

THE PATH OF ADMINISTRATIVE LAW REMEDIES

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The question whether the term “set aside” in the Administrative Procedure Act (APA) authorizes a federal court to vacate a rule universally—as opposed to setting aside the rule solely as to the plaintiffs—is a significant and contested one. This Essay traces the history of the statutory term “set aside” from its origins in the 1906 passage of the Hepburn Act to its 1946 placement in the APA. During this era, Congress repeatedly used the term “set aside” in agency review statutes. This Essay argues that, in doing so, Congress did not intend to depart from the underlying remedial framework created by the law of judgments and equity. The traditional approach limited the ability of a stranger to litigation to enforce a judgment previously obtained by another, even if the stranger proceeded on the same legal theory. The Essay explains how that traditional approach continues to apply in challenges to agency “adjudications” and offers some reasons for why the same approach ought to apply in challenges to those agency actions that are categorized as “rulemakings.”

INTRODUCTION

My goal in this Essay is to clarify how one corner of the system of administrative remedies developed and how it functions in the present day. The general topic is large and important—after all, everyone who initiates a lawsuit wants a remedy. But from the passage of the Administrative Procedure Act (APA) in 1946¹ until recently, it perhaps did not receive the attention it deserves.² Those who study remedies tend

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¹ Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

² Early commentators were quite interested in the origins and scope of remedies available in administrative law challenges. For classic treatments, see LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 152–96 (1965); Frederic P. Lee, *The Origins of*

not to focus on the peculiarities of administrative law, which might seem to be governed by idiosyncratic statutory provisions or niche caselaw developments. At the same time, those who study administrative law might overlook what happens after the merits of a case are resolved. Precisely what remedies a prevailing party obtains after successfully challenging government action can seem like an afterthought, both for academics and for the courts that address administrative challenges.

Recent years, however, have brought the question of administrative law remedies to the foreground.³ Specifically, in a number of cases, the federal government has argued that the scope of an injunction is impermissibly “universal,” “national,” or “nationwide.”⁴ Both federal courts⁵ and

Judicial Control of Federal Executive Action, 36 GEO. L.J. 287 (1948); see also Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 885–86 (1970) (remarking that nineteenth-century judges had “great[] reverence for the integrity of the pleadings”).

3 The issue addressed in this Essay is by no means the only one to have experienced a mini renaissance in recent years. For another such remedial question, see the Court’s recent cases addressing the severability of statutory provisions that violate structural constitutional law: *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2207–11 (2020); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1986–88 (2021); *Collins v. Yellen*, 141 S. Ct. 1761, 1787–89 (2021). For a recent attempt to address the issue of severability from a “first principles” perspective, see William Baude, *Severability First Principles*, 109 VA. L. REV. 1, 34–35 (2023) (briefly noting the connection between severability and the question of administrative law remedies addressed in this Essay).

4 In a set of 2018 guidelines, the Department of Justice embraced the position that the APA does not allow “universal vacatur” of rules. See Memorandum from the Office of the Att’y Gen. to the Heads of Civil Litigating Components & U.S. Att’y’s, *Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* 7, 7–8 (Sept. 13, 2018) [hereinafter *Litigation Guidelines*] (“In any case brought pursuant to the APA that presents the possibility of universal vacatur (*i.e.* the possibility that the court might vacate the rule with respect to all persons, even those who are not parties to the case), Department litigators should . . . argue that the APA’s text should not be read to displace the traditional equitable limitation of relief to the parties before the court.”).

5 For cases on this topic, see *City of Chicago v. Barr*, 961 F.3d 882, 912–13 (7th Cir. 2020); *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018); *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 511–12 (9th Cir. 2018), *rev’d in part, vacated in part*, 140 S. Ct. 1891 (2020); *District of Columbia v. U.S. Dep’t of Agric.*, 444 F. Supp. 3d 1 (D.D.C. 2020); *Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 72 (D.D.C. 2019), *rev’d and remanded sub nom.*, *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020); *City & Cnty. of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 970–74 (N.D. Cal. 2018), *aff’d in part, vacated in part sub nom.*, *City & Cnty. of San Francisco v. Barr*, 965 F.3d 753 (9th Cir. 2020); *City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087, 1100–01 (C.D. Cal. 2018), *rev’d sub nom.*, *City of Los Angeles v. Barr*, 929 F.3d 1163 (9th Cir. 2019); see also *New York v. U.S. Dep’t of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 580 (S.D.N.Y. 2019) (ordering that a challenged rule should be vacated “in its entirety”); *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019); *New York v. U.S. Dep’t of Com.*, 351 F. Supp. 3d 502, 677 n.87 (S.D.N.Y. 2019), *aff’d in part, rev’d in part*, 139 S. Ct. 2551. At least two Supreme Court Justices have

scholars⁶ have responded by addressing the topic of “universal” injunctions at length. While any one of the many cases presenting the universal-injunction question might be categorized as “administrative law,” this Essay will address an issue of particular salience to the construction of the APA and the development of administrative law remedies: What consequences flow from a court’s determination that an agency rule is “unlawful” and must be “set aside” or “vacated”?

Section 706 of the APA authorizes courts to “hold unlawful and set aside agency action.”⁷ In § 703, the APA also provides that “[t]he form of proceeding for judicial review is,” in the absence of a special statutory review provision, “any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus.”⁸ The question is *precisely* what judicial remedies these provisions authorize and whether the remedies differ for those agency actions that the APA defines as “rulemakings”⁹ and those agency actions that administrative lawyers describe as “adjudications.”¹⁰ In both instances, agency action can be “set aside,” whether on procedural grounds (such as, for example, the theory that a rulemaking has violated the APA’s notice-and-comment requirements) or substantive grounds (such as, for example, the theory that an adjudication rests on an interpretation that exceeds an agency’s statutory authority).¹¹

But scholars and courts have differed over what “setting aside” a rule entails. On the one hand, the APA may be understood to authorize “universal vacatur”—in other words, the invalidation of a rule with consequences both for the plaintiffs in the litigation as well as everyone else in the world. An exemplary case expressing this perspective is Judge Stephen Williams’s opinion for the D.C. Circuit in *National Mining Ass’n v. U.S. Army Corps of Engineers*,¹² which reasoned that “[w]hen

questioned the propriety of universal injunctions generally. See Dep’t of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay); Trump v. Hawaii, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring).

6 See, e.g., Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920 (2020); Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977 (2020); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 418 (2017); Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335, 336–37 (2018).

7 5 U.S.C. § 706 (2018).

8 *Id.* § 703.

9 *Id.* § 553.

10 On adjudication generally, see Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377 (2021).

11 See *infra* Part I.

12 145 F.3d 1399 (D.C. Cir. 1998).

a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.”¹³ On the other hand, the APA may be understood to permit a court to “set aside” the rule *only as to the plaintiffs*—which would permit the government to continue to apply the rule to those who are not parties to the litigation.¹⁴ If that were the meaning of “set aside,” the government might continue to apply the rule (or more accurately, pursue the same policy or interpretation announced in the rule), notwithstanding a prior “set aside” court order. It might do so *only against other parties*, perhaps in other circuits or courts where the prior order is not binding precedent.

This Essay will address this topic through the lens of (1) the APA’s text; (2) the law of equity and the special statutory review provisions that formed the backdrop against which the APA was adopted; and (3) nuances in the law of judgments involving the tailoring of injunctive remedies. I will argue that the APA’s text did not displace the background law of judgments and that background equitable principles generally require, where possible, the tailoring of relief to the parties before the court. Where such tailoring might not be possible—such as where injunctive relief is “indivisible”—a court has the authority to issue an injunction with the collateral or ancillary consequences of benefiting nonparties.

Start with the APA’s text—specifically, the term “set aside.” The term originates in statutory review provisions incorporated into the Hepburn Act,¹⁵ then into the Urgent Deficiencies Act,¹⁶ and later into other statutes that either incorporated the Urgent Deficiencies Act by

13 *Id.* at 1409 (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)). Judge Williams noted that Justice Blackmun had observed in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), that if a plaintiff prevails on a challenge to a rulemaking, “the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual.” *Id.* at 913 (Blackmun, J., dissenting).

14 For recent exemplary scholarship on this topic, see Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1122 (2020) (claiming that a court “generally does not set aside the rule (or its provisions) as to some parties and not others” because “vacatur leaves no rule (or provision) in place to enforce against anyone”); Bray, *supra* note 6, at 454 n.220, 438 n.121; Ronald A. Cass, *Nationwide Injunctions’ Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 56–61 (2019); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1100 (2018); Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1701–07 (2019); Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1012–16 (2018); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2120–26 (2017). Though I might part ways with several of these scholars at various points in this Essay, I have learned a great deal from each one of their contributions to the literature.

15 Hepburn Act, ch. 3591, § 5, 34 Stat. 584, 592 (1906).

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

reference or used similar terminology.¹⁷ By the time of the APA's adoption in 1946, the "set aside" remedy had come to be equated in many (though perhaps not all) respects with the equitable remedies that formed the backdrop to the APA's adoption.¹⁸ Accordingly, the language does not depart from, but rather incorporates, background rules of equity and judgments.¹⁹

In turn, the background rules of equity require that judgments be tailored to provide relief to the parties properly before the court. The injunctive relief might be tailored to specific named plaintiffs or, alternatively, a class of plaintiffs in the case of representative litigation such as a class action. But though the *injunction* should be tailored in this fashion, sound judicial administration requires that an *opinion* accompanying the judgment should explain how the court would treat similarly situated parties, if they were before the court.²⁰ In that sense, an opinion sweeps more broadly than a judgment. While a judgment addresses the parties, an opinion need not—and should not—be so limited. Rather, it should address the consequences of the court's reasoning for others, too.

This distinction between judgments, on the one hand, and a court's reasoning, on the other, has significant explanatory value.²¹ The distinction is easiest to appreciate in cases involving damages. In such cases, the judgment of a court might require the defendant, under compulsion of law, to pay a certain dollar amount to the plaintiff. At the same time, the court's accompanying opinion might announce if and how similarly situated parties would receive similar damage awards if they were to come before the court. The same is true of an injunction sought by a plaintiff against a defendant. There, the judgment protects *the* plaintiff from actions by *the* defendant through an order enforceable by sanctions for contempt of court. At the same time, the court's opinion declares that similarly situated plaintiffs seeking injunctive relief will be treated equally.²²

17 For more on these statutes, see *infra* Section II.B.

18 See *infra* Section II.B.

19 Cf. Litigation Guidelines, *supra* note 4, at 2 (claiming that "nothing in the APA supersedes the traditional equitable limitation of relief to the parties before the court").

