

# VACATUR, NATIONWIDE INJUNCTIONS, AND THE EVOLVING APA

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*The courts' growing use of universal or nationwide injunctions to invalidate agency rules that they find to be unlawful has given rise to concern that such injunctions circumvent dialogue among the circuits, promote forum shopping, and leave too much power in the hands of individual judges. Some scholars, joined by the Department of Justice, have argued that such judicial decisions should be limited through restrictive interpretations of the Administrative Procedure Act (APA).*

*This Article takes issue with these authorities. It argues that the courts' use of the APA to vacate a rule as a whole—as opposed to merely enjoining application of the rule to an individual plaintiff—serves vital functions in maintaining judicial control over agency discretion. The Article goes on to argue that such relief is consistent with the language and legislative background of the APA. However, courts have discretion as to whether they will make use of this remedy in individual cases.*

*Starting from these premises, the Article surveys factors that can militate for or against universal relief in particular circumstances. It also suggests possible doctrinal adaptations and structural reforms that could contribute to preventing overuse of universal injunctions.*

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## INTRODUCTION

The permissibility and proper role of so-called universal or nationwide injunctions<sup>1</sup> in constitutional and administrative law is a prominent source of controversy these days. There is already a considerable literature on the policy issues raised by such decrees. To simplify the question greatly, injunctions that apply nationwide can provide a particularly powerful judicial response to statutes and rules that are found to be unlawful,<sup>2</sup> but they can also give rise to concerns about the enormous power that such decrees afford to individual judges, sometimes to the detriment of the opportunity of other courts to weigh in on the same issue. The potential availability of such injunctions can also distort the litigation process by augmenting plaintiffs' incentives to file their actions in a forum that is likely to favor their positions.<sup>3</sup>

Some of the disputants in this ongoing debate have used the perceived ills of the universal injunction as a jumping-off point for raising far-reaching questions about the fundamental structure of the judicial review regime established by the Administrative Procedure Act.<sup>4</sup> Those questions will be the initial focus of this Article. I have written on this

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1 Some authorities prefer the term “universal injunctions” because, in their view, the emphasis should not be on geographical reach, but instead on the court’s effort to resolve the issues raised in the case for all situations in which they might arise. *E.g.*, Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335, 349–53 (2018). On the other hand, the term “nationwide injunction” is relatively concrete and easily grasped and corresponds more closely with general usage. In this Article, I use the two terms interchangeably and do not intend any distinction between them.

2 For commentaries supportive of universal relief against rules under at least some circumstances, see, for example, Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Doug Rendleman, *Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity*, 91 U. COLO. L. REV. 887 (2020).

3 For commentaries critical of universal relief, see, for example, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Ronald A. Cass, *Nationwide Injunctions’ Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29 (2019).

4 5 U.S.C. §§ 701–706 (2018).

subject before, both individually<sup>5</sup> and in collaboration with Mila Sohoni.<sup>6</sup> Here I will review and elaborate on that work as it pertains to current controversies. I will then use this analysis as a foundation for exploring broader policy issues and reform proposals regarding universal relief.

This inquiry will require an examination of two types of remedies that courts frequently invoke when they have determined that an administrative rule is unlawful.<sup>7</sup> The injunction—whether or not nationwide in scope—is one of these. The other is vacatur—a judicial order declaring that the rule shall no longer have legal effect. These two remedies are technically distinct, because an injunction binds the defendant and is enforceable through contempt, whereas a vacatur binds only the agency to which it is directed. In functional terms, however, a vacatur can have roughly the same effects as a nationwide injunction.

The capacity of the universal relief debate to generate controversy over fundamental APA issues became glaringly apparent during an oral argument in the Supreme Court in November 2022. In *United States v. Texas*,<sup>8</sup> the Court is currently reviewing the legality of guidelines issued by the Department of Homeland Security to set priorities for detention and removal enforcement under the immigration laws.<sup>9</sup> The district court in this case had found that the guidelines violated the APA and had ordered that the guidelines be vacated throughout the country.<sup>10</sup> At argument, Solicitor General Elizabeth Prelogar (SG) took the position that a judicial decree under the APA may not vacate or enjoin an agency rule on a universal basis; normally, she suggested,

5 Ronald M. Levin, *The National Injunction and the Administrative Procedure Act*, REGUL. REV. (Sept. 18, 2018) [hereinafter Levin, *National Injunction*], <https://www.theregreview.org/2018/09/18/levin-national-injunction-administrative-procedure-act/> [https://perma.cc/2L6A-4ED6].

6 Ronald M. Levin & Mila Sohoni, *Universal Remedies, Section 706, and the APA*, YALE J. ON REGUL.: NOTICE & COMMENT (July 19, 2020), <https://www.yalejreg.com/nc/universal-remedies-section-706-and-the-apa-by-ronald-m-levin-mila-sohoni> [https://perma.cc/NT7D-XCGQ].

7 This Article focuses on judicial review of agency rules that have been adopted through notice-and-comment rulemaking, but the universal relief debate has also extended to judicial review of other pronouncements that technically are rules. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring) (presidential proclamation); *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015) (agency memorandum), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016). Most of the analysis in this Article applies equally to these pronouncements.

8 *United States v. Texas*, No. 22-58 (U.S. argued Nov. 29, 2022).

9 See Application for a Stay of the Judgment Entered by the United States District Court for the Southern District of Texas at 1–2, *United States v. Texas*, 143 S. Ct. 51 (2022) (mem.) (No. 22A17 (22-58)).

10 See *Texas v. United States*, 40 F.4th 205, 213 (5th Cir. 2022) (per curiam), *cert. granted*, 143 S. Ct. 51 (2022) (mem.).

it should only provide relief for the benefit of the prevailing challenger.<sup>11</sup> Chief Justice Roberts responded with considerable consternation, as did other members of the Court who, like the Chief Justice, had previously served as judges on the D.C. Circuit. “[Y]our position on vacatur,” Chief Justice Roberts said,

sounded to me to be fairly radical and inconsistent with, for example, you know, with those of us who were on the D.C. Circuit, you know, five times before breakfast, that’s what you do in an APA case. And all of a sudden you’re telling us that, no, you can’t vacate it, you do something different. Are you overturning that whole established practice under the APA?<sup>12</sup>

When the SG confirmed that she thought that “the lower courts, including the D.C. Circuit, have . . . been getting this one wrong,”<sup>13</sup> Roberts replied with a “[w]ow.”<sup>14</sup> The SG went on to assert that the lower courts had not been paying attention to the text, context, and history of the APA.<sup>15</sup> Justice Kavanaugh, another D.C. Circuit veteran, met her assertion directly. He noted that he had served on that court with very eminent judges who paid a lot of attention to those factors.<sup>16</sup> He added that the SG’s claim was “a pretty radical rewrite, as the Chief Justice says, of what’s been standard administrative law practice.”<sup>17</sup> Justice Jackson joined in their criticism.<sup>18</sup>

In the wake of these unsympathetic, if not hostile, reactions from what Justice Kagan jokingly called the “D.C. Circuit cartel,”<sup>19</sup> it seemed clear that the Court was not likely to accept the SG’s view in this case. Indeed, as some of their colleagues observed, the Court did not really have to reach this issue at all.<sup>20</sup> Nevertheless, the Court did not appear close to agreeing on an explanation as to *why* the SG’s arguments were unfounded. Nor did these colloquies shed light on the issue of how, if

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11 Transcript of Oral Argument at 49–50, *United States v. Texas*, No. 22-58 (U.S. Nov. 29, 2022) [hereinafter Transcript] (Prelogar).

12 *Id.* at 35 (Roberts, C.J.).

13 *Id.* at 36 (Prelogar).

14 *Id.* (Roberts, C.J.).

15 *Id.* (Prelogar).

16 *Id.* at 54–55 (Kavanaugh, J.).

17 *Id.*

18 *See id.* at 66 (Jackson, J.) (suggesting that the SG’s view would create a “disconnect” between “the claim that is being made in a case and the remedy that is provided to a successful plaintiff”).

