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MILA SOHONI

The Past and Future of Universal Vacatur

ABSTRACT. Universal vacatur, the judicial power to void a regulation, is a remedy rooted in the foundations of modern administrative law, not an artifact of judicial overreach or creative re-interpretation of the Administrative Procedure Act (APA). This Feature adds to the literature on the historical underpinnings and legal propriety of universal vacatur by mapping the development of universal vacatur from the pre-APA period through the *Abbott Labs* trilogy. Canvassing the work of courts, Congress, and scholars, this account underscores that universal vacatur is a legitimate part of the remedial scheme of administrative law, grounded in history and sustained by subsequent recognition.

After establishing these points, the Feature connects the debate over universal vacatur to another topic of vigorous discussion in contemporary administrative law: the Roberts Court's recent fortification of the major questions doctrine. The case against universal vacatur leverages the intuition that an individual district court judge should not be able to decide issues of vast economic and political significance by vacating a rule universally absent a clear statement in the APA that the judge possesses that authority. That form of argument resembles the mechanics of the new major questions doctrine. As to their consequences, the two also align: both serve to centralize power in the Supreme Court by weakening actors of our government other than the Supreme Court. Though accepting the case against universal vacatur will certainly place curbs on lower court judges, it would also indulge, and thereby strengthen, the perilous proposition that the Supreme Court should intervene to redistribute congressional allocations of power in ways that centralize its own importance and preferences.

AUTHOR. Herzog Research Professor of Law and Associate Dean of Faculty, University of San Diego School of Law; Professor of Law and John A. Wilson Distinguished Faculty Scholar, Stanford Law School (starting June 2024). For helpful comments and conversations, I am grateful to Kent Barnett, Jack M. Beerhmann, Emily Bremer, Kevin M. Clermont, Zachary D. Clopton, Justin Driver, Christopher M. Egleson, William N. Eskridge, Richard H. Fallon, Vicki C. Jackson, Christopher S. Havasy, Lee Kovarsky, Margaret H. Lemos, Ronald M. Levin, Joshua C. Macey, John F. Manning, David McGowan, Nicholas R. Parrillo, James E. Pfander, Daphna Renan, Judith Resnik, Amanda L. Tyler, Christopher J. Walker, Jed Stiglitz, Ernest A. Young, and Adam S. Zimmerman. This draft benefitted from feedback received at the Boston University School of Law faculty workshop, the Duke Law School Public Law Colloquium, the Harvard Law School Public Law Workshop, the Power in the Administrative State workshop, and the Yale Law School faculty workshop. I am indebted to the editors of the *Yale Law Journal* for their thoughtful comments and suggestions.



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Surely something has to be done; and who else to do it but this Court?

— Justice Kagan¹

INTRODUCTION

A great deal of public law has a single question at its crux: what is the appropriate scope of federal judicial power in our system of government? Much of administrative law is an organically developed answer to this question;² the area of study we call “federal courts” was consciously invented to address it.³ Explicitly or implicitly, that question is raised in every lawsuit that asks a federal court to opine on the legality of a federal regulation and – if it is illegal – to enjoin or vacate that regulation in an order with universal effect.⁴

Judges and scholars continue to debate vigorously the propriety of universal remedies,⁵ and at least two cases decided by the Supreme Court in the October

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1. *Sackett v. EPA*, 598 U.S. 651, 712 (2023) (Kagan, J., concurring).
 2. Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 482 (2004) (noting that “[a]t its core, . . . administrative law consists of the body of principles and rules that govern judicial review of executive action,” and tracing its roots back to *Marbury*).
 3. See HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, at xii (1st ed. 1953) (“In varying contexts we pose the issue of what courts are good for – and are not good for – seeking thus to open up the whole range of questions as to the appropriate relationship between the federal courts and other organs of federal and state government.”).
 4. The concept of the universal or nationwide injunction is familiar. For the sake of variety, I will use interchangeably the terms “universal injunction” and “nationwide injunction.” The term “universal vacatur” means the invalidation of a rule, not just “as to the plaintiffs” but “as to anyone,” with the effect of restoring the status quo before the rule’s adoption. See, e.g., *Env’t Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004) (“When a court vacates an agency’s rules, the vacatur restores the status quo before the invalid rule took effect and the agency must ‘initiate another rulemaking proceeding if it would seek to confront the problem anew.’” (quoting *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854 (D.C. Cir. 1987))). For background on the universal injunction and a defense of its legality as an Article III matter, see Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920 (2020) [hereinafter Sohoni, *Lost History*]. For background on universal vacatur and a defense of its legality as an Administrative Procedure Act (APA) remedy, see Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121 (2020) [hereinafter Sohoni, *Power to Vacate*].
 5. See, e.g., Aditya Bamzai, *The Path of Administrative Law Remedies*, 98 NOTRE DAME L. REV. 2037, 2037 (2023); William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 169–70 (2023); John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REGUL. BULL. 119, 119–21 (2023) [hereinafter Harrison, *Vacatur of Rules*]; John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. ON REGUL. BULL. 37, 37 (2020) [hereinafter

2022 Term fairly presented an opportunity to rule on their validity. At oral argument for *United States v. Texas*,⁶ a complicated immigration-law case, the Solicitor General contended that the Administrative Procedure Act (APA) does not authorize a federal court to vacate a rule universally.⁷ Several of the Justices reacted to this argument with palpable surprise. Chief Justice Roberts exclaimed, “Wow.”⁸ As he pointed out, universal vacatur was “what the D.C. Circuit and other courts of appeals have been doing all the time as a staple of their decision output,”⁹ and was a remedy that the Court had upheld “over and over and over again.”¹⁰ In response to the Solicitor General’s contention that D.C. Circuit judges have “reflexively assumed” the power to vacate rules universally without attending to the APA’s text, structure, and history,¹¹ Justice Kavanaugh stoutly disagreed and added, “no case has ever said what you’re saying anywhere.”¹² Justice Jackson pointed out the “conceptual problem” with the government’s argument that a null agency action could continue to be applied to nonplaintiffs.¹³ And Justice Alito made a plea for additional scholarly work in this area, noting that the “innovative law review article” relied on by the government appeared only recently: “are we left to do all of the scholarship that would be required to figure out whether this new interpretation is the correct interpretation?”¹⁴ The topic of universal vacatur arose again at an oral argument in February 2023 – this time, in a challenge to the Biden Administration’s student-loan-forgiveness

Harrison, *Section 706*]; Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997, 1998-2002 (2023); Ronald M. Levin & Mila Sohoni, *Universal Remedies, Section 706, and the APA*, YALE J. ON REGUL.: NOTICE & COMMENT (July 19, 2020), <https://www.yalejreg.com/nc/universal-remedies-section-706-and-the-apa-by-ronald-m-levin-mila-sohoni> [<https://perma.cc/35LE-96WH>]; Kathryn Kimball Mizelle, *To Vacate or Not to Vacate: Some (Still) Unanswered Questions in the APA Vacatur Debate*, 38 HARV. J.L. & PUB. POL’Y PER CURIAM 1, 1-3 (2023); Mila Sohoni, *Do You C What I C? – CIC Services v. IRS and Remedies Under the APA*, YALE J. ON REGUL.: NOTICE & COMMENT (June 8, 2021), <https://www.yalejreg.com/nc/do-you-c-what-i-c-cic-services-v-irs-and-remedies-under-the-apa-by-mila-sohoni> [<https://perma.cc/4JV6-YUQ3>]; *Developments in the Law – District Court Reform: Nationwide Injunctions*, 137 HARV. L. REV. 1701 (2024).

6. 599 U.S. 670 (2023).
7. See Brief for the Petitioners at 39-44, *Texas*, 599 U.S. 670 (No. 22-58).
8. Transcript of Oral Argument at 36, *Texas*, 599 U.S. 670 (No. 22-58).
9. *Id.*
10. *Id.* at 38.
11. *Id.* at 36.
12. *Id.* at 55.
13. *Id.* at 66-68.
14. *Id.* at 119. The referenced law review article is Harrison, *Section 706*, *supra* note 5.

program.¹⁵ Intriguingly, on that occasion, the Justices' questions spoke not only to positive law but also to how the government has and would respond to non-universal, party-specific orders issued by various levels of courts.¹⁶

Ultimately, the Court did not address the propriety of universal relief in either case.¹⁷ But in a concurring opinion in *United States v. Texas*,¹⁸ at least three Justices indicated that they were receptive to the government's reading of the APA—a reading that has justly been described as “[d]eeply revisionist.”¹⁹ In that concurrence, Justice Gorsuch questioned “the essential premise on which the district court proceeded—that the APA empowers courts to vacate agency action.”²⁰ Expanding upon arguments made both by the government and by Professor John Harrison,²¹ Gorsuch doubted whether Congress, by enacting the APA, meant to “vest courts with a ‘new and far-reaching’ remedial power”²² to vacate rules. He acknowledged, however, that the question was a complex one requiring further reflection.²³ He concluded his discussion of this issue by noting, “[T]he questions here are serious ones. And given the volume of litigation under the APA, this Court will have to address them sooner or later.”²⁴

On that last point, at least, Justice Gorsuch was clearly correct: “sooner or later,” the Court will have to address the propriety of universal vacatur. And for

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15. Transcript of Oral Argument at 15-19, 47-49, *Dep't of Educ. v. Brown*, 600 U.S. 551 (2023) (No. 22-535).
 16. *See id.* at 47-49.
 17. *See United States v. Texas*, 599 U.S. 670 (2023); *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).
 18. *Texas*, 599 U.S. at 693-703 (Gorsuch, J., concurring). Justices Thomas and Barrett joined Justice Gorsuch's concurrence.
 19. Levin, *supra* note 5, at 2008; *see also* 3 CHARLES H. KOCH, JR. & RICHARD MURPHY, *ADMINISTRATIVE LAW AND PRACTICE* § 8.31 (2024) (referring to the government's argument as a “rather shocking assault on a long accepted, foundational aspect of judicial control of agency action”).
 20. *Texas*, 599 U.S. at 693 (Gorsuch, J., concurring).
 21. *Id.* at 698-99 (citing Harrison, *Section 706*, *supra* note 5; Harrison, *Vacatur of Rules*, *supra* note 5).
 22. *Id.* at 695 (quoting *Arizona v. Biden*, 40 F.4th 375, 396 (6th Cir. 2022) (Sutton, C.J., concurring)).
 23. *Id.* at 701 (“I do not pretend that the matter is open and shut. Thoughtful arguments and scholarship exist on both sides of the debate.”).
 24. *Id.* at 702. Justice Alito, in his dissent, was the only Justice to engage with Justice Gorsuch's APA arguments. *Id.* at 721 (Alito, J., dissenting). In Alito's view, the states had Article III standing, and their injury was redressable in one of two ways: by an injunction issued by the Supreme Court itself or a district court order setting aside the guidelines (i.e., a vacatur). He noted that to read the APA as not permitting vacatur would cause significant disruption “in administrative law as currently practiced in the lower courts.” *Id.* Pointing out that the Court “did not grant review on this very consequential question,” he stated that he “would not reach out to decide it” in this case. *Id.* (citing *Biden v. Texas*, 597 U.S. 785 (2022)).

all the ink already spilled on universal remedies,²⁵ much remains to be written. As Gorsuch’s opinion epitomizes, the legal and historical contentions against the propriety of universal vacatur have recently evolved in ways that demand fresh interrogation and response.

This Feature takes up that challenge by responding to the newest iterations of the case against universal vacatur. It also situates that latest contest within broader ongoing debates concerning statutory interpretation in administrative law and the Supreme Court’s role in our system of government. Justice Gorsuch’s concurring opinion has now squarely placed on the table the claim that the APA—not only as originally enacted but also as understood for two decades thereafter—did not contemplate a regime of judicial review in which courts could vacate rules universally. The implication of that claim would be that the practice of universal vacatur is nothing but the product of judicial freelancing by lower courts.

This view, which treats universal vacatur as the fruit of judicial fiat, disregards a lot of history and a lot of law. The APA authorizes the universal vacatur of rules. The APA allows litigants to bring a civil action that seeks, *inter alia*, a judgment that a rule be “h[e]ld unlawful and set aside.”²⁶ Universal vacatur—“a judicial order declaring that the rule shall no longer have legal effect”²⁷—is simply an order decreeing that an unlawful rule is invalid in toto. Lower courts issued universal vacatur before the APA’s enactment;²⁸ they continued to issue universal vacatur in the decade following the APA under the framework for review set out in the APA and related statutes;²⁹ and they continue that practice today.³⁰

25. See *supra* note 5. In 2020, I canvassed several reasons why the APA should be read to authorize universal vacatur. See Sohoni, *Power to Vacate*, *supra* note 4 (explaining that history, structure, text, purpose, and practice all point towards reading the APA to allow universal vacatur). This Feature adds to that earlier discussion by responding to new arguments that have since emerged concerning universal vacatur, see *Texas*, 599 U.S. at 693 (Gorsuch, J., concurring), and by examining previously underexplored facets of this debate, including special statutory review provisions and the declaratory judgment. In addition, this Feature explores the relationship between the case against universal vacatur and the new major questions doctrine, which crystallized into its current, more robust form only after 2020.

26. 5 U.S.C. § 706(2) (2018).

27. Levin, *supra* note 5, at 1999; see, e.g., *Action on Smoking & Health v. Civ. Aero. Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (“To ‘vacate,’ as the parties should well know, means ‘to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.’” (quoting 91 C.J.S. *Vacate* (1955))).

28. See *infra* Section II.A.

29. See *infra* Section II.C.

30. See, e.g., *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 539 F. Supp. 3d 29, 43 (D.D.C. 2021); *O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019).

Many skeptics of universal vacatur are today consumed with the question of *who* may benefit from a lower court judgment that a rule is invalid. But at the time of the enactment of the APA and indeed for many years thereafter, the consuming question was not *who* but *when*. The pivotal issue was the “reviewability” of the agency action, not who the potential beneficiaries would be if the court ultimately reviewed the agency action and held it to be unlawful. In cases implicating special statutory review provisions,³¹ Congress had itself marked specified agency actions as “reviewable.”³² However, in deciding challenges to agency actions that Congress had *not* specifically made reviewable by statute, courts were navigating more ambiguous territory.³³ Crucially, though, if a regulation *was* deemed reviewable, the court then possessed the authority to determine the validity of the regulation in exactly the same way as it would have determined the validity of an agency action made reviewable via a special statutory review proceeding. Once the regulation was deemed reviewable, the court had the power to pronounce on the rule’s validity and to nullify it if invalid.

This overriding concern with reviewability explains why it is a red herring to focus, as some have urged,³⁴ on the absence of an express mention of the term “vacatur” in the portions of post-APA treatises and legal materials dealing with remedies. Scholars such as Kenneth Culp Davis and Louis Jaffe dealt with cases that resulted in the universal vacatur of regulations in their discussions of ripeness or reviewability, not in their discussions of remedies.³⁵ The absence of the term “vacatur” from their writings – and indeed, that word’s absence from the APA itself – is merely because suits seeking review through special statutory provisions, declaratory judgments, and injunctions – which these scholars *did* discuss – were the vehicles through which courts invalidated regulations entirely.

31. See 33 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 8303 (2d ed. Apr. 2023 update) (describing “special statutory review” provisions, which govern judicial review of specified types of agency action).

32. See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 *TEX. L. REV.* 113, 173-74 (1998).

33. See *id.* at 173 n.305 (noting cases reflecting that “the Court was more hesitant to allow review without specific statutory support”).

34. See Harrison, *Vacatur of Rules*, *supra* note 5, at 120; *cf.* *United States v. Texas*, 599 U.S. 670, 699 (2023) (Gorsuch, J., concurring) (“Surely, too, it is odd that leading scholars who wrote extensively about the APA after its adoption apparently never noticed this supposed remedy. . . . These are not people who would have missed such a major development in their field.” (citing Harrison, *Vacatur of Rules*, *supra* note 5)).

35. See *infra* Section II.D.

The fact that the shorthand term for such relief subsequently came to be “vacatur”³⁶ – and much more recently “universal vacatur”³⁷ – is neither here nor there.

The *Abbott Labs* trilogy,³⁸ far from casting doubt on the foregoing account,³⁹ instead encapsulates and confirms it. The parties’ focus in the *Abbott Labs* trilogy was chiefly on reviewability – the “when” question – not on to whom the remedy would extend if the government lost.⁴⁰ Critically, though, the consequences of holding the regulations reviewable were apparent in the record: the Delaware district court had issued a universal injunction and a universal vacatur of the regulations, and the litigants in the Southern District of New York sought similar relief.⁴¹ The government’s merits brief expressly argued that allowing pre-

36. Well before Congress enacted the APA, dictionaries defined “set aside” to mean to render void or to annul and as synonymous with “vacate.” See *Stewart v. Oneal*, 237 F. 897, 906 (6th Cir. 1916) (“Vacate means to annul, set aside, or render void; suspend, to stay. When a thing is vacated it is devalitized.”); *Set Aside*, BLACK’S LAW DICTIONARY (3d ed. 1933) (defining set aside as “to cancel, annul, or revoke [any proceedings] at the instance of a party unjustly or irregularly affected by them”); *Set Aside*, BOUVIER’S LAW DICTIONARY (8th ed. 1914) (defining set aside as “to annul; to make void”). So did courts. See *Powell v. United States*, 300 U.S. 276, 290 (1937) (“Complainants were entitled to the judgment and decree of the specially constituted court declaring that the [Interstate Commerce Commission (ICC)]’s order striking the tariff from its files is illegal and void and setting aside and annulling the same.”); *St. Louis & O’Fallon Ry. Co. v. United States*, 279 U.S. 461, 482, 488 (1929) (noting that “the proceeding below was to set aside” an ICC order and explaining that “[w]hether the [ICC] acted as directed by Congress was the fundamental question presented. If it did not, the action taken, being beyond the authority granted, was invalid. . . . A decree will be entered here annulling the challenged order.”); *Venner v. Mich. Cent. R. Co.*, 271 U.S. 127, 128 (1926) (“[T]he suit is essentially one to annul or set aside the order of the [ICC]. . . . [T]he amended bill . . . assail[s] the validity of the order and pray[s] that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside.”). Quite soon after the APA’s enactment, the Third Circuit stated that Section 706 “affirmatively provides for vacation of agency action” in a suit brought to “set aside” a regulation concerning, of all things, salad dressing. *Cream Wipt Food Prods. Co. v. Fed. Sec. Adm’r*, 187 F.2d 789, 790 (3d Cir. 1951).
37. See Sohoni, *Power to Vacate*, *supra* note 4, at 1123 n.5 (noting that the Trump Department of Justice appeared to have coined the term “universal vacatur” in 2018 and that “[t]hrough this term therefore is relatively unfamiliar (and perhaps a bit loaded), it does crisply capture the concept of setting aside a rule not just as to the plaintiffs, but as to anyone,” and so it might as well be used (emphasis omitted)).
38. *Abbott Lab’s v. Gardner* (*Abbott Labs*), 387 U.S. 136 (1967); *Toilet Goods Ass’n v. Gardner*, 387 U.S. 158 (1967); *Gardner v. Toilet Goods Ass’n*, 387 U.S. 167 (1967). For an indispensable guide to the trilogy, see Ronald M. Levin, *The Story of the Abbott Labs Trilogy: The Seeds of the Ripeness Doctrine*, in *ADMINISTRATIVE LAW STORIES* 431 (Peter L. Strauss ed., 2006).
39. *Contra* Harrison, *Vacatur of Rules*, *supra* note 5, at 129–31 (arguing that the *Abbott Labs* litigation demonstrates the absence of a belief that the APA “presumptively calls for vacatur of unlawful regulations”).
40. See *infra* Section II.D.
41. See *infra* notes 363–382 and accompanying text.

enforcement review in district courts would subvert Congress's plan by enabling individual district court judges to halt a regulation's enforcement throughout the country.⁴² This was all in plain view as the Court decided the *Abbott Labs* trilogy—in decisions that rejected the government's arguments in two of the trilogy's three cases.⁴³

The power to vacate a rule is, in short, firmly rooted in the APA, as courts and litigants have long understood. Now, however, the Court is being urged to read the APA to omit that power. As Justice Alito noted, endorsing that argument would cause “a sea change in administrative law as currently practiced in the lower courts.”⁴⁴ Yet this possibility is no longer “off the wall.” And while this argument has drawn its most visible momentum from the determined advocacy of the Department of Justice (DOJ) under both President Trump and President Biden, it is an argument that may gather steam on a more subterranean level from the way in which it plays on themes evident elsewhere in the Roberts Court's jurisprudence.

Most resonant in this context is the Roberts Court's new approach to cases in which agencies have relied on existing statutory authority to exert significant, and to many eyes startling, regulatory power. The major questions doctrine, which has very recently taken on a newly muscular incarnation, requires that Congress speak clearly to authorize agencies to address subjects of vast economic and political significance.⁴⁵ On three occasions in the last two years—in cases involving the Centers for Disease Control and Prevention's eviction moratorium, the Occupational Safety and Health Administration's (OSHA) vaccine mandate, and the Environmental Protection Agency's Clean Power Plan—the Court has deployed the major questions doctrine to curtail the executive branch's efforts to regulate in consequential ways.⁴⁶

42. See Brief for the Respondents at 21-22, *Abbott Labs*, 387 U.S. 136 (No. 39); see *infra* notes 383-385.

43. The government prevailed on ripeness grounds in the third case. See *Toilet Goods*, 387 U.S. at 162 (holding that a challenge to a Food and Drug Administration (FDA) inspection regulation was unripe).

44. *United States v. Texas*, 599 U.S. 670, 721 (2023) (Alito, J., dissenting).

45. See Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1011-12 (2023); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 314 (2022); cf. Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. (forthcoming 2024) (manuscript at 133), <https://ssrn.com/abstract=4304404> [<https://perma.cc/A2VF-Z38B>] (offering a more nuanced perspective, in which the major questions cases reflect a “quite potent” presumption rather than a “draconian” or “categorical” clear statement rule)

46. *West Virginia v. EPA*, 597 U.S. 697, 723 (2022); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 762-65 (2021) (per curiam); *Nat'l Fed'n of Indep. Bus. v. Dep't of*

What does the new major questions doctrine have to do with the debate over universal vacatur? One resonance appears in their mechanics. Several skeptics of universal vacatur point to the absence of a pellucid statement in the APA that a court has the power to “vacate” a rule and infer from that absence that the APA should not be read to confer that power on the reviewing court.⁴⁷ The insistence on a precise form of words to authorize a significant form of power is the major questions doctrine’s signature move,⁴⁸ and it is poised to become the engine powering the case against universal vacatur. Indeed, as if on cue, a veteran DOJ litigator recently penned a paper expressly urging the Court to use “major questions doctrine jujitsu” to “rein in district court judges” by holding that Section 706 does not authorize universal vacatur of rules.⁴⁹

As to consequences, the relationship is subtler, but well worth exploring. At first blush, the two appear to cut in opposite directions: the new major questions doctrine expands the power of the federal courts vis-à-vis the executive branch and Congress, while accepting the case against universal vacatur would seem to have the effect of reducing the power of federal courts vis-à-vis the executive branch. The key point to understand, though, is that accepting the case against universal vacatur would have a sharply disparate impact on different levels of courts. It would significantly curtail the remedial powers of the *inferior* federal

Lab., 595 U.S. 109, 117 (2022). In a subsequent case, the Court treated the major questions doctrine as a supplemental justification for its holding that the Biden student-debt-relief plan exceeded the Secretary of Education’s statutory authority. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2375 & n.9 (2023).

47. *See, e.g., Texas*, 599 U.S. at 695 (Gorsuch, J., concurring) (“If the Congress that unanimously passed the APA in 1946 meant to overthrow the ‘bedrock practice of case-by-case judgments with respect to the parties in each case’ and vest courts with a ‘new and far-reaching’ remedial power, it surely chose an obscure way to do it.”); Harrison, *Vacatur of Rules*, *supra* note 5, at 125 (“Section 10(b) gave as examples two forms of proceeding especially suited to pre-enforcement review . . . but did not mention vacatur. . . . If the drafters thought they were creating another remedy of that kind in section 10(e), it is odd that they made no mention of it explicitly.”); Baude & Bray, *supra* note 5, at 181-82 (“[B]ecause there is no traditional legal or equitable remedy of ‘vacatur’ . . . , there is an acute need for real congressional authorization if the courts are going to apply a new remedy, especially a super-remedy that upends the traditional relationship between the federal courts and the executive branch.”).
48. *See Ala. Ass’n of Realtors*, 594 U.S. at 764 (“We expect Congress to speak clearly when authorizing an agency to exercise powers of ‘vast ‘economic and political significance.’”).
49. *See* Alisa B. Klein, *Major Questions Doctrine Jujitsu: Using the Doctrine to Rein in District Court Judges*, ADMIN. L. REV. (forthcoming June 2024) (manuscript at 2-3), <https://ssrn.com/abstract=4630449> [<https://perma.cc/EK7P-E48P>]; *id.* at 13 (“If . . . the major questions doctrine . . . is a ‘clear-statement rule’ that works ‘to protect the Constitution’s separation of powers,’ then an analogous clear-statement rule should apply when the Supreme Court interprets the authority that the APA vests in a district court judge.”) (quoting *West Virginia v. EPA*, 597 U.S. 697, 740, 737 (Gorsuch, J., concurring) (2023)).

courts,⁵⁰ but create only technical limitations upon the powers of the Supreme Court, which will retain the authority to cause a rule to be “*as good as*” universally vacated because of the vertical effect of its holding.⁵¹

For that reason, the case against universal vacatur and the major questions doctrine align: they both serve to weaken actors in our government other than the Supreme Court. Through the major questions doctrine, the Court has funneled statutory interpretive power to the federal courts and away from the executive branch—all while keeping its own powers (at least) intact. If the Court were to jettison universal vacatur, it would curtail the power of lower courts to give remedies that Congress has sanctioned and accepted for decades—but the Court’s own effective power to invalidate rules universally would remain untouched. Thus, the case against universal vacatur has subtler consequences for the distribution of power across actors in our government than it may seem at first glance. While accepting the case against universal vacatur will undoubtedly curb the capacity of lower court judges to check agencies, it would also indulge—and thereby reinforce—the perilous proposition that the Supreme Court should intervene in reshaping congressional allocations of power in ways that centralize its own importance and preferences.