20 See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995); see also *infra* Part III.

21 For the law of judgments generally, see 1 HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS INCLUDING THE DOCTRINE OF RES JUDICATA (St. Paul, West Publ'g Co. 1891); A.C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS INCLUDING ALL FINAL DETERMINATIONS OF THE RIGHTS OF PARTIES IN ACTIONS OR PROCEEDINGS AT LAW OR IN EQUITY (San Francisco, A.L. Bancroft & Co. 1873).

22 See Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 691 n.15 (2018) ("Note the distinction between (a) an agency's noncompliance with a court order that actually binds that

Though it might sound straightforward, this distinction between a judgment and the reasoning of an opinion has important implications for remedies against the government. These broadly applicable principles of judgments apply to damages actions and those administrative actions classified as “adjudications.” Though there are counterarguments, I will contend that these principles ought to apply with equal force to challenges to rulemakings, as well.

This Essay proceeds as follows. Part I addresses the APA’s text and structure. Part II then turns to the APA’s backdrop, focusing on the background rules of equitable remedies and special statutory review schemes that use language, like the APA, authorizing a reviewing court to “set aside” agency action. I conclude that the APA generally, and the “set aside” language in particular, did not intend to displace traditional limits on judgments and equitable remedies. Part III discusses those limits, which required tailoring relief to the plaintiffs, where such was possible, but authorized relief with collateral benefits for nonparties where further tailoring was not possible. Part III also discusses how those principles apply to APA “adjudications” and “rulemakings.”

I. THE APA’S TEXT AND REMEDIAL FRAMEWORK

The APA says little about the remedies that a party might obtain through a successful challenge to agency action. Scholars and litigants have argued that two provisions in the statute—§ 703 and § 706—might concern remedies.

To start with the first of the two, consider § 703.²³ It provides that “[t]he form of proceeding for judicial review is,” in the absence of a special statutory review provision, “any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus.”²⁴ While the provision does not identify a specific remedy on its face—indeed, it points to “any applicable form of legal action”—it hints at some forms of proceedings that the APA permits, where appropriate. Thus, a plaintiff can obtain

agency and (b) an agency’s refusal, in taking action *not* subject to a court order, to acquiesce in the view of the law taken by the courts that *could* issue an order affecting that action *if* a plaintiff were to sue. The former behavior is subject to a contempt finding. The latter behavior—known as ‘nonacquiescence’—has substantial claims to being legitimate and is practiced regularly by several federal agencies . . .”).

23 For scholars relying in part on § 703 as a basis for the APA’s remedial framework, see JAFFE, *supra* note 2, at 164 (quoting § 703 to begin the section on “What Does the APA Add to the Remedial System?” and contending that the provision “would appear to do no more than incorporate by reference existing jurisdictions”); 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, 45 (2020).

24 5 U.S.C. § 703 (2018).

a “declaratory judgment[]” or “writ[] of prohibitory or mandatory injunction” or a writ of “habeas corpus.”²⁵ Each of these forms of proceeding carries a kind of remedy with it. Section 703 does not establish the remedy’s contours, but rather borrows the form of remedy from a set of background principles (about declaratory judgments, writs of injunction, writs of habeas corpus, and the like). Section 703 thus appears to instruct courts to use an appropriate remedy from among those traditionally granted.

The form of proceeding that was most clearly on the mind of the drafters of the APA in 1946 was the “bill in equity,” which provided much of the framework for judicial control of agency action in the early twentieth century.²⁶ For example, the *Final Report of the Attorney General’s Committee on Administrative Procedure* (“1941 Attorney General Report”)—written in 1941, five years before the APA’s enactment—described the injunction as “the common remedy” and “the remedy normally used” in administrative actions.²⁷

I will discuss bills in equity in more detail below, but for present purposes, it suffices to note that § 703 says that a plaintiff can get “injunct[ive]” relief, presumably comparable to what was available in equity.²⁸ In doing so, § 703 points in the direction of using the background general rules of equity to fashion judicial relief.

The second relevant statute is the APA’s standard-of-review provision, § 706. Section 706 provides in part that a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be” in violation of the statute’s substantive and procedural provisions.²⁹ Here, the relevant language authorizes courts to “hold unlawful and set aside.” The provision applies to “agency action,” which the APA defines to include “the whole or a part of an agency

25 *Id.* As for why these remedies might have been listed, Professor Jaffe noted in 1965 that habeas corpus had “become the typical method of reviewing an order to deport or a refusal to admit an alien.” JAFFE, *supra* note 2, at 193. Equitable relief functioned as a “catchall.” *Id.* And declaratory relief was also “applicable to administrative situations.” *Id.* at 194.

26 *See infra* Section II.A.

27 COMM. ON ADMIN. PROC., ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 81 (1941) [hereinafter 1941 ATTORNEY GENERAL REPORT]; *see also id.* (remarking that declaratory judgments have “not yet been extensively used to bring Federal administrative action before the Federal courts”). To be sure, the Report described as a “basic judicial remedy” the “private action for damages against the official in which the court determines, in the usual common-law manner and with the aid of a jury, whether or not the officer was legally authorized to do what he did in the particular case.” *Id.* But the Report contended that a damages action “is generally inadequate and the equity injunction has become in the United States the common remedy.” *Id.* Whether and why a damages action is “inadequate” is outside the scope of this Essay.

28 5 U.S.C. § 703.

29 *Id.* § 706.

rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.”³⁰ Section 706 thus applies on its face to a “rule” and, through the definition section’s reference to an “order,” applies equally to adjudications.³¹ As the *1941 Attorney General Report* put it, “[a] judgment adverse to a regulation results in setting it aside.”³²

Read as a whole, §§ 703 and 706 naturally raise the question whether the term “set aside” differs in any material respect from the injunctive relief alluded to in § 703. Taking the two provisions together, they suggest that courts may issue injunctions and declaratory judgments and “set aside” agency action—all under the appropriate circumstances. Not coincidentally, by the early twentieth century, these two mechanisms—the bill in equity and special statutory provisions authorizing courts to “set aside” agency action—had become the primary avenues for judicial review of administrative action. Written in 1947 to interpret the APA, the *Attorney General’s Manual on the Administrative Procedure Act* effectively claimed that the newly enacted statute restated preexisting law related to judicial review.³³ To understand the APA’s remedial scheme, it is therefore necessary to understand these two mechanisms.

II. THE PRE-APA BACKDROP

In this Part, I address the two primary methods for reviewing agency action in the pre-APA era: the bill in equity and special statutory review provisions authorizing a reviewing court to “set aside” agency action.

A. *The Bill in Equity*

Early courts sought to control administrative action through a number of avenues, such as officer suits and the writs of mandamus, prohibition, quo warranto, certiorari, and habeas corpus.³⁴ The form

30 *Id.* § 551(13).

31 *Id.* § 551(7) (defining an “adjudication” to mean “agency process for the formulation of an order”); *see also id.* § 551(6) (defining an “order” to mean “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing”).

32 1941 ATTORNEY GENERAL REPORT, *supra* note 27, at 117.

33 *See* U.S. DEP’T OF JUST., ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 93 (1947).

34 For an overview, *see* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 877–92 (7th ed. 2015). For an officer suit, *see Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178–79 (1804). For mandamus, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838); *Decatur v. Paulding*, 39 U.S. (14

of action dictated the nature and scope of the remedies that a court could offer. In the wake of Congress's grant of general federal question jurisdiction to federal courts in 1875, litigants began to file and courts began to entertain "bills of equity" to enjoin allegedly unlawful administrative action.³⁵

A bill in equity was an "original action" filed directly in a trial court, where the trial court developed the record without reference to the agency's proceedings. An equitable action differed in kind from damages actions brought against officers³⁶ because a plaintiff could bring the case pre-enforcement as a challenge to a law or to an agency action.³⁷ But to do so, a plaintiff had to satisfy the requirements—such as a showing of threatened irreparable harm—imposed by courts for obtaining equitable relief.³⁸

B. The "Set Aside" Provisions (and other Special Review Statutes)

In the twentieth century, Congress adopted various special statutory review provisions—many conferring on courts the power to "set aside" agency action—to fix the perceived inadequacies of the then-existing remedial scheme. The question is whether the "set aside"

Pet.) 497 (1840). For recent treatments, see Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 946–53 (2011); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 947–58 (2017); Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 802 (1986).

35 See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 147 (1998) (reasoning that "judicial review prior to the enactment of the APA was grounded in the judge-made law of federal equity"); Caleb Nelson, "Standing" and Remedial Rights in Administrative Law, 105 VA. L. REV. 703, 713 (2019) (noting that, by "the early part of the twentieth century, the most common path for plaintiffs who wanted courts to control the behavior of federal officials was to bring a suit in equity for an injunction"); ERNST FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY: A COMPARATIVE SURVEY 247 (1928) ("The important point, then, is that the Supreme Court recognizes the appropriateness of equitable relief by injunction to correct administrative error which the court believes should be corrected judicially."); *id.* at 248 ("The relief in equity has thus by force of circumstances become the normal form of relief where it is not (as in revenue cases) shut out by statute."). Litigants brought such suits without waiting for Congress to create causes of action in equity. See *id.* at 247; *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110–11 (1902). For why that might have been appropriate, see Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763 (2022); Aditya Bamzai & Samuel L. Bray, *Debs and the Federal Equity Jurisdiction*, 98 NOTRE DAME L. REV. 699 (2022).

36 See, e.g., *Little*, 6 U.S. (2 Cranch) 170.

37 Cf. *Ex parte Young*, 209 U.S. 123 (1908).

38 For the irreparable injury test, see DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 387 (5th ed. 2019).

language added to the remedy available in a bill of equity.³⁹ In my view, these two mechanisms were viewed alike with respect to scope of remedies.