19 *Id.* (Kagan, J.); *see* Mark Joseph Stern, *Why Roberts and Kavanaugh Got So Furious at Biden’s Solicitor General*, SLATE (Dec. 2, 2022, 4:27 PM), <https://slate.com/news-and-politics/2022/12/supreme-court-biden-immigration-masks-debt-relief-elizabeth-prelogar.html> [<https://perma.cc/DQ3S-7QJ7>] (describing Roberts as “audibly angry” and Kavanaugh as “aggrieved and exasperated”).

20 *See* Transcript, *supra* note 11, at 120 (Sotomayor, J.); *id.* at 139 (Barrett, J.).

at all, the Court would be able to reconcile longstanding vacatur practice with the objections to nationwide injunctions that some of the other Justices have expressed in past cases.<sup>21</sup> The Court will have to address these issues before long. Hence the need for scholarship to analyze these and related issues.

More specifically, this inquiry will revolve around the interrelationship between two APA provisions. Section 703 provides in relevant part that

[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.<sup>22</sup>

The most immediately relevant language in § 706 provides that “[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be” in violation of six listed standards of review.<sup>23</sup>

In the *United States v. Texas* case, the SG’s line of argument was largely inspired by scholarship by Professor John Harrison, who has written voluminously on the subject during the past few years.<sup>24</sup> Harrison’s ideas also find support in the work of Professor Samuel Bray, which has also exerted influence at the Supreme Court level<sup>25</sup> and has contributed historical dimensions to the revisionist turn in legal scholarship on this issue. In this Article I will undertake to provide a counterpoint to the theories expounded by Harrison and Bray. The general thrust of my argument is to agree with the “D.C. Cartel” that the body of caselaw on rulemaking review under the APA is not in need of drastic overhaul. At the same time, I will suggest that some of those Justices’ ideas are in need of clarification and refinement.

21 See *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 599–601 (2020) (Gorsuch, J., joined by Thomas, J., concurring in the grant of stay); *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring).

22 5 U.S.C. § 703 (2018).

23 *Id.* § 706.

24 Transcript, *supra* note 11, at 55 (Kavanaugh, J.); *id.* at 119 (Alito, J.); see 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 (2020) [hereinafter Harrison, *Section 706*]. In addition to that article, which was cited in the government’s brief, Brief for the Petitioners at 40–42, *United States v. Texas*, No. 22-58 (U.S. Sept. 12, 2022), see, for example, John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REGUL. BULL. 119 (2023).

25 Bray, *supra* note 3, cited in *Dep’t of Homeland Sec.*, 140 S. Ct. at 600 (Gorsuch, J., concurring in the grant of stay); *Trump*, 138 S. Ct. at 2427–29 (Thomas, J., concurring).

Part I of this Article offers a brief introduction to some basic features of the APA system of judicial review of agency rules, emphasizing how interpretation of that Act has evolved over time to accommodate emerging realities. Part II explains why reviewing courts need the option of vacating or enjoining rules on a universal basis. Part III provides a critique of several theories that Harrison and Bray have deployed in order to cast doubt on central premises of that system. Part IV provides what I consider a more balanced and realistic framework for understanding the relationship between §§ 703 and 706. In the course of this discussion, I will try to clear up some contested points, including the apparently mandatory import of the “shall . . . set aside” language of § 706, the permissibility of vacatur, and the interrelationship between § 706 of the APA and general injunctions practice as reflected in § 703.

In Part V I will take up specific applications of my framework, including the manner in which courts can apply it to both vacatur and nationwide injunctions. Finally, Part VI offers some suggestions for reforms that could serve to discourage unnecessary universal relief and ameliorate some of the detrimental effects that such relief can bring about.

## I. THE ADMINISTRATIVE PROCEDURE ACT AND ITS INTERPRETATION

I will begin by emphasizing the creativity and flexibility that pervades judicial interpretation of the APA. I have recently written at length about this pattern.<sup>26</sup> Some commentators characterize the Act as a “superstatute” in order to highlight the fact that it is frequently construed in a more open-ended manner than most legislation—a manner that somewhat resembles constitutional interpretation.<sup>27</sup> For example, the Court’s interpretation of § 702 allows for standing to sue in a manner that is completely at odds with the text of that provision.<sup>28</sup> Moreover, the Court has recently and unanimously declared that an agency must reply to significant comments that it receives in a rule-making proceeding,<sup>29</sup> although nothing in the text supports that interpretation.

This flexibility, this rejection of originally contemplated meaning, most definitely applies to the APA’s scope of review provision, § 706,

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26 Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 CHI-KENT L. REV. 7, 10–19 (2022) [hereinafter Levin, *Originalist Challenge*].

27 *Id.* at 38–39; see, e.g., William N. Eskridge Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1894 & n.1 (2023).

28 *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 883 (1990); Levin, *Originalist Challenge*, *supra* note 26, at 18–19.

29 *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015).

which is central to this Article's analysis. Many principles that are commonly ascribed to this section differ considerably from the expectations of the Congress that enacted it, such as the requirement of hard-look review and the principle that the facts underlying a rule must have support in the record of the proceeding.<sup>30</sup>

Much of the evolution in the manner in which the APA has been interpreted consists of adaptation to the rise of rulemaking as the principal vehicle for administrative policymaking. As then-Professor Scalia wrote in 1978, "perhaps the most notable development in federal government administration during the past two decades . . . [has been] the constant and accelerating flight away from individualized, adjudicatory proceedings to generalized disposition through rulemaking."<sup>31</sup> This expansion in rulemaking was driven by the growth in the range and complexity of functions that society expects the federal government to perform, and especially the enactment of mass justice programs that cannot be coherently administered without a host of program-wide regulations. Scalia continued: "The increased use of rulemaking has changed the whole structure of administrative law . . . ."<sup>32</sup> In a procedural context, this meant such innovations as an expectation that the factual support for a rule must be based on the administrative record, a duty to disclose scientific data on which a rule depends, and, as I have mentioned, a duty to respond to significant comments submitted during a rulemaking proceeding.<sup>33</sup> None of these expectations was contemplated at the time of the APA's enactment, but they have served to promote rigor, factual investigation, and careful reasoning in the exercise of this important administrative function.

"Another post-APA development of monumental importance," according to Scalia, was "the establishment in 1967 of the principle that rules could be challenged in court directly rather than merely in the context of an adjudicatory enforcement proceeding against a particular individual."<sup>34</sup> Prior to that time it was widely assumed, though not squarely held at the Supreme Court level, that, except in the context of a special statutory review proceeding, a rule could only be challenged as a defense to enforcement proceedings.<sup>35</sup> *Abbott Laboratories*

30 Levin, *Originalist Challenge*, *supra* note 26, at 16–17.

31 Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 376.

32 *Id.* (quoting William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 38–39 (1975)).

33 Levin, *Originalist Challenge*, *supra* note 26, at 12–13.

34 Scalia, *supra* note 31, at 377.

35 Ronald M. Levin, *The Story of the Abbott Labs Trilogy: The Seeds of the Ripeness Doctrine*, in ADMINISTRATIVE LAW STORIES 430, 442–43 (Peter L. Strauss ed., 2006) [hereinafter Levin, *Trilogy Story*].

*v. Gardner*<sup>36</sup> was the 1967 case in which the Supreme Court rejected that assumption and held that the “ripeness” of a rule for preenforcement review would depend on a discretionary judgment, turning on the fitness of the rule for immediate review and the degree of hardship that challenging parties would incur if review were postponed.<sup>37</sup> In the wake of *Abbott Labs*, reviewing courts routinely exercised their discretion in most instances to allow preenforcement review. Congress signaled its support for this trend by providing that rules issued in certain regulatory programs, most notably environmental statutes, *must* be challenged within a short period after their issuance.<sup>38</sup> The availability of preenforcement review enables both the agency and affected individuals to know from a relatively early juncture whether a rule will survive judicial review or not; regulated persons do not need to violate the rule and risk penalties in order to test its validity.