This Feature proceeds in three parts. Part I sets the table by pointing out recent statements—and silences—by various Justices concerning universal remedies in suits against the federal government and by explaining some of the reverberations of these varied signals on lower court judges. Part II addresses the concerns mooted by Justice Gorsuch and others regarding universal vacatur, beginning with materials from before the APA and ending with a discussion of the *Abbott Labs* trilogy. Part III shifts to a broader plane to explore the institutional distribution-of-power consequences of deleting universal vacatur from the APA. This Part explains why—when it comes to the Supreme Court’s power—the case against universal vacatur and the major questions doctrine should be understood as two sides of the same coin. A brief conclusion follows.

I. TAKING STOCK OF THE DEBATE

The debate over universal remedies has reached a moment of ambivalence—and of possibility. The Justices have been sending mixed signals concerning the propriety of universal injunctions and universal vacatur. Meanwhile, in the lower courts, doubts concerning universal remedies have reared their heads in

50. See *infra* notes 422–432 and accompanying text.

51. See Baude & Bray, *supra* note 5, at 183 (“[W]hen the Court holds a statute to be unconstitutional or a rule to be unlawful, it may be *as good as* vacated.”).

unexpected ways as jurists have absorbed and extended the critiques of universal remedies that the conservative Justices and some scholars have articulated.

At the Court, Justices Thomas and Gorsuch first voiced criticisms of universal remedies when lower courts issued nationwide injunctions against the Trump Administration. In separate opinions in *Trump v. Hawaii* and *Department of Homeland Security v. New York*,⁵² these Justices contended that federal courts lacked the power to protect nonparties by enjoining executive-branch actions on a sweeping and universal basis. Critically, they rested their case against universal remedies not just on prudential considerations but also on the originalist argument that a decree shielding those who are not plaintiffs exceeds Article III power and the traditions of equity that it incorporates.⁵³

But following President Trump's departure from the White House, these criticisms were not voiced in a number of cases against the federal government in which they might have been. In 2021, the Court issued a decision allowing a district court's universal vacatur to go into effect;⁵⁴ in 2022, it issued a decision universally staying an agency rule.⁵⁵ No Justice expressed doubts about the scope of relief of either decision.⁵⁶ Still more recently, the Court decided a challenge to the Biden Administration's student-loan-relief program in the 2023 case of *Biden v. Nebraska*.⁵⁷ The court of appeals preliminarily enjoined the program nationwide.⁵⁸ The government asked the Court to narrow the scope of that injunction so that it protected only one plaintiff state, Missouri.⁵⁹ The Court did not do so and instead left the lower court's preliminary nationwide injunction in place

52. *Trump v. Hawaii*, 585 U.S. 667, 712–21 (2018) (Thomas, J., concurring); *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599–601 (2020) (Gorsuch, J., concurring).

53. *See Trump*, 585 U.S. at 714 (Thomas, J., concurring); *Dep't of Homeland Sec.*, 140 S. Ct. at 600 (Gorsuch, J., concurring).

54. *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 766 (2021) (per curiam) (“The application to vacate stay presented to the Chief Justice and by him referred to the Court is granted.”).

55. *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor (NFIB)*, 595 U.S. 109, 120 (2022) (per curiam) (“[OSHA's vaccine mandate] is stayed pending disposition of the applicants' petitions for review . . .”). Justice Gorsuch and Justice Thomas concurred in the *NFIB* case, expressing no concerns about the universality of the stay. *See id.* at 121–26 (Gorsuch, J., concurring).

56. *See Sohoni*, *supra* note 45, at 315 n.377.

57. *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

58. *See Biden v. Nebraska*, 52 F.4th 1044, 1048 (8th Cir. 2022).

59. *See Application to Vacate the Injunction* at 35, *Nebraska*, 143 S. Ct. 2355 (No. 22-506) (“The court of appeals could have simply enjoined the Secretary from discharging loans that are serviced by [the Missouri Higher Education Loan Authority (MOHELA)]. Such an injunction would have fully remedied the injury that Missouri asserts . . .”); *id.* at 40 (“This Court should vacate, or at minimum narrow, the injunction pending appeal . . .”).

pending its merits decision.⁶⁰ When the Court ultimately held that the loan-relief program was invalid, the Court denied as moot the government's application to vacate that nationwide injunction and did not speak to the scope of relief the lower court entered.⁶¹ No Justice wrote separately to express the view that the lower court should have enjoined the loan-relief program only as to Missouri instead of universally.⁶² In a companion case, *Department of Education v. Brown*, a district court vacated universally the Biden Administration's student-loan-relief program.⁶³ The Court unanimously held that the *Brown* plaintiffs lacked standing and vacated the decision below.⁶⁴ Again, no Justice wrote separately to address the propriety of the lower court's universal vacatur.⁶⁵ In August 2023, the Court in *Garland v. VanDerStok* stayed a district court's universal vacatur of regulations concerning ghost guns.⁶⁶ The government had asked, as a fallback, that the Court "at minimum" limit the scope of the district court's vacatur to the plaintiffs.⁶⁷ No Justice wrote separately to censure the district court for vacating the regulations universally. In any of these cases, separate opinions like those that appeared in *Trump v. Hawaii* and *Department of Homeland Security v. New York* could have materialized—but they didn't.⁶⁸ Indeed, in October 2023, Justices who previously penned or joined opinions critical of universal remedies filed a

60. See *Biden v. Nebraska*, 143 S. Ct. 477 (2022) (mem.).

61. *Nebraska*, 143 S. Ct. at 2376 ("The Government's application to vacate the Eighth Circuit's injunction is denied as moot.").

62. See *id.*

63. See *Dep't of Educ. v. Brown*, 640 F. Supp. 3d 644, 668 (N.D. Tex. 2022) (vacating the Biden Administration student-loan plan).

64. *Dep't of Educ. v. Brown*, 600 U.S. 551, 568-69 (2023).

65. *Id.*

66. See 144 S. Ct. 44 (2023) (mem.).

67. Application for a Stay at 34, *VanDerStok*, 144 S. Ct. 44 (No. 23A82) ("At a minimum, therefore, this Court should stay the district court's vacatur as applied to individuals and entities that are not parties to this case. And granting such a stay would be the most natural way for the Court to begin to curb the lower courts' routine issuance of universal relief.").

68. Cf. *Trump v. Hawaii*, 585 U.S. 667, 712-21 (2018) (Thomas, J., concurring) (criticizing universal injunctions); *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599-601 (2020) (Gorsuch, J., concurring) (same); *Labrador v. Poe*, 144 S. Ct. 921, 926-28 (2024) (mem.); (Gorsuch, J., joined by Thomas & Alito, JJ., concurring in the grant of a stay) (criticizing universal injunctions as novel and disruptive in a suit involving state law); *Griffin v. HM Fla.-ORL, LLC*, 144 S. Ct. 1, 1 (2023) (mem.) (noting that Justices Thomas, Alito, and Gorsuch would have narrowed a district court preliminary universal injunction against a state law so that the injunction shielded only the plaintiff pending appeal).

separate opinion *dissenting* from the Court's stay of a universal injunction that enjoined federal officials from "jawboning" social-media platforms generally.⁶⁹

At the lower court level, the Justices' critiques of universal injunctions have provoked a stir, though their subsequent silences seem to have gone unremarked. Consider Judge Sutton of the Sixth Circuit. In two separate concurrences,⁷⁰ Sutton drew upon Justices Thomas's and Gorsuch's critiques to contend that "nationwide injunctions or universal remedies . . . seem to take the judicial power beyond its traditionally understood uses, permitting district courts to order the government to act or refrain from acting toward nonparties in the case."⁷¹ Still more recently, Sutton contended that universal injunctions that federal courts enter against *state* laws exceed the Article III power of federal courts.⁷² However, Sutton dissented when the Sixth Circuit refused to stay the OSHA vaccine mandate.⁷³ Pursuant to the Hobbs Act⁷⁴ and the multicircuit lottery,⁷⁵ challenges to the OSHA policy were consolidated before the Sixth Circuit. But in the brief interval of time before the consolidation and transfer of the challenges to the Sixth Circuit, the Fifth Circuit had stayed the vaccine mandate universally.⁷⁶ Sutton wrote that he would have preserved the universal stay of the vaccine mandate that the Fifth Circuit had entered.⁷⁷ But if a universal stay of a

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69. See *Murthy v. Missouri*, 144 S. Ct. 7, 7 (2023) (Alito, J., dissenting from grant of application for stay). Justices Thomas and Gorsuch joined this dissent. The government had asked the Court to "[a]t a minimum . . . stay the injunction to the extent it extends beyond government action specifically targeting content posted by the individual respondents." Application for a Stay of the Injunction Issued by the United States District Court for the Western District of Louisiana at 36, *Murthy*, 144 S. Ct. 7 (No. 23A243).
70. *Arizona v. Biden*, 40 F.4th 375, 394 (6th Cir. 2022) (Sutton, J., concurring); *Arizona v. Biden*, 31 F.4th 469, 483 (6th Cir. 2022) (Sutton, J., concurring).
71. *Arizona*, 40 F.4th at 395-96; *id.* at 398 ("The sooner [nationwide injunctions] are confined to discrete settings or eliminated root and branch the better."); see also *Arizona*, 31 F.4th at 483-84.
72. *L.W. ex. rel. Williams v. Skrmetti*, 73 F.4th 408, 415 (6th Cir. 2023) ("Article III confines the 'judicial power' to 'Cases' and 'Controversies.' Federal courts may not issue advisory opinions or address statutes 'in the abstract.' They instead must operate in a party-specific and injury-focused manner. A court order that goes beyond the injuries of a particular plaintiff to enjoin government action against nonparties exceeds the norms of judicial power.").
73. See *In re MCP No. 165*, 20 F.4th 264, 268 (6th Cir. 2021) (Sutton, J., dissenting).
74. The Hobbs Act is the term colloquially used to refer to the Administrative Orders Review Act, 28 U.S.C. §§ 2341-2351 (2018).
75. See 28 U.S.C. § 2112(a) (2018).
76. See *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, 619 (5th Cir. 2021).
77. See *MCP No. 165*, 20 F.4th at 269 (Sutton, J., dissenting) ("[T]he challengers are likely to prevail on the merits when it comes to their petitions targeting the emergency rule. That

rule is permissible in the Hobbs Act context, as Sutton seemed to here accept, then how can there be an Article III obstacle to a federal court giving universal relief?⁷⁸

Judge Menashi of the Second Circuit was willing to grasp that nettle. By extending the criticisms of universal vacatur to the context of Hobbs Act cases, he has pressed the case against universal vacatur to its next logical step. Also drawing on Justices Thomas's and Gorsuch's criticisms of universal injunctions,⁷⁹ Menashi reasoned that federal courts may only bind the parties before them and cannot provide relief to the parties beyond the case.⁸⁰ Thus, he concluded, a D.C. Circuit decision that vacated a Federal Communications Commission (FCC) rule in a case lotteried to that court by the Hobbs Act should not be regarded as having had universal effect: "The Hobbs Act does not contain any language authorizing a consolidating court to go beyond providing relief to the parties before it and instead to issue a universally binding judgment."⁸¹ The Hobbs Act, he correctly noted, simply leaves courts to apply the APA⁸²—but Menashi resisted the proposition that the APA allows universal vacatur.⁸³

So far, Judge Menashi's arguments concerning Hobbs Act vacatur do not appear to have gained much traction amongst courts or commentators. The point, though, is that Supreme Court opinions have consequences, even when they are separate opinions for a minority of the Justices that are sporadically and inconsistently aired. When influential Justices voice grave constitutional doubts on procedural and remedial matters, and especially when they frame those doubts in the discourse of original meaning, those doubts have ripple effects that can unsettle the law in unexpected and problematic ways.⁸⁴

reality together with the other stay factors show that the emergency rule should remain stayed.").

78. Cf. *L.W. ex. rel. Williams v. Skrmetti*, 73 F.4th 408, 415 (6th Cir. 2023) ("But absent a properly certified class action, why would nine residents represent seven million? Does the nature of the federal judicial power or for that matter Article III permit such sweeping relief?").

79. *Gorss Motels, Inc. v. FCC*, 20 F.4th 87, 99 (2d Cir. 2021) (Menashi, J., dissenting).

80. *Id.* at 103.

81. *Id.* at 104.

82. *Id.*

83. *Id.* at 103 ("The court thereby suggests that the D.C. Circuit somehow eliminated the Solicited Fax Rule when it decided *Bais Yaakov*. But the D.C. Circuit in that decision did not purport to apply anything other than normal standards of review under the Administrative Procedure Act."); *id.* (questioning whether Section 706 allows courts to universally invalidate agency action under review).

84. See, e.g., Mila Sohoni, *The Puzzle of Procedural Originalism*, 72 DUKE L.J. 941, 965 (2023) (noting the recent uptick of originalist argumentation concerning remedies and its potential linkage to the still-more-recent call for the application of originalism to civil-procedure doctrine).

Such ripple effects will likely be greatly amplified by Justice Gorsuch's latest shot across the bow – his concurring opinion in *Texas* – inasmuch as his opinion expressed skepticism about the propriety of universal vacatur packaged in an originalist wrapper.⁸⁵ The government is now frankly begging the Court to rein in universal vacatur – ideally, by holding that it is not authorized by the APA full-stop, but as a fallback on the basis of prudential concerns. And while it is certainly worthwhile to discuss prudential limits on remedies, the lexically prior question, and the more fundamental, remains one of statutory meaning: does the APA authorize universal vacatur?

With respect to that critical question, Justice Gorsuch's concurring opinion brought to the fore several issues.⁸⁶ As noted above, Gorsuch argued that Section 706's instruction to courts to "set aside" unlawful agency action should not be read to mean that the court may "vacat[e]" the agency action.⁸⁷ He offered several reasons for this argument. First, he suggested that this phrase meant simply that courts should disregard or refuse to apply ("hold off to one side") an unlawful rule when deciding a case.⁸⁸ Second, he questioned why vacatur was not mentioned expressly in the APA if the statute contemplates such a remedy. He contended that Section 703 is the provision "where the APA most clearly discusses remedies" and pointed out that this section does not enumerate vacatur as a remedy.⁸⁹ Third, he questioned whether, prior to the APA, courts "set aside" regulations in the sense of vacating them universally.⁹⁰ Fourth, he questioned why, in the post-APA period, scholars and commentators did not speak of the

85. *United States v. Texas*, 599 U.S. 670, 693 (Gorsuch, J., concurring) (claiming support from "the founding-era understanding that courts 'render a judgment or decree upon the rights of the litigant[s]'" and emphasizing "the limits of [federal courts'] Article III authority to decide cases and controversies").

86. Justice Gorsuch concurred only in the judgment that the states lacked standing to challenge the immigration enforcement guidelines. *See id.* at 686. He argued that the states' injuries were not redressable because even universal vacatur of the guidelines would not provide the states meaningful relief from harms they alleged; the states' injuries hinged on individual enforcement decisions that no court order could control. *See id.* at 691. This analysis led Gorsuch to ponder the important antecedent question of whether the APA allows universal vacatur to begin with.

87. *See id.* at 695 (Gorsuch, J., concurring).

88. *See id.* at 696 (Gorsuch, J., concurring) ("There are many reasons to think § 706(2) uses 'set aside' to mean 'disregard' rather than 'vacate.'").

89. *See id.* at 698 ("Conspicuously missing from the list [of forms of action in § 703] is vacatur. And what exactly would a 'form of legal action' seeking vacatur look like anyway? . . . Nor is it apparent why Congress would have listed most remedies in § 703 only to bury another (and arguably the most powerful one) in a later section addressed to the scope of review.").

90. *See id.* at 700-01.

remedy of vacatur if it was understood to be an available remedy at that time.⁹¹ In sum, while prudently refraining from definitively rejecting the possibility that the APA authorizes universal vacatur, Gorsuch raised substantial concerns regarding the permissibility of this remedy. The next Part responds to these doubts.

II. UNIVERSAL VACATUR, BEFORE AND AFTER THE APA

Nowadays, there is a widespread (and perhaps understandable) perception that any lawyer worth his salt can walk into the federal district court of his choosing and walk out the next day with a universal vacatur of a critically important federal regulation. In such an environment, it is easy to forget, and hard to imagine, how such a system could ever have been permitted to crystallize. It is therefore worthwhile to revisit some historical context that helps illuminate how the remedial landscape of administrative law came to have the shape that it does today.

Historically, obtaining judicial review of executive-branch action in federal courts required navigating a maze riddled with obstacles. Litigants striving to challenge an unlawful executive action faced a complex web of technical legal rules grounded in the older system of writs.⁹² Formidable difficulties were posed by doctrines concerning sovereign immunity, indispensable parties, succession in office, venue, the establishment of a threat of enforcement, “negative orders” – and so on.⁹³ The injustices and inefficiencies of this labyrinthine system

91. See *id.* at 699.

92. See Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 6 (2015) (“Individuals claiming injury could bring writs of mandamus, habeas corpus, and other prerogative writs whose familiarity has been lost to time. These writs were extremely limited in scope – mandamus being limited to ‘ministerial’ duties, and habeas corpus requiring the petitioner to be in custody – and provided severely limited opportunities for judicial oversight of the Executive.”); Frederic P. Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 GEO. L.J. 287, 291 (1948) (noting the use of “trover, detinue, assumpsit, and replevin” as uncontroversial remedies against executive officers); James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269, 1305–1318 (2020) (tracing the evolution of common-law and equitable remedies against the executive).

93. See, e.g., Clark Byse, *Proposed Reforms in Federal “Nonstatutory” Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1480 (1962); *id.* at 1484 (noting the “fortuitous denial of judicial review in altogether too many cases” and illustrating the point with sovereign immunity, indispensable parties, and mandamus); Jonathan Siegel, *ACUS, the APA, and Sovereign Immunity*, ADMIN. CONF. UNITED STATES (June 9, 2021, 9:39 AM), <https://www.acus.gov/newsroom/administrative-fix-blog/acus-apa-and-sovereign-immunity> [<https://perma.cc/J5PC-KR2M>] (describing the problems created by the

produced a clamor for reforms that would simplify judicial review of administrative action so that courts would address merits, not technicalities.⁹⁴

To modern eyes, the most salient element of those reforms is probably the APA, a landmark statute designed to “set[] forth a simplified statement of judicial review designed to afford a remedy for every legal wrong.”⁹⁵ But the enactment of the APA did not create a streamlined system of review of executive-branch action in one fell swoop. Rather, reform occurred through a series of changes implemented over an extended period, both before and after the APA,⁹⁶ many of which are so uncontroversial today that it is easy to lose sight of their significance.

One crucial development in the pre-APA period was the gradual creation of various special statutory review proceedings, which are provisions that govern the judicial review of specified actions taken by an agency pursuant to its

abatement of officer suits and by holdings that senior officials were necessary parties in officer suits); *Procter & Gamble Co. v. United States*, 225 U.S. 282, 289 (1912) (articulating the negative-order doctrine), *overruled by* *Rochester Tel. Co. v. United States*, 307 U.S. 125 (1939).

94. See, e.g., Breck P. McAllister, *Statutory Roads to Review of Federal Administrative Orders*, 28 CALIF. L. REV. 129, 167 (1940) (“If we are to continue to have some form of judicial review of administrative action the road to review should be as simple as possible. Procedural bogs should have no place.”); see also *infra* notes 240-241 and accompanying text.
95. S. DOC. NO. 79-248, at 193 (1946) [hereinafter APA LEGISLATIVE HISTORY] (reprinting S. REP. 79-752 (1945)); see also *id.* at 244 (“It contains comprehensive provisions for judicial review for the redress of any legal wrong.”).
96. Many more could be added, but the following reforms are especially noteworthy. Congress adopted the Federal Rules of Civil Procedure in 1938. Rule 25(d) of the Federal Rules of Civil Procedure provides, “An action does not abate when a public officer who is party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer’s successor is automatically substituted as a party.” FED. R. CIV. P. 25(d). Congress enacted the Hobbs Act in 1950. See *Administrative Orders and Review Act*, Pub. L. No. 81-901, 64 Stat. 1129 (1950) (codified as amended at 28 U.S.C. §§ 2341-2351). In 1962, Congress gave district courts outside D.C. the jurisdiction to grant mandamus against federal officers and expanded venue rules concerning suits against federal officers. See *Mandamus and Venue Act of 1962*, Pub. L. No. 87-748, 76 Stat. 744 (codified as amended at 28 U.S.C. § 1391(e)); see also Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and “Non-statutory” Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 310 (1967) (discussing the background and implications of the passage of the Mandamus and Venue Act). In 1976, Congress waived sovereign immunity in specified suits by amending Sections 702 and 703, and it eliminated the amount-in-controversy requirement for suits brought in the federal-question jurisdiction against the United States, its agencies, and its officers or employees acting in an official capacity. See *Act of Oct. 21, 1976*, Pub. L. No. 94-574, 90 Stat. 2721 (amending 5 U.S.C. §§ 702-703). In 1988, Congress fixed the “race to the courthouse” problem with Hobbs Act petitions by creating a lottery if petitions challenging an order were filed in multiple circuits. See *Multicircuit Petition Statute*, Pub. L. No. 100-236, 101 Stat. 1731 (1988) (codified as amended at 28 U.S.C. § 2112(a)) (prescribing a random lottery conducted by the Judicial Panel on Multidistrict Litigation to select “from among the courts of appeals in which petitions for review have been filed and received within” the statutory period).

enabling act.⁹⁷ The cases in which courts interpreted and applied such statutes are relevant to understanding what Congress meant when it enacted the APA in 1946. As explained below, these cases show that before the APA, courts vacated rule-like agency actions universally, and they did so in reliance on language later replicated in the APA.⁹⁸

Another crucial development was the adoption of the declaratory judgment into federal law.⁹⁹ Reformers saw the declaratory judgment as a way to cut through needless traps for the unwary and to promote practical, efficient, and merits-focused judicial review, including in cases involving public law. Before the APA, in passing the vetoed Walter-Logan Bill—which was, like the APA, an effort to regularize administrative procedure and judicial review of agency action—Congress acted on the understanding that the declaratory judgment was a mechanism through which a court could invalidate a rule in toto. Congress expressed continued reliance on that understanding when it enacted the APA six years after the Walter-Logan Bill was vetoed. This history significantly complicates the claim that Section 703, which refers to declaratory judgments, does not contemplate universal vacatur.

Following the APA's enactment, courts continued to review broad-gauged regulations and to set them aside universally.¹⁰⁰ In this period, an issue that commanded the attention of courts and commentators was reviewability or ripeness—the “when” question—not the question of “who” could benefit from a judgment that invalidated a rule. Because of this focus on reviewability, scholars like Davis and Jaffe included cases that resulted in the vacatur of rules in their discussions of standing, reviewability, or ripeness, not in their discussions of remedies and scope of relief.¹⁰¹ The *Abbott Labs* trilogy similarly illustrates the dominance of the focus on reviewability. In the trilogy, the government fought hard against a finding of reviewability, and the cases decided only that issue. But it was clear from the record that if the Court greenlit review of the rules at issue in *Abbott Labs* and they were then found invalid, they would be enjoined and vacated universally; a court below had done just that.

The remainder of this Part elaborates on this history and unpacks its significance. While the narrative below proceeds chronologically rather than

97. For a helpful primer, see WRIGHT & MILLER, *supra* note 31, § 8303 (describing “agency-specific” special statutory review proceedings, general statutory review under the APA, and the Administrative Orders Review Act (often called the Hobbs Act), which is a special statutory review scheme applicable to several specified agencies).

98. *See infra* Section II.A.

99. *See infra* Section II.B.

100. *See infra* Section II.C.

101. *See infra* Section II.D.

addressing Justice Gorsuch’s arguments sequentially, it may be helpful to map each of these Sections to the doubts regarding universal vacatur that Gorsuch and others have raised. Assessing pre-APA review caselaw, Section II.A responds to the historical contention that pre-APA courts did not set aside regulations in the sense of vacating them and to the textual contention that “set aside” should instead be read as meaning that a court should “disregard” or “hold off to one side” a rule rather than nullify it. Section II.B probes the relevance of Section 703 and its reference to the declaratory judgment. It begins by explaining why Section 703 should not be read as implicitly limiting the remedies available in an APA suit. It then recounts why, even if Section 703 were read to address remedies, its reference to declaratory judgments would anyway support the propriety of universal vacatur. Section II.C shows that in the decade after the APA’s enactment courts continued their pre-APA practice of vacating rules rather than “disregarding” them. These cases are a further rebuttal of the historical and textual contentions made by skeptics of universal vacatur. Finally, Section II.D turns to reviewability and ripeness to explain the absence of an express mention of universal vacatur from the work of Davis and Jaffe and to explore what the *Abbott Labs* litigation and decisions show concerning the availability of universal vacatur as a remedy.

