Post, *supra* note 12 (manuscript at 32).

289. *See, e.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024) (noting that the holdings in earlier cases "are still subject to statutory *stare decisis*"); Knick v. Township of Scott, 588 U.S. 180, 204 (2019) (discussing the force of statutory stare decisis); Seminole Tribe v. Florida, 517 U.S. 44, 66-67 (1996) ("We adhere in this case, however, not to mere *obiter dicta*, but rather to the well-established rationale upon which the Court based the results of its earlier decisions."); United Gas Improvement Co. v. Cont'l Oil Co., 381 U.S. 392, 404 (1965); City of Los Angeles v. Patel, 576 U.S. 409, 429 (2015) (Scalia, J., dissenting) ("[U]nder the doctrine of *stare decisis*, this reasoning — to the extent that it is necessary to the holding — will be binding in all future cases."); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 563-64 (1993) (Souter, J., concurring in part and concurring in the judgment); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 773 n.236 (1988); Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1723 n.200, 1732-33 (1994); Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1460 (2010).

There is debate over whether the holding alone or the holding plus some other feature of an opinion is entitled to stare decisis effect. *See, e.g.*, Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1259 (2006) ("Stare decisis requires a court to adhere only to its decisions — its holdings — not to any utterance the court may make."); Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755, 807 (2004) ("Stare decisis only requires that a holding be applied to similar cases . . . ."); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2144 (2002) ("[T]he Justices do not seem to treat methodology as part of the holding [of a case]."); *In re* Osborne, 76 F.3d 306, 309 (9th Cir. 1996) ("[U]nder the doctrine of *stare decisis* a case is important only for what it decides — for the 'what,' not for the 'why,' and not for the 'how.'"); Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1476 (2007) ("Full-force stare decisis involves adhering to both the holding and rationale of the prior decision and allows for doctrinal growth across analogous areas. Minimal, or 'discount' stare decisis, on the other hand, involves adhering only to the holding itself in the context of the particular facts of the prior case, thus preventing any attempt to extend the reasoning of the case to analogous situations."); Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 389 (2005) ("[W]hen the Court issues opinions interpreting statutes, stare decisis effect attaches to the ultimate holding as to the meaning of the particular statute interpreted, but not to general methodological pronouncements, no matter how apparently firm."); County of Allegheny v. ACLU, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.");

dicta do not.[290] Such evaluations consistently rely on the familiar—albeit tenuous—distinction between holding and dicta.

Thus, stare decisis requires a means to identify a holding. On the most common account, the holding comprises answers to legal questions necessary to the judgment in the case.[291] While scholars have produced many other potential candidates, they all rely on the existence of judgments.[292]

The Court's new use of vacatur thus undermines stare decisis. If there is no judgment, there can be no holding. If there is no holding, there is no stare decisis effect. Even setting aside the likely absence of judicial power that attends the lack of a judgment, a practical problem remains: identifying exactly what parts of an opinion are precedential. Thus, there are both theoretical and practical problems with using vacatur to declare law without reaching a judgment.

C. Potential Counterarguments

This final Section considers potential counterarguments to the account offered in this Article. First, it could be argued that the Court's use of vacatur is functionally equivalent to—and often driven by—the Court's practice of preselecting questions for review through certiorari. Second, the historical account of vacatur may discount vacatur's natural evolution, mooring it to standards arbitrarily frozen in 1789. Finally, perhaps the Court has simply changed nomenclature, using "vacate" instead of "reverse," either to be kinder to the lower-court judges being corrected, or because the Justices have lost any understanding of the difference between reversing and vacating.

The first of these counterarguments raises a good point about the Court's current practice. The Court frequently grants certiorari and limits its review to

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Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1765-66 (2010) ("[P]rior methodological statements do not carry into future cases with the force of precedent."); *Seminole Tribe*, 517 U.S. at 66-67 (stating that a "well-established rationale upon which the Court based the results of its earlier decisions" is entitled to stare decisis effect).

290. *See* Barrett, *supra* note 21, at 827 ("The fundamental rule of horizontal stare decisis is that holdings bind and dicta do not.").

291. *Holding*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("A court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision."); *cf. Obiter Dictum*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.").