The first important use of the “set aside” language in federal statutory law was in 1906, when the Hepburn Act conferred on circuit courts jurisdiction to “enjoin, set aside, annul, or suspend any order or requirement of the” Interstate Commerce Commission (ICC).⁴⁰ Before the Hepburn Act, the ICC was required, under the Interstate Commerce Act of 1887, to petition “the circuit court of the United States sitting in *equity*” to enforce Commission orders, at which point the court could “hear and determine the matter speedily as a court of *equity*.”⁴¹ In a 1903 statute seeking to expedite cases brought by the United States, Congress provided that “in any suit in *equity* pending or hereafter brought in any circuit court” under several statutes, including the Interstate Commerce Act, the Attorney General could file a certificate and seek “precedence over others.”⁴²

The Hepburn Act altered this remedial scheme by making the ICC’s orders self-executing, which had the effect of flipping the parties to a lawsuit.⁴³ Instead of the ICC bringing suit to enforce its orders, challengers brought suit to stop those orders from taking effect.

Did Congress intend to depart from the preexisting equitable scheme by using the “set aside” language? All the available evidence suggests that it did not. Although a significant debate over the “set aside” provision did occur during the Hepburn Act’s consideration, it concerned the scope of judicial review not the scope of remedies.⁴⁴ Those who spoke to the kind of relief that would be available under the statute repeatedly referenced a preexisting equitable framework. Senator John Spooner of Wisconsin, for example, claimed that the “set aside” language was “quite insignificant,” because it was “mere recognition of existing jurisdiction,” and, if “stricken from the bill,” “would not in anywise affect the power of the circuit courts on a proper bill in

39 Cf. Sohoni, *supra* note 14, at 1169 (“Much, then, turns on the semantic content of the phrase ‘set aside.’ The conventional thinking on that issue has been that invalid rules are set aside *universally*, thereby leaving no rule in place to enforce.”).

40 Hepburn Act, ch. 3591, § 5, 34 Stat. 584, 592 (1906).

41 Interstate Commerce Act, ch. 104, § 16, 24 Stat. 379, 384–85 (1887) (emphasis added).

42 Expediting Act, ch. 544, § 1, 32 Stat. 823, 823 (emphasis added).

43 See CARL MCFARLAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION, 1920–1930: A COMPARATIVE STUDY IN THE RELATIONS OF COURTS TO ADMINISTRATIVE COMMISSIONS 114–15 (1933).

44 See, e.g., G. Edward White, *Allocating Power Between Agencies and Courts: The Legacy of Justice Brandeis*, 1974 DUKE L.J. 195, 199–205.

equity to restrain” the ICC order.⁴⁵ Senator Philander Knox of Pennsylvania likewise equated the remedial authority of the courts under the act with equity.⁴⁶

The following years saw several changes in judicial review of ICC orders, but no relevant changes to the statutory review provision. When Congress created the Commerce Court to review ICC orders in the Mann-Elkins Act, it carried over the same statutory review terms to the newly created Court’s jurisdictional provision.⁴⁷ But the Commerce Court was not long for this world. In a 1913 statute known as the Urgent Deficiencies Act, Congress abolished the Court and transferred review of ICC orders to three-judge district courts.⁴⁸ In doing so, Congress established the “venue of any suit . . . brought to enforce, suspend, or set aside, in whole or in part, any order of the [ICC].”⁴⁹

Writing in the wake of the passage of the Urgent Deficiencies Act, Joseph Henry Beale and Bruce Wyman commented in their treatise on *Railroad Rate Regulation* that “[u]nder the Interstate Commerce Act suits in the courts to enjoin, set aside, annul or suspend an order of the Commission may be maintained not only by those who were parties to the complaint before the Commission but by anyone who is affected by the Commission’s order.”⁵⁰ Such a lawsuit was “not an appeal or writ of error,” but rather “a plenary suit in equity.”⁵¹

In the decades that followed, the statutory language (and its accompanying form of review) adopted in the Urgent Deficiencies Act was enormously influential. Congress repeatedly incorporated—either by express cross-reference or by using comparable terminology—this very language into the organic statutes of a variety of pre-APA

45 40 CONG. REC. 4115 (1906) (statement of Sen. Spooner); *see also id.* at 4116–19. For similar remarks, *see id.* at 4442 (statement of Sen. Clay); *id.* at 4445 (statement of Sen. Newlands).

46 *Id.* at 4382–84 (statement of Sen. Knox).

47 Mann-Elkins Act, Pub. L. No. 61-218, ch. 309, § 1, 36 Stat. 539, 539 (1910) (confering on the Commerce Court “the jurisdiction now possessed by circuit courts . . . over all cases . . . brought to enjoin, set aside, annul, or suspend . . . any order of the [ICC]”).

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

49 *Id.* at 219, 220 (establishing that three-judge district courts were authorized to issue “interlocutory injunction[s] suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any [ICC] order”). For discussion of the “set aside” provision, *see Hearings on H.R. 7898 Before the Subcommittee of the S. Comm. on Appropriations*, 63d Cong. (1913).

50 JOSEPH HENRY BEALE & BRUCE WYMAN, *RAILROAD RATE REGULATION, WITH SPECIAL REFERENCE TO THE POWERS OF THE INTERSTATE COMMERCE COMMISSION UNDER THE ACTS TO REGULATE COMMERCE* § 1153 (2d ed. 1915).

51 *Id.*

agencies, such as the Shipping Act of 1916,⁵² the Packers and Stockyards Act of 1921,⁵³ and the Perishable Agricultural Commodities Act of 1930.⁵⁴ Decades after the Commerce Court's abolition, when Congress created the Federal Communications Commission in 1934, it expressly provided that, with specified exceptions, the "provisions of the [Urgent Deficiencies Act], relating to the enforcing or setting aside of the orders of the [ICC], are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act."⁵⁵ And decades after *that*, in his 1965 volume on *Judicial Control of Administrative Action*, Louis Jaffe characterized the Urgent Deficiencies Act as "[o]ne of the earliest of review statutes."⁵⁶

52 Shipping Act of 1916, ch. 451, § 31, 39 Stat. 728, 738 (providing that the venue for "suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall . . . be the same as in similar suits in regard to orders of the [ICC]").

53 Packers and Stockyards Act of 1921, ch. 64, § 204(a), (e), 42 Stat. 159, 162 (authorizing an "appeal[] to the circuit court of appeals . . . by filing . . . a written petition praying that the Secretary's order be set aside or modified" and providing that "[t]he court may affirm, modify, or set aside the order of the Secretary"); see also *id.* § 204(h) ("The circuit court of appeals shall have exclusive jurisdiction to review, and to affirm, set aside, or modify, such orders . . .").

54 Perishable Agricultural Commodities Act of 1930, ch. 436, §§ 10–11, 46 Stat. 531, 535 (providing that an order could be "suspended, modified, or set aside by a court of competent jurisdiction" and that "all laws relating to the suspending or restraining of the enforcement, operation, or execution, or the setting aside in whole or in part, of the orders of the [ICC] are made applicable to orders of the Secretary under this Act").

55 Communications Act of 1934, ch. 652, § 402(a), 48 Stat. 1064, 1093. For other statutes using the "set aside" language, see Bituminous Coal Act of 1937, ch. 127, § 6(d), 50 Stat. 72, 86 (conferring on federal courts authority to "enforce, set aside, or modify"); Fair Labor Standards Act of 1938, ch. 676, § 10, 52 Stat. 1060, 1065–66 ("affirm, modify, or set aside"); Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 21, 44 Stat. 1424, 1436–37 (1927); Railroad Retirement Act, ch. 868, § 11, 50 Stat. 307, 315–16.

56 JAFFE, *supra* note 2, at 157. According to Professor Merrill, these provisions collectively entrenched the "appellate review model" of administrative law. Merrill, *supra* note 34, at 940. Under that model, reviewing courts would treat agency decisions in a manner similar to how they treat the judgments of trial courts in civil litigation. See *id.* Merrill contrasts that model with the "bipolar" or "res judicata"-style review identified by others as prevalent in the nineteenth century. See *id.* at 942 & n.6; see also Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1736 (2007); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1334–37 (2006) (describing judicial review using common law actions); Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 200–01 (1991). The key features of the model were the court's reliance on the evidentiary record generated by the agency and a standard of review that turned heavily on the distinction between law and fact. See Merrill, *supra* note 34, at 940. For more on the law-fact distinction, see Bamzai, *supra* note 34, at 959–62; JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 50–55, 312–19 (1927). For a recent treatment of Dickinson's book, see Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 889–90 (2020).

Several cases addressed whether the “set aside” language added to the remedy otherwise available in a bill of equity. That question was relevant *both* to whether a regulation could be challenged in a preenforcement posture—the issue of “ripeness”—*and* to the scope of the remedy that a court might issue in a preenforcement action. In a sequence of cases, the Court reasoned that preenforcement challenges to regulations were sometimes “ripe” and that the “set aside” remedy mirrored the framework for equitable relief.

In 1927, the Court decided *United States v. Los Angeles & Salt Lake Railroad Co.*,⁵⁷ which addressed a suit brought both “under the Urgent Deficiencies Act . . . and also under [the court’s] general equity powers” to enjoin and annul an ICC order purporting to determine the “final value” of certain railroad property.⁵⁸ The Court concluded that, although the ICC decision was “called an order,” “there are many orders of the Commission which are not judicially reviewable under the provision now incorporated in the Urgent Deficiencies Act.”⁵⁹ This was one of them, because the order did “not command the carrier to do, or to refrain from doing, any thing.”⁶⁰ In the course of his analysis, Justice Brandeis traced the genesis of the review provisions in the Urgent Deficiencies Act.⁶¹ He noted that “[f]or the first nineteen years of the [Interstate Commerce] Commission’s existence no order was . . . reviewable [before enforcement],” until the Hepburn Act conferred statutory jurisdiction on courts to enjoin and set aside an order.⁶²

Justice Brandeis’s decision effectively dismissed the lawsuit for lack of ripeness.⁶³ What is equally notable for purposes of this Essay is

57 273 U.S. 299 (1927).

58 *Id.* at 307–08.

59 *Id.* at 309.

60 *Id.* at 309–10.

61 *See id.* at 309 (noting that, after the Hepburn Act’s enactment in 1906, jurisdiction was transferred in 1910 to the Commerce Court, and then to the district courts by the Urgent Deficiencies Act).