Two points concerning the discussion of caselaw below are worth mentioning. First, as some have cautioned, courts sometimes use language in opinions that can be read to suggest they are granting broad-gauged remedies,¹⁰² even when the courts’ *judgments* do not actually do so.¹⁰³ Following the method of my earlier work,¹⁰⁴ much of the below discussion relies for its conclusions concerning remedial scope not just on opinions but also on the language of the courts’ judgments and an examination of other filings and documents related to the case.

Second, to understand these cases properly, the reader must keep in mind the backdrop of procedural rules against which these cases were litigated, particularly the mechanism of the representative suit. From 1913 to 1938, representative suits in federal court were governed by Federal Equity Rule 38, which

102. For the leading critique, see Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 935-36 (2018), describing the proposition that courts strike down unconstitutional statutes as “imprecise” and “misleading.” Note, however, that Mitchell expressly carves out the APA and similar review statutes from his critique because the APA “empower[s] the judiciary to act directly against the challenged agency action In these situations, the courts do hold the power to ‘strike down’ an agency’s work, and the disapproved agency action is treated as though it had never happened.” *See id.* at 1012-13.

103. *See, e.g.*, Bamzai, *supra* note 5, at 2059-60 n.127 (“[T]he fact that courts used terms like ‘invalidate’ or ‘vacate’ or even ‘validity of the regulation as a whole’ does not necessarily tell us whether the judgment the court issued could be enforced to protect nonparties.”).

104. *See* Sohoni, *Power to Vacate*, *supra* note 4, at 1126; Sohoni, *Lost History*, *supra* note 4, at 929.

allowed parties to sue on behalf of others similarly situated *without* formal certification of a class and *without* causing preclusive effect on absentees if the suit failed on the merits.¹⁰⁵ The first version of Federal Rule of Civil Procedure 23, which was in effect from 1938 to 1966, left intact the so-called “spurious” or “nonbinding” class suit.¹⁰⁶ It was not until 1966 that Rule 23 was modified to create a mechanism for formally “certifying” a class. What this means is that in the period of relevance here – from before the APA through the time of *Abbott Labs* – a suit brought by a litigant on behalf of itself and those “similarly situated” offered a pathway through which a challenger could obtain broad-gauged relief that would shield nonparty absentees.¹⁰⁷ The relief in these suits operated much in the way that a universal injunction or a universal vacatur does today.¹⁰⁸

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105. EQUITY R. 38, 226 U.S. 649, 673 (1912) (superseded 1938). See James Wm. Moore & Marcus Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 319–20, 319 n.97 (1937) (listing federal court “spurious” class suits); James Wm. Moore & Marcus Cohn, *Federal Class Actions – Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 561 (1938) (“The decree in the spurious type of class action is not binding . . .”); Sohoni, *Lost History*, *supra* note 4, at 962–64, 976 n.364; Sohoni, *Power to Vacate*, *supra* note 4, at 1145 n.119, 1173 n.269.
106. See Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J. L. REFORM 347, 348 (1988) (“The pre-1966 Rule permitted nonbinding class suits, called ‘spurious’ class actions If the named plaintiff lost the case, the result did not bind the class members, who were free to file later lawsuits on the same claim, and win or lose on the merits without any application of res judicata against them.”); Sohoni, *Power to Vacate*, *supra* note 4, at 1173 n.269 (“[T]he extant rules for representative suits at the time of the APA’s enactment allowed plaintiffs to obtain injunctive relief on behalf of similarly situated nonparties *without* imposing onerous procedural hoops for class certification and *without* levying the price tag of potential class-wide preclusion on absent parties if the suit failed. . . . Against that backdrop, it makes sense that the APA should have similarly authorized courts to issue relief extending beyond the parties without requiring anything by way of procedural hoops or preclusive price tags.”).
107. See, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 437 (2017) (citing as a “national injunction” the decree in *Wirtz v. Baldor Elec. Co.*, which was a suit brought by the plaintiffs “on behalf of themselves and all other United States manufacturers of electric motors and generators similarly situated” to challenge a minimum-wage determination for the industry, 337 F.2d 518, 533 (D.C. Cir. 1963)). On remand from *Wirtz*, the district court ordered that the challenged determination was “null and void and of no legal effect” and enjoined the government “from enforcing or attempting to enforce said determination in any manner and with respect to any member of the motors and generators industry.” See *Motors and Generators Industry—Revocation*, 29 Fed. Reg. 13322 (Sept. 25, 1964) (reprinting the court’s order).
108. See, e.g., *Trump v. Int’l Refugee Assistance Project*, 582 U.S. 571, 582 (2017) (per curiam) (maintaining nationwide injunctions barring enforcement of an executive order against “parties similarly situated to Doe, Dr. Elshikh, and Hawaii”).

A. *Pre-APA Cases and the Meaning of Set Aside*

Monumental though it was, the APA was but one of a long sequence of laws in which Congress authorized courts to review agency action. In the Hepburn Act of 1906, Congress conferred on circuit courts the jurisdiction to “enjoin, set aside, annul, or suspend any order or requirement of” the Interstate Commerce Commission (ICC).¹⁰⁹ A few years later, in the Urgent Deficiencies Act of 1913, Congress authorized three-judge district courts to take “venue of any suit . . . brought to enforce, suspend, or set aside, in whole or in part, any order of the [ICC].”¹¹⁰ That language subsequently propagated into several other pre-APA statutes, including the Shipping Act of 1916, the Perishable Agricultural Commodities Act of 1930, and the Communications Act of 1934.¹¹¹

An equally important development occurred in 1914, when “Congress first provided for direct appellate court review” of agency action in the statute that created the Federal Trade Commission.¹¹² The petition for review in the court of appeals eventually became regarded as the “typical,” “usual,” or “prototypical” form of a special statutory review proceeding.¹¹³ For example, the Federal Food, Drug, and Cosmetic Act of 1938 (FDCA) gave the courts of appeals the “jurisdiction to affirm the order [of the Secretary of Agriculture], or to set it aside in

109. Hepburn Act of 1906, ch. 3591, § 5, 34 Stat. 584, 592.

110. Act of Oct. 22, 1913, ch. 32, 38 Stat. 208, 220.

111. See, e.g., Communications Act of 1934, ch. 652, § 402(a), 48 Stat. 1064, 1093 (applying Urgent Deficiencies Act provisions “relating to the enforcing or setting aside” of ICC orders “to suits to enforce, enjoin, set aside, annul, or suspend any order” of the Federal Communications Commission (FCC)).

112. Mead & Fromherz, *supra* note 92, at 12. See Federal Trade Commission Act of 1914, ch. 311, § 5, 38 Stat. 717, 720 (“Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside.”).

113. Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 HARV. L. REV. 980, 980 (1975) [hereinafter *Jurisdiction to Review*] (“The typical review statute is patterned after the Federal Trade Commission Act of 1914, which authorizes a ‘petition for review’ in the court of appeals.”); *id.* at 980 n.6 (“Professor Jaffe calls this the ‘usual’ provision. Davis says that the Federal Trade Commission Act is prototypical.” (citation omitted)); Note, *Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 904-05 (1957) [hereinafter *Remedies Against the United States and Its Officials*] (offering “a distillation of the most typical provisions of the statutes providing for judicial review”).

whole or part,”¹¹⁴ upon the filing of a petition “for a judicial review of such order.”¹¹⁵

Taken collectively, these statutes gave designated courts the authority to “set aside” the actions of designated agencies. The attentive reader will have noted that these statutes spoke of “orders,” not of “rules.” But as the cases described below will illustrate, agencies used orders to promulgate broad-gauged regulations.¹¹⁶ Thus, special statutory review provisions that authorized courts to review and set aside “orders” allowed courts to review the legal validity of regulations of general application. The APA, of course, drew a sharp distinction between rules and orders. But that did not change the practice: courts continued to review agency actions that were functionally rules even when those agency actions were denominated as “orders.”¹¹⁷ We see this locution today when the FCC issues an “order” that in fact is a regulation of an entire industry, and that order is then reviewed via a special statutory review proceeding.¹¹⁸

The overarching point is that when Congress in the APA authorized the “reviewing court” to “hold unlawful and set aside” unlawful “agency action”¹¹⁹ — and simultaneously defined “agency action” expressly to include both an “order”

114. See Federal Food, Drug, and Cosmetic Act of 1938, ch. 675, § 701(f)(1), 52 Stat. 1040, 1055-56 (codified as amended at 21 U.S.C. § 371(f)(1)) (“In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may . . . file a petition with the Circuit Court of Appeals of the United States for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order.”); *id.* § 701(f)(3), 52 Stat. at 1056 (codified as amended at 21 U.S.C. § 371(f)(3)) (“The court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently.”).

115. 21 U.S.C. § 371(f)(1) (2018).

116. See, e.g., *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 417 (1942) (“The order is thus in its genesis and on its face, and in its practical operation, an order promulgating regulations which operate to control such contractual relationships, and it was adopted by the [FCC] in the avowed exercise of its rule-making power. Such regulations which affect or determine rights generally, even though not directed to any particular person or corporation, when lawfully promulgated by the [ICC], have the force of law and are orders reviewable under the Urgent Deficiencies Act.”).

117. See *United States v. Storer Broad. Co.*, 351 U.S. 192, 193-94 (1956) (reviewing an order of the FCC that amended the Commission’s rules); *N.Y. Republican State Comm. v. SEC*, 799 F.3d 1126, 1129 (D.C. Cir. 2015) (“For nearly four decades, it has been blackletter administrative law that, absent countervailing indicia of congressional intent, statutory provisions for direct review of orders encompass challenges to rules.”); *Jurisdiction to Review*, *supra* note 113, at 991-92.

118. See, e.g., *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014) (“Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose *per se* common carrier obligations, we vacate those portions of the Open Internet Order.”).

119. 5 U.S.C. § 706 (2018).

and a “rule”¹²⁰—it was not administrative law’s first rodeo with these concepts. Courts had been reviewing agency action, including broad-gauged regulations, well before the APA pursuant to various special statutory review provisions that spoke of “setting aside” such actions. In such a suit, as the Attorney General’s Committee on Administrative Procedure succinctly put it, “[a] judgment adverse to a regulation results in setting it aside.”¹²¹

Let us briefly review a few examples of how courts “set aside” regulations in the pre-APA period. Some of these cases have been discussed in earlier scholarship, including my own.¹²² But they are nonetheless worth revisiting because their import remains contested, as most prominently exemplified by Justice Gorsuch’s opinion in *Texas*.¹²³ These cases show that in the pre-APA period, reviewing courts understood the set-aside remedy in the same way that courts generally do today: as the power to vacate or to nullify a rule.

For example, in the 1931 case *Chicago, Rock Island & Pacific Railway Co. v. United States*, the Court “disapprov[ed]” of a portion of an ICC regulation that regulated fees for car hiring by railroads.¹²⁴ The regulation was directed to “[a]ll common carriers by railroad in the United States,”¹²⁵ and it required them to establish certain rules governing the hiring of their cars.¹²⁶ Twelve common carriers challenged the regulation in a three-judge district court on behalf of

120. 5 U.S.C. § 551(13); *id.* § 701(b)(2) (2018) (incorporating definitions).

121. ROBERT H. JACKSON, FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 106 (1941) (“In 1938 Congress adopted a legislative requirement of formal hearings in connection with several varieties of regulation of products under the Food, Drug, and Cosmetic Act.”); *id.* at 116-17 (“Some of the recent statutes conferring rule-making power . . . provide for a much more detailed judicial review of certain administrative regulations . . . They require that the regulations in question be based upon findings of fact; that these, in turn, be based upon evidence made of record at a hearing; and that a reviewing court set aside a regulation not only for failure of the findings to support it, but also for failure of a finding to be based upon substantial evidence in the record. Review by the courts is had in statutory proceedings which may be instituted within a prescribed time by parties aggrieved by regulations and which result in a certification of the administrative record to the court. A judgment adverse to a regulation results in setting it aside.” (emphasis added)).

122. See Sohoni, *Power to Vacate*, *supra* note 4; Levin, *supra* note 5; Levin & Sohoni, *supra* note 5.

123. See, e.g., *United States v. Texas*, 599 U.S. 670, 700-01 (2023) (Gorsuch, J., concurring).

124. 284 U.S. 80, 100 (1931). See generally Comment, *Railroad Rehabilitation and Equal Protection of the Laws*, 41 YALE L.J. 745, 749 (1932) (“[T]he Supreme Court, through Mr. Justice Sutherland, held the Commission’s order with respect to car-hire invalid, on the ground that it violated the Fifth Amendment by confiscating the property of the carriers not included in the two days’ exemption from *per diem*.”).

125. *Chi., Rock Island & Pac. Ry. Co.*, 284 U.S. at 87.

126. *Id.* at 88-89.

themselves and other similarly situated carriers,¹²⁷ seeking to “set aside” and “annul” specific paragraphs of the regulation and to have it “be declared void and perpetually set aside, suspended and annulled.”¹²⁸ The Court agreed with the ICC that two of the challenged paragraphs were fine, but the third was not because it arbitrarily exempted some of the railroads from paying car-hire fees that the ICC had elsewhere found to be necessary.¹²⁹ The Court explained that “[p]lainly this order is in flat opposition to the finding and cannot be permitted to stand” and “[t]he vice of the situation is that the order of the Commission, that is to say, its judgment, does not conform to its conclusions upon the facts.”¹³⁰ As a result, it concluded that “*the court below* should have set aside paragraph (5) of the order.”¹³¹ The Court thus directly spoke to the relief that the *lower court* should have given as to this provision of a nationwide regulation.

Another example is *United States v. Baltimore & Ohio Railroad Co.*, a 1935 case involving an ICC regulation that required railroads to use a certain kind of reverse gear on steam locomotives.¹³² Twenty railroads challenged the regulation in a three-judge district court on behalf of themselves and “all other railroads subject to the Interstate Commerce Act.”¹³³ The lower court issued a final decree that stated: “it is now [o]rdered, adjudged, and decreed that the order of the [ICC] . . . is hereby, vacated, set aside, and annulled, and the enforcement thereof by the [ICC] or otherwise, perpetually enjoined.”¹³⁴ The government’s filings described this decree as one “permanently annulling, enjoining, and

127. See Brief of the United States and the ICC at 4, *Chi., Rock Island & Pac. Ry. Co.*, 284 U.S. 80 (No. 69) (“This suit was brought in the United States District Court for the Northern District of Illinois by appellants, twelve common carriers subject to the Interstate Commerce Act, on behalf of themselves and other carriers similarly situated, to set aside parts of an order of the Interstate Commerce Commission entered July 15, 1930.”).

128. See Transcript of Record at 1176, *Chi., Rock Island & Pac. Ry. Co.*, 284 U.S. 80 (No. 69); *id.* at 1178 (“[The district court] erred in failing to set aside and annul paragraphs numbered 2, 3 and 5 of the order of the [ICC]. . . . [The district court] erred in failing to issue a permanent injunction suspending, restraining and enjoining paragraphs 2, 3 and 5 of the said order and enjoining the enforcement of said paragraphs of said order.”); *id.* at 1179 (“Wherefore the petitioners above named and each of them pray that the said decree . . . be reversed and that the said [district court] be ordered to enter a decree with direction that the said petition of the petitioners be granted, and that said order of the [ICC], in so far as it is complained of in said petition, be declared void and perpetually set aside, suspended and annulled, and that your petitioners may have such other and further relief as may be appropriate.”).

129. *Chi., Rock Island & Pac. Ry. Co.*, 284 U.S. at 96.

130. *Id.* at 96, 100.

131. *Id.* at 100 (emphasis added).

132. 293 U.S. 454 (1935).

133. Transcript of Record at 4-5, *Balt. & Ohio R.R. Co.*, 293 U.S. 454 (No. 221); see *Balt. & Ohio R.R. v. United States*, 5 F. Supp. 929, 930 (N.D. Ohio 1933).

134. See Transcript of Record, *supra* note 133, at 224-25.

setting aside the [ICC's] order."¹³⁵ The Supreme Court affirmed. Justice Brandeis, writing for the Court, pithily described the lower court's decree as "setting aside" the ICC's action¹³⁶ and agreed with the lower court that the ICC order was "void."¹³⁷

On its face, *Baltimore & Ohio* shows the breadth of the set-aside remedy. One newspaper simply described the Court as "nullifying" the ICC's action—an action, it noted, that the lower court had "set aside."¹³⁸ Justice Gorsuch, however, resisted this view of the case. He correctly noted that the lower court in *Baltimore & Ohio* "held the Commission's order invalid" and "'restrain[ed] . . . enforcement' of it," and that the Supreme Court described the lower court's decree as "setting aside" the ICC's order.¹³⁹ But Gorsuch then stated, "[T]he fact that the lower court *had only restrained enforcement of the order* goes to show that 'set aside' did not then (and does not now) necessarily translate to 'vacate.'"¹⁴⁰ Yet, as the quote above shows, the lower court in *Baltimore & Ohio* not "only restrained enforcement of the order" by enjoining it but *also* decreed that the order was "vacated, set aside, and annulled."¹⁴¹ That language in the lower court decree and the wording of the Court's decision both shed light on the import of "setting aside" in the pre-APA period.

*The Assigned Car Cases*¹⁴² also offer evidence of how the phrase "set aside" was used and understood in the pre-APA period. In 1927, a three-judge district court in the Eastern District of Pennsylvania decided a challenge to an ICC

135. See Statement as to Jurisdiction on Appeal at 4, *Balt. & Ohio R.R. Co.*, 293 U.S. 454 (No. 221).

136. See *Balt. & Ohio R.R. Co.*, 293 U.S. at 455; *id.* at 463 ("The power to make the determination whether the proposed device or change is so required, vests in the Commission. But its finding to that effect is essential to the existence of authority to promulgate the rule; and as Congress has made affirmative orders of the Commission subject to judicial review . . . the order may be set aside unless it appears that the basic finding was made.").

137. *Id.* at 464 ("This complete absence of 'the basic or essential findings required to support the Commission's order' renders it void.").

138. *I.C.C. Ruling Upset, but Power Upheld*, N.Y. TIMES, Jan. 13, 1935, at 9 ("By nullifying the commission's ruling the court saved the railroads from an estimated expenditure of \$7,000,000. . . . The Baltimore & Ohio, backed by virtually all other railroads in the country, succeeded in having the Federal Court for Northern Ohio set aside the order, which decision was affirmed by the Supreme Court.").

139. See *United States v. Texas*, 599 U.S. 670, 701 (2023) (Gorsuch, J., concurring) (quoting *Balt. & Ohio R.R. Co. v. United States*, 5 F. Supp. 929, 936 (N.D. Ohio 1933)).

140. *Id.* (emphasis added).

141. See Transcript of Record, *supra* note 133, at 224-25.

142. 274 U.S. 564 (1927).

regulation that directed how railroads should distribute their cars to coal mines during periods of car shortage.¹⁴³ It issued the following decree:

[I]t was ordered, adjudged, and decreed as follows, viz.: 1. That the order of the [ICC] in the case entitled ‘Assigned cars for bituminous coal mines’ . . . be and the same is hereby set aside, annulled, and suspended. 2. That a permanent injunction be and the same is hereby granted and issued out of this court as prayed in the bill of complaint and the defendants and each of them . . . are hereby, permanently restrained and enjoined from enforcing or in any manner attempting to enforce or carry out the said order or any of the terms thereof.¹⁴⁴

Justice Gorsuch dismissed the relevance of this case by noting that the Court ultimately upheld the agency action at issue,¹⁴⁵ but that is beside the point. The *Assigned Car Cases* are relevant not for their ultimate result, but because they show how the term “set aside” was used by courts in this period. The lower court issued a decree that by its terms “set aside, annulled, and suspended” the ICC regulation, and the Supreme Court then described the suit as one “brought . . . to enjoin and annul an order of the [ICC].”¹⁴⁶ Those usages show that the phrase “set aside” in 1927—here used in reference to broad-gauged regulatory action by the ICC—carried the same meaning of universal nullification or invalidation that courts give it today.

*Columbia Broadcasting System, Inc. v. United States (CBS)*¹⁴⁷ also offers a good example of how the phrase “set aside” was used and understood in the pre-APA period. This prolonged litigation involved a challenge to the FCC’s chain-broadcasting regulations.¹⁴⁸ As Judge Learned Hand of the three-judge district court described the suit, “These actions were brought to declare invalid and set aside certain regulations [T]he ‘networks’ brought the two actions at bar . . . to

143. See *Berwind-White Coal-Mining Co. v. United States*, 9 F.2d 429 (E.D. Pa. 1925). The suit was brought as a representative suit “in behalf of themselves and in behalf of such other railroads as have an interest and may by proper proceedings become parties hereto.” Transcript of Record at 4, *The Assigned Car Cases*, 274 U.S. 564 (Nos. 606, 638). See *The Assigned Car Cases*, 274 U.S. at 569 (“The number of the railroads to which the prescribed rule applies is 3073. Of these, all except the 35 plaintiffs in No. 606 have acquiesced in the order.”).

144. See Transcript of Record, *supra* note 143, at 75.

145. See *United States v. Texas*, 599 U.S. 670, 701 (2023) (Gorsuch, J., concurring).

146. *The Assigned Car Cases*, 274 U.S. at 567 (emphasis added).

147. 316 U.S. 407 (1942).

148. See *id.* at 416-19 (addressing whether the chain-broadcasting regulations could be challenged via the Urgent Deficiencies Act procedure as incorporated by the Communications Act); *Nat’l Broad. Co. v. United States (NBC)*, 319 U.S. 190, 227 (1943) (sustaining the regulations on the merits).

set them aside as beyond the powers of the [FCC] and as arbitrary, unreasonable and without basis in the evidence.”¹⁴⁹ The networks had also “moved for a preliminary injunction against their enforcement pendent lite.”¹⁵⁰ On appeal, even though it did not use the term “set aside,” the *CBS* Court explained at length why these regulations were “appropriately the subject of attack”: “The regulations are the effective implement by which the injury complained of is wrought, and hence must be the object of the attack.”¹⁵¹

Justice Gorsuch glossed the *CBS* case as one involving merely a “claim for traditional equitable relief.”¹⁵² But this description shortchanges the case. The challengers’ motion for preliminary injunctive relief was distinct from, and in addition to, their complaint’s prayer for an order “to declare invalid and set aside” the regulations.¹⁵³ They wanted, in other words, more than just the preliminary injunction—they sought that the regulations be invalidated and set aside. Conversely, anyone who sees the *CBS* suit as simply involving a “claim for traditional equitable relief” should regard today’s suits seeking to declare rules invalid universally as involving “claim[s] for traditional equitable relief,” too.

Cases which adjudicated petitions for review of regulations brought in the first instance in the courts of appeals also shed light on the meaning of “set aside.” Consider *A.E. Staley Manufacturing Co. v. Secretary of Agriculture*.¹⁵⁴ In *Staley*, the agency had issued a regulation concerning sweetened condensed milk, which it defined as a mixture of cow’s milk with sugar and/or “corn sugar.” That definition excluded corn *syrup* from serving as the sweetening ingredient. A corn-syrup manufacturer filed a petition in the Seventh Circuit to “set aside” the agency’s order promulgating this regulation.¹⁵⁵ The court held that it had jurisdiction and found that the evidentiary basis for the regulation was unsatisfactory.¹⁵⁶ It then remanded the regulation back to the agency for it to “disclose the basis of its order.”¹⁵⁷ The agency responded: in the *Federal Register*, it explained that the court “has directed that said order be revised so as to set forth the basis for the exclusion of corn sirup as a saccharine ingredient in said regulation.”¹⁵⁸ It

149. See *Nat’l Broad. Co. v. United States (NBC)*, 44 F. Supp. 688, 690 (S.D.N.Y. 1942).

150. *Id.*

151. *CBS*, 316 U.S. at 419, 421.

152. See *United States v. Texas*, 599 U.S. 670, 701 (2023) (Gorsuch, J., concurring).

153. See *NBC*, 44 F. Supp. at 690.

154. 120 F.2d 258, 261 (7th Cir. 1941).

155. *Id.* at 259.

156. *Id.* at 260–61.

157. *Id.* at 261.

158. In the Matter of Fixing and Establishing a Definition and Standard of Identity for Sweetened Condensed Milk, 6 Fed. Reg. 3973, 3973 (Aug. 8, 1941).

proceeded to set out a revised finding of fact concerning the exclusion of “corn sirup.” In short, a single plaintiff seeking to “set aside” a regulation caused a remand that prevented a regulation from taking effect until the agency had adequately grounded its regulation in the evidence.