292. *See, e.g.*, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1065 (2005); Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 182-83 (1930); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2041 (1994).

preselected questions.[293] If the answers the Court provides to the preselected questions are insufficient to render judgment, the Court cannot affirm or reverse, so it simply vacates. According to this counterargument, if it is legitimate for the Court to limit its review to preselected questions and to give binding answers to those questions, vacatur is easily justified as the tool that facilitates these efforts.

The problem with this argument is the premise. For the Court's preselection of questions to be legitimate, two things must be true: such a power must be consistent with the Article III judicial power, and it must be congressionally authorized. Strong reasons exist to doubt both of these preconditions.

Constitutionally, courts have no general power to answer freestanding legal questions. They have a general power, derived from their judicial obligation to decide cases, to answer the questions necessary to reach judgment. In much the same way that an agent's incidental authority is constrained to actions that are "necessary, usual, and proper to accomplish or perform an agent's express responsibilities,"[294] courts have the implied power to answer questions only when they are performing their express responsibility: deciding the case. As John Harrison explains, "To suggest that the power to interpret is primary and the case deciding power secondary, is to misinterpret the Constitution and to confuse cause and effect."[295]

This is not to say that federal courts do not have a specific power to answer freestanding legal questions when not deciding cases.[296] When a case is pending in one federal court and that court certifies a question to a second court to answer, the latter court may answer in a way that binds the present and future parties. These situations constitute a longstanding and narrow exception to the general rule that courts cannot declare law when not deciding a case. When the Supreme Court chooses its own question related to a final judgment already

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293. *See supra* notes 17-20 and accompanying text.

294. RESTATEMENT (THIRD) OF AGENCY § 2.01 cmt. b (A.L.I. 2006).

295. John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORN. L. REV. 371, 373 (1988).

296. English common-law practice made use of the case-stated procedure that routed a stand-alone question within ongoing litigation to a higher court so that the answer might aid the lower court in deciding the case. The United States quickly developed a similar practice in the case of two-judge circuit courts where a disagreement between them might occasion a certificate of division on the disputed question that would be referred to the Supreme Court. The Justices' answer would then be returned to the circuit court, which would resolve the case. The Evarts Act did away with the old circuit courts in favor of the new circuit courts of appeals. Those courts were given the power to certify questions to the Supreme Court if the answers would be helpful to those courts. For further discussion in this vein, see generally Benjamin B. Johnson, *May Federal Courts Answer Questions When Not Deciding Cases?*, 100 NOTRE DAME L. REV. 583 (2025).

reached by a lower court, any answers the Justices provide are well outside every dimension of this narrow exception.

Apart from these constitutional concerns, the Court's practice is plainly inconsistent with the governing statutes. For instance, 28 U.S.C. § 1254 states that "[c]ases . . . may be reviewed . . . [b]y writ of certiorari," and "question[s] of law" are answered after "certification . . . by a court of appeals."[297] The statute links certiorari to a review of a full case and certification to answering questions. This reading is consistent with the historical usage of both devices. Congress created the statutory writ of certiorari to bring cases to the Court so that the Justices might act with "the same power and authority in the case as if it had been carried by appeal or writ of error."[298] Such review required an independent and comprehensive review of the record.[299]

Even the celebrated 1925 Judges' Bill that massively expanded the Court's certiorari jurisdiction presumed that certiorari would lead to a review of the entire case.[300] The Justices testified to Congress that certiorari review "extend[ed] to the whole case and every question presented in it."[301] Granting the writ meant "that, in the entire environment of the case, it is one that should be argued at length before them, be considered by them in the light of that presentation and

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297. 28 U.S.C. § 1254 (2024).

298. Judiciary Act of 1891, ch. 517, § 6, 26 Stat. 826, 828; *see also* Harris v. Barber, 129 U.S. 366, 369 (1889) ("A writ of *certiorari*, when [used] to bring up after judgment the proceedings of an inferior court . . . is in the nature of a writ of error. Although the granting of the writ of *certiorari* rests in the discretion of the court, yet after the writ has been granted . . . the questions arising upon that record must be determined according to fixed rules of law . . . .").