Preenforcement review, as it has become entrenched in the post-*Abbott Labs* era, has come to be understood as a challenge to the rule itself, not just to a particular potential application of the rule to the current plaintiff. In other words, to borrow a phrase used by Richard Fallon and Matthew Adler in a different context, the APA creates a cause of action for implementing “rights against rules.”<sup>39</sup> This premise has led naturally to the conclusion that when a challenger succeeds in demonstrating on the merits that a rule was adopted unlawfully, the rule itself should be nullified. This result can be accomplished by an *injunction* against its enforcement, but *vacatur* is an alternative, and perhaps simpler and more straightforward mechanism, for putting this goal into practice. I will discuss the practical arguments that favor such relief in the next section, but for now I will simply note that these remedial options have become standard features of modern judicial review of rulemaking.

I should add, however, that the regime of across-the-board relief that I have been describing is not as inflexible as it may seem at first. On its face, the phrase “shall . . . set aside” in § 706 seems to mean that a court not only may, but must, “set aside” a rule that it considers unlawful.<sup>40</sup> However, recent decades have seen the rise of a practice known as “remand without vacatur,” whereby a court may allow a rule

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36 387 U.S. 136, 148–49 (1967).

37 *Id.*

38 See generally Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203 (2011) (discussing interpretive problems under such statutes).

39 Richard H. Fallon, Jr., *Facial Challenges, Saving Constructions, and Statutory Severability*, 99 TEX. L. REV. 215, 239–42 (2020); Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 3 (1998).

40 5 U.S.C. § 706(2) (2018).



to remain in effect during remand proceedings to repair a deficiency in the agency's stated rationale for the rule or the procedure by which it was adopted. Although the use of this device may deprive a victorious plaintiff of some or all of the fruits of its victory, courts have at times permitted remand without vacatur in order to prevent disruption of an administrative program, to protect reliance interests of people who have depended on that program, or for other reasons. Thus, the actual incidence of vacatur (or equivalent injunctive relief) depends in the end on judicial discretion.

The cumulative import of the doctrines just discussed is that judicial review of agency rules has developed into a fairly stable and manageable regime. Yet the growth of nationwide injunctions has threatened to destabilize this settlement. This Article will consider a variety of possible ways in which the system could respond to that challenge.

## II. THE NEED FOR UNIVERSAL RELIEF IN JUDICIAL REVIEW OF RULES

Before digging into the details of the doctrinal arguments favoring or opposing the SG's position in *United States v. Texas*, I will explain why the courts' ability to order the nullification of rules on an across-the-board basis is, in many instances, a practical necessity. This is particularly true in an extensively regulated industry governed by a host of complex rules. If the agency is to be able to administer its program in a coherent manner, let alone a well-considered manner, it needs to be able to develop and implement these rules on a uniform, or at least holistically designed, basis. If a single company—say, one pharmaceutical manufacturer, or one airline, or one auto manufacturer, or one pipeline company—seeks judicial review of one of these rules and prevails on the merits, the court cannot award relief only to that company without creating chaos. If the rule is to be revised, it must be revised to apply to all similarly situated companies.

Consider, for example, the leading case on judicial review of rules for abuse of discretion—*Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*<sup>41</sup> In that case, the National Highway Traffic Safety Administration (NHTSA) in the Carter administration had adopted a rule requiring all auto manufacturers to install airbags or passive seatbelts in cars. Later, the Reagan administration took office and rescinded that rule.<sup>42</sup> State Farm brought suit to contest that decision, and the Supreme Court held that the reasoning underlying the agency's rescission decision was flawed.

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41 463 U.S. 29 (1983).

42 See *id.* at 38.

Thus, the Court remanded the rescission rule to the agency to be reconsidered.<sup>43</sup> In this situation, it would have been absurd for a reviewing court to have held that the prior passive restraints rule would continue to apply for the benefit of car buyers who held an insurance policy with State Farm, but would remain rescinded for all other car buyers.

Furthermore, a reviewing court is not entitled to specify exactly how the rule should be revised; such a directive would invade the agency's responsibilities to decide how to execute the law.<sup>44</sup> The ultimate rule that results from the remand proceedings might distinguish among various companies or situations, and may provide for waivers in appropriate instances, but these distinctions must be drawn by the responsible agency, subject to judicial oversight.

Thus, the normal remedy in this situation is for the court to order that the rule be vacated and remanded to the agency for further consideration.<sup>45</sup> The rule has to be either remanded or not remanded; it cannot be remanded only with respect to an individual plaintiff. Courts and practitioners have assumed for decades that this remedy is permissible and authorized by the "shall . . . set aside" language in § 706 of the APA.<sup>46</sup>

This reasoning helps explain why principles of injunctive relief developed in common-law contexts, in which atomistic relief for an individual plaintiff is entirely feasible, have had to be liberally adapted to fit the context of administrative law practice. It also helps to explain why, in my view, the SG's position in the *Texas* case is ultimately unrealistic.

Professor Bray, however, has dismissed the argument that the court must be able to grant across-the-board relief. He suggests that the court should, instead, simply prescribe relief for the successful

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43 *Id.* at 57.

44 *See, e.g.*, *Negusie v. Holder*, 555 U.S. 511, 523–24 (2009); *NLRB v. Food Store Emps. Union, Local 347*, 417 U.S. 1, 9–10 (1974); *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952); Ronald M. Levin, "Vacation" at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 364–67 (2003) [herein after Levin, *Vacation*]; Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1555–56 (2014) ("[W]hen a court concludes that an agency's decision is erroneous, the ordinary course is to remand to the agency for additional investigation or explanation (as opposed to the court deciding the issue itself)."); *id.* at 1563–65.

45 *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976); *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (citing *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)).

46 *See* Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1138 (2020) (citing numerous cases in which "[t]he Supreme Court has . . . used the term 'set aside' to denote the act of invalidating a regulation[,] . . . affirmed lower court decisions that have invalidated rules universally[, or] . . . stayed agency action universally").

plaintiff and wash its hands of broader issues. It will be up to the agency to decide whether or not to extend similar relief to other persons.<sup>47</sup> Let's put aside the disruptions that would occur between the time of the court's individualized judgment and the months or years that the agency might need to conduct proceedings to adapt to that judgment. More fundamentally, Bray's notion would greatly complicate, and perhaps undermine, the court's ability to oversee the agency's implementation of the remand. This would be particularly true if the rule had to go through multiple remands before the court and the agency arrive at a mutually satisfactory resolution. Consider, for example, the "Deferred Action for Childhood Arrivals" program that the Obama administration adopted in 2012 for the benefit of so-called "Dreamers." Over the course of a decade, litigation contesting the validity of the program has traveled back and forth between court and agency, and the program's legality is still not resolved.<sup>48</sup> That example may be extreme, but instances of multiple remands are not particularly uncommon.<sup>49</sup> A fragmented approach to judicial oversight would mean, on the one hand, that the agency would receive no real guidance as to how it can use its discretionary authority in a manner that would pass muster in a later judicial review proceeding; on the other hand, it would mean that the agency would face little if any accountability on the issue of whether it has used that discretion in a responsible manner.

Detailed judicial scrutiny of the reasoning and fact findings underlying an agency rule has become the norm in our so-called "hard look" era.<sup>50</sup> I see little likelihood that the present Supreme Court, with its skepticism about real or perceived abuses of agency power, would have any interest in abandoning that role.

### III. REVISIONIST ACCOUNTS OF § 706 AND INJUNCTIVE RELIEF

The preceding Part argued in broad strokes that the APA must be read to authorize across-the-board nullification of rules in at least some circumstances. In this Part, I will address on a more technical level some of the arguments that have been advanced to challenge that proposition. These arguments contemplate radical departures from current norms, and, as will become apparent, I do not believe that such

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47 See Bray, *supra* note 3, at 476.

48 See *Texas v. United States*, 50 F.4th 498, 508–12 (5th Cir. 2022) (summarizing this history).

49 See Emily Hammond Mezell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1743–72 (2011); Christopher J. Walker & James R. Saywell, *Remand and Dialogue in Administrative Law*, 89 GEO. WASH. L. REV. 1198, 1235, 1245–47 (2021).