A similar challenge occurred in *Twin City Milk Producers Ass’n v. McNutt*.¹⁵⁹ The challenged regulation specified a standard of identity for skim milk.¹⁶⁰ Skim-milk producers contended that the agency failed to make the requisite finding that the regulation would promote “honesty and fair dealing in the interest of consumers.”¹⁶¹ For that reason, they argued that “the order should be declared invalid.”¹⁶² The Eighth Circuit explained that this deficit in the order would “justify us in declaring the regulation invalid.”¹⁶³ But it instead stayed its hand for thirty days to give the agency an opportunity to make the needed finding.¹⁶⁴ The agency complied and amended its findings in the *Federal Register*.¹⁶⁵ When the case returned after remand, the court explained why it had so acted:

Because of the field of public interest involved, we exercised our judicial discretion not to declare the regulation invalid summarily, for failure of the order to demonstrate that the necessary processes had been observed, as we might have done, but, with greater tolerance in the public interest, gave the Administrator an opportunity to disclose the basis of his action¹⁶⁶

Declaring itself satisfied “in light of this nunc pro tunc finding and showing,” the court concluded that “the order and regulation should be, and they hereby are, approved and affirmed.”¹⁶⁷

Finally, consider *Federal Security Administrator v. Quaker Oats Co.*¹⁶⁸ In 1941, the relevant federal agency issued an order promulgating a regulation that

159. 122 F.2d 564, 566 (8th Cir. 1941); *Twin City Milk Producers Ass’n v. McNutt*, 123 F.2d 396, 397 (8th Cir. 1941).

160. See *Twin City*, 122 F.2d at 566.

161. *Id.*

162. *Id.*

163. *Id.* at 567.

164. *Id.* at 569 (remanding but retaining jurisdiction in case “no such finding is made within thirty days hereafter”).

165. In the Matter of the Definition and Standard of Identity for Dried Skim Milk, 6 Fed. Reg. 4933, 4933 (Sept. 30, 1941).

166. *Twin City Milk Producers Ass’n v. McNutt*, 123 F.2d 396, 397–98 (8th Cir. 1941).

167. *Id.* at 398.

168. 318 U.S. 218, 224 (1943).

established the standard of identity for, *inter alia*, farina and enriched farina.¹⁶⁹ Upon a petition for review of those regulations by the Quaker Oats Company,¹⁷⁰ the Seventh Circuit “set aside” the order—and the regulations thereby promulgated—as exceeding the agency’s statutory authority: “[T]he action of respondent, in promulgating the regulations in controversy, was beyond his statutory authority. Such being the case, they [i.e., the ‘regulations in controversy’] must be set aside.”¹⁷¹ On appeal to the Supreme Court, the government defended the legality of its regulations on the merits. Its filings reflected the government’s understanding that the Seventh Circuit’s judgment “invalidat[ed]” the “regulations in controversy.”¹⁷² Agreeing with the government that the regulations were not invalid, the Supreme Court ultimately reversed the lower court. But its opinion likewise showed that it understood the task at hand to be the job of reviewing “regulations of general application” for their validity.¹⁷³ Nowhere in the litigation of this case was there any inkling of the idea that these “regulations of general application” had been, or could be, set aside or invalidated *only* “as to Quaker Oats” rather than universally. Equally conspicuously absent was the notion that the challenged regulations should be “set off to one side” and disregarded; Quaker Oats was asserting that the regulations were unauthorized by the statute and should be invalidated, not that they should be disregarded.

Any one of these cases taken in isolation does not definitively settle the current debate concerning the meaning of “set aside” in the APA.¹⁷⁴ But when one

169. *Quaker Oats Co. v. Fed. Sec. Adm’r*, 129 F.2d 76, 78 (7th Cir. 1942).

170. The gist of the problem was that Quaker wanted to continue to sell farina enriched with Vitamin D and *only* with Vitamin D. But the new regulations made that impossible. See *id.* at 80.

171. Transcript of Record at 689, *Quaker Oats*, 129 F.2d 76 (No. 7765) (ordering and adjudging “that the order of the Federal Security Administrator entered on May 26, 1941, be, and the same is hereby, set aside”).

172. Petition for a Writ of Certiorari at 11 n.5, *Fed. Sec. Adm’r v. Quaker Oats Co.*, 317 U.S. 616 (1942) (No. 424); see Brief for the Federal Security Administrator at 9 n.5, *Quaker Oats*, 318 U.S. 218 (No. 424) (referencing the Seventh Circuit’s judgment and noting “[l]iterally this judgment invalidates the standards for flour, enriched flour, [etc.], . . . since standards for all of these products were included in the same order . . . Further, the judgment on its face invalidates phases of the farina and enriched farina regulations . . . about which respondent did not complain in its petition for review.”). While it resisted the inadvertent overbreadth of the judgment’s wording, the government clearly understood the judgment to have “invalidate[d]” the farina/enriched-farina regulations.

173. *Quaker Oats*, 318 U.S. at 227-28 (noting that the consideration of “the discretion and informed judgment of an expert administrative body” was “especially appropriate *where the review is of regulations of general application* adopted by an administrative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged” (emphasis added)).

174. For other relevant sources and arguments, see, for example, Levin, *supra* note 5, at 2007-19; and Sohoni, *Power to Vacate*, *supra* note 4.

considers such cases collectively, can we doubt what courts understood themselves to be doing? Each case shows that before the APA's enactment, courts and litigants spoke of setting aside and invalidating federal regulations in exactly the same terms as courts do today.¹⁷⁵ That decrees worded and understood in these terms existed before the APA, continued to be issued after it,¹⁷⁶ and are still being granted in the present day demonstrates a continuing pattern of both linguistic usage and conceptual understanding that should carry significant weight. Or, as Justice Kavanaugh more succinctly put it to the Solicitor General during oral argument, "'Set aside' means 'set aside.' That's always been understood to mean the — the rule's no longer in place. . . . [N]o case has ever said what you're saying anywhere."¹⁷⁷

B. Remedies Under the APA and Declaratory Judgments

At the core of the revisionist account of the APA's remedial scheme is the claim that Section 703 of the APA implicitly specifies the remedies available in an APA challenge by enumerating the available "forms of proceeding" for such a suit and, further, that none of the referenced forms of proceeding provides a foothold sufficient for a court to vacate a rule.¹⁷⁸ As Justice Gorsuch explained this argument, Section 703 lists "actions for declaratory judgments" and "writs of prohibitory or mandatory injunction"; it does not, however, expressly reference actions for "vacatur."¹⁷⁹ The scholar whose work inspired this argument — Professor Harrison — contends that neither the drafters of the APA¹⁸⁰ nor eminent commentators¹⁸¹ contemplated a remedy of vacatur "distinct from" the remedies available in a suit for declaratory or injunctive relief. As this carefully

175. See, e.g., *CIC Services, LLC v. IRS*, 593 U.S. 209, 223 (2021) ("The complaint, and particularly the relief sought, targets the Notice's reporting rule, asking that it be set aside as a violation of the APA."). See generally Sohoni, *supra* note 5 (analyzing *CIC Services*).

176. See *infra* Section II.C.

177. Transcript of Oral Argument, *supra* note 8, at 55.

178. See Harrison, *Section 706*, *supra* note 5, at 47; *United States v. Texas*, 599 U.S. 670, 698 (2023) (Gorsuch, J., concurring) ("Then there is § 703. That is where the APA most clearly discusses remedies.").

179. *Texas*, 599 U.S. at 698 (Gorsuch, J., concurring) ("Conspicuously missing from the list is vacatur.").

180. Harrison, *Vacatur of Rules*, *supra* note 5, at 125 ("[T]he APA's drafters did not think that vacatur, as distinct from injunctive or declaratory relief, was an existing non-statutory form of proceeding or remedy.").

181. *Id.* at 128 ("Professor Jaffe almost certainly was not familiar with a non-statutory remedy of vacatur that was distinct from injunctions and declarations."); *id.* ("Vacatur was not on Professor Davis's list of non-statutory remedies, but injunctions and declaratory judgments were.").

worded language indicates, Harrison regards the APA as not *adding to* the remedies that Section 703 references. The revisionist account, in short, directs us to look to Section 703 for available remedies and then treats the fact that Section 703 does not expressly reference a form of proceeding or “form of legal action” for vacatur as evidence that the APA does not contemplate universal vacatur.¹⁸²

The remainder of this Section responds to these arguments in two ways. It begins by rebutting the revisionist reading of the APA’s remedial scheme, under which Section 703 rather than Sections 705 and 706 is treated as the locus of the reviewing court’s remedial authority. It then contends that even if Section 703 *were* treated as the exclusive locus of the court’s remedial authority, Section 703’s reference to declaratory judgments would nevertheless support the propriety of universal vacatur, given what the history recounted below reveals concerning Congress’s understanding of how the declaratory judgment could be used in challenges to rules.

1. *The Locus of Remedies and Section 703*

It is useful to start with the point—which Professor Levin has noted—that no court has ever held that Section 703 implicitly delimits the kinds of remedies available in an APA suit.¹⁸³ And with good reason: Section 703 speaks to venue and forms of proceedings, not to remedies, and regardless, its listing of the available forms of proceedings is nonexhaustive (“any . . . including”).¹⁸⁴ By its plain terms, then, Section 703 authorizes bringing suit by any “applicable form of legal action,”¹⁸⁵ including a “civil action.”¹⁸⁶ The types of remedies available in such a suit are left to be determined by other sources of law, including, as relevant here, Sections 705 and 706 of the APA.¹⁸⁷ The proposition that Section 703 is the

182. *See Texas*, 599 U.S. at 698 (Gorsuch, J., concurring) (“And what exactly would a ‘form of legal action’ seeking vacatur look like anyway? Would it be a creature called a ‘writ of vacatur’? Nobody knows (or bothers to tell us).”).

183. *See Levin*, *supra* note 5, at 2010 (“Perhaps, given the creativity with which courts have interpreted the APA over the decades, § 703 *could* have been interpreted as a fount of doctrine as to the proper occasions for an injunction (or declaratory judgment, writ of habeas corpus, etc.). But this has never happened in the entire seventy-five-plus years during which the APA has been in effect, and there is no good reason to start now.”).

184. 5 U.S.C. § 703 (2018).

185. *Id.*

186. *See* FED. R. CIV. P. 2.

187. *See* 3 KOCH & MURPHY, *supra* note 19, § 8:30 (3d ed.) (“The forms of proceeding . . . which initiate the litigation do not affect the choice of remedies ultimately compelled by the litigation. Because these forms are couched in remedy sounding language, they might be thought to dictate the remedy but they do not. Thus, whether the case begins through a ‘petition for

exclusive font of a court's authority to grant relief also does not square with the House Judiciary Committee Report on the APA, which expressly notes that "[u]nder [Section 10(b), now 5 U.S.C. § 703] and the other provisions of [S]ection 10 a proper reviewing court has full authority to render decision and grant relief."¹⁸⁸

What about Sections 705 and 706?¹⁸⁹ The text of Section 705 and Section 706 show that they address remedies.¹⁹⁰ The overall architecture of the APA's judicial-review provisions shows that Section 705 and Section 706 address remedies.¹⁹¹ And the legislative history of Sections 705 and 706 shows this too.¹⁹²

review' or a 'nonstatutory' traditional form, a court might nonetheless resort to the full range of remedies . . .").

188. APA LEGISLATIVE HISTORY, *supra* note 95, at 276 (emphasis added) (reprinting H.R. REP. 79-1980 (1946)).
189. Section 705 authorizes the "reviewing court" – "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury" – to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705 (2018). Section 706 states that the "reviewing court shall . . . hold unlawful and set aside" procedurally or substantively flawed agency action and "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706.
190. Sohoni, *Power to Vacate*, *supra* note 4, at 1162-63 & n.222; see also *Bowen v. Massachusetts*, 487 U.S. 879, 911 (1988) ("The question whether the District Court had the power to enter the orders it did is governed by the plain language of 5 U.S.C. § 706. It seems perfectly clear that, as 'the reviewing court,' the District Court had the authority to 'hold unlawful and set aside agency action' that it found to be 'not in accordance with law.' As long as it had jurisdiction under § 702 to review the disallowance orders of the Secretary, it also had the authority to grant the complete relief authorized by § 706." (footnote omitted)).
191. Sohoni, *Power to Vacate*, *supra* note 4, at 1163 n.222 (discussing "the structure of the APA's judicial review provisions" and noting that "[t]hese provisions progress in a logical fashion from section to section. Section 702 addresses who can sue; section 703 addresses where and how to sue; section 704 addresses what sorts of agency action can be challenged; section 705 addresses interim remedies pending judicial review; and section 706 addresses final remedies and scope of judicial review"); Levin & Sohoni, *supra* note 5 (same); Note, *Direct Judicial Review of Administrative Action Under Section 10(C) of the Administrative Procedure Act*, 62 HARV. L. REV. 1216, 1217 n.4 (1949) ("Section 10(a) defines who has a right of review; Section 10(b), the form and venue of the review proceeding; Section 10(d), the authority of a court to delay agency action pending review; and Section 10(e), the scope of review and the authority of a court to grant relief." (emphasis added)).
192. Sohoni, *Power to Vacate*, *supra* note 4, at 1157-58; APA LEGISLATIVE HISTORY, *supra* note 95, at 278 (reprinting H.R. REP. 79-1980 (1946)); APA LEGISLATIVE HISTORY, *supra* note 95, at 214 (reprinting S. REP. 79-752 (1945)); APA LEGISLATIVE HISTORY, *supra* note 95, at 377 (reprinting 92 CONG. REC. 5657 (statements of Rep. Scrivner and Rep. Springer (Mr. Scrivner: "Does the gentleman feel that [section 10(e)] would correct the evils that might exist where a regulation was contrary to the intent, spirit, or purpose of the act?" Mr. Springer: "I think, unquestionably, it would . . . That is the purpose and that is the intention of that

The argument that Section 706 does not address remedies rests on a half-hearted reading of Section 706. Professor Harrison reads Section 706 to address not remedies, but rather the *Chevron* question: “the extent to which courts decide questions de novo, as opposed to deferring to agencies.”¹⁹³ In support, he correctly notes that the House and Senate Judiciary Committee Reports regarding this provision state, “This section provides that questions of law are for courts rather than agencies to decide in the last analysis and it also lists the several categories of questions of law.”¹⁹⁴ But the very next sentence in the House Report states, “Under it courts are required to determine the application or threatened application or *questions respecting the validity* or terms of *any agency action notwithstanding the form of the proceeding* or whether brought by private parties for review or by public officers or others for enforcement.”¹⁹⁵ This sentence states that the function of the court under Section 706 – indeed, its duty – is to review the agency action for its validity, *whatever the technical form of proceeding may be*, and it undercuts the notion that Section 706 does not contemplate invalidation as a remedy. Furthermore, the very next sentence in the Senate Report states, “[Section 10(e)] expressly recognizes the right of properly interested parties to compel agencies to act where they improvidently refuse to act.”¹⁹⁶ That “express[ly] recogni[tion]” of the “right” to “compel agencies to act” refutes the notion that Section 706 “does not refer to remedies.”¹⁹⁷ Other textual arguments against the traditional reading of Section 706 fare no better.¹⁹⁸

provision In those cases where these decisions are found to be arbitrary, . . . capricious or an abuse of discretion or otherwise not in accordance with the law, the decision can be set aside. That is certainly fair, that is certainly equitable, and that is certainly based upon a sound philosophy. . . . [A]ny decision can be set aside which is contrary to constitutional right, power, privilege, or immunity. There is no one in the world who could object to a provision of that kind because that is based upon the sound philosophy of the law.”)

193. Harrison, *Vacatur of Rules*, *supra* note 5, at 126; Harrison, *Section 706*, *supra* note 5, at 42 (“[Section 706] directs the court not to decide in accordance with the agency action. The remedial consequences of so treating an agency action depend on the form of proceeding, and so are governed by section 703 and the sources of law to which it points.”).
194. Harrison, *Vacatur of Rules*, *supra* note 5, at 126 (quoting H.R. REP. NO. 79-1980, at 44 (1946); S. REP. NO. 79-752, at 28 (1945)). These quotes are reprinted in APA LEGISLATIVE HISTORY, *supra* note 95, at 214, 278.
195. APA LEGISLATIVE HISTORY, *supra* note 95, at 278 (emphasis added) (reprinting H.R. REP. 79-1980 (1946)).
196. APA LEGISLATIVE HISTORY, *supra* note 95, at 214 (reprinting S. REP. 79-752 (1945)).
197. See Harrison, *Vacatur of Rules*, *supra* note 5, at 126 n.29.
198. Justice Gorsuch contends that interpreting Section 706 to mean “vacate” would cause an interpretive problem because “[a]ny interpretation of ‘set aside’ . . . must make sense in the context of . . . habeas,” and “no one thinks a court adjudicating . . . a habeas petition ‘vacates’ agency action along the way.” *Texas*, 599 U.S. at 698-99 (Gorsuch, J., concurring). But a court

To come at the point from the other side, it is worth stressing the strange and even absurd consequences that would follow from the revisionist reading. Proponents of this view contend that when a court finds a rule invalid, it should (and can) only declare that the individual plaintiff has no duty to comply with the rule and should refrain from statements concerning the invalidity of the rule.¹⁹⁹ Even at the level of literal meaning, the claim is hard to parse: how, one wonders, would a court that is “holding off to one side and disregarding the rule” be able to conclude that the plaintiff has no duty to comply with it?²⁰⁰ On a broader level, this proposal ignores the reality that administrative-law cases frequently call for judgments that speak to the defendant agency’s powers or rights, not to the individual plaintiff’s liberties or immunities. Consider, for example, a case that seeks to set aside an agency’s unlawful rescission of a regulation.²⁰¹ A court order that said “the plaintiff has no duty to comply with the rescission of the regulation” would be nonsensical. Instead, under current practice, courts sensibly and simply vacate the rescission of the regulation, which causes the regulation previously in force to be reinstated.²⁰² Consider, too, a case in which a plaintiff seeks to set aside an agency’s regulation as not going far enough (i.e., as falling short of what the statute mandates that the agency do). Litigants can challenge regulatory underreach well as regulatory overreach.²⁰³ The APA allows a litigant to bring a civil action that seeks a judgment stating that an agency action

adjudicating a habeas petition may well invalidate and vacate an agency action. See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 52–53 (1950) (sustaining habeas and ordering release because “deportation proceedings must conform to the requirements of the [APA] if resulting orders are to have validity,” and the challenged order was procedurally invalid); *Mojica v. Reno*, 970 F. Supp. 130, 182 (E.D.N.Y. 1997) (“Writs of habeas corpus are issued on behalf of petitioners. Petitioners’ orders of deportation are vacated.”); U.S. *ex rel. Mandel v. Day*, 19 F.2d 520, 522 (E.D.N.Y. 1927) (“[T]he writ will be sustained, the order of deportation vacated, and the alien discharged from custody.”). For a rebuttal of the textual argument that the traditional reading of “hold unlawful and set aside” is incompatible with Section 706’s reference to “findings[] and conclusions,” see Levin, *supra* note 5, at 2011–12.

199. John Harrison, *Remand Without Vacatur and the Ab Initio Invalidity of Unlawful Regulations in Administrative Law*, 48 *BYU L. REV.* 2077, 2142 (2023) (“[A] court that finds a regulation unlawful normally should enter a declaratory judgment providing that the regulated party has no duty to comply.”); *id.* at 2147 (“[V]acatur is not necessary to give relief to the party before the court.”).
200. *Cf.* Levin, *supra* note 5, at 2018 (“A court cannot enjoin the application of a rule to even a single plaintiff if the court must simply ‘set the rule to the side’ and disregard it.”).
201. See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020).
202. See, e.g., *State Farm*, 463 U.S. at 41.
203. See, e.g., *Telecomm. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984); *NRDC v. Train*, 510 F.2d 692 (D.C. Cir. 1975).

falls “short of statutory right.”²⁰⁴ Such a judgment says nothing meaningful *to* or *about* the plaintiff or about the plaintiff’s duty to comply; it is directed at the agency and declares the agency’s obligation to do more.²⁰⁵ For a challenger who wants an agency to do more than it has done, it would be both perverse and meaningless for a court to set aside the regulation “as to the plaintiff” or declare merely that the plaintiff has no duty to comply with that regulation.²⁰⁶

Equally fundamental, for any plaintiff whose complaint is that the agency has violated the APA’s procedural mandates in promulgating a rule,²⁰⁷ a plaintiff-specific remedy would be inadequate. As then-Judge Ketanji Brown Jackson explained, “[T]o remedy an agency’s procedural violations of the APA entirely, it is not enough for a court to prevent the application of the facially invalid rule to a particular plaintiff”²⁰⁸ That is because “the true gravamen of an APA claim is . . . that the agency has breached the plaintiff’s (and the public’s) entitlement to non-arbitrary decision making and/or their right to participate in the rule-making process when the agency undertook to promulgate the rule.”²⁰⁹ The only way to remedy that injury is to invalidate the rule — “so as to give interested parties (the plaintiff, the agency, and the public) a meaningful opportunity to try again.”²¹⁰

Lastly, if the revisionist reading were adopted, there would be a lot of wasteful individual litigation, as plaintiff after plaintiff seeks a declaration as to his individual liberty not to comply with the rule.²¹¹ The government, in turn,

204. 5 U.S.C. § 706(2)(C) (2018). The APA also authorizes courts to use mandatory injunctions to compel agency action, but a litigant need not ask for, and a court may prefer not to issue, an injunction when a declaratory judgment would suffice — as it generally does. See Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1108 (2014) (“Once a court tells an executive official that certain conduct is required or forbidden, it is presumed that the official will comply.”).

205. See Levin, *supra* note 5, at 2019 (“[T]he last thing such a litigant would want is a judicial decision directing the agency that it should henceforth ignore or disregard the rule (either across the board or only with regard to the individual litigant), because that ‘relief’ would leave the litigant worse off than if it had not sued at all.”).

206. The remedy that courts afford in this scenario is remand *without* vacatur. On remand without vacatur, see generally Ronald M. Levin, “Vacation” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003).

207. 5 U.S.C. § 553 (2018).

208. Make the Rd. N.Y. v. McAleenan, 405 F. Supp. 3d 1, 72 (D.D.C. 2019), *rev’d on other grounds sub nom.* Make the Rd. N.Y. v. Wolf, 962 F.3d 612 (D.C. Cir. 2020).

209. *Id.*

210. *Id.*

211. See PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2061 (2019) (Kavanaugh, J., concurring) (“It would be wholly impractical—and a huge waste of

would have the incentive not to appeal its losses in these individual district court cases, for that way it would avoid setting adverse circuit precedent.²¹² In the meantime, and conceivably indefinitely, a rule held invalid, even repeatedly, would remain in place as to nonplaintiffs. In the business-regulation setting, odd competitive advantages would ensue: could only the plaintiff manufacturer use corn syrup as a sweetener from the time of the first judgment until all its competitors got their local district courts to agree? In the sphere of regulations affecting civil rights and liberties, the consequences could be more dire.

These problems are conceptual, semantic, and pragmatic, and they are weighty enough that they should suffice to reject the revisionist reading that locates the APA's grant of remedial authority in Section 703. But even if we assume *arguendo* that Section 703 (and not Sections 705 and 706) *does* speak to remedies, there would still be ample room there for universal vacatur, because Section 703 plainly authorizes actions seeking injunctive and declaratory relief, and those forms of proceeding are broad enough to allow universal vacatur. I have addressed the history of universal injunctions elsewhere and will not review that history here.²¹³ Instead, in the next subsection, I review the adoption of the declaratory judgment, the functions that Congress thought the declaratory judgment could perform in challenges to rules, and how this background bears on the case against universal vacatur.

2. Declaratory Judgments and Section 703

Inspired by antecedents in both civil law and in equity, the declaratory judgment is a mechanism that allows parties to obtain a “definite statement of their legal relations as a way to order their affairs.”²¹⁴ A declaratory judgment can be obtained without a “consummated wrong”²¹⁵ and instead “allow[s] courts to

resources—to expect and require every potentially affected party to bring pre-enforcement . . . challenges against every agency order that might possibly affect them in the future.”).

212. See Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 54 (2017) (noting that if universal injunctions were jettisoned from our law, “[n]o one would be protected from an illegal policy without bringing their own challenge. The number of lawsuits over some policies might have to increase dramatically. And while the eventual development of appellate precedent might ultimately provide broader protection, the government would have far less incentive to appeal, because appellate precedent is the only thing that could shut down an illegal policy in full”).

213. See generally Sohoni, *Lost History*, *supra* note 4 (canvassing the history and propriety of universal injunctions).

214. James E. Pfander, *The Past and Future of Procedure Scholarship*, 169 U. PA. L. REV. 2551, 2555 (2021).

215. *Id.*

provide preventive relief before a potential wrong [is] committed.”²¹⁶ Unlike an order to pay money damages or an injunction, the declaratory judgment lacks immediate “coercive” force,²¹⁷ and so is often described as “a milder alternative to coercive remedies.”²¹⁸

A typical account of the declaratory judgment’s introduction into federal law goes as follows.²¹⁹ In the early part of the twentieth century, it was uncertain whether federal courts could entertain suits for declaratory judgments. Caselaw prompted “responsible expressions of doubt that constitutional limitations on federal judicial power would permit” the declaratory judgment.²²⁰ Eventually, the states’ gradual adoption of this mechanism²²¹ and an intervening Supreme Court decision²²² encouraged Congress to enact the Declaratory Judgment Act (DJA) in 1934. Unlike the declaratory-judgment statutes that many states enacted, the federal DJA expressly limited its application to “a case of actual controversy.”²²³ Shortly thereafter, in *Aetna Life Insurance Co. v. Haworth*,²²⁴ the Court affirmed the constitutionality of the DJA.²²⁵ In so doing, it also affirmed the broader principle that Congress had wide power to specify new procedures and remedies: “In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict.”²²⁶

That conventional recitation addresses the declaratory judgment’s de jure acceptance into federal law. What it misses, though, is that before the declaratory judgment was adopted, other mechanisms often did the work of the declaratory judgment, even if in unpredictable and ill-understood ways.²²⁷ Proponents of the

216. Andrew Bradt, “*Much to Gain and Nothing to Lose*”: Implications of the History of the Declaratory Judgment for the (b)(2) Class Action, 58 ARK. L. REV. 767, 772 (2006) (footnote omitted).