62 *Id.* at 309. Justice Brandeis contended that the review provision was added because “for the first time, the rate-making power was conferred upon the Commission, and then disobedience of its orders was first made punishable.” *Id.* (citing Hepburn Act, ch. 3591, §§ 2–7, 34 Stat. 584, 586–95 (1906)). Although outside the scope of this Essay, the ICC is conventionally understood to be the first independent agency, with its commissioners protected by a for-cause removal provision. *See* Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. RICH. L. REV. 691, 695 (2018); Interstate Commerce Act of 1887, ch. 104, § 11, 24 Stat. 379, 383 (1887). Justice Brandeis intriguingly characterized orders reviewed under the Urgent Deficiencies Act as arising out of the ICC’s “exercise either of the quasi-judicial function of determining controversies or of the delegated legislative function of rate making and rule making.” *L.A. & Salt Lake R.R. Co.*, 273 U.S. at 309; *cf.* *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

63 *See L.A. & Salt Lake R.R. Co.*, 273 U.S. at 310–13.

that the plaintiff sought to bring both a bill in equity *and* a “set aside” action. Justice Brandeis concluded that “[n]o basis is laid for relief under the general equity powers” while bracketing the question “[w]hether the remedy conferred by the Urgent Deficiencies Act is in all cases the exclusive equitable remedy.”⁶⁴ The Court’s reasoning thus acknowledged that the “set aside” remedy was a form of “equitable remedy,” even while it left open the possibility that it was not the “exclusive” one.

Fifteen years later, in 1942, the Court decided *CBS v. United States*,⁶⁵ prompting a dispute between Chief Justice Stone in the majority and Justice Frankfurter in dissent over ripeness under the “set aside” remedy.⁶⁶ The case arose when the FCC promulgated regulations requiring the agency to refuse to grant a license to a broadcasting station that entered into certain types of contracts with any broadcasting network organization.⁶⁷ Writing for the majority, Chief Justice Stone held that a preenforcement challenge to the regulations was ripe.⁶⁸ In doing so, he reasoned that “[a] proceeding to set aside an order of the Commission under § 402(a) [of the Communications Act] and the Urgent Deficiencies Act is a plenary suit in equity.”⁶⁹ Justice Frankfurter argued that, by defining the term “order” in the Urgent Deficiencies Act, “Congress did not leave opportunity for reviewing damaging action by the [FCC] to the general equity powers of the district courts.”⁷⁰ But even Justice Frankfurter’s reasoning presupposed that equitable principles applied unless superseded by statute.

These cases, decided fifteen years apart, demonstrate that the pre-APA framework permitted preenforcement challenges to rules under appropriate circumstances. But neither case establishes the scope of the remedy—party-specific or universal—available in a preenforcement challenge.⁷¹ Thus, a few years before the 1946 enactment of the

64 *Id.* at 314–15.

65 316 U.S. 407 (1942).

66 *See id.* at 408 (noting that the lawsuit was “brought under § 402(a) of the Communications Act of 1934 . . . and the Urgent Deficiencies Act”).

67 *See id.*

68 *See id.* at 419–20.

69 *Id.* at 415.

70 *Id.* at 429–30 (Frankfurter, J., dissenting). Both *L.A. & Salt Lake R.R. Co.* and *CBS* are precursors to the “ripeness” issue famously addressed in *Abbott Laboratories v. Gardner*, which allowed plaintiffs to challenge rules before their enforcement. 387 U.S. 136 (1967).

71 The mere fact that the cases permitted preenforcement challenges does not answer the scope-of-remedy question. It is certainly possible (and even sensible) for a legal regime to (1) permit a preenforcement challenge, *and* (2) tailor the injunction to the plaintiff’s injury, so that other parties who seek the same relief must bring their own claims. Just because the law permits preenforcement challenges does not mean that it must also allow a plaintiff who succeeds on such a challenge to obtain injunctive relief for other parties.

APA, the “set aside” language had the meaning of a suit in equity. That meaning was incorporated into the APA. But what were the relevant incorporated equitable principles?

III. EQUITABLE REMEDIES AND THE TAILORING PRINCIPLE

Having established that background principles of equity (and more generally, judgments) ought to govern the scope of relief under the APA, I turn to how those principles might apply to administrative challenges. I start by discussing the “tailoring principle” of remedies, which generally requires relief to match injury. I then address nuances in the tailoring principle, such as the problem of injunctive indivisibility, as well as application in particular instances. I finally turn to how the tailoring principle might apply to forms of agency action that we term “adjudication” and “rulemaking.”

A. *The Tailoring Principle*

The traditional rule—in both law and equity—was that a stranger to litigation could not enforce a judgment previously obtained by a plaintiff against a defendant, even if the stranger alleged the same legal theory on which the plaintiff had prevailed. In turn, a party ordinarily could obtain only such relief that bore a sufficiently strong link to the party’s injuries, rather than relief for the injuries of others. These two interconnected rules found expression in historic treatises concerning both the law of judgments and of equity. And although the Supreme Court has departed from some of the principles reflected in those treatises, the Supreme Court’s current jurisprudence reflects those rules in cases involving the federal government.

1. Tailoring and the Law of Judgments

Starting at the most general level, consider early treatises on the law of judgments. In his 1891 treatise on the subject, Henry Campbell Black explained that “judgments and decrees are conclusive evidence of facts only as between parties and privies to the litigation.”⁷² Black therefore reasoned that “no person is entitled to take advantage of a former judgment or decree, as decisive in his favor of a matter in controversy, unless, being a party or privy thereto, he would have been prejudiced by it had the decision been the other way.”⁷³ Black’s views on this point were consistent with those of other authors of treatises on judgments. For example, Abraham Clark Freeman said much the

72 2 BLACK, *supra* note 21, § 534, at 636.

73 *Id.* at 637.

same in his 1873 treatise: “No party is, as a general rule, bound in a subsequent proceeding by a judgment, unless the adverse party now seeking to secure the benefit of the former adjudication would have been prejudiced by it if it had been determined the other way.”⁷⁴ A party could not benefit from a judgment unless he would be injured by it if the tables were turned.

Both treatises rested this conclusion on the then-prevailing rule of “mutuality of estoppel.”⁷⁵ As Black put it, “no person can claim the *benefit* of a judgment, as an estoppel upon his adversary, unless he would have been *prejudiced* by a contrary decision of the case.”⁷⁶ Or, in Freeman’s words: “It is essential to an estoppel that it be mutual, so that the same parties or privies may both be bound and take advantage of it.”⁷⁷

The “mutuality of estoppel” principle applied to cases involving government action similar to rulemaking. For example, among the cases relied on by these treatises was *Moore v. City of Albany*,⁷⁸ an 1885 decision by the Court of Appeals of New York. In *Moore*, the court addressed a challenge to a tax assessment. As it happens, another set of plaintiffs subject to the very same assessment had previously obtained a judgment declaring the “assessment null and void for the same reasons now urged by these appellants, and vacated the same as to the lands of those plaintiffs.”⁷⁹ The court rejected the attempt by the second plaintiffs to “claim the benefit of [the earlier] adjudication.”⁸⁰ It reasoned that “no principle . . . enable[d] these appellants to claim the benefit of that judgment as *res adjudicata* in their favor,” for it was “a general rule that estoppels by judgment must be mutual, that a party cannot claim the benefit of a judgment favorable to him unless he would be bound by a judgment in the same matter if adverse to him.”⁸¹ At the same time, *Moore* acknowledged the “doctrine of *stare decisis*, which is of a different nature.”⁸² As *Moore* explained,

74 FREEMAN, *supra* note 21, § 159, at 130.

75 For the roots of this principle, see CODE JUST. 7.56.2 (Gordian) (“Where judgment has been rendered between certain parties, those who did not appear in the case will experience neither benefit nor injury . . .”). Indeed, Black expressly relied on Justinian to argue that all persons other than parties and privies were generally treated as “‘strangers’ to the judgment and, as such, exempt from its effect as evidence or as an estoppel.” 2 BLACK, *supra* note 21, § 600, at 717 & n.459.

76 2 BLACK, *supra* note 21, § 548, at 652.

77 FREEMAN, *supra* note 21, § 159, at 130 (quoting *Petrie v. Nuttall* (1856) 156 Eng. Rep. 957, 960; 11 Ex. 568, 575–76).

78 98 N.Y. 396 (1885).

79 *Id.* at 409.

80 *Id.*

81 *Id.*

82 *Id.* at 410.

[w]hen a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same, and this it does for the stability and certainty of the law.⁸³

Thus, a later party who was a stranger to litigation could invoke the earlier opinion as precedent under the doctrine of *stare decisis* but could not rely on the judgment as *res judicata*.

Intriguingly, Black acknowledged exceptions to the “mutuality of estoppel” rule.⁸⁴ One exception involved courts of exclusive jurisdiction.⁸⁵ As Black observed,⁸⁶ in *Rhoades v. Selin*,⁸⁷ Justice Bushrod Washington, riding circuit, reasoned that, in the absence of fraud or collusion, “where the matter adjudicated is by a court of peculiar and exclusive jurisdiction, and the same matter comes incidentally before another court, the sentence in the former is conclusive upon the latter, as to the matter directly decided, not only between the same parties, but against strangers.”⁸⁸ Justice Washington’s reasoning thus appeared to contemplate that the legislature could create a court of “exclusive jurisdiction” and authorize it to bind nonparties—and presumably to confer benefits on nonparties, as well.⁸⁹ But Black contended that the rule of *Rhoades* had no “proper application except in the case of judgments *in rem*, or judgments determining matters of public right or of police.”⁹⁰ That leads to the second exception that Black identified, which was for judgments *in rem* held “to be binding and conclusive, not only upon the immediate parties to the litigation, but upon all persons who may be interested in the *res*.”⁹¹

These exceptions suggest that the rule of “mutuality of estoppel” was periodically relaxed. But the two exceptions Black identified—courts of exclusive jurisdiction and *in rem* actions—do not appear to

83 *Id.*

84 Some of the exceptions—such as those for warrantors or indemnitors bound by a judgment against another—are not relevant to the analysis here. 2 BLACK, *supra* note 21, § 600, at 717. For that reason, I do not discuss them. Black also listed *stare decisis* as an exception. *See id.* § 603, at 720–21.

85 *Id.* § 601, at 720.

86 *See id.*

87 20 F. Cas. 631 (C.C.E.D. Pa. 1827) (No. 11,740).

88 *Id.* at 634.