50 See EDWARD STIGLITZ, *THE REASONING STATE* 72–78, 128–43, 284–87 (2022).

a drastic overhaul of administrative law doctrine is warranted. Subsequent Parts will present what I consider a more helpful and proportionate perspective for coping with the policy challenges posed by universal relief.

One reason for my agreement with the perspective that Chief Justice Roberts and Justice Kavanaugh expressed during the *United States v. Texas* oral argument is that it tallies with my own experience. During the period from 1995 to 1997, I coordinated an extensive dialogue within the American Bar Association (ABA) on the subject of remand without vacatur.<sup>51</sup> It occurred primarily within the Section of Administrative Law and Regulatory Practice, but it also included dialogue with practitioners from other Sections and culminated in the adoption by the House of Delegates of extensive guidelines regarding the proper uses of the device in 1997.<sup>52</sup> Later, in 2013, I participated in deliberations on remand without vacatur within the Administrative Conference of the United States (ACUS), leading up to a Conference recommendation containing a similar set of guidelines.<sup>53</sup> During all of these consultations among practitioners, government attorneys, and academics, I heard extensive debate on the question of whether this practice should be permissible at all—in other words, whether a judicial finding that a rule is unlawful should lead *automatically* to a vacatur of the rule. These two bodies opted for relatively flexible approaches. But I cannot recall a single suggestion by any participant in these debates that vacatur should rarely, if ever, be allowable in the first place, as the SG contended in *United States v. Texas*.<sup>54</sup>

Deeply revisionist though the SG's position was, I recognize that her argument needs to be met on its merits. I will respond in this Part to various arguments on the government's side, as well as in Justice

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51 Ronald M. Levin, "Vacation" at Sea: *Judicial Remands and the APA*, ADMIN. & REGUL. L. NEWS, Spring 1996, at 4, 11 (newsletter item seeking to "draw upon the lessons of experience [by inviting] readers to share their thoughts about the remand without vacation issue").

52 AM. BAR ASS'N, ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION INCLUDING PROCEEDINGS OF THE ONE HUNDRED NINETEENTH ANNUAL MEETING OF THE HOUSE OF DELEGATES 1, 45–46 (1997); see Levin, *Vacation*, *supra* note 44, at 387–88 (reprinting the ABA resolution).

53 Adoption of Recommendations and Statement Regarding Administrative Practice and Procedure—Administrative Conference Recommendation 2013-6: Remand Without Vacatur, 78 Fed. Reg. 76,269, 76,272 (Dec. 17, 2013).

54 Respected legal scholarship has shared these organizations' premise. See, e.g., 2 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 11.9, at 1232 (6th ed. 2019) ("Traditionally, a circuit court has vacated agency action upon concluding that the action was arbitrary and capricious . . ."); Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 568 (1985) ("Traditionally, [when] faced with an arbitrary and capricious . . . decision . . . the court normally vacates the decision and remands the matter to the agency for further proceedings 'consistent with' the court's opinion.").

Gorsuch's questions during the oral argument and in the scholarship of Professors Bray and Harrison.

### A. *Proposed Reinterpretations of the Statutory Text*

On the surface, the textual argument for allowing vacatur looks straightforward. Justice Kavanaugh insisted to the SG that the text of § 706 is clear: "'Set aside' means 'set aside.' That's always been understood to mean . . . the rule's no longer in place. . . . [N]o case has ever said what you're saying anywhere."<sup>55</sup> This straightforward interpretation of § 706 is bolstered by the language of the APA's adjacent provision, § 705, which authorizes a court to stay the effective date of an agency action pending the completion of judicial review.<sup>56</sup> A stay of a rule necessarily applies to the rule as a whole, not merely to named parties.<sup>57</sup> Presumably, the scope of this preliminary relief should not be greater than the scope of the permanent relief that the APA would authorize if the lawsuit were successful.

The SG's principal textual basis for disputing this interpretation rested on the interplay between § 703 and § 706. "It's Section 703 that sets forth the remedies under the APA, not 706, and we think . . . that there was no intent by Congress to create a truly unprecedented, sweeping, non-party-specific remedy . . . ."<sup>58</sup> Justice Gorsuch was similarly minded:

I think it is kind of interesting that remedies are expressly listed in 703, that Congress would sneak in the most important remedy and by far the most sweeping one in Section 706, . . . which governs the scope of review, and that nobody at the time, Davis, Jaffe, you know, people who noticed things, noticed this innovation.<sup>59</sup>

I will turn to historical aspects of the problem in the next section; for now, I will stick with textual arguments. On that level, the SG's and Justice Gorsuch's claims have at least three flaws.

First, the idea that § 706 does not address remedies at all looks dubious on its face. Whatever "set aside" means, it surely looks like some sort of authorization for the reviewing court to take action. The

55 Transcript, *supra* note 11, at 55 (Kavanaugh, J.).

56 5 U.S.C. § 705 (2018). As the Court has recognized, *Sampson v. Murray*, 415 U.S. 61, 68 n.15 (1974), this provision codifies the principles of *Scrapps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942), which described such stays as "part of [a federal court's] traditional equipment for the administration of justice." *Id.* at 9–10.

57 See, e.g., *District of Columbia v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 48 (D.D.C. 2020).

58 Transcript, *supra* note 11, at 49 (Prelogar).

59 *Id.* (Gorsuch, J.).

inference becomes all the stronger when this statutory language, technically found in § 706(2), is read together with its companion provision, § 706(1), which states that a reviewing court may “compel agency action unlawfully withheld or unreasonably delayed.”<sup>60</sup> Thus, § 706 itself pairs something that is quite obviously a remedy—the affirmative power to order an agency to undertake action “unlawfully withheld or unreasonably delayed”—with its converse remedy: the negative power to “hold unlawful and set aside agency action.”<sup>61</sup>

Second, the SG’s assertion that § 703 “sets forth the remedies under the APA” greatly overstates the function of that provision in the APA’s judicial review chapter. The purpose of the first sentence of that section is simply to identify the forum to which a litigant should bring its APA claim.<sup>62</sup> Expressed in ordinary English, its thrust is that when no special statutory provision for judicial review applies, a person who has a *claim* for injunctive or other types of relief should file it in a “court of competent jurisdiction,” that is, a district court. It doesn’t purport to define the circumstances in which such a claim would be valid or invalid. Perhaps, given the creativity with which courts have interpreted the APA over the decades, § 703 *could* have been interpreted as a fount of doctrine as to the proper occasions for an injunction (or declaratory judgment, writ of habeas corpus, etc.). But this has never happened in the entire seventy-five-plus years during which the APA has been in effect, and there is no good reason to start now.

The limited purpose that I just mentioned is not trivial. The listing in § 703 of types of relief that may be sought in an APA action is important in the context of proceedings that are not filed under a special statutory review statute. Sections 703 and 706 should be read to harmonize with each other, not conflict, as I will discuss later. But nothing about § 703 negates the remedial provisions that § 706 has almost uniformly been held to contain.

Finally, supposing for the moment that § 703 is regarded as an authoritative declaration that injunctive, declaratory, and habeas relief are APA remedies, can it be read to contain a negative implication that other types of relief are excluded? Not at all. The actual wording of that provision refers to “*any* applicable form of legal action, *including*” the three types of relief just mentioned.<sup>63</sup> “Including” is not a word of negation. On the contrary, it directly suggests that other “forms of legal action” may also be pursued. Moreover, the House and Senate committee reports on the Act glossed the language under discussion

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60 5 U.S.C. § 706(1) (2018).

61 *Id.* § 706(2).

62 *See id.* § 703. The remaining sentences allow a litigant to sue the United States in its own name and to contest a rule in agency enforcement proceedings. *Id.*

63 *Id.* (emphasis added).

by referring to the filing of “any relevant form of legal action (such as those for declaratory judgments or injunctions) in any court of competent jurisdiction.”<sup>64</sup> The parentheses and the words “such as” cast further doubt on the negative implication that the government and its allies seek to draw. Indeed, the word “traditional” does not appear in the section.