217. Pfander, *supra* note 214, at 2557 & n.29.

218. Bradt, *supra* note 216, at 772.

219. See, e.g., *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007); *Pub. Serv. Comm’n of Utah v. Wycoff Co.*, 344 U.S. 237, 241-42 (1952). For an insightful overview of the history of the federal declaratory judgment, see Bradt, *supra* note 216, at 771-74.

220. *Wycoff*, 344 U.S. at 241.

221. *Wycoff*, 344 U.S. at 241-42.

222. *Nashville, Chattanooga & Saint Louis Ry. Co. v. Wallace*, 288 U.S. 249, 268 (1933).

223. 28 U.S.C. § 2201(a) (2018); *Wycoff*, 344 U.S. at 241-42 (“[The Declaratory Judgment Act’s] enabling clause was narrower than that of the Uniform Act adopted in 1921 by the Commissioners on Uniform State Laws, which gave comprehensive power to declare rights, status and other legal relations. The Federal Act omits status and limits the declaration to cases of actual controversy.”).

224. 300 U.S. 227 (1937).

225. *Id.* at 244.

226. *Id.* at 240.

227. See Bradt, *supra* note 216, at 777.

declaratory judgment heavily underscored that fact because it helped them establish that the declaratory judgment device would not be a bizarre new addition to the remedial toolkit of federal courts but was instead something that federal courts were doing regularly in substance.

Perhaps the biggest proponent of this sort of thinking was the father of America's declaratory judgment, Edwin Borchard.²²⁸ And the main fodder for his argument in public law was the way that federal courts had used injunctions to grant what was, in effect, declaratory relief.²²⁹ Borchard had little patience for such "fictions which distorted the judicial process."²³⁰ His goal was for courts to cut to the chase – that is, to the "substantive issue" – rather than get tangled up in whether the requisites for injunctive relief were met.²³¹

A prime illustration, on which Borchard frequently relied, was *Pierce v. Society of Sisters*,²³² a case that involved an Oregon compulsory public-schooling statute. As I have elsewhere described, *Pierce* affirmed a lower court's universal injunction against the enforcement of that statute.²³³ Was *Pierce* an appropriate use of the injunction? No, said Borchard – though not, mind you, because the injunction shielded nonplaintiffs as well as the two plaintiff schools and their potential pupils. Rather, Borchard's point was that the *Pierce* injunction was granted without the traditional requisites for injunctive relief.²³⁴ Borchard argued that *Pierce* showed that "no threat" of enforcement was necessary or should be necessary when a plaintiff challenged a statute "which exposed to danger and loss the plaintiff's property or personal freedom of action."²³⁵ As Borchard saw

228. On Borchard's importance, see, for example, Pfander, *supra* note 214, at 2554-59. On the indispensable roles played by Edwin Sunderland and Charles Clark, see Bradt, *supra* note 216, at 772.

229. Edwin Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 YALE L.J. 445, 454 (1943).

230. *Id.* at 466.

231. *Id.* ("[T]he injunction came naturally to be looked upon as an instrument to restrain an imminent wrong, incidental to which the justification for the alleged wrong, the statute, would have to be passed upon. The procedural vehicle, instead of the substantive issue at stake, thus focus[ed] the Court's attention.").

232. 268 U.S. 510 (1925).

233. See Sohoni, *Lost History*, *supra* note 4, at 925, 959-61. *Pierce* is relevant to today's debate over the universal injunction for it shows that nearly a century ago, the Supreme Court gave its approbation to universal injunctions of state laws. See *id.* at 973-77. That should assuage doubts (such as those voiced by some Justices, see *supra* note 68, and Judge Sutton, see *supra* note 72 and accompanying text) concerning the power of federal courts to issue such injunctions as to state law.

234. Borchard, *supra* note 229, at 462 (noting "no evidence of irreparable injury, inadequacy of legal remedy or emergency"); EDWIN BORCHARD, DECLARATORY JUDGMENTS 1045 (2d ed. 1941).

235. Borchard, *supra* note 229, at 465-66.

it, *Pierce* was “really an abuse of the injunction in order to grant a declaration of rights, which should have been sought and granted . . . *eo nomine* without circumlocution.”²³⁶

Borchard built on *Pierce* and other cases to show that, in public law, the suit for an injunction had already proved capable of reproducing, as a functional matter, the effect of a suit seeking a declaratory judgment that would invalidate a statute or regulation. The problem was that suits for injunctions whipsawed courts and litigants between two unpleasant choices: “the injunction has had to be either abused beyond all its normal functions or else it has been refused, either because a ‘criminal’ act was in question or because the conditions of an equitable proceeding were not present.”²³⁷ The consequence was that the case would “go[] off on the propriety of injunctive relief rather than on the validity of the challenged statute, regulation, or order.”²³⁸ And as Borchard’s colleague Thurman Arnold observed, using the injunction as the vehicle to challenge executive-branch action gave courts great discretion. When courts wished to grant relief against the government, courts could find that an injunction was justified. When they wished to deny it, “the loose formulae of equity” were ready at hand.²³⁹

Borchard and other reformers envisaged the declaratory judgment as the pathway to freeing litigants and courts from such unpredictable “procedural quagmire[s].”²⁴⁰ To Borchard’s eye, the need for such a solution was increasingly

236. *Id.* at 462-63; BORCHARD, *supra* note 234, at 768 (noting that, in *Pierce*, “it was only necessary to show a statute or ordinance which injuriously affected the plaintiff, having a concrete interest at stake”).

237. BORCHARD, *supra* note 234, at 906; *see also* Note, *Declaratory Judgments in Constitutional Litigation*, 51 HARV. L. REV. 1267, 1269 (1938) (noting that in public law, “the concept of irreparable injury has been twisted and tortured so as to allow the injunction to preclude effective operation of any questioned statute prior to adjudication, as well as to hasten the adjudicatory process almost as much as is desired under the declaratory judgment acts”).

238. Edwin M. Borchard, *Declaratory Judgments in Administrative Law*, 11 NYU L.Q. REV. 139, 166 (1933).

239. Thurman W. Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913, 935 (1934). As Arnold quipped, “to the two-story structure of law and equity was added a third story of administrative law, and the whole structure was equipped with noiseless elevators and secret stairways, by means of which the choice was always open either to take a bold judicial stand or make a dignified escape.” *Id.*

240. Borchard, *supra* note 238, at 167 (condemning “the procedural resourcelessness of a legal system which could apparently discover no way to enable the individual to secure a prompt adjudication upon the legality of the administrative requirement without entangling him in a procedural quagmire and then leaving it uncertain whether and when the substantive issue would be reached”); *see also* BORCHARD, *supra* note 234, at xv (“[T]he extraordinary legal remedies and injunctions[] have accumulated so vast a cargo of technicalities that the citizen desirous of challenging an administrative power or privilege finds himself frequently engulfed

pressing. As he saw it, “the twentieth century, with its kaleidoscopic changes and the resulting necessity of new legislation and regulation to maintain the social equilibrium . . . [created] a special need for a speedy determination of the constitutionality and construction of legislation and regulations imposing burdens on the individual.”²⁴¹ Just as a plaintiff ought to be able to sue to remove a cloud on title, Borchart said, “[t]he statute or regulation now constitutes the cloud which plaintiff has the right to challenge and, if successful, to remove.”²⁴²

In some ways, the remedial scheme of federal administrative law anticipated the reforms that Borchart sought; in other ways, it was shaped by those reforms.²⁴³ Before the DJA’s enactment, Congress had already created a number of special statutory review proceedings that enabled litigants to seek to “set aside” certain agency actions in a streamlined manner. As we have seen, a successful challenge to such an agency action would result in its invalidation.²⁴⁴ After the DJA’s enactment, Congress evidently drew inspiration from the DJA when in 1938 it created the provision for review of “the validity” of specified orders under the FDCA.²⁴⁵ A successful challenge to such an order, as we have also seen, would

in a procedural bog which bars him from his goal.”); BORCHARD, *supra* note 234, at 875 (“[A] citizen seeking a declaration of the illegality of an administrative act . . . [is] forced into a mystic maze, whereas he wished merely to ascertain whether the regulation or order served upon him, or to which he had been subjected, is valid or not, or, if valid, what it means.”).

241. Borchart, *supra* note 229, at 454.

242. *Id.*; see also BORCHARD, *supra* note 234, at 21 (“The action for a so-called negative declaration is simply a broadening of the equitable action for the removal of a cloud from title to cover the removal of clouds from legal relations generally”); BORCHARD, *supra* note 234, at 21 (noting that the plaintiff “can urge the defendant’s duty not to claim (no-right) or the defendant’s disability”); BORCHARD, *supra* note 234, at 877 (“The jural relation involved may not always be clearly stated in the petition, or may be stated in combined or alternative form that defeats exact classification. For example, the plaintiff’s privilege to act without interference may appear as the administration’s no-right to prevent, e.g., to refuse a permit, or as its duty to grant it. The defendant commission’s activities may be challenged by placing in issue its duties, no-rights, disabilities, or liabilities, or the plaintiff’s rights, privileges, powers, and immunities, or some combination of these jural relations.”).

243. Borchart predicted the latter effect. See Edwin Borchart, *The Federal Declaratory Judgments Act*, 21 VA. L. REV. 35, 49 (1934) (“The greatest usefulness of the declaratory judgment in the federal jurisdiction will probably lie in the field of constitutional and administrative law, in the testing of the statutory and administrative powers of officials under federal and state legislation . . .”).

244. See *supra* notes 124–153 and accompanying text (discussing *Chicago, Baltimore & Ohio*, and the *Assigned Car Cases*).

245. Compare 28 U.S.C. § 2201(a) (2018) (“In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” (emphasis added)), with *Federal Food*,

result in the invalidation of the regulation promulgated or (if appropriate) remand to the agency so that it could correct its errors in issuing the regulation.²⁴⁶

These statutory mechanisms placed the reviewing court in the position of reviewing the validity of orders of particular agencies. In 1940, however, in the Walter-Logan Bill, Congress very nearly created an expanded, generalized judicial-review mechanism that would have been applicable to the rules and orders of a great number of agencies. And in doing so, Congress proceeded on the understanding that a declaratory judgment could render a regulation invalid *in toto*.

Section 3 of the Walter-Logan Bill, entitled “Judicial Review of Rules,” provided that “any person substantially interested in the effects of any administrative rule” could petition the D.C. Circuit within 30 days of the rule’s publication to determine whether the rule was “in conflict with the Constitution of the United States or the statute under which issued.”²⁴⁷ Furthermore, it stated that the D.C. Circuit “shall have no power in the proceedings *except to render a declaratory judgment holding such rule legal and valid or holding it contrary to law and invalid*. If the rule is held contrary to law and invalid, *the rule thereafter shall not have any force or effect . . .*”²⁴⁸ The House Judiciary Committee Report noted that under Section 3, “a judgment entered holding a rule invalid would be binding upon the administrative agency concerned . . .”²⁴⁹

Section 3 had both critics and supporters. Objections clustered in three areas. First, critics assailed Section 3 for accelerating the timing of challenges to regulations to such an extent that the D.C. Circuit would be adjudicating attacks on regulations “in vacuo,” without “necessary factual background” and in advance

Drug, and Cosmetic Act of 1938, ch. 675, § 701(f)(1), 52 Stat. 1040, 1055-56 (codified as amended at 21 U.S.C. § 371(f)(1)) (“*In a case of actual controversy as to the validity of any order under subsection (e)*, any person who will be adversely affected by such order if placed in effect may . . . file a petition with the Circuit Court of Appeals of the United States for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order.” (emphasis added)). See H.R. REP. NO. 2139, at 11 (1938) (noting that the provision “will permit an early determination of the validity” of the agency action and “make for prompt certainty as to legal rights”).

246. See *supra* notes 154-173 and accompanying text (discussing *Staley*, *Twin City*, and *Quaker Oats*).

247. H.R. DOC. NO. 76-986, at 13 (1940) (reprinting Walter-Logan Bill, H.R. 6324, 76th Cong. § 3 (1940)). As Professor Nelson notes, the bill referred to the “United States Court of Appeals for the District of Columbia,” which is nowadays colloquially called the “D.C. Circuit.” See Caleb Nelson, “*Standing*” and Remedial Rights in Administrative Law, 105 VA. L. REV. 703, 725-26 (2019).

248. H.R. DOC. NO. 76-986, at 13 (reprinting Walter-Logan Bill, H.R. 6324, 76th Cong. § 3 (1940)) (emphasis added).

249. H.R. REP. NO. 76-1149, at 4 (1939).

of an “actual controversy.”²⁵⁰ Second, and relatedly, critics argued that the D.C. Circuit’s decisions would be advisory or “nonjudicial” and that the Supreme Court would consequently lack power to hear appeals from those decisions—with the result that the D.C. Circuit would be anointed the final arbiter of the legality of rules.²⁵¹ And third, critics castigated the asymmetric operation of Section 3: if the government won in the D.C. Circuit, that victory would not bar a subsequent court from deciding that the rule was invalid in a case brought by a different plaintiff, while a defeat for the government would invalidate the rule once and for all.²⁵² For their part, supporters of such review²⁵³—echoing Borchard and his invocation of *Pierce*—noted that “[p]reventive justice by way of injunction” was well-established in the law²⁵⁴ and that this new provision was

250. See H.R. REP. NO. 76-1149, pt. 2, at 4 (providing the minority report of the House Judiciary Committee on H.R. 6324) (“[T]he court would pass upon the rule in vacuo—that is, before an actual controversy had arisen. The court would not have before it the necessary factual background.”).

251. See, e.g., 84 CONG. REC. 5688 (1939) (letter from Stephen B. Gibbons, Acting Sec’y, Dep’t of Treasury) (“It is recognized that the [D.C. Circuit] has the status both of a constitutional and of a legislative court and that the Congress may impose nonjudicial functions upon it. However, . . . [the] Supreme Court would have no constitutional power to review a declaratory judgment of the [D.C. Circuit] holding an administrative rule invalid since this would involve an administrative proceeding and not a case or controversy . . .”). Even the American Bar Association’s Special Committee on Administrative Law, which supported the Walter-Logan Bill, conceded that this was a possibility. See 84 CONG. REC. 9489 (1939) (letter from O.R. McGuire, Chairman, Am. Bar Ass’n Special Comm. on Admin. L., to Sen. Marvel M. Logan) (“[N]o one can say at this time with certainty whether the Supreme Court . . . would review a judgment of the [D.C. Circuit] in such a case, but it is not without significance that the Supreme Court does review declaratory judgment cases. Even if the Supreme Court should refuse to review such a judgment as to an administrative rule, the [D.C. Circuit] is a most able court.”).

252. See, e.g., 84 CONG. REC. 9487 (1939) (letter from Harry Slattery, Acting Sec’y, Dep’t of Interior, to Sen. Henry F. Ashurst) (complaining that Section 3 confers a power on the D.C. Circuit “which, if viewed as judicial in its nature, clearly violates the fundamental maxim of justice that both parties to an adjudication should be bound thereby in like degree”).

253. See, e.g., 86 CONG. REC. 12456-57 (1940) (letter from Roscoe Pound to Sen. Edward R. Burke) (“There is crying need of providing for a simple, expeditious, nontechnical mode of review of administrative determinations . . . No less important are the provisions with respect to ascertaining the validity of administrative rules by declaratory judgment. Every consideration which calls for administrative guidance in advance . . . calls equally for giving assured validity to that guidance by determining the validity of administrative rules wherever controversial in advance of their operation.”).

254. See *Bills to Provide for the More Expeditious Settlement of Disputes with the United States, and for Other Purposes: Hearings on H.R. 4236, H.R. 6198, and H.R. 6324 Before Subcomm. No. 4 of the H. Comm. on the Judiciary, 76th Cong. 132* (1939) [hereinafter *Walter-Logan Bill Hearings*] (reprinting the Report of the Special Committee on Administrative Law at the 1938 Cleveland Convention of the American Bar Association) (“There is no substantial difference between

no different. To accept that a court could give injunctive relief as in *Pierce* but to simultaneously deny the propriety of “a simple and direct proceeding to challenge a rule” would be to “stick in the bark, discarding substance and hewing to form.”²⁵⁵

The debate over Section 3 was intense and sustained; in that respect and others, it anticipated aspects of current debates concerning universal remedies. For our purposes, however, what matters about Section 3 of the Walter-Logan Bill is what it reveals about how Congress and contemporary observers understood the declaratory judgment. At a House Judiciary Committee hearing, Chester Lane, the general counsel of the Securities and Exchange Commission, commented that this provision gave the D.C. Circuit “the power to hold the rule contrary to law and invalid with the result that if it does the rule thereafter is without force and effect. It has no force and effect. That means that the court of appeals can wipe the rule off the books”²⁵⁶ A statement submitted by Ashley Sellers, head attorney of the Department of Agriculture’s Office of the Solicitor, mightily complained about the provision and stipulated *arguendo* that the bill be read to “prescribe[] a sufficient legal interest in the petitioner” and that “the term ‘declaratory judgment’ means just what it says.”²⁵⁷ Sellers then asked: “What is to be the effect of the court’s action? If the rule be declared ‘contrary to law and invalid,’ neither the rule, nor, of course, any portion of the departmental program dependent thereon would have any force and effect.”²⁵⁸ At the Senate, the Acting Secretary of the Treasury, Stephen Gibbons, warned in a letter reprinted in the *Congressional Record* that “a decision of the [D.C. Circuit] holding a rule invalid

this and preventive justice by means of a declaratory determination where present individual interests are threatened by exercise of administrative rule-making power.”).

255. *Id.* (“To admit that the courts may entertain such a proceeding as that in *Pierce vs. Society of Sisters*, and yet that they cannot entertain a simple and direct proceeding to challenge a rule of the same sort as that involved in the *Pierce case* because it does not take the form of a suit for an injunction but seeks a declaratory determination instead . . . is to stick in the bark, discarding substance and hewing to form.”).

256. *Id.* at 41 (statement of Chester Lane, General Counsel, Securities and Exchange Commission). Mr. Lane here referenced Section 2 of H.R. 4236, *id.* at 40, which contained the key language concerning declaratory judgments as to rules, *see supra* text accompanying note 242, that was ultimately contained in Section 3 of the Walter-Logan Bill. *Compare id.* at 2 (reprinting H.R. 4236, 76th Cong. § 2 (1939)), *with* H.R. DOC. NO. 76-986, at 13 (1940) (reprinting Walter-Logan Bill, H.R. 6324, 76th Cong. § 3 (1940)).

257. *Walter-Logan Bill Hearings*, *supra* note 254, at 84 (statement of Ashley Sellers, Office of the Solicitor General, Department of Agriculture). Mr. Sellers here referenced Section 2 of H.R. 4236. *See supra* note 256 (noting the overlap between Section 2 of H.R. 4236 and Section 3 of the Walter-Logan Bill).

258. *Walter-Logan Bill Hearings*, *supra* note 254, at 84 (statement of Ashley Sellers).

would be absolutely binding upon the Government,”²⁵⁹ though a rule that was sustained would remain vulnerable to subsequent attack. Similarly, Harry Slattery, the Acting Secretary of the Interior, wrote in a letter reprinted in the *Congressional Record* that the provision “would confer upon the [D.C. Circuit] a veto power over administrative regulations,” a power that Slattery regarded as violative of the separation of powers and of elemental principles of fairness.²⁶⁰

Ultimately, President Franklin Delano Roosevelt vetoed the Walter-Logan Bill. Roosevelt’s DOJ wrote a memo that accompanied the veto message.²⁶¹ With respect to judicial review of rules, the memo criticized the Walter-Logan Bill for opening the door to judicial resolution of “abstract legal questions.”²⁶² DOJ saw that “innocent-looking provision” as inviting courts to issue advisory opinions beyond Article III case-or-controversy limits by permitting suits by any person “substantially interested” rather than only by persons who had actually suffered Article III injury.²⁶³ Notably, however, the DOJ memo argued that the DJA *already allowed* persons injured within the meaning of Article III to obtain “a judgment as to the validity” of a rule: “Under the [DJA] any person may now obtain a judgment as to the validity of such administrative rules, if he can show such an interest and present injury therefrom as to constitute a ‘case or controversy.’ This bill removes that limitation, or it does nothing.”²⁶⁴ Thus, DOJ opined, the DJA was an already available mechanism for obtaining a judgment as to the validity of regulations, and that the objectionable innovation of this provision was that it expanded standing—not that it expanded the concept of what a declaratory judgment could accomplish. DOJ, which had every incentive to object to the Walter-Logan Bill, did not claim here that a declaratory judgment could *not* be used to remove “any force and effect” from a rule “held contrary to law and invalid.”²⁶⁵ To the contrary, its argument was predicated on its understanding that such a mechanism was *redundant with existing law*, insofar as existing law already allowed actions for declaratory judgments by parties with Article III standing.

Louis L. Jaffe, who was no fan of the Walter-Logan Bill, appears to have reached a similar conclusion. In a 1939 article, he commented that because of the DJA, “[n]o further legislation would be necessary” concerning judicial review of

259. See 84 CONG. REC. 5688 (1939) (letter from Stephen B. Gibbons, Acting Sec’y, Dep’t of Treasury).

260. 84 CONG. REC. 9487 (1939) (letter from Harry Slattery, Acting Sec’y, Dep’t of Interior, to Sen. Henry F. Ashurst).

261. H.R. DOC. NO. 76-986, at 5-12 (1940).

262. *Id.* at 7.

263. *Id.*

264. *Id.*

265. See *id.*

rules.²⁶⁶ In a 1941 article, Jaffe noted, “The proponents of the Logan-Walter bill believed that under existing arrangements there was insufficient opportunity for judicial review of rules.”²⁶⁷ Responding to that claim, Jaffe countered that “[t]here is, as a matter of fact, considerable available procedure for reviewing in one form or another the validity and impact of rules, although no doubt there are certain gaps.”²⁶⁸ He pointed to statutory review of rules under the Interstate Commerce Act, the FDCA, and other acts; noted that a person could raise the issue of validity in enforcement proceedings (though he noted that this method was “not satisfactory, as it requires risking a penalty to test the rule”); and then stated that “[t]here remain the common law suit for injunction, and the statutory Declaratory Judgment Act.”²⁶⁹ Jaffe explained that the problem with these methods, and in particular the latter, was that courts – “liberal’ judges”²⁷⁰ – too rigidly applied a requirement that litigants show threatened enforcement as a prerequisite to suit. It was a “mistake,” wrote Jaffe, to take that attitude with respect “to regulations, most of which are concerned with setting up schemes for the conduct of enterprise and the validity of which thus should be known in time to prevent waste and confusion.”²⁷¹ Jaffe commented that it was “unnecessary to any concept of controversy” and “disingenuous” for courts to require that plaintiffs demonstrate a “‘threat’ of enforcement in addition to a legitimate interest,” and concluded, “I think that the most hopeful attack on this problem is not more legislation, but an effort to educate the courts in a sensible use of the Declaratory Judgment Act.”²⁷²

266. Louis L. Jaffe, *Investive and Investigation in Administrative Law*, 52 HARV. L. REV. 1201, 1230-31 (1939) (describing a similar provision for judicial review of rules in the bill introduced by Senator Logan and contending that “there is nothing to warrant the risk [of the proposed provision]. Already in a number of cases, Congress has provided for review of rules; in still other cases the common-law remedy of injunction is quite adequate. . . . If a controversy is likely sooner or later to come to court, if time seems to promise little more in the way of revelation, and if it presses heavily upon practical conduct though not formal legal rights, then *there is a case for declaratory relief*. . . . The Declaratory Judgment Act with its doctrine of discretionary exercise can be used to place this jurisdiction on a more honest and dependable basis. *No further legislation would be necessary.*” (emphasis added)).

267. Louis L. Jaffe, *The Report of the Attorney General’s Committee on Administrative Procedure*, 8 U. CHI. L. REV. 401, 437 (1941).

268. *Id.*

269. *Id.* at 437-38.

270. *Id.* at 438 (“The Supreme Court in the past has displayed sporadic hostility to all types of declaratory procedure. This attitude, I believe, was primarily a tactic by the ‘liberal’ judges to preclude indiscriminate attacks on the constitutionality of statutes.”).

271. *Id.*

272. *Id.*

Let us pause to take stock: the material just canvassed tells us that Congress in 1940 approved of legislation that gave a court “the power . . . to render a declaratory judgment holding [a] rule . . . contrary to law and invalid” at the behest of any person “substantially interested.”²⁷³ DOJ responded to that legislation by explaining that the DJA itself *already* gave plaintiffs *with Article III standing* the ability to “obtain a judgment as to the validity” of rules.²⁷⁴ And a sharp-eyed commentator – Louis Jaffe – believed that “educat[ing] the courts in a sensible use of the Declaratory Judgment Act,” rather than “more legislation,” would be the best way to address the problem that the Walter-Logan Bill had sought to remedy with Section 3.²⁷⁵ The fact that the Walter-Logan Bill was vetoed – and vetoed, by the way, for a plethora of reasons extending well beyond judicial review of rules²⁷⁶ – does not change this pre-APA understanding of how a declaratory judgment could be employed in challenges to rules.