89 The reasoning seems to parallel Justice Ginsburg’s point in *Taylor v. Sturgell*, 553 U.S. 880, 895 (2008) (noting that, under some circumstances, the legislature may enact a “special statutory scheme” to preclude nonparties).

90 2 BLACK, *supra* note 21, § 601, at 720.

91 *Id.* § 602, at 720 (emphasis added).

justify a broader exception about nonparties in cases against the government more generally.⁹²

Treatises on equity expressed principles consistent with these broader points about judgments, though they made allowances for representative lawsuits. Consider a few passages from James High's treatise on the law of injunctions. There, High claimed that, in general, a party must show injury before the granting of an injunction, because "irregular and unauthorized" acts without "injurious result" were ordinarily "no ground for the relief."⁹³ But an injunction could issue without actual injury in appropriate circumstances, such as where the challenged acts were repetitious or continuous.⁹⁴ In those circumstances, the court would grant relief "only to the extent that is necessary for the protection and vindication of the plaintiff's rights."⁹⁵ High expressed the same principle in his explanations on the appropriate joinder of parties, contending that the "general" rule was that a court's equity jurisdiction would be "exercised only in behalf of parties interested in the transaction or subject-matter of the proceedings which it is sought to enjoin."⁹⁶ That meant that a court in equity would not "interpose by injunction for the protection of one who seeks relief indirectly through the equities of other parties, on which they themselves do not insist."⁹⁷

To take another example, in his 1915 treatise, Robert Treat Whitehouse addressed the manner in which a plaintiff could bring a

92 Could Black's exception for courts of exclusive jurisdiction explain the various channeling statutes that Congress has enacted? Perhaps. For example, the Administrative Orders Review Act (commonly referred to as the Hobbs Act) gives a "court of appeals . . . exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain orders. 28 U.S.C. § 2342 (2018) (emphasis added). Challenges must occur within a specified time period after the order's promulgation. See *id.* § 2344; PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2059–60 (2019) (Kavanaugh, J., concurring in the judgment) (noting that some such statutes "preclude judicial review in subsequent enforcement actions"). Perhaps the statutory requirement for "exclusive jurisdiction," rather than the "set aside" language alone, explains why the Hobbs Act (and similar statutory schemes) might be understood to authorize some form of universal vacatur. That would explain why the remedial structure of the Hobbs Act differs from that of the APA. A full exploration of the Hobbs Act is outside the scope of this Essay.

93 1 JAMES L. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS § 9, at 14–15 (Shirley T. High, ed., 4th ed. 1905).

94 See *id.*

95 *Id.* at 14.

96 2 *id.* § 1547, at 1525, 1525–26 (remarking "that one who has no personal interest in the matter is not entitled to the relief, even though he may have been a party to the proceedings at law which he seeks to restrain").

97 *Id.* at 1526; see 1 *id.* § 573, at 544, 544–45 (reasoning that, in the context of a suit to restrain the enforcement or collection of a tax, "the court will refuse to interfere unless the proper parties are before it").

proto-class action.⁹⁸ He defined the boundaries of representative litigation where “numerous persons hav[e] a material interest” and a court sought to dispense with “a portion” as parties to the litigation.⁹⁹ In such cases, according to Whitehouse, a plaintiff or group of plaintiffs could—“rest[ing] on the principle of virtual representation”—represent “a large number of persons hav[ing] a common interest” where they “may fairly be taken to represent the whole so that a decree can be rendered in the case without prejudice to the rights of the absent.”¹⁰⁰ For representative litigation to be appropriate, “the bill must be brought in behalf of the plaintiff and all others of like interest, and it should be alleged in the bill that it is thus brought since the parties are too numerous to do otherwise.”¹⁰¹ By contrast, if a plaintiff brought a case “solely” on his own behalf, or only “nominally in behalf of all, but seeking to establish an individual right of the plaintiff’s,” “all whose interests will be affected must be made technical parties or the bill will not be sustained.”¹⁰² And “[t]he rights of the absent [parties] can only be bound by the decree of the court where all have a common interest so that a portion before the court may fairly be taken to represent all.”¹⁰³

The common thread connecting these passages from the various treatises is the requirement of a link between a plaintiff’s injury and the scope of the relief that a court in equity would provide. And while Whitehouse acknowledged the propriety of representative litigation, he contended that ordinarily a party sued on the party’s behalf alone. None of these treatises required judicial *opinions* to be limited to the parties alone. To the contrary, opinions show the court’s reasoning so that nonparties can orient their activities around judicial pronouncements of the law. By their very nature, opinions sweep more broadly than judgments.

Modern Supreme Court cases have adhered to the traditional principles in some ways, but departed from them in others. To begin, cases frequently say that the relief should match—and not go beyond—the interests of the parties. For example, in *Gill v. Whitford*,¹⁰⁴ the Court recently said that “standing is not dispensed in gross”

98 1 ROBERT TREAT WHITEHOUSE, *EQUITY PRACTICE: STATE AND FEDERAL: WITH STATUTES RULES FORMS AND PRECEDENTS* § 59, at 92–96 (1915). For the current boundaries of class actions, see FED. R. CIV. P. 23.

99 1 WHITEHOUSE, *supra* note 98, at 92, 92–96.

100 *Id.* at 92–94. Such circumstances arose, according to Whitehouse, where the plaintiffs had a “community of interest in the subject matter of the suit”—for example, because of a common “estate, title or right involved in the controversy.” *Id.* at 94.

101 *Id.* at 94–95.

102 *Id.* at 95.

103 *Id.*

104 138 S. Ct. 1916 (2018).

because “[a] plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury.”¹⁰⁵ Thus, a “remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.”¹⁰⁶ The tailoring principle requires that the relief fit, and not extend beyond what is necessary to remedy, the plaintiff’s harm—no more and no less.¹⁰⁷ Or as the Court put it in *Monsanto Co. v. Geertson Seed Farms*,¹⁰⁸ the challengers in the case “do not represent a class, so they could not seek to enjoin such an order on the ground that it might cause harm to other parties.”¹⁰⁹ In the words of Justice Thomas, courts decide cases for the parties before them, not “general questions of legality.”¹¹⁰

In some respects, however, the Court has shifted its view on the mutuality of estoppel. Modern cases allow nonparties to benefit from prior judgments.¹¹¹ But in the relevant respect, the rule remains the same. In *United States v. Mendoza*, the Court held that nonmutual preclusion was not available against the federal government.¹¹² There is no reason, therefore, to view the Court’s modern equity cases as departing from the rules that (1) a stranger to litigation *against the*

105 *Id.* at 1934 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006)); *see, e.g.,* *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645 (2017) (requiring that “a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought” (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008))).

106 *Lewis v. Casey*, 518 U.S. 343, 357 (1996); *see also* *Missouri v. Jenkins*, 515 U.S. 70, 88, 89 (1995) (“[T]he nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation.” (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977))).

107 *See* *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994).

108 561 U.S. 139 (2010).

109 *Id.* at 163.

110 *Trump v. Hawaii*, 138 S. Ct. 2392, 2428 (2018) (Thomas, J., concurring). Like the Supreme Court cases just cited, the 1941 ATTORNEY GENERAL REPORT repeatedly remarked that agency action could be challenged only by those with legal standing. *See* 1941 ATTORNEY GENERAL REPORT, *supra* note 27, at 80 (observing that challenges can be brought only by “parties in an adversary position who have ‘legal standing’ to maintain their positions and ‘justiciable’ issues in such form that the judicial power is ‘capable of acting on them’”) (quoting *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 444 (1923)); *id.* at 84 (“[O]nly a person with ‘legal standing’ can attack an administrative act.”); *id.* at 117 (noting that a court may “set aside” a regulation in “statutory proceedings which may be instituted . . . by parties aggrieved by regulations”).

111 *See, e.g.,* *Blonder-Tongue Lab’ys., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 314–27 (1971); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326–33 (1979). For the differing perspectives on mutuality of estoppel in the two Restatements, *see* RESTATEMENT (FIRST) OF JUDGMENTS § 93 (AM. L. INST. 1942) (adhering to the prevailing mutuality rule at the time of the 1942 publication); RESTATEMENT (SECOND) OF JUDGMENTS § 29 (AM. L. INST. 1982) (relaxing the mutuality rule in 1982).

112 *United States v. Mendoza*, 464 U.S. 154, 162–63 (1984); *see* Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 627–33 (2017).

government cannot enforce a judgment obtained by another; and (2) absent a suit in a representative capacity, a party can obtain an injunction solely to protect its own injuries. The rules fit together to match injunctive scope with preclusive effect.¹¹³

2. Explaining Precedents

These distinctions and nuances can explain many of the sources and much of the case law on which scholars have relied in claiming that the APA clearly mandated universal relief.

For example, the distinction between judgment and reasoning helps to explain the *1941 Attorney General Report's* description of the remedies that a party can obtain against regulations promulgated by administrative agencies. The *Report* noted that, “[u]ntil recently,” review of regulations “could be had only collaterally, in actions brought to enforce them, in injunction suits to prevent their enforcement, in declaratory judgment proceedings, in habeas corpus actions to obtain release from arrests for violation, or in private actions in which the results turn upon the effect of regulations.”¹¹⁴ Through this list, the *Report* appeared to preview the set of potential remedies that Congress ultimately incorporated into § 703 of the APA.¹¹⁵ Notably, the *Report* included the possibility of collateral attacks against regulations in enforcement actions.

The *Report* then remarked that *in such an action* “the issue may be either the validity of a regulation as a whole or the legality of applying it to the person who is challenging it”¹¹⁶ and it analogized a challenge to an administrative regulation to “an attack upon a statute [that] may involve either the constitutionality of the measure as a whole or the constitutionality of applying it to a particular party.”¹¹⁷ The *Report* lastly observed that “[w]here the validity of the entire regulation is in question *in one of the types of actions above enumerated*, the central issue is one

113 Professor Sohoni describes an argument similar to the one that I have just set forth as “thought-provoking,” but relies on various precedents to “show that injunctive scope was not always coextensive with future preclusive effect.” Sohoni, *supra* note 14, at 994 n.487. I will address some of the precedents immediately below. See *infra* subsection III.A.2. But in my view, occasional and unexplained deviations do not undermine the generally accepted rules regarding judgments.

114 1941 ATTORNEY GENERAL REPORT, *supra* note 27, at 115.