The argument from negative implication also does not seem consistent with the reasoning of *Ford Motor Co. v. NLRB*,<sup>65</sup> a 1939 case with which the drafters of the APA would have been familiar. The judicial review provision of the labor laws authorized a reviewing court to enter “a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.”<sup>66</sup> Ford argued that this provision did not authorize the court of appeals to remand a case to the Board for additional factfinding, without ruling on the merits, but a unanimous Supreme Court brushed this argument aside, remarking:

The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.<sup>67</sup>

One other textual argument that some advocates have raised is that § 706(2) directs a reviewing court to “hold unlawful and set aside agency action, findings, and conclusions found to be [arbitrary, capricious, etc.].”<sup>68</sup> Surely, the argument goes, findings and conclusions are not enjoined; therefore, the term “set aside” as used in § 706(2) must not have operative effect.<sup>69</sup> Actually, though, cases decided during the era in which the APA was adopted did sometimes speak about findings or conclusions being directly at issue.<sup>70</sup> Today we would more likely

64 H.R. REP. NO. 79-1980, at 42 (1946), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 233, 276 (1946); S. REP. NO. 79-752, at 26 (1945), *reprinted in* S. DOC. NO. 79-248, at 185, 212.

65 305 U.S. 364 (1939).

66 *Id.* at 368 (quoting National Labor Relations Act, Pub. L. No. 74-198, § 10(e), 49 Stat. 449, 454 (1935) (codified at 29 U.S.C. § 160(e))).

67 *Id.* at 373. For similar examples, see Levin, *Vacation*, *supra* note 44, at 319–23.

68 5 U.S.C. § 706(2) (2018) (emphasis added).

69 Samuel Bray, *Does the APA Support National Injunctions?*, REASON: THE VOLOKH CONSPIRACY (May 8, 2018, 2:15 PM), <https://reason.com/volokh/2018/05/08/does-the-apa-support-national-injunction/> [<https://perma.cc/7QCB-YYQV>].

70 See *Frozen Food Express v. United States*, 351 U.S. 40, 41–42 (1956) (“findings”); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 118 (1940) (“findings of fact, conclusions and recommendations”); *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 127–28 (1939) (“findings”).

speak of such pronouncements as declaratory orders or interpretive rules. Then, as now, such cases would be at risk of being dismissed on the basis of defenses such as ripeness, exhaustion, and standing; but the drafters of the APA understandably wrote § 706 to accommodate the subset of these cases that did surmount such threshold obstacles. The “findings and conclusions” language in the provision is virtually never mentioned in modern administrative law cases, but the fact that it has become obsolete does not appear to shed light on the meaning of “set aside” in the statute.<sup>71</sup>

### B. History-Based Arguments

As I have mentioned, advocates and commentators who argue that the APA does not authorize vacatur or nationwide relief rely substantially on history. Professor Bray is the leading voice in this aspect of the debate. His article *Multiple Chancellors: Reforming the National Injunction*<sup>72</sup> contains an elaborate review of injunctions in our legal tradition, stretching back to English courts’ jurisprudence antedating the Founding of our Constitution. He contends that nationwide injunctions were all but unheard-of until quite recently. That article dealt only briefly with the APA,<sup>73</sup> but a more recent blog commentary does take up that issue directly and seeks to harmonize that Act with his overall thesis.<sup>74</sup>

In the latter commentary, Bray writes:

First, when the APA was enacted the expectation was that agencies would make policy primarily through adjudication, not through general rulemaking. . . .

Second, “set aside” was a technical term for reversing judgments. This can be seen in *Morgan v. Daniels*, 153 U.S. 120, 124 (1894). . . . “[S]et aside” as a term for reversing judgments, not for giving national injunctions, is exactly what we would expect if Congress were anticipating a norm of agency policymaking through adjudication.<sup>75</sup>

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71 The notion, discussed at length below, that “set aside” as used in § 706 means “disregard” does not make better sense of the “findings and conclusions” language. When the theory of the plaintiff’s case is that the agency’s rule is arbitrary and capricious because the agency adopted it for illogical or factually groundless reasons, the court surely cannot simply ignore the agency’s findings and conclusions, because they are the key to the merits.

72 Bray, *supra* note 3.

73 *See id.* at 438 n.121.

74 *See* Bray, *supra* note 69.

75 *Id.*



Of these two arguments, the latter is the more tenuous. The APA does use terms of art with specialized meanings in some of its provisions,<sup>76</sup> but Bray offers no evidence that the drafters of the APA thought of the phrase “set aside” as a “technical” term with a restrictive meaning. In particular, Bray offers no support for the negative implication that he seeks to draw from the *Morgan* opinion. Nothing in that opinion says that the meaning of the phrase “set aside” should be limited to the context in which the Court used it. On the contrary, Congress used the term “set aside” in a broader sense in a statute that it enacted while the bills to establish an APA were under consideration. This statute empowered an Emergency Court of Appeals to determine the validity of wartime price control regulations, orders, and schedules, and provided that no other court “shall have jurisdiction or power . . . to stay, restrain, enjoin, or *set aside*, in whole or in part, . . . any provision of any such regulation, order, or price schedule . . . .”<sup>77</sup>

On the other hand, Bray is essentially correct when he observes that agencies did most of their policymaking through adjudication at the time of the APA’s enactment. As I explained above, the blossoming of substantive rulemaking in the 1960s and 1970s was a key turning point in the development of modern administrative law. The question, however, is what conclusions should be drawn from this observation.

In the first place, common practice should not be equated with universal practice. Bray asserts in the same commentary that “the complete absence of national injunctions in the decades before and after the APA makes it highly unlikely that the text was understood by Congress to authorize or require national injunctions.”<sup>78</sup> In an earlier article,<sup>79</sup> however, I showed that there was a pre-Act history of cases in which the Court did entertain actions to set aside agency rules.<sup>80</sup> More-

76 See *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (describing “substantial evidence” as a term of art); *T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 301 (2015) (same).

77 Emergency Price Control Act of 1942, Pub. L. No. 77-421, § 204(d), 56 Stat. 23, 33 (terminated 1947) (emphasis added).

78 Bray, *supra* note 69.

79 See Levin, *National Injunction*, *supra* note 5.

80 *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407 (1942); *Am. Tel. & Tel. Co. v. United States*, 299 U.S. 232 (1936); *United States v. Balt. & Ohio R.R. Co.*, 293 U.S. 454 (1935); *The Assigned Car Cases*, 274 U.S. 564 (1927). In my earlier article, I described *CBS* as a case in which the Court set a rule aside. This was an overstatement, because the Court’s opinion arose in a preliminary posture; in a subsequent proceeding, the rule was in fact upheld. *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 193, 227 (1943). However, the language of the *CBS* opinion leaves little doubt that the Court contemplated nullifying the rule if the broadcasters were to prevail. In any event, the rule involved in *Baltimore & Ohio Railroad* was indeed set aside. See also Emily Bremer, *Pre-APA Vacatur: One Data Point*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 21, 2023), <https://www.yalejreg.com/nc/pre-apa->

over, the statutory schemes under which these cases arose were recognized in the report of the Attorney General's Committee on Administrative Procedure:

Some of the recent statutes conferring rule-making power . . . require that the regulations in question be based upon findings of fact; that these, in turn, be based upon evidence made of record at a hearing; and *that a reviewing court set aside a regulation* not only for failure of the findings to support it, but also for failure of a finding to be based upon substantial evidence in the record. Review by the courts is had in statutory proceedings which may be instituted within a prescribed time by parties aggrieved by regulations and which result in a certification of the administrative record to the court. *A judgment adverse to a regulation results in setting it aside.*<sup>81</sup>

Since this committee was appointed by President Roosevelt for the exact purpose of building a record for Congress to consider as it drafted administrative procedure legislation, one can infer that Congress was aware of these provisions and would presumably have designed the Act to accommodate them.