Six years later, the APA was enacted. The APA retreated from the Walter-Logan Bill’s relaxation of standing in challenges to rules. Rather than “refer[ring] to everyone who was ‘substantially interested’ or who was ‘aggrieved’ in a factual sense,” Section 10(a), now 5 U.S.C. § 702, instead “said that ‘[a]ny person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.’”²⁷⁷

What Congress did *not* do, however, was indicate any retreat from its previously enacted views of how a declaratory judgment could be used. Indeed, it relied on that previous understanding. Section 10(b), now 5 U.S.C. § 703, stated that litigants may seek a declaratory judgment when challenging agency action, including a regulation. With respect to this provision, the Senate Judiciary Committee Print expressly quoted DOJ’s earlier representations concerning the declaratory judgment:

In his letter accompanying the veto of the Logan-Walter bill, the Attorney General stated that “Under the Declaratory Judgments Act of 1934, any person may now obtain a judgment *as to the validity*

273. H.R. DOC. NO. 76-986, at 13 (1940).

274. *Id.* at 7.

275. Jaffe, *supra* note 267, at 438.

276. See H.R. DOC. NO. 76-986, at 1-4 (transmitting President Roosevelt’s veto of the Walter-Logan Bill to Congress).

277. Nelson, *supra* note 247, at 726 (quoting APA, ch. 324, § 10(a), 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. § 702)).

of * * * administrative rules, if he can show such an interest and present injury therefrom as to constitute a ‘case or controversy.’”²⁷⁸

It also noted that “[a]lthough the declaratory judgment ‘proceeding has not yet been extensively used to bring Federal administrative action before the Federal courts, its potentialities are indicated by its wide use in other fields.’”²⁷⁹ The Senate Judiciary Committee Report stated, “The declaratory judgment procedure, for example, may be operative before statutory forms of review are available; and in a proper case it may be utilized to determine *the validity* or application of agency action.”²⁸⁰ The House Judiciary Committee Report repeated that statement²⁸¹ and elaborated: “By such an action *the court must determine the validity* or application of a rule or order, render a judicial declaration of rights, and so bind an agency upon the case stated and in the absence of a reversal.”²⁸²

This legislative history shows that in enacting the APA, Congress regarded the “declaratory judgment procedure” as an available pathway to “determine the validity” of “a rule” and to “so bind an agency” to that judgment. Moreover, it shows that Congress expressly relied on DOJ’s earlier assurances that the DJA was an existing mechanism for persons with Article III standing to obtain a judgment “as to the validity of * * * administrative rules.”

Finally, the Attorney General’s Manual in 1947 took a position consistent with DOJ’s earlier stance.²⁸³ With respect to Section 10(c), Reviewable Acts, now 5 U.S.C. § 704,²⁸⁴ the Manual explained:

Many statutes which give rule making powers (particularly rules of general applicability) to agencies make no provision for judicial review of such rules. The validity of such rules has generally been open to challenge in proceedings for their enforcement. In addition, it has been suggested that in appropriate circumstances, review could be obtained in

278. APA LEGISLATIVE HISTORY, *supra* note 95, at 37 (emphasis added) (quoting H.R. DOC. NO. 76-986 (1940)). The omitted language in the original is the word “such.”

279. *Id.* (quoting JACKSON, *supra* note 121, at 81).

280. *Id.* at 212 (emphasis added) (reprinting S. REP. 79-752 (1945)).

281. *Id.* at 276 (reprinting H.R. REP. 79-1980 (1946)) (“Declaratory judgment procedure, for example, may be operative before statutory forms of review are available and *may be utilized to determine the validity* or application of *any agency action*.” (emphasis added)).

282. *Id.* (emphasis added); *cf.* H.R. REP. NO. 76-1149, at 4 (1939) (stating, in the House Judiciary Committee Report on Section 3 of the Walter-Logan Bill, that “a judgment entered holding a rule invalid would be binding upon the administrative agency concerned”).

283. See TOM C. CLARK, U.S. DEP’T OF JUST., ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 102 (1947).

284. 5 U.S.C. § 704 (2018) (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”).

proceedings under the Declaratory Judgment Act. It is clear from the legislative history that section 10(c) was not intended to provide for judicial review in the abstract of all rules.²⁸⁵

Noting the earlier debate over the Walter-Logan Bill concerning “direct judicial review of rules by declaratory judgment,” the Manual quoted the minority view of the Attorney General’s Committee on Administrative Procedure, which had stated that it was “unnecessary and unwise to provide for court review (except where otherwise required by particular statutes) of rules in the abstract,” but that “such review upon the application of the rule to a particular person, or upon accepted principles of declaratory judgment, should be expressly recognized.”²⁸⁶ From this, the Manual reasoned, “[E]ven the proponents of detailed provisions for judicial review of rules did not intend to prescribe an abstract form of review going far beyond the limitations of the Declaratory Judgment Act.”²⁸⁷ As this passage reflects, DOJ in 1947 did not deviate from its earlier stance: it read the APA as having rejected “an abstract form of review going far beyond the limitations of the Declaratory Judgment Act,”²⁸⁸ meaning challenges by persons without Article III standing.²⁸⁹ In short, the Manual recognized that “the APA did not alter what is still the law today – a plaintiff must have standing in order to obtain a judgment as to the validity of a rule.”²⁹⁰

To sum up, during the period leading up to the Walter-Logan Bill, the idea that a court could give a declaratory judgment that would “wipe the rule off the books”²⁹¹ was very much a live one. Out of all the possible forms of proceeding that Congress might have selected or invented to serve that function, the one it chose was the declaratory judgment. When it enacted the APA, Congress indicated no shift from its earlier conception of how a declaratory judgment could be used. Thus, *even if* we were to shoehorn remedies into Section 703 and close our eyes to Sections 705 and 706 – which we should not – universal vacatur would remain on the table.

285. CLARK, *supra* note 283, at 102 (internal citation omitted).

286. *Id.* (quoting *Administrative Procedure: Hearing on S. 674, S. 675, and S. 918 Before a Subcomm. of the S. Comm. on the Judiciary*, 77th Cong. 1344 (1941) (statement of Carl McFarland, Chairman, American Bar Association Special Committee on Administrative Law)).

287. *Id.* at 102-03.

288. *Id.*

289. *See supra* notes 262-263 and accompanying text.

290. Sohoni, *Power to Vacate*, *supra* note 4, at 1157. I am grateful to Professor Levin for encouraging me to note here that even when a plaintiff has Article III standing, prudential ripeness concerns may limit the availability of pre-enforcement review.

291. *Walter-Logan Bill Hearings*, *supra* note 254, at 41 (statement of Chester Lane, General Counsel, Securities and Exchange Commission).

C. *Post-APA Cases and the Meaning of Set Aside*

The APA was a major milestone in the long road towards the creation of a more practical and less formalistic system for challenging federal agency action. Over time, the formally distinct mechanisms that we have encountered – the numerous special statutory review provisions, the APA’s generic statutory review provision, and so-called “nonstatutory” methods of review, including the injunction and declaratory judgment – came to be assimilated into a unified concept, as parallel pathways to reach the same substantive endpoint: a review proceeding.²⁹² Just as the injunction and the declaratory judgment had earlier come to serve as “interchangeable methods for reviewing administrative action,”²⁹³ so, too, after the enactment of the APA, “general statutory review” under the APA and its more specific cousins (“special statutory review”) would likewise come to be regarded as parallel techniques for obtaining review.²⁹⁴ In *United States v. Jones*,²⁹⁵ the Court, in dicta, noted the “consonan[ce]” between review by district courts through their “equity or declaratory jurisdiction,” review under the APA, and review under the Urgent Deficiencies Act.²⁹⁶ By the 1950s, observers noted

292. See *Hameetman v. City of Chicago*, 776 F.2d 636, 640 (7th Cir. 1985) (Posner, J.) (“When an administrative action is judicially reviewable but no statute specifies the route to take to get judicial review, an aggrieved party can bring a suit against the responsible officials in a federal district court under 28 U.S.C. § 1331, the general federal-question statute. . . . Such a suit resembles an equity suit but is actually a review proceeding rather than an original proceeding.”). The APA itself underwrites this unified conception: it repeatedly references the “reviewing court” or the “review proceeding[.]” See 5 U.S.C. § 705 (2018) (“[T]he reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.” (emphasis added)); *id.* § 706(2)(F) (“The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.” (emphasis added)).

293. Note, *Williams v. Fanning Revisited: The Indispensable Superior in Judicial Review of Administrative Actions*, 54 COLUM. L. REV. 1128, 1134 n.31 (1954).

294. See, e.g., *Harmon v. Thornburgh*, 878 F.2d 484, 494 n.19 (D.C. Cir. 1989) (Wald, C.J.) (“Nor is it especially relevant that this case involves a suit for injunctive relief in district court rather than a petition for review to the Court of Appeals. The Administrative Procedure Act strongly suggests that the two avenues of review are analogous.”).

295. 336 U.S. 641 (1949).

296. Discussing a pre-APA case, *United States v. Griffin*, 303 U.S. 226 (1938), the *Jones* Court noted *Griffin*’s suggestion that “under their general equity jurisdiction,” the district courts “would have power, on finding a rate order invalid, . . . to remand the cause to the Commission In this respect the review afforded and the relief given would more nearly approximate that given by the Urgent Deficiencies Act in similar cases reviewable under its terms.” *Jones*, 336 U.S. at 671-72 (citation omitted). Noting the subsequent enactment of Section 10 of the APA, the *Jones* Court commented that Section 10 “adds force to the suggestion made in

that “the modern trend is to treat any suit to nullify agency action as a bill for review.”²⁹⁷ As Clark Byse wrote in 1962, “Whether an action for review is brought pursuant to specific or general statutory review provision, the theory of the action is the same: Congress has directed the court to review the administrative determination”²⁹⁸

In the decade after the APA’s enactment, lower courts obeyed this “direct[ive]” by (continuing) to review and invalidate regulations, as the cases described below will illustrate. This evidence of practice closely following the APA’s enactment sheds some light on the meaning of the statute. It is worth stressing that these litigants were often rebuffed on the merits at the Supreme Court. During this era, the Court was reluctant to interfere with administrative action and, on the whole, inclined to promote rather than hinder the operations of the administrative state.²⁹⁹ But these frequent rebuffs do not change the fact that, on those occasions in which lower courts did find rules invalid, they issued sweeping remedies against those rules. Moreover, where universal remedies are concerned, it is helpful to understand how lower courts understood their powers. The Court’s decisions are effectively universal anyway, but a lower court that wants to settle a question universally must be clear it is doing so.

Let us begin with *Ramspeck v. Federal Trial Examiners Conference*, in which the Court considered a suit brought by trial examiners seeking to invalidate rules the Civil Service Commission (CSC) promulgated relating to their promotion, compensation, tenure, and case assignments.³⁰⁰ The suit was filed in the D.C. federal district court by the Federal Trial Examiners Conference, a “voluntary, unincorporated association whose membership consists of approximately 150 hearing examiners and several of its members and on behalf of those examiners

[*Griffin*] Such review under the equity or declaratory jurisdiction of those courts would seem to afford a remedy consonant with § 10 of the [APA] and also more nearly like that afforded by the Urgent Deficiencies Act, though without its expediting features.” *Id.* at 672. The Court further noted that “[t]he relief afforded . . . could thus be limited to setting aside or enjoining the Commission’s order and remanding the cause to it for further consideration, as is done in like cases reviewable by three-judge courts.” *Id.* at 672-73.

297. See *Remedies Against the United States and Its Officials*, *supra* note 113, at 901.

298. Byse, *supra* note 93, at 1480; *id.* (“[S]o long as the statute does not transgress constitutional limitations, it is the court’s duty to comply with the congressional directive.”).

299. See LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 565 (1965) (“In the 1940’s judicial deference to administrative policy became one of the central credos of our administrative law.”); Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History*, 123 YALE L.J. 266, 283, 285 (2013) (providing a rich account of how legislative history in this period came to serve as a “key element of [the Court’s] larger acceptance of an agency-centered vision of governance”).

300. 345 U.S. 128, 129 (1953).

‘similarly situated.’³⁰¹ The plaintiffs complained that the new civil-service regulations were unlawful and void as violative of Section 11 of the APA. They sought preliminary and final injunctive relief forbidding the defendant federal officers from enforcing the challenged regulations and from enforcing any future regulations concerning hearing examiners without first going through formal rulemaking; they further sought a declaratory judgment that the regulations were void.³⁰²

The *Ramspeck* district court (a single-judge court, not a three-judge court) granted summary judgment mostly in favor of the plaintiffs.³⁰³ It then issued an order that

[a]djudged, declared, ordered and decreed that, for the reasons set forth in the Memorandum Opinion . . . [the listed sections of the challenged rules] are invalid and void as contrary and in violation of Section 11 of the [APA], and it is further [a]djudged, ordered and decreed that the Defendants, their officers, agents . . . be and they hereby are enjoined from, directly or indirectly, enforcing, applying, or taking any action under or pursuant to those sections of the [challenged rules], which have been herein declared to be invalid and void.³⁰⁴

Thus, the district court both declared the rules invalid and void and universally enjoined their enforcement. The D.C. Circuit affirmed.³⁰⁵ The Supreme Court held that the rules were valid and reversed. As to remedies, though, the majority clearly recognized that the lower court had held the rules invalid and enjoined their enforcement.³⁰⁶ The three Justices in dissent, for their part, stated

301. Transcript of Record at 56, *Ramspeck*, 345 U.S. 128 (No. 278). The complaint stated that one of these members, J. Edgar Snider, “brings this action for and on behalf of himself individually and as a member and the representative of said Federal Trial Examiners Conference, and on behalf of all examiners similarly situated. . . . [T]he members of said Conference, and said examiners similarly situated, are too numerous and it is impractical to bring all of them before this Court and this cause of action is of general and common interest to said Conference and to each, every and all of the members thereof and all other examiners.” *Id.* at 57.

302. *Id.* at 68–69.

303. *Fed. Trial Exam’rs Conf. v. Ramspeck*, 104 F. Supp. 734 (D.D.C. 1952).

304. Transcript of Record, *supra* note 301, at 112–13.

305. *Ramspeck v. Fed. Trial Exam’rs Conf.*, 202 F.2d 312, 312 (D.C. Cir. 1952) (per curiam). Judge Bazelon dissented on the merits, but he made no objection to the form of proceeding or the scope of relief below, which he evidently understood as having invalidated the regulations under review. *Id.* at 313 (Bazelon, J., dissenting) (“Each of these regulations is held by the trial court and this court to be invalid because it falls outside the scope of the governing statute.”).

306. *Ramspeck*, 345 U.S. at 129–30 (“The District Court held that these four rules were invalid The District Court granted a permanent injunction against the enforcement of these

that “these regulations should be held invalid and the judgment affirmed for substantially the reasons” the district court stated.³⁰⁷

It is patent in *Ramspeck* that everyone understood that this suit, which was brought under the APA, was about whether or not these rules were invalid – full stop. The plaintiffs were not asking that the rules be “set off to one side” and disregarded. Nor is there any way in which the plaintiffs’ complaint could have been redressed by a declaratory judgment that simply stated, “The trial examiners had no duty to comply with these rules.” Either form of judgment would have been completely meaningless in such a suit. Nor was the relief afforded by the lower court limited only to the association and the named hearing examiners. Instead, the relief sought (and temporarily won) was a universal injunction and a declaration that the rules were “invalid and void” – what we now call a universal vacatur.

The following year, in *FCC v. American Broadcasting Co. (ABC)*,³⁰⁸ the Court considered a challenge to FCC interpretive rules pertaining to “giveaway” programs. Radio and television audiences for programs such as “Stop the Music” and “What’s My Name” could win prizes from broadcasters of these programs as a reward for answering a question or solving a problem broadcast on air. The FCC deemed this quaint form of entertainment to violate a statute that criminalized broadcasting of a “lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance.”³⁰⁹ Based on this interpretation, the FCC’s new regulations provided that licenses would not be granted or renewed for applicants who broadcast the verboten forms of entertainment. The three major broadcasting companies filed suit in the Southern District of New York, under the APA and the Communications Act, seeking that the court “enjoin[], set[] aside, and annul[]” the FCC order promulgating the rules.³¹⁰ A three-judge district court held that the FCC lacked authority to issue specified paragraphs of the challenged rules.³¹¹ It then entered a judgment that “ordered, adjudged and decreed” that the FCC be “permanently restrained and enjoined

four Civil Service rules.”); *id.* at 137-38 (“We come next to Rule 34.4 This rule was held invalid by the District Court”); *id.* at 139 (“The lower courts accepted the respondents’ view and held Rule 34.12 invalid.”); *cf. id.* at 143 (“The rules conform to the statute and carry out the purpose and intent of Congress, and they are therefore valid.”).

307. *Id.* at 143 (Black, J., dissenting).

308. 347 U.S. 284 (1954).

309. *Id.* at 285 (quoting 18 U.S.C. § 1304).

310. *Am. Broad. Co. v. United States (ABC)*, 110 F. Supp. 374, 378 (S.D.N.Y. 1953) (internal quotation marks omitted).

311. *Id.* at 390.

from enforcing” the specified provisions³¹² and that “the Order of said defendant [FCC] . . . to the extent that it adopted [the specified provisions] is vacated and set aside.”³¹³

The Supreme Court affirmed unanimously, agreeing with the challengers that “giveaway” programs were not lotteries within the meaning of the relevant criminal law.³¹⁴ Here, as in *Ramspeck*, the litigants and courts understood that at issue in the case was whether the FCC’s giveaway rules should be universally vacated. The networks sought invalidation of the rules, not that they be “set to one side” and disregarded. Observe that in this case (unlike *Ramspeck*) the lower court could sensibly have entered a declaratory judgment that stated, “the three plaintiff networks have no duty to comply with these interpretive rules.” But that is not, in fact, the order that the lower court entered. Instead, the order that it entered—and that the Supreme Court affirmed—“vacated and set aside” the offending provisions of the rules.³¹⁵ This relief is just like the pre-APA cases (e.g., *Baltimore & Ohio*³¹⁶) and many modern-day universal vacatur.

Two years on, in *United States v. Storer Broadcasting*, a broadcasting company challenged FCC regulations known as “Multiple Ownership Rules” that restricted any single entity from owning too many television broadcast licenses within a designated geographic area.³¹⁷ The case was brought under the APA and the Communications Act by petition in the D.C. Circuit.³¹⁸ The company argued that the rules exceeded the FCC’s statutory authority.³¹⁹ The relief that Storer sought was not that the court *disregard* the rules or exempt just Storer from complying with them. Rather, Storer asked that the court “vacate the provisions of the Multiple Ownership Rules insofar as they denied to an applicant already controlling the allowable number of stations a ‘full and fair hearing’ to determine whether additional licenses to the applicant would be in the public interest.”³²⁰ The D.C. Circuit “struck out” selected words from the regulations

312. Transcript of Record at 138, *ABC*, 347 U.S. 284 (No. 117) (“[P]laintiff’s motion for summary judgment is granted to the extent that defendants are permanently restrained and enjoined from enforcing subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of defendant Federal Communications Commission’s Rules adopted August 18, 1949 . . .”).

313. *Id.*; see also *id.* at 238 (issuing the same order for NBC); *id.* at 296-97 (issuing the same order for CBS).

314. *ABC*, 347 U.S. at 296-97.

315. *ABC*, 110 F. Supp. at 390.

316. See *supra* notes 132-140 and accompanying text.

317. 351 U.S. 192, 193 (1956).

318. See *id.* at 194-95.

319. *Id.*

320. *Id.* at 200.

and remanded the case back to the agency “with directions to eliminate these words.”³²¹ On review, the Court held that the original regulations were lawful and therefore undid the court of appeals’ edits, but the Court did not question the court of appeals’ power to make such edits.³²² In a separate opinion, Justice Harlan objected that the lower court lacked jurisdiction because Storer was not yet “aggrieved” by the regulations.³²³ While Harlan would have made Storer wait for a license denial rather than allow Storer to seek relief immediately, he did not contend that the lower court had acted in any surprising way when it “struck out” select language from the agency’s regulations.

What has been recounted here shows that in the decade following the APA, courts and litigants continued to speak of setting aside, vacating, and/or invalidating federal regulations in exactly the same terms as courts do today. To repeat a point earlier made, the fact that decrees worded and understood in these terms existed before the APA,³²⁴ continued to be issued after it, and are still being granted in the present day demonstrates a continuing pattern of both linguistic usage and conceptual understanding that should carry significant weight.

D. *The Focus on Reviewability and Abbott Labs*

The foregoing has shown that both before and after the APA, the courts “set aside” regulations universally in a variety of cases. Today, this remedy has achieved such enormous salience that it naturally raises the question: how could people have missed this? As Justice Gorsuch put it, drawing on Professor Harrison’s work: “[I]t is odd that leading scholars who wrote extensively about the APA after its adoption apparently never noticed this supposed remedy. . . . These are not people who would have missed such a major development in their field.”³²⁵

Unsurprisingly, these scholars did not miss this. It is just that their eyes were trained on a different question: not on remedial scope but on reviewability or ripeness, which they regarded as the question that really mattered. They were familiar with cases in which courts had invalidated regulations. But they were interested in what these cases said about the reviewability of the agency action

321. *Id.*

322. *Id.* at 205-06.

323. *Id.* at 208 (Harlan, J., concurring in part and dissenting in part). Justice Frankfurter agreed that Storer was not aggrieved but dissented separately. *Id.* at 213-14 (Frankfurter, J., dissenting).

324. See *supra* text accompanying notes 174-177.

325. *United States v. Texas*, 599 U.S. 670, 699 (2023) (Gorsuch, J., concurring) (citing Harrison, *Vacatur of Rules*, *supra* note 5, at 127-28).

vel non. And although one can only glean so much about their views on subjects that they did not expressly address, they appeared to take it simply as a given that once a regulation *was* deemed reviewable, that review would resolve the validity or invalidity of the regulation. The remainder of this Section begins by discussing these scholars. It then turns to examine a related contention—one that Justice Gorsuch did not advance—that the litigants and justices in the *Abbott Labs* trilogy were “not familiar” with the remedy of universal vacatur.³²⁶

Begin with Davis. Like Borchard before him,³²⁷ Davis had very little patience with procedural intricacies that produced fruitless litigation and prevented courts from reaching the merits when it was sensible to do so. As Davis exhorted, “Attention should be directed to problems having practical significance—whether particular action should be reviewable, whether the time is ripe for review, what the scope of judicial inquiry ought to be. . . . Focus attention then on the problems having significance—whether, when, and how much to review.”³²⁸ He praised the efficiency of the special statutory review provisions.³²⁹ And he approved of the “general utility remedies” of the declaratory judgment and injunction, which concentrated the “attention of courts and of counsel upon the merits of cases, where attention should be focused, instead of upon technicalities about forms of proceeding.”³³⁰ He rejected the idea that ripeness for review should “depend upon historical accidents about origins of particular remedies.”³³¹ Davis’s view, in short, was that reviewable agency action should be reviewed when it was sensible to review it.

Davis was well acquainted with the cases we have seen in which litigants sought and obtained decrees that invalidated and set aside regulations. For example, he stressed that “regulations of the ICC and of the FCC have been challenged by suits for injunctions under the Urgent Deficiencies Act; if a suit under that Act is not premature, no reason is apparent for holding premature an

326. See Harrison, *Vacatur of Rules*, *supra* note 5, at 129–31; see also *id.* at 129 (“The parties and the Justices [in *Abbott Labs*] assumed that relief in pre-enforcement cases takes the form of injunctions and declarations, and did not mention vacatur. Their failure to discuss vacatur of regulations where it would have been relevant shows that they were not familiar with that remedy.”).

327. See *supra* text accompanying notes 228–243.

328. KENNETH CULP DAVIS, ADMINISTRATIVE LAW 719 (1951) [hereinafter, DAVIS, 1951 TREATISE].

329. *Id.* at 720.

330. 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW § 24.05, at 420 (1958) [hereinafter 3 DAVIS, 1958 TREATISE].

331. DAVIS, 1951 TREATISE, *supra* note 328, at 734; see also *id.* (“If on the merits of the ripeness question, particular administrative action should or should not be reviewed, the result probably should be the same whether the proceeding is a statutory petition for review, statutory injunction, equity injunction, declaratory judgment, or one of the extraordinary remedies.”)

ordinary bill in equity or a declaratory action.”³³² And he commented that even though the Urgent Deficiencies Act spoke in terms of reviewing “any order” of the relevant agency, “[u]nder the decisions, a usual meaning of the word ‘order’ is both expanded and restricted. *Rules are reviewable.*”³³³ The cases he cited in these passages should now be familiar: *The Assigned Car Cases*, *Baltimore & Ohio*, and *CBS*,³³⁴ all of which were suits seeking to set aside regulations. With respect to *CBS*, he explained, “[T]he broad practicality is that the party most directly affected by the regulation is the network. . . . The position that such a party may not raise the question of the regulations’ validity . . . seems artificial and impracticable.”³³⁵ As to *Ramspeck*, Davis described it as a case in which the Court “passed upon the validity of the regulations without deciding the problem of ripeness.”³³⁶ With respect to *ABC*, the “giveaway” lottery case, Davis noted that the networks had brought “[a]n action to test the regulations” in advance of their enforcement and that the Court “held invalid” the regulations.³³⁷ Davis cautiously agreed the *ABC* Court was correct to reach the merits: “[T]he result may be sound from the standpoint of the practical fact[] that a concrete application was unnecessary to a careful consideration of the validity of the regulations”³³⁸

If Davis had any objection to the sweeping relief that lower courts had issued in these cases, he did not say so. Echoing Borchard,³³⁹ Davis noted that “[t]he long-standing tradition of making judicial machinery available for removing clouds on title to real estate is entirely sound,” and he asserted that it “should be used as an analogy for allowing the removal of clouds on business or other activity whenever the continued uncertainty causes substantial harm and whenever a controversy exists over the validity of the governmental action creating the uncertainty.”³⁴⁰ With respect to injunctions, he noted that “[a]n equity court has power to grant the relief it finds to be appropriate and practical in the

332. 3 DAVIS, 1958 TREATISE, *supra* note 330, § 21.06, at 150-51.