115 See 5 U.S.C. § 703 (2018) (providing that “[t]he form of proceeding for judicial review is,” in the absence of a special statutory review provision, “any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus”).

116 1941 ATTORNEY GENERAL REPORT, *supra* note 27, at 115 (citing *Perkins v. Lukens Steel Co.*, 310 U.S. 114 (1940)).

117 *Id.* at 115. For this proposition, the *Report* cited *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), which I discuss below. See *infra* notes 125–26 and accompanying text.

of law, involving the relation of regulation to the governing statute or occasionally to the Constitution.”¹¹⁸

Some might read this language from the *Report* as supporting universal injunctions. But a close inspection of the *Report* suggests that its import is different. Recall that the *Report* listed collateral attacks against regulations in enforcement actions as one among the proceedings in which “the validity of the entire regulation is in question.”¹¹⁹ Yet nobody would contend that a successful collateral attack on a regulation in an enforcement action resulted in the vacatur of, or a “universal” injunction against, the regulation, even if the regulation were deemed to be “facially” invalid.¹²⁰ Instead, the *Report* appears to reflect the possibility that in many actions (including enforcement actions) a court may deem a regulation invalid in all its applications. That proposition can be true even if the court ultimately “sets aside” the regulation only as to the plaintiff, rather than universally. Indeed, in an enforcement action, plaintiff-specific relief is the only form that a court could conceivably grant—dismissal of the government’s lawsuit.

The various nuances that I have discussed can also explain some of the language in opinions that appear to grant injunctive relief to nonparties.¹²¹ For example, in the *Assigned Car Cases*,¹²² a three-judge district court held that the ICC was enjoined “from enforcing or in any manner attempting to enforce or carry out the said order or any of the terms thereof.”¹²³ But it is unclear whether this language suggests that

118 1941 ATTORNEY GENERAL REPORT, *supra* note 27, at 115 (emphasis added).

119 *Id.*

120 *See, e.g.*, PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2063 (2019) (Kavanaugh, J., concurring in the judgment) (“[I]f the district court disagrees with the agency’s interpretation in an enforcement action, that ruling does not invalidate the order and has no effect on the agency’s ability to enforce the order against others.”).

121 Here, I address the cases deployed by Professor Sohoni for the proposition that “a federal court could offer preliminary or final equitable relief that extended *beyond just the plaintiffs* and that *shielded nonplaintiffs, too.*” Sohoni, *supra* note 14, at 1146, 1147–54.

122 274 U.S. 564 (1927).

123 Final Decree, *Berwind-White Coal Mining Co. v. United States*, 9 F.2d 429 (E.D. Pa. 1925) (Nos. 8271, 8278, 3275, 3317), *as reprinted in* Transcript of Record at 75, *The Assigned Car Cases*, 274 U.S. 564 (1927) (Nos. 606, 638) [hereinafter Transcript, *Assigned Car Cases*]. Professor Sohoni notes that the lawsuit in the *Assigned Car Cases* was brought “in behalf of [certain railroads] and in behalf of such other railroads as have an interest and may by proper proceedings become parties hereto.” Sohoni, *supra* note 14, at 1147 n.124 (quoting Bill of Complaint, *Berwind-White Coal Mining Co.*, 9 F.2d 429 (Nos. 8271, 8278, 3275, 3317), *as reprinted in* Transcript, *Assigned Car Cases*, *supra*). The language suggests that the case might have been brought in a representative capacity, which resulted in a broader remedy than the norm. The same representative capacity issue explains *United States v. Baltimore & Ohio Railroad Co.*, 293 U.S. 454 (1935). *Petition, Balt. & O. R. Co. v. United States*, 5 F. Supp. 929 (N.D. Ohio 1933) (No. 4681), *as reprinted in* Transcript of Record at 4–5, *United States v. Balt. & Ohio R.R. Co.*, 293 U.S. 454 (1935) (No. 221) [hereinafter Transcript, *Balt. & Ohio*] (“The said railroads are so numerous as to make it impracticable to bring them all

the ICC order was being enjoined in a manner that granted relief to nonparties. And at any rate, the Supreme Court reversed on the merits, finding the rule valid and rendering the case a thin reed on which to build a theory of universal injunctions.¹²⁴ To take another example, in *Lukens Steel Co. v. Perkins*, the D.C. Circuit appeared to stay implementation of a statute for a lengthy period of time.¹²⁵ But the Supreme Court reversed for lack of standing while chastising the lower court and characterizing its remedy as extending “beyond any controversy that might have existed between the complaining companies and the Government officials.”¹²⁶ It would be strange to draw firm conclusions from a temporary stay issued by a lower court in a decision that the Supreme Court ultimately reversed and harshly criticized on the scope of the injunction.

I do not mean to suggest that I have canvassed all the pre-APA cases to check whether any embraced universal vacatur of a regulation. In light of the mutuality of estoppel rule, it seems doubtful any did in a manner inconsistent with the broader principles of judgments and equity. But to the extent that there were stray remarks in an occasional judicial opinion that tend to cut in the opposite direction, such remarks are easily explainable, because courts do not scrupulously distinguish between judgments and opinions.¹²⁷ The general approach was that relief mirrored injury.

before this court; and they constitute a class which is fairly represented by the petitioners herein . . . This suit is filed by these petitioners, who sue on behalf of themselves and of all other railroads subject to the Interstate Commerce Act which may have an interest in the subject matter of this suit.”); *see also* Findings of Fact, *Balt. & O. R. Co.*, 5 F. Supp. 929 (No. 4681), *as reprinted in* Transcript, *Balt. & Ohio*, *supra* (noting that the suit was brought in a “representative capacity”).

124 *The Assigned Car Cases*, 274 U.S. at 584.

125 *Lukens Steel Co. v. Perkins*, 107 F.2d 627 (D.C. Cir. 1939) (per curiam), *rev'd* 310 U.S. 113, 120–21 (1940) (“The seven companies named as complainants by the bill did not merely pray relief for themselves against the Secretary’s wage determination but insisted that all these Government officials be restrained from requiring the statutory stipulation as to minimum wages in contracts with any other steel and iron manufacturers throughout the United States.”); *see* 1941 ATTORNEY GENERAL REPORT, *supra* note 27, at 86, 115 (citing *Perkins*, 310 U.S. 113).

126 *Perkins*, 310 U.S. at 123 (remarking that the “benefits of [the lower court’s] injunction . . . were not limited to the potential bidders in the ‘locality,’ however construed, in which the respondents do business”).

127 For a similar point to my own, consider Justice Kavanaugh’s plurality opinion in *Barr v. Am. Ass’n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020). There, Justice Kavanaugh observed that “[t]he term ‘invalidate’ is a common judicial shorthand when the Court holds that a particular provision is unlawful and therefore may not be enforced against a plaintiff.” *Id.* at 2351 n.8. Justice Kavanaugh further noted that “when it ‘invalidates’ a law as unconstitutional, the Court of course does not formally repeal the law from the U.S. Code or the Statutes at Large.” *Id.* In a similar vein, the fact that courts used terms

B. *Indivisibility*

Certain cases—specifically, those involving relief that might be considered “indivisible”—raise complex questions under the tailoring principle. In some circumstances, it might be possible to grant relief to an individual without conferring significant ancillary benefits on nonparties. In other circumstances, however, a remedy conferred on the plaintiff necessarily ends up giving relief to nonparties. In these latter circumstances—where the relief is “indivisible”—relief to the plaintiff incidentally helps nonparties.

Consider a straightforward example that illustrates the point. A plaintiff may seek to abate a nuisance—say, an environmental harm—by obtaining an injunction. Under appropriate circumstances, a lawsuit of this kind can be brought by a single plaintiff.¹²⁸ If successful, the injunction might protect the plaintiff’s neighbors from the enjoined environmental harm, because the relief obtained by the plaintiff cannot be divided from any relief that could have been obtained by the plaintiff’s neighbors. The relief is “indivisible” in this sense.

The concept of “indivisible” relief cuts across a variety of substantive areas and does not allow for a one-size-fits-all approach.¹²⁹ Consider a case where plaintiffs sought an injunction against aggressive law-enforcement tactics enforcing a motorcycle helmet law.¹³⁰ The court concluded that, because highway patrol officers could not distinguish between plaintiffs and other motorcyclists, the appropriate relief was an injunction of the forbidden practices with respect to every motorcyclist in the State.¹³¹ Or consider a factual circumstance where a professional athlete seeks an injunction against a practice that he contends violates the antitrust laws. Success in obtaining the injunction may necessarily result in relief for other athletes in the same league.¹³² Or consider a single student in a school system who proves district-wide segregation and thereby obtains an injunction requiring integration of

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.

128 See, e.g., RESTATEMENT (SECOND) OF TORTS § 821C(2)(c) (AM. L. INST. 1979) (providing that abatement can be sought by public officials, by plaintiffs with special harms, or by citizens who represent the public “as a citizen in a citizen’s action or as a member of a class in a class action”).

129 For discussion of this point, see Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 649–51 (2015); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1609 (2007); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 925–26 & n.31 (1998); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1195–97 (1982).

130 *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486 (9th Cir. 1996).

131 See *id.* at 1501–02.

132 See, e.g., *Robertson v. NBA*, 556 F.2d 682, 684–85 (2d Cir. 1977).

the entire system. The effect of the injunction will necessarily be felt by other students.¹³³

The propriety of the scope of injunction can be debated in any of these substantive areas. Perhaps in some of the cases a narrower injunction could have been tailored. But the broader set of principles is coherent: (1) a court should tailor an injunction to remedy a plaintiff's injury; and (2) on occasion, the narrowest tailoring of the remedy will nevertheless provide ancillary relief to third parties.

Recent cases illustrate this point. In the currently pending case *Biden v. Nebraska*, various States challenged the student loan forgiveness program adopted by the federal government.¹³⁴ The government, in turn, argued that the States lacked standing and could not succeed on the merits.¹³⁵ But assume away any such difficulties and consider how relief might be shaped if the State had standing and prevailed on the merits. If so, the State's relief should be tied to the State's injury, as expressed in its theory of standing. In those circumstances, the scope of the injunction likely would cover only the particular state-run loan provider and its loans, because that remedy would fit the injury shown.