I continued this historical analysis in the subsequent column that I wrote in collaboration with Mila Sohoni,<sup>82</sup> and she has addressed the historical record in much more detail in a law review article.<sup>83</sup> I will not try to duplicate her work here, but I will make a complementary point.

During the oral argument in *United States v. Texas*, Justice Barrett put her finger on a key issue:

[L]et's say that I agree with you and agree with some of the scholarship that says that [vacatur] was not contemplated at the time of the APA's enactment. Why can't remedial authority evolve over time? . . . Remedial authority is a flexible concept, and so maybe the courts of appeals have expanded that concept. Why would that be impermissible?<sup>84</sup>

That is indeed an apt point. Congress probably did not foresee the advent of agencies' widespread reliance on substantive rulemaking, but it may nevertheless have intended to provide the courts with sufficiently broad remedial authority to keep up with emerging challenges. Bray has cited no evidence that Congress intended to limit the

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vacatur-one-data-point/ [https://perma.cc/7E9S-5MXP] (discussing *West v. Chesapeake & Potomac Telephone Company of Baltimore*, 295 U.S. 662 (1935), as another example).

81 ATT'Y GEN.'S COMM. ON ADMIN. PROC., FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 116-17 (1941) (emphasis added).

82 Levin & Sohoni, *supra* note 6.

83 Sohoni, *supra* note 46, at 1140-62.

84 Transcript, *supra* note 11, at 59 (Barrett, J.).

scope of § 706 to situations with which it was already familiar.<sup>85</sup> Moreover, as I discussed in Part I of this Article, courts have in a variety of ways taken great liberties with the language of the APA in order to facilitate such evolution. In the case of the “set aside” language of § 706, the language is very broad anyway, as Justice Barrett pointed out.<sup>86</sup> Accordingly, there is all the more reason to interpret it to encompass the power to vacate a rule, which has proved to be an indispensable component of judicial review of rulemaking.<sup>87</sup>

Bray makes some valid policy points about nationwide injunctions, which I will discuss below. But I doubt that tradition can carry the weight that his argument seems to presuppose.

### C. *Setting Aside as Disregarding*

Professor Harrison has developed a different but equally transformative theory for dismissing the straightforward meaning of “set aside.” In his view, the term as used in the APA does not, or not always, mean “to nullify.” Instead, it can mean simply “set to the side” or “to disregard.”<sup>88</sup> He notes that, in a case challenging the constitutionality of a statute, a court does not actually cause the statute to cease to exist;

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85 In a follow-up post, Bray relies on a presumption to cast doubt on the permissibility of such remedial change: “[S]tatutes are read as incorporating traditional remedial principles.” Samuel Bray, *Vacatur and United States v. Texas*, REASON: THE VOLOKH CONSPIRACY (Nov. 30, 2022, 2:02 AM) (first citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); then citing *Nken v. Holder*, 556 U.S. 418, 433 (2009); and then citing *The Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944)), <https://reason.com/volokh/2022/11/30/vacatur-and-united-states-v-texas/> [<https://perma.cc/AE6J-YLH5>]. The difficulty with this argument is that the “traditional remedial principle” discussed in these three cases favored judicial *flexibility* in the face of statutory language that arguably limited the courts’ remedial authority. See *infra* notes 113–19 and accompanying text.

86 Transcript, *supra* note 11, at 60 (Barrett, J.). Similarly, when § 703 refers to actions for writs of mandatory injunction, it does not say that such actions must correspond closely to formats that were commonplace in 1946. See 5 U.S.C. § 703 (2018).

87 Although Professors Jaffe and Davis, the eminent scholars to whom Justice Gorsuch looked for guidance during the *United States v. Texas* oral argument, apparently did not speak to the vacatur issue at the time of the APA’s enactment, there is little if any reason to think that they would have been unsympathetic to *Abbott Laboratories v. Gardner* and the revolution in judicial review doctrine that it brought about. Both were stern critics of the restrictive ripeness principles that *Abbott Labs* overthrew, and the Court relied directly on the writings of both in reaching its holding. *Abbott Lab’s v. Gardner*, 387 U.S. 136, 141, 148 n.15, 154 (1967). So did Judge Friendly, in the lower court opinion that set forth the ripeness framework that the Court later adopted in that case. *Toilet Goods Ass’n v. Gardner*, 360 F.2d 677, 684–87 (2d Cir. 1966), *aff’d in relevant part*, 387 U.S. 167 (1967). See Levin, *Trilogy Story*, *supra* note 35, at 442, 457; Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 341–42 (2005).

88 Harrison, *Section 706*, *supra* note 24, at 42–43.

rather, it sets the statute to one side<sup>89</sup> and decides the case without regard to it. The popular shorthand that erroneously describes this dynamic as the court “striking down” the statute is sometimes called the “writ-of-erasure fallacy.”<sup>90</sup>

The SG’s reliance, or partial reliance, on Harrison’s argument encountered strong resistance during the oral argument in *United States v. Texas*. Some of the Justices noted that his analysis, a mere law review argument, had no real case support and had not been adequately analyzed in the government’s briefs, although these Justices did not engage directly with the particulars of his argument.<sup>91</sup>

Their factual premise about the caselaw was, however, accurate. In the context of constitutional litigation, the “disregard” concept has some continuing visibility in precedents regarding severability, at least nominally, although the Court does not seem to have fully embraced it.<sup>92</sup> In contrast, during the seventy-five-plus years in which the APA has been in effect, courts have never entertained Harrison’s theory in an administrative law context. At least, I have not been able to find any such case, and Harrison does not cite to any. Indeed, the author who coined the term “writ-of-erasure fallacy” expressly acknowledges that administrative law cases are different: judicial disapproval of a rule of ten can and should result in its nullification.<sup>93</sup>

To put the matter more concretely, when a final court judgment orders vacatur of a rule, the agency is supposed to instruct the Office of the Federal Register (OFR) to remove the provision from the Code of Federal Regulations (C.F.R.).<sup>94</sup> In practice, agencies do not always comply with this expectation immediately, due to uncertainties about whether the relevant court decision has become final, deliberation about how to rewrite the underlying regulation when a portion of it has been vacated, etc. At least, however, OFR maintains that agencies do have an obligation to fulfill this task.<sup>95</sup>

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89 *Id.* at 42.

90 Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 933 (2018).

91 Transcript, *supra* note 11, at 55, 119, 139 (Kavanaugh, J., Alito, J., and Barrett, J., respectively).

92 See *Collins v. Yellen*, 141 S. Ct. 1761, 1787–89 (2021); *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2350, 2351 n.8 (2020).

93 Mitchell, *supra* note 90, at 1012–13.

94 Adoption of Recommendations and Statement Regarding Administrative Practice and Procedure—Administrative Conference Recommendation 2013-6: Remand Without Vacatur, 78 Fed. Reg. 76,269, 76,272, 76,273 (Dec. 17, 2013) (“Agencies should . . . work with the Office of the Federal Register to remove the vacated regulation from the Code of Federal Regulations.”).

95 By statute, the *Code of Federal Regulations* (C.F.R.) must contain regulations that are “in effect as to facts arising on or after dates specified by the Administrative Committee [of the Federal Register].” 44 U.S.C. § 1510(a) (2018). OFR interprets this language to mean

We can go on to ask whether anything can be said in favor of Harrison's notion that, in an administrative law context, "set aside" should sometimes be read as "disregard." It certainly does not seem to have any relevance to judicial review of agency adjudicative orders, which, as I have been saying, was the most common use of judicial review in the years immediately following the APA's enactment. I do not think anyone disputes that, when a litigant makes a case that such an order was unlawful, the court will normally respond by setting it aside in the sense of nullifying it.

If Harrison's interpretation of "set aside" is to have any utility in administrative law, it would probably occur in agency proceedings in which the government proposes to apply a regulation to the disadvantage of the respondent in a specific case. It would at least be intelligible to say that if the rule is shown to violate the APA's scope of review standards, the court should "set the rule to the side" and determine the litigant's rights without regard to it, while leaving the rule in place as to everyone else.