299. Garland v. Davis, 45 U.S. (4 How.) 131, 143 (1846) ("[I]t is the duty of the court to give judgment on the whole record, and not merely on the points started by counsel."). Writing in the wake of the 1891 Evarts Act that created statutory certiorari, the Court wrote that it was still understood that the "whole case and every matter in controversy in it [must be] decided in a single appeal." McLish v. Roff, 141 U.S. 661, 665-66 (1891). Noting that this has been the "object and policy of the acts of Congress in relation to appeals and writs of error," the Court remained clear that "a case cannot be brought to this court in fragments." *Id.* at 665.

300. For instance, Congressman Andrew J. Montague put the following to Justice Van Devanter: "Although you ask for discretionary power, you propose to exercise it in the method you have heretofore exercised it." Van Devanter replied, "Certainly. Of course, we could not maintain the institution and make it accomplish its purpose unless we did, and there is no purpose to do anything else." *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearing on H.R. 8206 Before the H. Comm. on the Judiciary*, 68th Cong. 18 (1924).

301. *See* 66 Cong. Rec. 2921 (1925) (reproducing Letter from Chief Justice William H. Taft to Sen. Royal S. Copeland (Dec. 31, 1924)).

then deliberately decided."[302] In short, the full case should be "reheard upon its merits."[303]

It did not take the Court long to change directions, however. In 1926, the Court attempted for the first time to limit review on certiorari to a particular issue.[304] The first case where the Justices clearly attempted to exclude potential errors from their review was *Olmstead v. United States* in 1928.[305] This move significantly deviated from historical practice and from the Justices' testimony to Congress only four years prior. In 1939, the Court officially changed its rules.[306] Thus, the Court's "power" to limit review to preselected questions does not come from statutes, nor is it inherent in the judicial power of Article III. It is a practice the Court developed for its own lawmaking convenience.

The express textual link between certiorari and the writ of error disappeared in 1948 when Congress codified the statutes governing the judiciary and dropped the traditional language telling the Court to proceed with "like effect, as if the cause had been brought there by unrestricted writ of error or appeal."[307] But the 1948 codification was not intended to transform meaningfully the Court's appellate powers. The House Judiciary Committee's report said that codification would "preserve existing law" and that the changes merely affected "phraseology

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302. James Craig Peacock, *Purpose of Certiorari in Supreme Court Practice and Effect of Denial or Allowance*, 15 A.B.A. J. 681, 684 (1929).

303. *See Procedure in Federal Courts: Hearing on S. 2060 and S. 2061 Before a Subcomm. of the S. Comm. on the Judiciary*, 68th Cong. 30 (1924) (statement of Justice McReynolds).

304. Pueblo of Santa Rosa v. Fall, 273 U.S. 678, 678 (1926) (mem.).

305. 276 U.S. 609, 609 (1928) (mem.). The case is famous for its holding on the constitutionality of wiretapping. The petitioner, having been convicted as part of a bootlegging organization, raised not only constitutional objections but also an evidentiary issue: could the government introduce evidence obtained in violation of the law of the state in which the evidence was collected? *See* Petition of Edward H. McInnis for Writ of Certiorari at 11, Olmstead v. United States, 277 U.S. 438 (1928) (No. 533) (arguing that "[b]ecause the tapping of the telephone wires was unlawful, being a direct violation of the penal statutes of the State of Washington, . . . the evidence[,] . . . having been obtained unlawfully, was inadmissible"). The Court's order limited review to the constitutional questions. The ultimate decision in *Olmstead* led to a series of dissenting opinions where the Justices disagreed about the meaning of that limitation. *See Olmstead*, 277 U.S. at 469, 471, 485, 488 (individual dissenting opinions of Justices Holmes, Brandeis, Butler, and Stone, respectively); *see also* Johnson, *supra* note 17, at 840-44 (analyzing the various opinions in the case).

306. *See* SUP. CT. R. 38.2 (1939) (repealed 1954) ("Only the questions specifically brought forward by the petition for writ of certiorari will be considered."); Johnson, *supra* note 17, at 846-48.