By contrast, in *United States v. Texas*, another pending case, several States brought a challenge to the lawfulness of the Department of Homeland Security's guidance directing immigration enforcement officials to prioritize the arrest and removal of certain groups who have entered the country without legal permission.¹³⁶ Once again, assume that the States possess standing and can prevail on the merits. If so, the form of injury alleged probably cannot be remedied without an injunction that bars the enforcement of the guidance document in all circumstances.

I do not definitively resolve the complex issues in either of these two pending cases. But these two examples show how the tailoring principle, tempered by the indivisibility rule, can produce sensible and principled results across a host of controversial subject areas.

C. Tailoring Challenges in Administrative Law Cases

I. Adjudications and Rulemakings

Courts apply the generally applicable principle that relief should be tailored to injury in the context of agency adjudications. The

133 See, e.g., *Potts v. Flax*, 313 F.2d 284, 288–89 (5th Cir. 1963).

134 143 S. Ct. 477 (2022) (mem.), *granting cert. to* 52 F.4th 1044 (8th Cir. 2022).

135 *Nebraska v. Biden*, 52 F.4th at 1046.

136 *Texas v. United States*, 40 F.4th 205, 213 (5th Cir. 2022), *cert granted*, 143 S. Ct. 51 (2022) (mem.) (No. 22-58).

question is whether (and why) the ordinary backdrop rule should change for rulemakings. In my view, the better approach would apply the tailoring principle to, rather than carving out an exception for, challenges to rulemakings.

To illustrate why, start with an example involving a challenge to an agency adjudication based on the facts of the famous *Chenery I* case.¹³⁷ In *Chenery I*, the Court held that, in the course of adjudicating the Chenery corporation's case within the agency, the SEC had improperly construed the term "fair and equitable" in the SEC's organic statute.¹³⁸ When Chenery won at the Supreme Court, the SEC order was set aside.¹³⁹ But could the SEC have adhered to the same understanding of the statutory term in proceedings involving other parties? Yes and no. Yes, it could have without violating the equitable relief that the Court had granted Chenery in *Chenery I*. No, it could not have because, after the Court's decision in *Chenery I*, any subsequent federal court would have quickly and rightly declared unlawful the SEC's interpretation of "fair and equitable" in another case.

The example shows that, without significant controversy, courts tailor their remedies to the precise challenge brought to an agency adjudication, including where the adjudication might announce a new policy or a new statutory interpretation that applies broadly in other cases. The example also shows that other doctrines—such as stare decisis—compel uniformity in the judicial system. The scope of injunctive relief is not the sole doctrine encouraging adherence to judicial decisions.

When a *lower* court renders a decision like *Chenery I*, the justifications for uniformity drop. Because the judgment addresses solely the rights of the challenging party—and not the rights of others similarly situated who might litigate in other circuits—the federal government can, and often will, decline to "acquiesce" in the lower court's ruling.¹⁴⁰ Such "nonacquiescence" occurs when the agency decides in other cases not to abide by the lower court's adverse decision.¹⁴¹ Consider,

137 SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80 (1943).

138 See *id.* at 89, 89–90 (quoting Public Utility Holding Company Act of 1935, ch. 687, § 11(e), 49 Stat. 803, 822, *repealed by* Public Utility Holding Company Act of 2005, Pub. L. No. 109-58, 119 Stat. 972).

139 See *id.* at 95.

140 See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 & 681 n.1 (1989).

141 For an example of a case approving of such an agency approach, see *Baeder v. Heckler*, 768 F.2d 547, 553 (3d Cir. 1985) (reasoning that, in the context of an adjudication of a claim for disability benefits, the district court lacked "authority to issue an injunction aimed at controlling the Secretary's behavior in every disability case in the country"). For an example of controversy that can surround some invocations of nonacquiescence, see

for example, a holding similar to *Chenery I*, but at the federal-court-of-appeals level. If the appellate court determined that the SEC misinterpreted the statutory term “fair and equitable,” the agency might elect not to acquiesce in the court’s interpretation and continue to apply its own definition to other parties in other cases. Again, the doctrine of stare decisis would limit the effectiveness of any such nonacquiescence within the circuit of the particular appellate court. But the limited scope of the judgment—which was directed at the adjudication involving the party—would mean that the agency might be able to obtain a different interpretation in another circuit.

Although agencies ordinarily invoke nonacquiescence in the context of “adjudications”—in circumstances like the *Chenery I* example above—the premises that support an agency’s use of nonacquiescence apply to judicial orders setting aside rulemakings.¹⁴² Those premises are derived from the same underlying logic that I have discussed above—the tailoring principle (that a court’s judgment covers the plaintiff’s injury) and the distinction between the scope of the injunction (which remedies a specific injury) and the reasoning of the opinion (which sweeps more broadly).¹⁴³ Indeed, in *National Mining Ass’n*,

Heartland Plymouth Court MI, LLC v. Nat’l Lab. Rel. Bd., 838 F.3d 16, 21–29 (D.C. Cir. 2016).

142 Indeed, Professors Estreicher and Revesz note that, although “[n]onacquiescence typically occurs when the agency makes policy through administrative adjudication[,] [i]t can also occur . . . with respect to rulemaking and purely prosecutorial decisions, when an agency must go to court to bring an enforcement proceeding in the federal district court.” Estreicher & Revesz, *supra* note 140, at 688 n.35; cf. Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1760–61 (2012) (noting that a later rulemaking may be thought to “nonacquiesce” to an earlier court’s construction of statutory language, when the agency construes the statutory provision in a manner inconsistent with the court’s decision). In this respect, I part ways with Professor Sohoni, who contends that “[n]onacquiescence is about *adjudications*, not about *rules*.” Sohoni, *supra* note 14, at 1178–79. As explained further below, this specific contrast between our positions may in fact be the manner in which our differing analytical approaches lead to different outcomes. See *infra* note 143.

143 In reasoning to the contrary, Professor Sohoni claims that, in the adjudication context, “[a]n agency engaging in nonacquiescence is not asserting a prerogative to continue to enforce a rule that a court of appeals had held unlawful and set aside against other parties.” Sohoni, *supra* note 14, at 1179. While that may be technically true (in the sense that there may be no “rule” at issue in nonacquiescence involving adjudications), the agency may still assert a functionally identical prerogative—namely, the ability to continue to interpret a statute in a manner disapproved of by a court of appeals. Consider my use of the example of *Chenery I*, which involved a rejection of the agency’s interpretation of the term “fair and equitable.” *Chenery I*, 318 U.S. at 89. The fact that the interpretation was not embodied in a rulemaking seems to be neither here nor there. Indeed, Professor Sohoni acknowledges that a judicial opinion setting aside an agency adjudication “may implicate an agency’s generally applied policy for conducting adjudications, but all that is formally being set aside by the reviewing court is the final agency action at issue in the case.” *Id.* Here, I agree, because

Judge Williams acknowledged that the breadth of an injunction came “at the cost of somewhat diminishing the scope of the ‘non-acquiescence’ doctrine.”¹⁴⁴ But he justified this “gap in the effective scope of the non-acquiescence doctrine” by relying on statutory provisions giving the D.C. Circuit venue over the category of cases at issue in *National Mining Ass’n* “in combination with the APA’s command that rules ‘found to be . . . in excess of statutory jurisdiction’ shall be not only ‘h[e]ld unlawful’ but ‘set aside.’”¹⁴⁵ Judge Williams’s reasoning thus brings us back to where we started—what is the semantic meaning of the term “set aside” as used in the APA? If, as I have argued, the term “set aside” does not add to the law of judgments and equity with respect to scope of remedies, then it does not require differential treatment of rulemakings and adjudications. Tailoring relief to the party’s injury thus conforms rulemaking challenges to the general remedial rule.

2. Some “Policy” Considerations

Failure to tailor remedies in the rulemaking context leads to several oddities. One might argue that these oddities are “policy” considerations that are irrelevant to the analysis in light of the historical justifications that have already been canvassed. But given the traditional flexibility of equitable doctrines, it seems appropriate to consider them in the calculus.

First, as we have already discussed, proponents of universal vacatur for rulemaking under the APA concede that universal injunctions are inappropriate for APA adjudications.¹⁴⁶ They seek to treat “rulemaking” under the APA differently. But the distinction between adjudication and rulemaking is notoriously slippery. In the constitutional context, the line appears to be drawn based on the generality or particularity of the government’s action.¹⁴⁷ The APA’s definition of a

Professor Sohoni’s reasoning acknowledges the distinction between the formal judgment that is being set aside and the “generally applied policy.” With respect to rules, however, Professor Sohoni contends that “[i]f [a] rule is set aside, an agency that carried on as if the rule still existed would not be ‘refusing to acquiesce’; it would be disobeying the mandate of the court that set aside the rule.” *Id.* at 1180. But that reasoning presupposes that the “mandate of the court” prohibits the agency from applying the rule to another party—which is precisely the question that is in dispute.

144 *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998).

145 *Id.* at 1410 (alterations in original) (quoting 5 U.S.C. § 702(2)(C)).

146 See Sohoni, *supra* note 14, at 1179–80.

147 Compare *Londoner v. City & Cnty. of Denver*, 210 U.S. 373 (1908), with *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

rule—“an agency statement of general or particular applicability”¹⁴⁸—prompted no less an authority than Justice (then-Professor) Scalia to remark that “[s]ince *every* statement is of either general or particular applicability . . . it is generally acknowledged that the only responsible judicial attitude toward this central APA definition is one of benign disregard.”¹⁴⁹ Echoing that sentiment, the Supreme Court explained in *Lincoln v. Vigil* that “[d]etermining whether an agency’s statement is what the APA calls a ‘rule’ can be a difficult exercise.”¹⁵⁰

Carving out rulemaking from the general tailoring principle of judgments, thus, necessarily introduces an element of instability into the law of remedies. That is because injunctions would be tailored to the party if the agency action were an “adjudication,” but *might* extend beyond the parties if the action were a “rulemaking.”¹⁵¹ The distinction between the two forms of agency action is far from clear, with the consequence that requiring a court’s remedial action to turn on the distinction would leave their scope and lawfulness unclear.