However, no such artificial and convoluted construction of the words "set aside" is necessary in order to explain what happens in this situation. The more straightforward way to describe it is to say that the relevant "agency action" being reviewed is not the rule, but rather the agency's adjudicative decision applying the rule. If the petitioner wins on the merits, *that* decision will be set aside—i.e., nullified. Such a judicial order provides all the relief that this party needs. An injunction forbidding the agency to apply the rule to anyone else would appear to contravene the principle that equitable relief should go no further than necessary to provide complete relief to the prevailing party.<sup>96</sup>

Moreover, Harrison's theory is intelligible only when the litigant is in a defensive posture. As such, it would fare even worse in a preenforcement review context. When the object of the judicial review proceeding is to contest the rule itself, it would be entirely incoherent to say that the court should ignore the rule and decide the plaintiff's rights without regard to it. In this sense, Harrison's reading of § 706

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that each agency has a duty to request updates so as to ensure that the regulations in the C.F.R. are, in fact, in effect as of the quarterly revision date specified on the volume. Email from Miriam Vincent, Staff Att'y, Legal Affs. & Pol'y Div., Off. of the Fed. Reg., to author (Feb. 2, 2023) (on file with author) [hereinafter Email from Miriam Vincent]. A proposed amendment to the Administrative Committee's own regulations—published years ago but still pending—would provide that "[w]henver a codified regulation expires after a specified period by law *or by court order*, the issuing agency must submit a rule document for publication in the Federal Register removing the expired regulations." Revision of Regulations, 79 Fed. Reg. 64,133, 64,147 (proposed Oct. 28, 2014) (to amend 1 C.F.R. § 21.6) (emphasis added). The proposed amendment is intended to clarify, not change, existing legal requirements. Email from Miriam Vincent, *supra*.

96 See *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

may amount to a reversion to pre-*Abbott Labs* days, when regulated persons were generally unable to contest a rule except by violating it and hoping that they would prevail by defending in the enforcement proceeding (with the likelihood of incurring a penalty if their gamble did not pay off).

It seems unlikely that the Court would be receptive to such a step. As recently as 2021, in *CIC Services, LLC v. IRS*,<sup>97</sup> the Court considered whether the petitioner's APA suit to enjoin enforcement of an Internal Revenue Service reporting requirement was barred by the Anti-Injunction Act.<sup>98</sup> Justice Kagan's opinion for a unanimous Court proceeded on the explicit premise that the petitioner was seeking nullification of an IRS reporting rule, not merely a commitment to "disregard" it.<sup>99</sup> The Court held that the preenforcement challenge could go forward; the petitioner did not need to disobey the Notice, pay the resulting tax penalty, and then contest the requirement in a suit for a refund.<sup>100</sup>

I suppose the government's—not Harrison's—answer to this point would be that, in the preenforcement review, a plaintiff could potentially obtain a declaratory or even injunctive order instructing the agency not to apply its rule to the plaintiff (with the understanding that similarly situated persons would have to bring their own suits to obtain equivalent relief, unless someone qualifies as a class action representative). The problem then becomes that interpreting § 706 to mean that the rule should be "set to the side" would make even such limited relief impossible. A court cannot enjoin the application of a rule to even a single plaintiff if the court must simply "set the rule to the side" and disregard it.

Furthermore, what if the plaintiff's objective is not to be freed from the rule entirely, but instead to obtain a remand so that the rule can be modified? A "disregard" concept of judicial relief seems entirely incapable of accounting for such a remedy. At the extreme, suppose the litigant is a statutory beneficiary who approves of the agency rule as far as it goes, but wants the remand in order to induce the

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97 141 S. Ct. 1582, 1586 (2021).

98 26 U.S.C. § 7421 (2018).

99 141 S. Ct. at 1590 ("CIC's complaint asks for injunctive relief from the Notice's reporting rules, not from any impending or eventual tax obligation. Contra the Government's view, a request in an APA action to 'enjoin the enforcement' of an IRS reporting rule is most naturally understood as a request to 'set aside' that rule . . ."); *id.* at 1592 ("The complaint, and particularly the relief sought, targets the Notice's reporting rule, asking that it be set aside as a violation of the APA. And nothing in that request smacks of artful pleading."). See generally Mila Sohoni, *Do You C What I C?—CIC Services v. IRS and Remedies Under the APA*, YALE J. ON REGUL.: NOTICE & COMMENT (June 8, 2021), <https://www.yalejreg.com/nc/do-you-c-what-i-c-cic-services-v-irs-and-remedies-under-the-apa-by-mila-sohoni/> [<https://perma.cc/U2H9-9X9P>].

100 141 S. Ct. at 1594.

agency to strengthen it. Under Harrison’s theory, such litigants would rarely if ever be able to call the agency to account in court, because, by definition, they would never become the targets of an enforcement action brought by the agency. Moreover, the last thing such a litigant would want is a judicial decision directing the agency that it should henceforth ignore or disregard the rule (either across the board or only with regard to the individual litigant), because that “relief” would leave the litigant worse off than if it had not sued at all.<sup>101</sup>

In sum, Harrison’s “disregard” reading of “set aside” has no support in administrative law doctrine, and there does not appear to be any situation in which it would be helpful, let alone worth the disruptions that it could bring about in extant practice. The only credible argument that I can envision being made on behalf of his reading, or other radical theories discussed in this Part, is that they might serve to ameliorate some of the ill effects of vacatur and nationwide injunctions. As I will now proceed to argue, however, I believe that those problems can be addressed in other ways that would be far more consistent with established administrative law norms.

#### IV. A FLEXIBLE READING OF § 706

Even if the revisionist theories discussed in Part III are “set to the side,” significant issues remain as to how to reconcile § 706 with familiar administrative law doctrine. During the *United States v. Texas* oral argument, Justice Gorsuch wondered why one would look for authorization of a particular remedy in a provision that supposedly was about the *scope* of judicial review, and how this supposed support for vacatur could be reconciled with the statute’s silence on that point, especially when compared with the specific remedies that § 703 does mention.<sup>102</sup> The “set aside” language seems especially awkward as applied to, for example, a case involving a claim for habeas relief.<sup>103</sup> Moreover, the apparently mandatory tone of the “shall . . . set aside” directive seems too inflexible to accommodate the practical policy concerns that vacatur and nationwide injunctions have elicited.<sup>104</sup>

I believe that the right way to approach these questions is to recognize that § 706 was never designed or intended to be read in an overly literal manner. It was intended to be a declaratory provision,

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101 ACUS has identified this fact situation as one that will often warrant remand without vacatur. Adoption of Recommendation and Statement Regarding Administrative Practice and Procedure—Administrative Conference Recommendation 2013-6: Remand Without Vacatur, 78 Fed. Reg. 76,269, 76,272, 76,272 & n.5 (Dec. 17, 2013). Harrison, however, objects to that judicial device. See *infra* note 123 and accompanying text.

102 Transcript, *supra* note 11, at 47–49, 111–13 (Gorsuch, J.).

103 *Id.* at 48–49 (Prelogar).

104 5 U.S.C. § 706 (2018).

supplying a framework for decision but not tying the courts' hands too tightly.<sup>105</sup> As the comparative print issued by the Senate Judiciary Committee during its consideration of the APA bill put it:

A restatement of the scope of review, as set forth in subsection (e) [now § 706], is obviously necessary lest the proposed statute be taken as limiting or unduly expanding judicial review. . . . It is not possible to specify all instances in which judicial review may operate. Subsection (e), therefore, seeks merely to restate the several categories of questions of law subject to judicial review.<sup>106</sup>

That flexible, open-ended attitude is the spirit with which courts have in fact applied the judicial review provisions of the APA. The content of the “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” clause has been determined almost entirely by judicial doctrine.<sup>107</sup> Likewise, the clause that allows consideration of whether an agency action was taken “without observance of procedure required by law” does not specify what procedures are required; courts have filled in gaps themselves (not always by construing positive law prescribed elsewhere).<sup>108</sup> In closely related judicial review provisions (all part of § 10 of the original APA), courts have had to flesh out other undefined terms, including “committed to agency discretion by law”<sup>109</sup> and “final agency action.”<sup>110</sup> Some of these interpretations are unsupported by, or even contrary to, the actual wording of the Act. I have already mentioned the provision on standing; another example is the expectation that facts supporting a rule must be substantiated in the administrative record.<sup>111</sup>

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105 See Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 134–36 (2021) [hereinafter Levin, *Assault*] (discerning an endorsement of this approach in Justice Kagan’s plurality opinion in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2410–14 (2019)).