333. DAVIS, 1951 TREATISE, *supra* note 328, at 795 n.459 (emphasis added).

334. See 3 DAVIS, 1958 TREATISE, *supra* note 330, § 21.06, at 150 n.2 (citing *Baltimore & Ohio* and *The Assigned Car Cases*); DAVIS, 1951 TREATISE, *supra* note 328, at 795 n.459 (citing *Baltimore & Ohio* and *CBS*); see also DAVIS, 1951 TREATISE, *supra* note 328 at 532 (noting that *Baltimore & Ohio* “unanimously held the [ICC] order void”).

335. DAVIS, 1951 TREATISE, *supra* note 328, at 651.

336. 3 DAVIS, 1958 TREATISE, *supra* note 330, § 21.06, at 166.

337. *Id.* at 155.

338. *Id.* at 156.

339. Borchard, *supra* note 229, at 454 (“The statute or regulation now constitutes the cloud which plaintiff has the right to challenge and, if successful, to remove.”); see *supra* note 242.

340. 3 DAVIS, 1958 TREATISE, *supra* note 330, § 21.10, at 203.

circumstances”³⁴¹ and did not suggest that this equitable relief must be limited to enjoining agency action only “as to the plaintiff.”

It is true that Davis did not use the precise term “vacatur” in describing the relief that litigants had obtained or could obtain.³⁴² Interestingly, though, he supplied litigants with various roadmaps for obtaining just that sort of relief. In the Appendix of Forms to his 1958 treatise,³⁴³ Davis set out a variety of model complaints. The form for a generic “Complaint in Suit for Injunction and Declaratory Judgment” unfortunately is modelled on a suit challenging an individualized agency action rather than a rule,³⁴⁴ so it does not shed very much light here. Even still, it notably does pray that the agency action be invalidated,³⁴⁵ not that the plaintiff be declared to have no duty to comply with the agency’s requirement. Form 107, however, sets out a “Complaint for Injunction under Urgent Deficiencies Act” in “an action to set aside, annul and permanently enjoin the enforcement of certain portions of an order of the Interstate Commerce Commission.”³⁴⁶ The prayer for relief is that “the Court set aside, annul and permanently enjoin the enforcement of that portion of the order of the Commission *which promulgates the Rules* complained of in Paragraph Seven and that the Court grant the plaintiff such other and further relief as may be just and equitable.”³⁴⁷ Form 108, a “Petition to Review” under the Hobbs Act, asks that an FCC order be annulled: “[Y]our Petitioner prays this Honorable Court to set aside and annul the abovementioned order of the [FCC]”³⁴⁸ As we have now seen ad nauseam, orders were used (and still are used) to promulgate rules of broad application. Similar to the decisions we have encountered, these model complaints treated the setting aside and annulling of agency action, including agency action promulgating rules, as a proper sort of relief.

Let us now turn to Jaffe. Like Davis, he was much more interested in examining whether an agency action was reviewable than in spelling out the remedial

341. *Id.* § 23.10, at 339.

342. Davis did, however, use “set aside” as a synonym for “void.” DAVIS, 1951 TREATISE, *supra* note 328, at 532 (noting that *Baltimore & Ohio R.R.* “unanimously held the [ICC] order void Even that part of the order applying to locomotives built on or after April 1, 1933, was *set aside*.” (emphasis added)).

343. See 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 374-95 (1958) [hereinafter 4 DAVIS, 1958 TREATISE].

344. *Id.* at 374.

345. *Id.* at 375 (“Wherefore, plaintiff demands that the Court adjudge, decree and declare: . . . [t]hat said condition No. 4, hereinabove set forth, is unauthorized by law and beyond the power of said defendant to impose or enforce, and is invalid, null and void.”).

346. *Id.* at 378.

347. *Id.* at 379 (emphasis added).

348. *Id.* at 379-80.

consequences if the agency action was ultimately nullified.³⁴⁹ After surveying several of the cases discussed above,³⁵⁰ Jaffe noted that a 1956 case—*Frozen Food Express v. United States*³⁵¹—could be generalized as holding that “a regulation of any agency is as such reviewable as against a claim that it is not ripe.”³⁵² He noted that the existence of a special statutory review provision might matter for the reviewability determination: “If the statute setting up at the agency provides a method for review of ‘orders’ (as with the ICC, the FCC, etc.), the regulation would appear to be reviewable as such.”³⁵³ But, similar to Davis, he thought that if no special statutory review provision applied, a “review of any formal act whether by declaratory or equity procedure” should be available if the act would be reviewable under the “general principles deducible” from special statutory review cases.³⁵⁴

Jaffe did not speak in precise terms of “vacatur” of regulations. He clearly understood, however, that courts could invalidate regulations. In a discussion of standing, Jaffe placidly noted that in *Wirtz v. Baldor Electric Co.*,³⁵⁵ “it was held that the relief granted to wit: the invalidation of a questioned regulation should run not only to ‘persons aggrieved,’ but to everyone who may in future be subject to the regulation. In other words, *the regulation as such should be invalidated.*”³⁵⁶ In discussing reviewability, Jaffe explained the benefits of judicial review of the

349. For a very grouchy review of Jaffe’s treatment of remedies, see Kenneth Culp Davis, “*Judicial Control of Administrative Action*”: A Review, 66 COLUM. L. REV. 635, 641 (1966), which complained that “[t]he central feature of [Jaffe’s] chapter [on remedies] is its extensive treatment of certiorari and mandamus. Injunction is given less than a page and declaratory relief less than half a page.”

350. JAFFE, *supra* note 299, at 400-04 (discussing *The Assigned Car Cases*, *CBS*, and *Storer*); *id.* at 396 (describing *Ramspeck* as a class suit “attacking as invalid” the civil-service regulations).

351. 351 U.S. 40, 44-45 (1956) (holding reviewable an ICC order that made findings as to whether certain commodities fell within an exemption of the Interstate Commerce Act).

352. JAFFE, *supra* note 299, at 407 (“[W]here there has been formal action, as the adoption of a regulation, the teaching of *Frozen Food* is that presumptively the action is reviewable.”).

353. *Id.* at 407; *cf. id.* at 170 (noting that New Jersey, “which has an outstandingly liberal view of the uses of certiorari, does allow review of the zoning ordinance as such”).

354. *Id.* at 408 (“[W]here no provision for review is made, the general principles deducible from those [Urgent Deficiencies Act] cases should govern a review of any formal act whether by declaration or equity procedure. The failure to provide for review may, of course, suggest a question of reviewability *vel non*. But if that obstacle is hurdled, the principles developed in the Urgent Deficiencies Act cases should govern.”).

355. 337 F.2d 518 (D.C. Cir. 1964).

356. JAFFE, *supra* note 299, at 524 n.85 (emphasis added). As earlier noted, *Wirtz* was an APA suit in which the D.C. Circuit ordered that a nationwide injunction should be granted against a Department of Labor minimum-wage determination, *Wirtz*, 337 F.2d at 535, and the district court subsequently invalidated the determination and universally enjoined its enforcement. *See supra* note 107; *see also* Sohoni, *Lost History*, *supra* note 4, at 991-93 (discussing *Wirtz*).

legality of regulations. “[M]uch administration,” he wrote, “warrants review in situations lacking some traditional aspects of finality. I refer to administration which regulates in fairly comprehensive fashion, in a fashion which determines, not isolated transactions, but the organization and operation of an enterprise.”³⁵⁷ In such situations, “[t]he public has an interest in early implementation of policy; the regulated person has a legitimate interest whether to plan or not to plan his operation on the basis of a regulation.”³⁵⁸ All this, he reasoned, counseled in favor of “review as soon as it becomes possible to frame the issues in a form on which the judicial power can act effectively.”³⁵⁹ The role of the court, he said, was to “provide efficiently, with due regard for its limited competence, the service which it is duly bound to give to those who have a legitimate interest in the legality of the challenged action.”³⁶⁰ It is unlikely that Jaffe would have regarded a regime of plaintiff-by-plaintiff individualized court decisions that left rules of uncertain legality in place for an extended period time as “efficient[.]” or desirable; as noted above, Jaffe felt that “regulations, most of which are concerned with setting up schemes for the conduct of enterprise” should have their “validity . . . known in time to prevent waste and confusion.”³⁶¹

The takeaway from all of this is that Davis’s and Jaffe’s failure to use the term “vacatur” expressly is hardly a damning silence. To these scholars, the noteworthy feature of cases that resulted in the wholesale invalidation of regulations was what these cases said about when regulations were reviewable. They did not question that once an agency action, including a rule, was deemed reviewable, the court would determine its validity *vel non*.

Soon after Davis’s treatises and Jaffe’s book, the *Abbott Labs* trilogy clarified and settled the law concerning the reviewability of regulations.³⁶² Like Davis and Jaffe, the litigants and courts involved in these cases were chiefly focused on the question of reviewability or ripeness. As to remedies, though, the stakes were clear. There was zero mystery about the relief that would follow if the regulations *were* held to be reviewable and were then held unlawful.

357. JAFFE, *supra* note 299, at 404.

358. *Id.*

359. *Id.*; *cf. id.* at 170 (noting, in a discussion of certiorari, that “[i]f the administrative action should not be reviewable at all, or if certain administrative remedies should first be exhausted, let it be so held; otherwise let review proceed”).

360. *Id.* at 404.

361. See Jaffe, *supra* note 267, at 437-38.

362. *Abbott Lab’s v. Gardner (Abbott Labs)*, 387 U.S. 136, 149-50 (1967) (allowing a pre-enforcement challenge to an FDA drug-labelling regulation); *Toilet Goods Ass’n v. Gardner*, 387 U.S. 158, 162 (1967) (holding that a challenge to an FDA inspection regulation was unripe); *Gardner v. Toilet Goods Ass’n*, 387 U.S. 167, 170-71 (1967) (holding that challenges to three FDA regulations concerning color additives were ripe for review).

The trilogy comprised three decisions regarding cases that came up from two separate courts involving two different sets of FDA regulations. The District of Delaware plaintiffs – several drug companies and an association of drug manufacturers – challenged an FDA regulation (the “every time” requirement) mandating certain requirements for drug labels and advertisements.³⁶³ The case was filed in the district court in Delaware under the ordinary venue rules, not under a special statutory review provision.³⁶⁴ The Delaware plaintiffs prayed that the court “issue a judgment declaring that the [challenged regulations] . . . are null and void and of no effect, and that the statutory provisions on which they purportedly are based do not impose, or authorize the defendants to impose, the requirements which they embody”³⁶⁵ They also sought an injunction that would “enjoin and restrain the defendants and [their agents, etc.] from enforcing or causing to be enforced, or from attempting to enforce or to cause to be enforced, by any administrative action or civil or criminal proceeding, the requirements of such regulations”³⁶⁶

The Delaware district court held for the plaintiffs.³⁶⁷ The parties disagreed about whether the judgment should include only the declaration or the universal injunction as well.³⁶⁸ Siding with the plaintiffs, the court issued a judgment that declared the regulations “null and void and of no effect”³⁶⁹ and entered a permanent universal injunction against the regulations’ enforcement to boot.³⁷⁰ The Third Circuit noted that the district court had “not only declared the regulations

363. *Abbott Lab’s v. Celebrezze (Abbott Labs)*, 228 F. Supp. 855, 858 (D. Del. 1964).

364. *See id.* at 858-59.

365. Transcript of Record at 16, *Abbott Labs*, 387 U.S. 136 (No. 39); *see also Abbott Labs*, 228 F. Supp. at 862 (noting that plaintiffs sought “a declaration that the statutory provisions on which the contested regulations are based ‘do not impose, or authorize the defendants to impose’ the requirements which the regulations embody”).

366. Transcript of Record, *supra* note 365, at 16-17.

367. *Abbott Labs*, 228 F. Supp. at 864.

368. *See* Transcript of Record, *supra* note 365, at 58 (letter from Gerhard A. Gesell, Att’y, Covington & Burling LLP, to Caleb M. Wright, C.J., Dist. of Del.); *id.* at 61-62 (letter from William J. Wier, Jr., Assistant U.S. Att’y, Wilmington, Del., to Caleb M. Wright, C.J., Dist. of Del.).

369. *Id.* at 62-63 (“It is . . . hereby declared, adjudged and ordered by the Court as follows: . . . That [the challenged regulations], insofar as these sections require that the established name of a prescription drug must accompany each appearance of such drug’s proprietary name or designation, are null and void and of no effect, and the statutory provisions on which they are based do not impose, or authorize the defendants to impose, the requirements which they embody.”).

370. *See id.* at 63 (“That the defendants and each of them, and all persons acting under their direction and authority . . . are hereby perpetually enjoined and restrained from enforcing or causing to be enforced, by any administrative action or civil or criminal proceeding, the requirements of said regulations enumerated [above][.]”).

void . . . but also issued a sweeping injunction against the enforcement thereof.³⁷¹ In the Third Circuit’s view, however, the suit was not justiciable because no “threat of enforcement” had been made.³⁷²

The litigants in the Southern District of New York challenged a different set of FDA regulations concerning color additives in cosmetics.³⁷³ The New York plaintiffs were a group of individuals and companies that sold cosmetics and an association of cosmetics manufacturers.³⁷⁴ They sought relief similar to what the Delaware plaintiffs sought: a universal injunction and a declaration holding the regulations “null and void.”³⁷⁵ The government took an interlocutory appeal from the New York district court’s denial of the motion to dismiss, so the district court ultimately did not enter a judgment. At the Second Circuit,³⁷⁶ which held ripe the challenges to three of the four provisions at issue, Judge Friendly described the suit as one seeking “a declaratory judgment that four provisions of the Regulations exceeded the authority conferred by the statute.”³⁷⁷ Judge Friendly, like Davis and Jaffe, saw “the critical issue” as reviewability,³⁷⁸ or *when* a court should “pass[] judgment on the validity of an administrative regulation”³⁷⁹ (or “subject [it] to immediate frontal attack”³⁸⁰), not what would happen in the sequel if the court were to decide the rule was invalid. Notably, Judge

371. *Abbott Lab’s v. Celebrezze (Abbott Labs)*, 352 F.2d 286, 288 (3d Cir. 1965).

372. *Id.* at 290.

373. *Toilet Goods Ass’n v. Celebrezze*, 235 F. Supp. 648, 649 (S.D.N.Y. 1964).

374. *Id.*

375. *Id.* at 649–50 (“More specifically, plaintiffs contend that the challenged regulations exceed the authority vested in the FDA . . . and pray that the court declare the regulations null and void and enjoin their enforcement.”); *see also* Transcript of Record at 41, *Toilet Goods Ass’n v. Gardner*, 387 U.S. 158 (1967) (Nos. 336, 438) (attaching the complaint requesting “a judgment declaring that [the challenged provisions] . . . are in excess of the statutory jurisdiction, authority and limitations of the defendants, and contrary to the statutory provisions on which they purport to be based, and are null and void and of no effect”); Transcript of Record, *supra*, at 43 (requesting that the court “[e]njoin and restrain the defendants . . . from enforcing or causing . . . to be enforced, by any administrative action or civil or criminal proceeding or otherwise, the provisions of the Color Regulations alleged herein to be in excess of the statutory authority granted to the Secretary under the Act and to be null and void and of no effect”); Transcript of Record, *supra*, at 43 (requesting that the court “[i]ssue a preliminary injunction enjoining and restraining the defendants and said persons from enforcing or causing to be enforced, by any administrative action or civil or criminal proceeding or otherwise, said provisions of the Color Regulations, and to preserve the status and rights pending conclusion of this action”).

376. *Toilet Goods Ass’n v. Gardner*, 360 F.2d 677, 679 (2d Cir. 1966).

377. *Id.*

378. *Id.* at 684.

379. *Id.*

380. *Id.* at 685.

Friendly had before him the decisions from the Third Circuit litigation, and he thought that the Delaware district court had been justified in granting declaratory relief³⁸¹—relief that, recall, had declared the “every time” rules “null and void and of no effect.”³⁸²

As the cases came to the Supreme Court, then, the remedial stakes were clear on the face of the record. In arguing that the “every time” regulations were not subject to pre-enforcement review, the government’s merits brief relied heavily on the FDCA’s legislative history.³⁸³ Contending that the judicial review provisions of the statute had been crafted to “meet the objections” of the House Committee’s minority members, the government stressed that these members “were concerned that ‘a single district judge could be found who would issue an injunction’ against the enforcement of a regulation, and [they] therefore opposed any provision which would ‘clothe *each and every district judge* with authority to block the enforcement of a regulation throughout the United States.’”³⁸⁴ The government argued that for the Court to allow such pre-enforcement challenges in district courts could cause a “[m]ultiplicity of suits” and asymmetric effects for the government: “[i]f pre-enforcement review were held to be available . . . , each of the plaintiffs in this action and in *Toilet Goods* would be able to sue separately in the district where that plaintiff resided,” and “[a] judgment in favor of the [FDA] in any one of such actions would not, of course, be binding in a suit brought by another plaintiff in a different district.”³⁸⁵ The government painted a crystal-clear picture—and it should be a familiar picture—of what it would mean for the Court to give the go-ahead to pre-enforcement review of these regulations in district courts: individual district court judges scattered around the country would be empowered to block the enforcement of regulations nationwide and to declare them invalid, just as the Delaware district court had done. And even if the government won such a suit, it would have to litigate all over again when another plaintiff brought suit.

The government hoped that, at least in this case, the language and legislative history of the FDCA would allow it to escape that result. In deciding the *Abbott Labs* trilogy, though, the Court rejected that argument, both as to the “every time” regulations and as to the substantive regulations on color additives in

381. *Id.* at 687 (“[W]e must confess, with all respect, our inability to understand why the plaintiffs there [in *Abbott Labs*] should be required to violate the challenged FDA regulation in order to raise the same legal issue as to which the district court had granted declaratory relief. Insofar as the *Abbott* decision rested on a negative implication from the limited review provisions of the Food and Drug Act, we have already noted our inability to agree.”).

382. *See supra* note 369 (quoting the Delaware judgment).

383. Brief for the Respondents, *supra* note 42, at 9–26.

384. *Id.* at 21 (emphasis added) (quoting H.R. REP. NO. 2139, pt. 2, at 2 (1938)).

385. *Id.* at 33.

cosmetics.³⁸⁶ Following the path suggested by Jaffe, by Davis, and most of all by Judge Friendly, the Court held that the FDCA did not bar pre-enforcement review and that the challenges to these rules were ripe.³⁸⁷ And it is clear from the opinions that the Court had thought through and understood that a successful pre-enforcement challenge would invalidate a regulation. With respect to the “every time” rule, the Court noted that “[i]f the Government prevails, a large part of the industry is bound by the decree; *if the Government loses, it can more quickly revise its regulation.*”³⁸⁸ The Court also addressed how the government might manage a scenario in which multiple pre-enforcement challenges to a rule were brought by multiple plaintiffs suing separately around the country. Notably, the Court did *not* say, “each such suit could, of course, result in only plaintiff-specific declaratory relief (because such is the nature of declaratory relief), so the government may mostly continue to enforce its regulations while it awaits percolation up to this Court.” Rather, the Court proposed ways that the government might try to group and manage scattered challenges to its rules, including by asking courts to stay “actions in all but one jurisdiction . . . pending the conclusion of one proceeding.”³⁸⁹ That suggests that the Court believed that “one proceeding” in “one jurisdiction” was capable of determining the invalidity of the whole regulation for everyone. If not, courts in other jurisdictions would also have to proceed to give the plaintiffs there any relief.³⁹⁰ In sum, the Court—though it may have been a bit overconfident in the self-restraint of some lower

386. See *Abbott Lab's v. Gardner (Abbott Labs)*, 387 U.S. 136, 156 (1967); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 170-71 (1967). The regulation held unripe was one concerning administrative investigations, which did not require any immediate compliance costs or immediately impose any regulatory burdens. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164-65 (1967).

387. *Abbott Labs*, 387 U.S. at 148-49; *Gardner*, 387 U.S. at 168, 170.

388. *Abbott Labs*, 387 U.S. at 154 (emphasis added). To unpack this sentence: the Court here accurately observes that a loss for the government would force it to go back to the drawing board, whereas a loss for the industry would bind only the “large part of the industry” who had been plaintiffs in the “every time” suit.

389. *Id.* at 154-55 (“The venue transfer provision, 28 U.S.C. § 1404(a), may be invoked by the Government to consolidate separate actions. Or, actions in all but one jurisdiction might be stayed pending the conclusion of one proceeding. . . . A court may even in its discretion dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere. . . . In at least one suit for a declaratory judgment, relief was denied with the suggestion that the plaintiff intervene in a pending action elsewhere.”).

390. Likewise, for the Court’s suggestion that a court might exercise its discretion to “dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere.” *Id.* at 155. This suggestion implies that the Court believed that “litigation elsewhere” over “the same issue” could give relief that would obviate the need for a plaintiff to seek declaratory or injunctive relief for herself.

court judges³⁹¹—was not in the dark about the downstream remedial consequences of its ripeness holding.

And how could it have been, really, given the dissent? Justice Fortas complained that the Court had “authorize[d] threshold or pre-enforcement challenge by action for injunction and declaratory relief to *suspend the operation of the regulations in their entirety* and without reference to particular factual situations.”³⁹² He complained that the Court had “give[n] individual federal district judges a roving commission to halt the regulatory process.”³⁹³ The “destructive force and effect” of the Court’s decision, he said, was that it “arm[ed] each of the federal district judges in this Nation with power to enjoin enforcement of regulations and actions under the federal law designed to protect the people of this Nation against dangerous drugs and cosmetics.”³⁹⁴ He warned that “[r]estraining orders and temporary injunctions will suspend application of these public safety laws pending years of litigation.”³⁹⁵ And in a final peroration, he wrote that “this invitation to the courts to rule upon the legality of these regulations in these actions for injunction and declaratory relief should be firmly rejected,” and chastised the Court that it had “no warrant . . . to place these programs, essential to the public interest, and many others which this Court’s action today will affect, at the peril of disruption by injunctive orders which can be issued by a single district judge.”³⁹⁶ Fortas could not have said half of these things, nor would he have been half this upset, unless he thought that a “single district judge” had the power to “suspend application” of these regulations universally.

In light of the above, even if the exact word “vacatur” was not mentioned, I am unable to agree that the Justices and the parties in *Abbott Labs* did not understand that universality was on the table.³⁹⁷ Justice Fortas spelled out the

391. Compare *id.* at 156 (“It is scarcely to be doubted that a court would refuse to postpone the effective date of an agency action if the Government could show, as it made no effort to do here, that delay would be detrimental to the public health or safety.”), with *Danco Lab’s, LLC v. All. for Hippocratic Med.*, 143 S. Ct. 1075, 1075 (2023) (staying a lower court decision that purported to postpone the effective date of an agency action despite the government’s robust showing that suspending this agency action would be severely detrimental to public health).

392. See *Toilet Goods*, 387 U.S. at 175-77 (Fortas, J., concurring in part and dissenting in part) (emphasis added).

393. *Id.* at 177.

394. *Id.* at 183.

395. *Id.*

396. *Id.* at 200.

397. *Contra* Harrison, *Vacatur of Rules*, *supra* note 5, at 121 (“In *Abbott Laboratories*, the Court did not regard vacatur as a possible remedy in pre-enforcement review of regulations.”). Harrison finds significant that the Solicitor General cited 5 U.S.C. § 704 and not 5 U.S.C. § 706: “If section 706 was known to call for pre-enforcement vacatur of rules, to discuss section 704 and

downside consequences of allowing individual district court judges to adjudicate “the legality of . . . regulations in . . . actions for injunction and declaratory relief” in terms that any public-law-focused lawyer today would recognize. It is far more important to pay attention to the substance of what courts understood and did than to search for a modern-day label. A change in terminology concerning a remedy is not the same thing as an invention of that remedy.³⁹⁸

To place *Abbott Labs* within the broader sweep of the development of administrative-law remedies, the trilogy’s chief consequence was that pre-enforcement challenges to regulations became more common, even as regulations were becoming more common.³⁹⁹ The trilogy brought generic statutory suits for review under the APA into parity with the special statutory review suits that courts had adjudicated for decades – as both Davis and Jaffe had advocated.⁴⁰⁰ By confirming that the courthouse doors would be reliably open to pre-enforcement review of the validity of regulations in cases where no special statutory provision required such review, the trilogy took a long stride. But it was not in any dissonance with the longer arc of what had occurred before it. Rather, the trilogy took another step down the long road of procedural and remedial reforms aimed at achieving a streamlined system, free of procedural quagmires and technical legal obstacles, for assuring prompt, meaningful judicial review of the legality of administrative action – a system, as the APA’s drafters envisaged, of “judicial review designed to afford a remedy for every legal wrong.”⁴⁰¹

not section 706 would have been disingenuous at best. . . . [G]overnment counsel did not believe that [section 706] called for vacatur of rules.” *Id.* at 130. This is a curious argument. The government was litigating reviewability or ripeness, which Section 706 does not directly address. Nobody thinks that Section 706 “call[s] for” pre-enforcement review in the sense of making a case ripe when it would not otherwise be. Section 706 kicks in only once a regulation is deemed ripe for review.