Second, an injunction that sweeps beyond the parties introduces disharmony into the law of estoppel. Take the following two examples. For one thing, if an injunction were truly universal—if it truly prohibited the government’s reliance on a rule in a case involving a party other than the prevailing plaintiff—then who could enforce it? If a party successfully obtains an injunction against a rule that protects its *own* interests, it may obtain sanctions from a court for the government’s violation of that injunction.¹⁵² But who may seek sanctions for a violation of the injunction that injures other parties? Not the original plaintiff, which does not have the requisite interest in protecting the

148 5 U.S.C. § 551(4) (2018).

149 Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 383.

150 *Lincoln v. Vigil*, 508 U.S. 182, 196–97 (1993). For lower court cases showing the difficulty of drawing this distinction, see *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448–49 (9th Cir. 1994); *Safari Club Int’l v. Zinke*, 878 F.3d 316, 332–33 (D.C. Cir. 2017); *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 627–28 (5th Cir. 2001); *City of Arlington v. FCC*, 668 F.3d 229, 240–41 (5th Cir. 2012), *aff’d*, 569 U.S. 290 (2013).

151 I say “might” because universal relief might not be appropriate for challenges to all rulemakings. For example, even Judge Williams accepted in *National Mining Ass’n v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), that the “nationwide” injunction would not be appropriate where a plaintiff’s claim “did not involve a facial challenge to the validity of a regulation,” *id.* at 1409, but rather an individual “claim for disability benefits.” *Id.* (quoting and distinguishing *Baeder v. Heckler*, 768 F.2d 547, 553 (3d Cir. 1985)). In *Baeder*, the Third Circuit affirmed a district court judgment insofar as it “held [a] regulation invalid and directed the Secretary to proceed with *Baeder*’s case without reference to it,” but disagreed with the district court’s decision that it “had the authority to issue an injunction aimed at controlling the Secretary’s behavior in every disability case in the country.” *Baeder*, 768 F.2d at 553.

152 See Parrillo, *supra* note 22, at 691–93.

third party. Nor can the third party seek sanctions, barring the use of nonmutual preclusion against the government.¹⁵³ To illustrate this point, take the facts from another classic case, *Abbott Laboratories v. Gardner*.¹⁵⁴ Hypothesize that Abbott Labs, after establishing the ripeness of its challenge, successfully established in the lower courts that the FDA's rulemaking was unlawful. Would the relief from that lower court's judgment also protect nonparty pharmaceutical companies such that they could seek sanctions against the government on the theory that the agency was violating the Abbott Labs injunction to the injury of those nonparties? Or would we deem the order to be tailored to Abbott's injuries?

For another, if an injunction were truly universal—in that it covered nonparties to the litigation—then those same nonparties should be precluded by the plaintiff's lawsuit from initiating their own litigation against the government. But it seems that they would not be.¹⁵⁵ These various anomalies in who can enforce and be precluded by a successful rulemaking challenge cut in favor of applying the ordinary rules of judgments in this context.

Third, an injunction against a rule that sweeps to include similarly situated nonparties can be hard to implement, precisely because it might be hard to determine what it means to apply the rule, pursue the same policy announced in the rule, or follow the interpretation articulated in the rule. That is particularly true in cases where a party brings a challenge to final agency guidance that binds the agency to

153 *But see* *United States v. Mendoza*, 464 U.S. 154, 162–63 (1984). As this hypothetical suggests, the concept of a universal injunction appears to depend on the permissibility of nonmutual preclusion against the government. *See, e.g.,* Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 20–37 (2019) (proposing that *Mendoza* be overruled partly for this reason); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 93–101 (2019). At any rate, the question of who might enforce a universal injunction is a significant one. For without such an enforcement regime, the court's issuance of such an injunction is merely hortatory.

154 387 U.S. 136 (1967).

155 *See* *Taylor v. Sturgell*, 553 U.S. 880, 893–95 (2008) (disapproving of nonparty preclusion except in limited circumstances). For a summary of the complex law regarding preclusion in representative suits (such as class actions), see DAVID L. SHAPIRO, *CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS* 83–92 (2001). For contrary perspectives on class-member preclusion, compare *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), *vacated and remanded in part, and aff'd in part by an equally divided Court in part*, 539 U.S. 111 (2003) (per curiam), with *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999).

act in a particular way,¹⁵⁶ which the APA characterizes as a “rule.”¹⁵⁷ If a court tailors an injunction to the plaintiff’s injury, then the court effectively enjoins the implementation of the guidance in the case of the plaintiff. But if the court need not tailor the remedy to the injury, then the injunction effectively prohibits the form of prosecutorial discretion announced in the guidance. This can be a challenging remedy to understand, and to implement, because it is by no means clear whether the agency can engage in similar forms of prosecutorial discretion absent the guidance document (or whether those forms are also enjoined).

Fourth, another problem that results from a failure to apply the tailoring principle to challenges to rulemakings is the potential inconsistency of lower court judgments. Most problematically, two lower courts could issue inconsistent universal injunctions, subjecting the government to sanctions in one of the two courts depending on the approach it adopts. Moreover, an agency rule upheld multiple times in various courts of appeals may be invalidated as to all parties by a single court that disagrees with those earlier decisions.¹⁵⁸ The issue is similar to one from the law of judgments: the problem of a railroad company that wins the first twenty-five suits following a collision that injured fifty passengers who sue sequentially. If a plaintiff prevails in suit twenty-six, that would raise the question whether the railroad would face nonmutual estoppel in the later lawsuits based on the twenty-sixth judgment.¹⁵⁹ If early courts uphold a regulation and a later court does not, it may still be wise for an agency to follow the later court’s reasoning with respect to nonparties—in other words, to “acquiesce.” But the agency need not follow that reasoning because the judgment compelled it to do so.

156 See, e.g., *Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 320 (D.C. Cir. 2011) (reasoning that “the Guidance binds EPA regional directors and thus qualifies as final agency action” (citing *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000)).

157 See *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 385 (D.C. Cir. 2002) (reasoning that a guidance document was “undisputedly a ‘rule’” (quoting 5 U.S.C. § 551(4))); *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987) (reasoning that “cabining of an agency’s prosecutorial discretion can in fact rise to the level of a substantive, legislative rule”).

158 The example is not a hypothetical. In *Chemical Manufacturers Ass’n v. Natural Resources Defense Council*, 470 U.S. 116 (1985), the Environmental Protection Agency elected to amend a regulation in light of an adverse circuit decision even though other circuits had previously upheld the same regulation. See *id.* at 123–25; see also *id.* at 136 n.2 (Marshall, J., dissenting).

159 For a version of this problem, see Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 281, 304 (1957); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 n.14 (1979).

To be sure, one must acknowledge policy considerations on the other side of the ledger. In *National Mining Ass'n*, Judge Williams identified the primary one: a court's "refusal to sustain a broad injunction is likely merely to generate a flood of duplicative litigation."¹⁶⁰ An injunction setting aside a rule for one party, in other words, might prompt similarly situated parties to file their own challenges to the rulemaking. By contrast, in Judge Williams's words, "[i]ssuance of a broad injunction obviates such repetitious filings."¹⁶¹ But that policy consideration seems overstated. The government itself would be in a position to "acquiesce" to the court's judgment, thereby forestalling the filing of duplicative lawsuits. To the extent the government did not, it would have effectively invited these additional suits and, consequently, would be to blame for the duplicative nature and inefficiencies of the following litigation.

Thus far, I have largely discussed an agency's disagreement with, and decision not to acquiesce in, a *lower* court judgment. The decision not to acquiesce in a similar judgment by the *Supreme* Court presents different considerations and implicates the question of what is known as "departmentalism."¹⁶² That is because, while the federal government may plausibly disagree with, and seek to confine to its facts, a Supreme Court opinion, any such disagreement would presumably be immediately—and, if the confining of the decision were implausible, successfully—challenged in a lower court on the ground that it is inconsistent with the Supreme Court's decision. If so, the government's disagreement in other cases would not violate the Court's injunction. Rather, vertical stare decisis would require a uniform application of the law in similar cases.

This point brings me to an important comparison between proponents and opponents of the modern universal injunction. While the rhetoric surrounding the debate may make it seem like the two sides are far apart, truth be told, the practical differences between the two positions are not so large. Both sides agree that universal injunctions do not apply to agency adjudications. Both sides agree that, in the case of rulemakings, a definitive rejection of a rulemaking by the Supreme Court would (even absent an injunction) stop an agency from adopting a contrary position, because of vertical stare decisis.

160 *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998).

161 *Id.*

162 See Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1725–26 (2017); see also William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1815–17 (2008); Edward A. Hartnett, *A Matter of Judgment, not a Matter of Opinion*, 74 N.Y.U. L. REV. 123 (1999).

The two sides part ways over those cases where a lower court invalidates a rule. On the perspective of those who support universal vacatur, the holding alone requires the agency to stop using the invalidated and “set aside” rule. On the perspective of those who do not, the agency might engage in nonacquiescence in other jurisdictions until it receives a Supreme Court ruling. The differences are real, but perhaps not as stark as the rhetoric might sometimes suggest.¹⁶³

CONCLUSION

In this Essay, I have sought to clarify the fault lines in the debate over universal vacatur. The APA’s text calls for courts to “set aside” agency action, including adjudications and rulemakings. That language emerged from the Hepburn Act and, through the Urgent Deficiencies Act, found its way into a number of modern statutory review regimes—and ultimately, the APA. Notwithstanding the winding history, the fundamental interpretation of this terminology remained the same: the “set aside” language was initially intended to reflect review by a bill in equity, and the cases and scholarly discussion in the pre-APA era demonstrate no departure from that original understanding.

Applying the traditional background principles of judgments and equity, relief for challenges to rulemakings should be tailored to the plaintiff’s injury. That is because judgments matter. But although judgments should be addressed to the parties, opinions can sweep more broadly and provide guidance to nonparties. Moreover, on occasion, tailoring an injunctive judgment will leave room for relief that provides ancillary benefits to nonparties—especially where the relief sought is indivisible. This approach to the question of vacatur makes sense of the APA’s provisions and the underlying law of equity and can lead to principled and sensible results.

163 The differences are, perhaps, even less dramatic, because some proponents of universal injunctions nevertheless admit that they “present real dangers, and will be appropriate only in rare circumstances.” *City of Chicago v. Barr*, 961 F.3d 882, 916, 918–20 (7th Cir. 2020) (proposing a multifactor test for the propriety of such injunctions). Having said that, I believe the analytical framework described in this Essay best captures historical practice and offers a more predictable and principled path forward.