307. *Compare* Judiciary Act of 1925, ch. 229, § 1, 43 Stat. 936, 939 (requiring the Supreme Court to proceed on certiorari "with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal"), *with* Act of June 25, 1948, ch. 646, §§ 1254, 1257, 62 Stat. 869, 928-29 (codified at 28 U.S.C. §§ 1254, 1257) (describing the Supreme Court's certiorari jurisdiction without any reference to the writ of error).

and arrangement."[308] There is certainly no evidence that Congress intended to alter the Court's jurisdiction radically and grant it the power to decide freestanding questions instead of entire cases. The Court has been quite clear that, if there is no evidence that Congress was aware of a potential, significant change in the Court's jurisdiction, that would "readily dispose[] of any argument that Congress unmistakably intended to" change the rules.[309]

Vacatur itself leads to one more piece of evidence against the claim that Congress blessed the Court's efforts to limit its own review. Consider 5 U.S.C. § 706, which allows the Court to "set aside" agency actions. While the phrase "set aside" has been the subject of enormous debate in recent years, what is relevant for present purposes is that such relief is available after the Court "review[s] the whole record or those parts of it cited by a party."[310] This legislation shows that Congress is entirely capable of directing the Court to a partial review of the record. Notice also that Congress did not give the Court the power to choose which parts of the record to review. On a plain reading of the statutes, then, Congress directs the Court to review and decide full cases on certiorari, reviewing at least all parts of the record cited by parties under the Administrative Procedure Act and all questions certified by circuit courts. The Court's practice of preselection is unsanctioned by statute.

A second defense of modern vacatur would contend that inconsistencies between current practices and their historical roots by no means lock the Court into the latter practice. Put differently, the bare observation that there is little or no precedent for modern vacatur practice in the eighteenth or nineteenth centuries does not prove that modern vacatur is ultra vires. Article III does not lock vacatur in amber.

Such an argument merits at least two replies. First, this defense is nearly impossible to maintain alongside the Supreme Court's longstanding insistence that federal courts' remedial powers are limited to those "traditionally accorded by courts of equity at our country's inception."[311] Thus, for the Court, historical practice does indeed establish the theoretical limits.

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308. H.R. Rep. No. 80-308, at A107 (1947).

309. Tafflin v. Levitt, 493 U.S. 455, 462 (1990) (further noting that "the question is not whether any intent at all may be divined from legislative silence on the issue, but whether Congress in its deliberations may be said to have affirmatively or unmistakably intended" to amend jurisdictional practices).

310. 5 U.S.C. § 706 (2024). The original language from 1946, only two years before the recodification, stated that "the court shall review the whole record or such portions thereof as may be cited by any party." Administrative Procedure Act, ch. 324, § 10(e), 60 Stat. 237, 244 (1946).

311. Trump v. CASA, Inc., 606 U.S. 831, 841 (2025) (citing Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 319 (1999)); *see also* Payne v. Hook, 74 U.S. (7 Wall.) 425, 430 (1868) ("The equity jurisdiction conferred on the federal courts is the same that the High

A second reply to this argument places the evolution of vacatur within the larger history of judicial innovation. English courts liberalized the writ of error, for example, to free it from its overly technical historical roots.[312] Similarly, the First Judiciary Act freed courts to modify judgments. There is a longstanding history of innovation in judicial practice, but this innovation has always aimed at changes to facilitate more efficient and just resolution of the claims in a case.[313] Most of modern vacatur appears to benefit the Court at the expense of the parties, who must wait longer and spend more money to litigate issues ignored by the Court.[314]

Not all parts of modern vacatur are inconsistent with history. Recall the minimalist version of *Munsingwear* vacatur, under which the appellate court vacates the trial court's decision if the case becomes moot before any appellate judgment. This type of vacatur seems entirely consistent with a party- and fairness-focused judiciary, and it represents a minimal expansion of the historical practice of abatement.[315] If conceived as a modest step to bring civil cases in line with criminal practice and to ensure the fairness of the judicial process to the parties in concrete cases, at least some instances of *Munsingwear* vacatur seem consistent with historical developments in judicial procedures.[316]

Finally, one might say that this Article's concern with vacatur is much ado about nothing, mistaking collegial politeness for a change in doctrine. If one

Court of Chancery in England possesses, is subject to neither limitation or restraint by state legislation, and is uniform throughout the different states of the Union.").

312. *See* 3 BLACKSTONE, *supra* note 35, at *406-07 (explaining that English courts gradually relaxed the rigid formalism of the writ of error, allowing amendments even after technical mistakes and procedural defects, as part of a broader judicial shift toward substantive justice over procedural technicality); *see also* Johnson, *supra* note 17, at 809-12 (providing a history of the writ of error).