398. Indeed, one salient and rather vexing aspect of debates over universal remedies is that they can be labelled and taxonomized in myriad ways. See Portia Pedro, *Towards Establishing a Pre-Extinction Definition of ‘Nationwide Injunctions,’* 91 U. COLO. L. REV. 847, 863 (2020).
399. See Levin, *supra* note 38, at 474 (“Today, pre-enforcement review of rules is a pervasive feature of administrative law practice.”); Sohoni, *Power to Vacate, supra* note 4, at 1143 n.107 (“The best understanding of *Abbott Labs* is that it displaced the former default presumption – which itself had not been entirely consistently applied – that challenges to rules were not ripe until enforcement.”).
400. See *supra* Part II. Note that the Court cited Davis, Jaffe, and Borchard. See *Abbott Lab’s v. Gardner*, 387 U.S. 136, 141-42 (1967) (citing JAFFE, *supra* note 299, at 357); *id.* at 149 n.15 (citing 3 DAVIS, 1958 TREATISE, *supra* note 330; JAFFE, *supra* note 299); see also *id.* at 152 n.18 (citing Borchard, *supra* note 229, at 454).
401. APA LEGISLATIVE HISTORY, *supra* note 9595, at 193 (reprinting S. REP. 79-752 (1945)); see also *id.* at 244 (reprinting H.R. REP. 79-1980 (1946)) (“It contains comprehensive provisions for judicial review for the redress of any legal wrong.”).

If it feels as though we should have looked more carefully down this road before we ventured down it—as it clearly seems to feel, at least on some days, to some Justices—the natural question is what ought to be done, and who ought to do it. The next and final Part addresses that topic.

III. UNIVERSAL VACATUR AND MAJOR QUESTIONS

In a handful of years, in the wake of the controversy over the universal injunction,⁴⁰² the question of whether a court may universally vacate a rule has gone from one that most administrative lawyers would have been surprised to hear asked to an issue at the forefront of public-law discourse. The proposition that a court reviewing a rule under the APA lacks the power to vacate it universally was essentially absent from legal debate until 2018.⁴⁰³ It has now caught the eye of three Justices. And while that question is interesting enough in its own right, it is also worthwhile to place it in a broader context. This Part seeks to examine how the case against universal vacatur relates to themes elsewhere manifest in the administrative-law cases of the Roberts Court—in particular, the recent strengthening of the major questions doctrine—and how it fits in with the broader debate concerning the relative power of the Supreme Court to other governmental actors.

Over the course of the last three years, the Court has wielded the major questions doctrine to curtail high-stakes agency action in contexts ranging from greenhouse-gas control to vaccine mandates.⁴⁰⁴ Under this newly muscular doctrine, when a court deems an agency to have decided an extremely important question, the court then inquires whether the statute gives clear statutory authorization to the agency to decide that question; ambiguity is not enough.⁴⁰⁵

402. See Sohoni, *Power to Vacate*, *supra* note 4, at 1123 (noting that the debate over universal vacatur is “largely (though not entirely) an outgrowth of the current maelstrom over the propriety of the ‘universal’ or ‘nationwide’ injunction”).

403. See Mizelle, *supra* note 5, at 15 (“[C]ourts of appeals have regularly vacated unlawful regulations and the executive branch, to my knowledge, never officially took the position that vacatur—as distinct from nationwide injunctive relief—was unlawful until 2018.”); Memorandum from the Off. of the Att’y Gen. to the Heads of Civ. Litigating Components & U.S. Att’ys, *Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* 7-8 (Sept. 13, 2018), <https://www.justice.gov/opa/press-release/file/1093881/download> [<https://perma.cc/VE7K-6LWB>] [hereinafter *Litigation Guidelines*].

404. See generally Sohoni, *supra* note 45 (describing recent major-questions-doctrine jurisprudence); see also *Biden v. Nebraska*, 143 S. Ct. 2355, 2375 n.9 (2023) (holding unlawful the Biden student-loan-forgiveness program and relying on the major questions doctrine as a supplemental justification).

405. See *West Virginia v. EPA*, 597 U.S. 697, 716 (2022); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S.758, 764-65 (2021) (per curiam).

Breaking with the pre-existing framework for judicial review of agency action, “[t]his new version of the major questions doctrine turns *Chevron*’s presumption of deference when the statute is unclear into a strong presumption against the agency position even when it is supported by statutory plain meaning.”⁴⁰⁶

On its face, the Roberts Court’s fortification of the new major questions doctrine would seem to have little to do with the debate over universal vacatur.⁴⁰⁷ The Court has applied the new major questions doctrine in cases in which the executive branch has exercised regulatory power, not to delegations of power to the judicial branch. Further, the two seem to diverge rather dramatically with respect to their consequences. The major questions doctrine empowers federal judges and disempowers the executive branch, while accepting the case against universal vacatur would seem to do the reverse. A resonance, however, exists between these two topics.

Let us begin with the mechanics. The heart of the case against universal vacatur is best understood as urging a *district-court-oriented* adaptation of the major questions doctrine: the proposition that individual district court judges should not be allowed to resolve questions of vast economic and political significance by vacating rules universally without congressional authorization that is less “obscure”⁴⁰⁸ (or more “explicit[]”⁴⁰⁹) than that contained in the APA. The scenario in which a single district court judge halts a federal regulation, nationwide, is the setting in which the case against universal vacatur has its greatest intuitive appeal. In this context, an instinct that this surely *cannot* be our law has the potential to overwhelm and subordinate a dispassionate inquiry into whether this, in fact, *is* our law. That instinct is then apt to be repackaged as the argument that the APA should not be read to authorize universal vacatur *unless the exact word “vacatur”* is expressly mentioned in the APA as an available form of proceeding

406. William N. Eskridge Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1950 (2023).

407. Scant attention has been paid to how the major questions doctrine might connect with the debate concerning universal vacatur. See Beau Baumann, *Volume IV of the Major Questions Doctrine Reading List*, YALE J. ON REGUL.: NOTICE & COMMENT (Aug. 14, 2023), <https://www.yalejreg.com/nc/volume-iv-of-the-major-questions-doctrine-reading-list-by-beau-j-baumann> [<https://perma.cc/KM7K-96AK>] (curating scholarship on the doctrine). A notable and recent exception is Klein, *supra* note 49.

408. *United States v. Texas*, 599 U.S. 670, 695 (Gorsuch, J., concurring).

409. Harrison, *Vacatur of Rules*, *supra* note 5, at 125 (“If the drafters thought they were creating another remedy of that kind in section 10(e), it is odd that they made no mention of it explicitly.”); see also Klein, *supra* note 49 (manuscript at 24) (“[N]either the APA’s text nor its context clearly show that Congress intended to authorize universal vacatur.”); Litigation Guidelines, *supra* note 403, at 7 (arguing that “[i]n the absence of a clear statement in the APA that it displaces traditional rules of equity, courts should adopt the latter reading of the ‘set aside’ language” that rules should be set aside “as applied to the challenger”).

or a remedy;⁴¹⁰ nothing less will do. This insistence on the spelling out of the precise authority to exert significant power is the signature move of the major questions doctrine – and, as we have seen throughout, it is now becoming a central motif of the case against universal vacatur.

The temptation of that approach is obvious; it is much simpler to “ctrl-F” in the APA for the word “vacatur” than it is to locate and digest old dictionaries, cognate statutes, transcripts of record, legislative history, and so forth. Yet that temptation should be resisted, even if we assume *arguendo* that the new major question doctrine applies to this dispute over the APA’s meaning.⁴¹¹ Reading the APA to authorize universal vacatur satisfies any reasonable test of statutory interpretation – including the tests embraced by many *proponents* of the major questions doctrine. The term “set aside” literally means to invalidate and to nullify.⁴¹² This is therefore not a situation in which “unintentional” or “oblique” language is being called upon to authorize major results.⁴¹³ Nor are courts “pour[ing] new wine out of old bottles” when they give this remedy.⁴¹⁴ The APA has long been understood to authorize courts to invalidate rules universally, and similarly worded statutes were likewise understood before the APA.⁴¹⁵ The fact that courts invalidated regulations in the decade after the APA’s enactment shows that Congress spoke as clearly as it needed to in order to be understood by courts applying contemporaneous methods of interpretation.⁴¹⁶ If the new major questions doctrine is understood not as a clear-statement rule but instead as a maxim

410. See Transcript of Oral Argument, *supra* note 8, at 111-13 (Gorsuch, J.) (“[Section 703] talks about venue and forms of proceeding, and the forms of proceeding listed include injunctive relief and declaratory judgments. Those are classic remedial forms of relief or forms of proceeding. . . . So those are remedies, declaratory relief, injunctions. There they are in 703. So it’s a little odd that there’d be those giant remedies that swallow the whole of 703 lurking over in 706.”).

411. *But see* William Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 683-84 (1990) (noting the unfairness of the “bait-and-switch” that occurs when “Congress enacts a statute against certain well-established background assumptions” but the Court then “switches those assumptions and interprets Congress’s work product in ways that no one at the time would have, or perhaps even could have, intended”); Sohoni, *supra* note 45, at 286 (noting that Congress has no “crystal ball” with which to anticipate “future avulsions in interpretive regimes”).

412. See *supra* note 36.

413. Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., 595 U.S. 109, 125 (2022) (Gorsuch, J., concurring) (“The major questions doctrine . . . guard[s] against unintentional, oblique, or otherwise unlikely delegations of the legislative power.”).

414. Jonathan H. Adler, *West Virginia v. EPA: Some Answers About Major Questions*, 2021-2022 CATO SUP. CT. REV. 37, 38 (applying this “new wine” adage to the major questions doctrine articulated in *West Virginia v. EPA*).

415. See *supra* Part II.A.

416. See *supra* Part II.C.

that instructs courts to read statutes in light of context and “common sense,”⁴¹⁷ then the evidence of text and context is plainly sufficient to support the conventional reading – whereas reading the APA to *omit* universal remedies would produce some very odd and unjust outcomes⁴¹⁸ and would leave many without a meaningful remedy against unlawful executive branch action.⁴¹⁹ Lastly, if the major questions doctrine exists in order to act as a guardrail against nondelegation and/or extravagant readings of delegated authority,⁴²⁰ then that is an aim wholly in line with a regime in which lower courts can universally vacate unlawful agency regulation. The more controversial cases that the Court takes up tend to capture the lion’s share of attention. But in less prominent cases, including many in which the government does not challenge the scope of a lower court’s order but just takes its lumps and moves on,⁴²¹ the lower courts are the ones doing the work of ensuring agencies are kept within the bounds of their lawfully delegated statutory authority.

Let us now turn to juxtapose the major questions doctrine and the case against universal vacatur along a different dimension: their respective consequences for the institutional allocation of power across governmental actors. On that score, at least at first glance, the two would seem to diverge. The major questions doctrine cabins executive-branch power and empowers federal judges, while accepting the case against universal vacatur would seem to do exactly the opposite. But a closer look reveals a more complicated picture.

417. See *Biden v. Nebraska*, 143 S. Ct. 2355, 2376–80 (2023) (Barrett, J., concurring) (noting that “common sense,” “context,” and “[s]urrounding circumstances, whether contained within the statutory scheme or external to it,” are relevant to interpreting the “scope of a delegation”).

418. See *supra* notes 199–206 and accompanying text.

419. See, e.g., *D.C. v. U.S. Dep’t of Agric.*, 444 F. Supp. 3d 1, 51, 55 (D.D.C. 2020) (noting “the hunger that threatens the nearly 700,000 people who will lose their SNAP benefits if the Final Rule is implemented” and staying the rule under 5 U.S.C. § 705 pending review).

420. See Sohoni, *supra* note 45, at 290–315.

421. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 206–07 (1988) (noting that “the District Court struck down the 1981 wage-index rule” and that “[t]he Secretary did not pursue an appeal” but instead “recogniz[ed] the invalidity of the rule” and “settled the hospitals’ cost reimbursement reports by applying the pre–1981 wage-index method”); *Requirements Related to Surprise Billing*, 87 Fed. Reg. 52618, 52625 (Aug. 26, 2022) (amending interim final rules to remove language vacated by the district court for the Eastern District of Texas in *LifeNet, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 617 F. Supp. 3d 547 (E.D. Tex. 2022)); *Truth in Lending (Regulation Z)*, 78 Fed. Reg. 18795, 18795 (Mar. 28, 2013) (“As a result of the [*First Premier Bank*] court’s order, the portion of the [CFPB’s] 2011 final rule applying § 226.52(a) to pre-account opening fees has not become effective.” (referencing *First Premier Bank v. CFPB*, 819 F. Supp. 2d 906, 923 (D.S.D. 2011) (“The effective date of the 2011 amendment to § 226.52 of Regulation Z is postponed, and the [CFPB] is enjoined from enforcing it.”))); *Safety Standard for Magnet Sets; Removal of Final Rule Vacated by Court*, 82 Fed. Reg. 12716 (Mar. 7, 2017) (removing from the Code of Federal Regulations a rule vacated by the Tenth Circuit).

For those who are not preoccupied with debates over remedial scope in administrative law, it is worthwhile to pause here to review how it would play out if the case against universal vacatur were accepted.⁴²² For district courts, the effect would be obvious. If universal vacatur were read out of the APA, no district court could vacate or stay a rule universally. Relief against invalid rules would be plaintiff-by-plaintiff (to the extent it could be sensibly granted at all⁴²³) unless a class action was certified – which is not a trivial hurdle.⁴²⁴

As for the courts of appeals, in generic APA challenges they would retain the power to cause rules to be treated as invalid within their circuits through the intracircuit stare decisis effects of their decisions.⁴²⁵ But in special statutory review cases brought in the first instance in courts of appeals, appeals courts' powers may be curtailed if the phrase “set aside” were read as excluding universal vacatur. That is because key statutes that vest jurisdiction in courts of appeals to review specified agency actions – the most familiar being the Hobbs Act⁴²⁶ – use the same phrase (“set aside”) as Section 706, and several of them date back to roughly the same historical era. Moreover, the Hobbs Act speaks in terms of *conferring jurisdiction* on the courts of appeals,⁴²⁷ but the substantive law of judicial review *applied* by such courts once jurisdiction is conferred is generally understood to come from the APA itself.⁴²⁸ Furthermore, other statutes directly

422. The following description, *see infra* notes 423-438 and accompanying text, does not purport to break new conceptual ground. It instead aims to simply spell out, as an aid to the reader's understanding, some downstream consequences of reading the APA to omit universal vacatur.

423. *See supra* text accompanying notes 197-206.

424. *See* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1095-98 (2018) (noting the difficulty of obtaining class certification within “the time frame necessary to avoid irreparable injury”).

425. This assumes that the government will continue its assertedly “general practice” of treating a court of appeals ruling as binding within the circuit. *See* Transcript of Oral Argument, *supra* note 15, at 48 (SOLICITOR GENERAL: “Our general practice is yes, we . . . we treat it [a court of appeals decision] as binding within the relevant circuit.”).

426. *See* 28 U.S.C. § 2342 (2018) (“The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of [specified orders of listed agencies]. . . . Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.”); *id.* § 2349(a) (“The court of appeals . . . has exclusive jurisdiction to make and enter . . . a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.”); 15 U.S.C. § 78y(a)(3) (2018) (“On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.”).

427. *See* 28 U.S.C. § 2342 (2018).

428. *See* ICC v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 282 (1987) (“While the Hobbs Act specifies the form of proceeding for judicial review of ICC orders, *see* 5 U.S.C. § 703, it is the Administrative Procedure Act (APA) that codifies the nature and attributes of judicial

reference the APA's review provisions.⁴²⁹ Thus, reading the APA to omit universal vacatur would, logically speaking, take that remedy away from courts of appeals in cases implicating such statutes – as Judge Menashi concluded with respect to the Hobbs Act.⁴³⁰ Professor Harrison similarly acknowledged, “As to vacatur of rules, the historical evidence I present supports the conclusion that section 706(2) of the APA does not create a remedy of vacatur of rules that would be available in special statutory review proceedings.”⁴³¹ While it is possible to attempt the argument that the power to “set aside” agency action should be treated in a sharply different way when it is invoked in the special statutory review context,⁴³² that argument is hard to countenance. Again, the APA’s “set aside” language itself traces back to pre-APA special statutory review statutes, and the APA and the special statutory review statutes have long been treated as parallel pathways to review. In short, the historical and legal logic of the case against universal vacatur is not limited to *district court* universal vacaturs but would seep out to unsettle schemes that authorize courts of appeals to review and universally vacate rules as well. For that reason, fettering the remedial power of district courts – and *only* district courts – is not an aim that can be accomplished cleanly by reading the APA not to allow universal vacatur of rules.

Would the Supreme Court be affected by the deletion of universal vacatur from the APA? Hardly at all, for the Court’s decisions themselves are treated as intrinsically possessing universal effect. When the Court holds that a rule is invalid, that decision will bind lower courts through its vertical *stare decisis* effects. The Court can state its holding that the rule is invalid, reverse the decision below if it reached a contrary conclusion, affirm it if not, and remand for proceedings consistent with its own opinion. The Court need not *do* anything to the rule. It

review . . .”); *see also, e.g.*, *BNSF Ry. Co. v. U.S. Dep’t of Transp.*, 566 F.3d 200, 203 (D.C. Cir. 2009) (“Under the Hobbs Administrative Orders Review Act, we evaluate Department of Transportation orders using the familiar standards set forth in the APA.”); *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 7–8 (D.C. Cir. 2006) (reviewing an FCC action, pursuant to jurisdiction granted by the Hobbs Act, for whether it was arbitrary and capricious under Section 706); *Mead & Fromherz, supra* note 92, at 10–11 (“[T]he choice of forum does not affect the standard to be applied, as both circuit courts and district courts apply the same APA standard to the same administrative record.”).

429. *See, e.g.*, 15 U.S.C. § 2060(c) (2018) (“[T]he court shall have jurisdiction to review the consumer product safety rule in accordance with chapter 7 of title 5, and to grant appropriate relief . . . as provided in such chapter.”). The phrase “chapter 7 of title 5” refers to 5 U.S.C. §§ 701–706 (2018).

430. *See supra* notes 79–83 and accompanying text.

431. Harrison, *Vacatur of Rules, supra* note 5, at 121 n.6.

432. For a stab at this argument, see Harrison, *Section 706, supra* note 5, at 46 n.33, which argues, “[S]ection 706 tells the court not to decide in accordance with the agency action Under an appellate-type special review statute, not deciding according to the action means making it ineffective.”

can simply announce its decision and rely on the assumption that executive-branch acquiescence will take matters from there.⁴³³ Though under the revisionist reading of the APA the Court would no longer have the power—formally speaking—to vacate a rule universally, that formal power is not necessary for the Supreme Court’s decision to have the same effect as a universal vacatur in practical terms.

To take stock, reading universal vacatur out of the APA would have the most dramatic effect on the district courts; a different but still significant effect on the powers of courts of appeals, mediated through their application of the APA and review provisions similarly worded or connected to the APA; and next to no impact on the powers of the Supreme Court. The revisionist reading of the APA would, in other words, have a disparate impact across Article III courts: it would diminish the capacity of *lower* courts to resolve the legality of rules universally, but leave no real dent on the Court’s power. Though accepting the case against universal vacatur would (generally speaking) reduce the power of “the courts” vis-à-vis the executive branch, there is one very important court—the Supreme Court—whose powers vis-à-vis the executive branch would remain unscathed.

For that simple reason, when it comes to the Supreme Court, the case against universal vacatur and the new major questions doctrine share more in common than meets the eye, and indeed they should be recognized as fellow travelers. Through the new major questions doctrine, the Court has given all federal courts a potent tool to hold major agency action unlawful—a tool that diminishes the powers of the other branches but that leaves the Court’s own powers (at least) unscathed. If the Court were to pair that doctrine with a holding that *lower* courts cannot give universal remedies, it would upend Congress’s decades-old plan and cause a veritable “sea change in administrative law as currently practiced in the lower courts.”⁴³⁴ But it would take nothing away from the Supreme Court, which in the end would retain the authority to give the equivalent of those broad remedies anyway.

All told, then—and notwithstanding their chiasmatic effects on executive-branch power—the new major questions doctrine and accepting the case against universal vacatur cohere in serving to cement the Court as the cynosure of power

433. See Baude & Bray, *supra* note 5, at 183 (“[W]hen the Court holds a statute to be unconstitutional or a rule to be unlawful, it may be *as good as vacated*.”). They add, “Indeed, this may be even true for the D.C. Circuit when it has exclusive review.” *Id.* In the absence of universal vacatur, however, “exclusive review” in the D.C. Circuit would not make a rule “as good as vacated” unless Congress routed to the D.C. Circuit not just the initial challenge to the rule but also any subsequent cases that turned on the rule’s validity. The *Gorss Motels* case offers a useful illustration of how subsequent proceedings that implicate a rule may not always be routed to the court that had exclusive jurisdiction under the Hobbs Act to review the rule’s validity in the first instance. See *supra* notes 79–83 and accompanying text.

434. *United States v. Texas*, 599 U.S. 670, 721 (2023) (Alito, J., dissenting).

in our government. That coherence is perhaps no coincidence.⁴³⁵ A Court that is dubious that any institution but itself has the capacity to wield power responsibly⁴³⁶ will be skeptical of both broad grants of regulatory power to agencies and broad grants of remedial authority to lower courts.⁴³⁷ A Court reluctant to allow “novel” legislative arrangements of power⁴³⁸ will be reluctant to countenance either “novel” delegations of regulatory power to agencies or “novel” systems of judicial review of agency action – even when neither thing is really all that novel. Finally, and for the cynics among us, discerning these dynamics also helps to explain an otherwise puzzling fact: that the same Justices who are most skeptical of regulatory power are also – when the muse so moves them – the Justices who have been the most vocal proponents of limiting the scope of lower court remedies against federal rules. This puzzle dissolves, once one perceives that *these Justices’ power* will be diminished scarcely a whit were the case against universal vacatur to be accepted.

CONCLUSION

The latest iteration of the case against universal vacatur rests chiefly on newly minted claims concerning the APA’s meaning. Critics of universal vacatur have faulted judges for “reflexively assum[ing]” that the APA allows universal vacatur of rules without giving due consideration to the APA’s text, structure, and history.⁴³⁹ They have maintained that statutory language that has long been read to authorize universal vacatur should now be regarded as too opaque to furnish a basis for it. Some have contended that as recently as the 1960s courts and commentators remained unaware that a court could vacate a rule universally.

This Feature has countered the case against universal vacatur by examining how courts have used this remedy in the past and by probing the laws and understandings that have both underwritten and built upon that remedy’s availability. The power to vacate a rule has been an element of judicial control of agency action for decades; it was not suddenly hallucinated by federal judges.

435. I am grateful to Professor Fallon for his thoughts on this paragraph.

436. See Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. 97, 97 (2022) (“The common denominator across multiple opinions in the last two years is that they concentrate power in one place: the Supreme Court.”); *id.* at 104–06.

437. See Richard H. Fallon, *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1354 (2023) (explaining why “broadly worded congressional authorizations of injunctions under a variety of modern statutes—and judicial practice in awarding them—could . . . be in constitutional jeopardy”).

438. See generally Leah M. Litman, *Debunking Anti-Novelty*, 66 DUKE L.J. 1407 (2017) (critiquing the Court for espousing the notion that novelty implies unconstitutionality).

439. See Transcript of Oral Argument, *supra* note 8, at 36.

And it is a remedy fully in keeping with a broad range of other reforms undertaken by Congress to streamline the system of judicial review of agency action so that it would address questions of substantive legality rather than shunting litigants into procedural dead-ends and bogs. The terminology used to describe that remedy has shifted over time. But old wine with a new label on the bottle is not the same thing as new wine.

This Feature has also drawn connections between the case against universal vacatur and the new major questions doctrine to show how both implicate a larger debate going on in public law today concerning the distribution of power across and within the branches. How much power should the Supreme Court have in our law? How much leeway should Congress have to allocate power to institutions other than the Supreme Court? In the APA, Congress chose to allocate the power to vacate a rule universally to “the reviewing court,”⁴⁴⁰ not to confine that power to the Supreme Court. For the Court to construe the APA to omit universal vacatur may seem a sensible way forward to those pained to observe the frequency with which some district courts scupper executive-branch policy-making. But a nagging sense that “something has to be done”⁴⁴¹ is not a trustworthy guide to responsible statutory interpretation. Those who are concerned with respecting Congress’s authority to design our system of government should take seriously the proposition that it is Congress’s prerogative, not the Court’s, to instigate the “radical departures from current norms”⁴⁴² that the case against universal vacatur would entail.

440. See *supra* note 292.

441. *Sackett v. EPA*, 598 U.S. 651, 712 (2023) (Kagan, J., concurring) (“Surely something has to be done; and who else to do it but this Court?”).

442. See Levin, *supra* note 5, at 2007.