313. *See* Johnson, *supra* note 17, at 809-12; *supra* Section II.B.

314. *See supra* Section IV.A.

315. The death of a party before judgment would cause the claim to abate, and it would require some statutory hook to allow the claim to go forward by (or against) the representative of the deceased. *See, e.g.*, Green v. Watkins, 19 U.S. (6 Wheat.) 260, 262-63 (1821). The practice is most cleanly observed in the criminal context where the death of the defendant while on appeal abates the conviction. *See, e.g.*, List v. Pennsylvania, 131 U.S. 396, 396 (1888). The doctrine received attention after the deaths of Kenneth Lay of Enron infamy and Aaron Hernandez. *See* Timothy A. Razel, *Dying to Get Away with It: How the Abatement Doctrine Thwarts Justice—and What Should Be Done Instead*, 75 FORDHAM L. REV. 2193, 2193-95 (2007); Patrick H. Gallagher, *The Aaron Hernandez Case: The Inconsistencies Plaguing the Application of the Abatement Doctrine*, 53 GONZ. L. REV. 263, 267-74 (2018).

316. It is harder, though perhaps not impossible, to justify *Munsingwear* vacatur by the Supreme Court after the circuit court has given a final judgment on the merits. Fairness concerns are certainly lessened, since the petitioner received an appeal. The settlement justification might survive, but there is no reason the parties could not achieve this by returning to the circuit court within the same term.

views the term "reversing" to suggest that the lower court did something wrong, vacating the judgment might offer a kinder solution. Under this view, vacatur is really a polite way of reversing, not a failure to give a judgment.

This argument has a few problems. First, the Court does frequently reverse. Any argument that the Justices are using vacatur to be polite would also need to explain why the Court is only sometimes worried about the tender skins of lower-court judges, when at other times it disregards these feelings entirely.

If politeness is not the Court's rationale, perhaps confusion is. If this is the case, hopefully that difference has become clear over the course of this Article. Reversal is a judgment on the merits that might be followed by vacatur as a remedy. Vacatur is used as a judgment (and then a remedy) when some fraud or procedural irregularity has affected the proceedings below; it does not reach the merits. Even if the Justices were misinformed about proper nomenclature, this would be merely an explanation for their use of vacatur, not a justification. Even if the Court is using the wrong word and means to "reverse" when it says it is "vacating," the consequences of this practice are not dependent on word choice. The costs to the parties result from the Court's failure to finally resolve the case, not from the Court's terminology.

The Court's obligation is to decide cases,[317] not to punt them back to lower courts so parties can spend more and wait longer to receive an answer the Court was obligated to provide. Even those cases where the Court uses vacatur to avoid declaring law represent a failure. While there may be other reasons to applaud judicial minimalism, the Court fails in its duty when it refuses to decide a case within its jurisdiction.

CONCLUSION

The history of vacatur is in some sense the history of appellate law. Its roots go back to both common-law courts and Chancery. It found new uses in a new nation, helping the Court to manage law and equity in a land too vast to efficiently send cases back and forth between the Justices and the lower courts. When Congress revolutionized civil procedure with the federal rules in 1938, vacatur changed along with the judiciary and helped the Court manage the chaos. As the Court refashioned standing doctrine, vacatur became the tool used to enforce new jurisdictional limits. Now, as the Court continues to transform from a

317. *See* Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77 (2013) ("Jurisdiction existing, this Court has cautioned, a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976))).

tribunal resolving disputes into a superlegislature,[318] vacatur is once again adapting to changing circumstances.

This new usage of vacatur brings new challenges as well. Article III does not grant federal courts the power to answer freestanding questions of law, but this is what vacatur now facilitates. The challenge for a Court wedded to history and tradition is whether constitutional limits can be so easily evaded by adopting an entirely new use for such an ancient tool.

318. *See* Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 35-39, 60 (2005); Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORN. L. REV. 587, 589-90 (2009); *cf.* Bostock v. Clayton County, 590 U.S. 644, 782 (2020) (Kavanaugh, J., dissenting) ("In the face of the unsuccessful legislative efforts (so far) to prohibit sexual orientation discrimination, judges may not rewrite the law simply because of their own policy views.").