106 ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 39 (1946); see also Levin, *Assault*, *supra* note 105, at 150–51.

107 5 U.S.C. § 706(2)(A) (2018).

108 *Id.* § 706(2)(D).

109 *Id.* § 701(a)(2).

110 *Id.* § 704.

111 Levin, *Originalist Challenge*, *supra* note 26, at 17. I have recently argued at length that the language of § 706 that directs courts to “decide all relevant questions of law” does not prescribe any specific standard of review and, in particular, does not require de novo, nondeferential review of legal questions. See Levin, *Assault*, *supra* note 105. Justice Gorsuch staked out a contrary position in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2432–34 (2019) (Gorsuch, J., concurring in the judgment), and recently reaffirmed it in *Buffington v. McDonough*, 143 S. Ct. 14, 17 (2022) (Gorsuch, J., dissenting from the denial of certiorari), as well as during oral argument in *United States v. Texas*. Transcript, *supra* note 11, at 110 (Gorsuch, J.). Possibly he had not read my article when he made these most recent pronouncements. One point I made in the article is that Jaffe and Davis, in whom Justice Gorsuch placed such confidence in the exchange quoted above, *supra* note 59 and accompanying text, did not share his interpretation of the “questions of law” language. See Levin, *Assault*, *supra* note



Getting to the specific issue at hand, I think the phrase “set aside” has the same simple, straightforward meaning that most people—with the exception of a few heretics—have always thought it has; but the sentence should be read as *authorizing* set-aside relief, not as commanding it in every instance.<sup>112</sup>

This assertion may seem counterintuitive, but it finds support in a sizable body of caselaw that stands for the proposition that a statute should not be read to limit a court’s remedial discretion unless it does so in unequivocal language.<sup>113</sup> A leading example is *The Hecht Co. v. Bowles*,<sup>114</sup> in which a price control statute stated that when a person is shown to have violated the Act, an injunction to restrain the defendant from future violations “shall be granted without bond.”<sup>115</sup> The Court nevertheless held that the court had discretion to decide whether or not to issue the injunction.<sup>116</sup> The Court remarked that “[w]e are dealing here with the requirements of equity practice with a background of several hundred years of history,” and “[w]e do not believe that such a major departure from that long tradition as is here proposed should be lightly implied.”<sup>117</sup> The drafters of the APA would undoubtedly have been familiar with this 1944 case. The Court has followed *Hecht* on multiple occasions.<sup>118</sup> The holdings have gone both ways in light of the interpretations that the Court places on particular regulatory statutes,<sup>119</sup> but it is fair to say that the Court does not by any means treat the word “shall” as definitive on the question of whether Congress has foreclosed the exercise of equitable discretion.

Remand without vacatur is a modern example of how the concept of remedial discretion has shaped interpretation of the “shall . . . set

105, at 181–82. I will not belabor this disagreement here, however, because the APA contains an ample supply of other, less controversial examples, as discussed in the above text.

112 Interestingly, the merits issue in *United States v. Texas* also raised a significant question of whether the statutory term “shall” must be interpreted literally, notwithstanding norms of prosecutorial discretion and Congress’s failure to appropriate enough funding to enable the agency to do everything that the Immigration and Naturalization Act says it “shall” do. *Cf.* *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760–62 (2005) (also reading “shall” nonliterally in light of traditions of enforcement discretion).

113 For extensive discussion, see Levin, *Vacation*, *supra* note 44, at 310–11, 334–42.

114 321 U.S. 321 (1944).

115 *Id.* at 322 (quoting Emergency Price Control Act of 1942, Pub. L. No. 77-421, § 205(a), 56 Stat. 23, 33 (terminated 1947)).

116 *Id.* at 328–31.

117 *Id.* at 329–30.

118 *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 496 (2001) (dictum); *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).

119 See *Miller v. French*, 530 U.S. 327, 337–38 (2000) (holding discretion displaced); *Oakland Cannabis*, 532 U.S. at 497–99 (holding that lower court lacked discretion to legalize what Congress has declared to be unlawful).

aside” language of § 706. As the reader will recall, the device allows a court to refrain from vacating an agency rule while remand proceedings to repair a defect in the rule are under way. Defects such as an error in the reasoning supporting the rule or the procedure by which it was adopted often lend themselves to such treatment. According to the leading doctrinal test, the court’s decision about whether to invoke the device in a given case should depend on “the seriousness of the order’s deficiencies” and “the disruptive consequences of an interim change that may itself be changed.”<sup>120</sup> The device is considered inappropriate for situations in which the court has found a defect that cannot possibly be repaired, such as a flat legal prohibition on the agency’s chosen policy.

Certainly, there is a reasonable textual argument that the “shall” in § 706 renders remand without vacatur categorically impermissible. Notably, however, that view has not prevailed in administrative practice. Both the ABA and ACUS have endorsed selective use of remand without vacatur and have recommended guidelines for the exercise of discretion in this area.<sup>121</sup> Although some individual judges have questioned the legality of the device, and the Supreme Court has not ruled on it, the consultant’s report supporting the ACUS recommendation found that eight courts of appeals have applied the device in review of agency action, and no circuit was identified as having held it to be unlawful.<sup>122</sup> It seems, therefore, that remand without vacatur has become more or less established as a tool that allows courts to calibrate their use of remedial authority in rule review in a nuanced and flexible manner. In the next Part of this Article, I will argue that the courts should aim for a similarly context-sensitive approach to the nationwide injunction issue.<sup>123</sup>

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120 *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (quoting *Int’l Union, United Mine Workers v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)).

121 See *supra* notes 52–53 and accompanying text.

122 STEPHANIE J. TATHAM, ADMIN. CONF. OF THE U.S., *THE UNUSUAL REMEDY OF REMAND WITHOUT VACATUR* 28–29 (2014). For discussion of the caselaw, see *id.* at 21–29, 54–58; Levin, *Vacation*, *supra* note 44, at 377–85.

123 A forthcoming article by Professor Harrison takes a stand against remand without vacatur. John C. Harrison, *Remand Without Vacatur and the Ab Initio Invalidity of Unlawful Regulations in Administrative Law*, *BYU L. REV.* (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4101292](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4101292) [<https://perma.cc/4QL4-RST8>]. He argues that an illegally adopted rule is void from its inception, so that remand without vacatur amounts to wrongly telling parties that they are obliged to continue to comply with an unlawful rule. In the course of this discussion, he identifies me as author of the leading article on the subject. *Id.* (manuscript at 6) (citing Levin, *Vacation*, *supra* note 44). In light of that characterization (which I appreciate), few will be surprised to learn that I do not agree with Harrison’s thesis. Even if one conceives of an action as “void,” as opposed to being merely “voidable,” the law of remedies is chock-full of doctrines that can sometimes prevent a party

The insight that the availability of set-aside relief under § 706 should depend on equitable principles, instead of being bestowed automatically in every case, suggests that a party’s ability to obtain nationwide relief should be largely the same regardless of whether the complaint seeks (a) vacatur or set-aside relief under § 706, or instead (b) an injunction as contemplated by § 703. To be sure, as mentioned earlier, the universal injunction and the vacatur are technically different, but that distinction does not seem to make much difference in practice. The underlying policy considerations are closely related. In the next Part, therefore, I will discuss these two types of relief within a single analytical framework.<sup>124</sup>

## V. CRITERIA FOR UNIVERSAL RELIEF

As this Article mentioned at the outset, nationwide or universal injunctions can have a variety of ill effects. They can bestow what seems an inordinate amount of power on individual district judges; they can foreclose “percolation” among multiple courts; and they can increase the incentives for forum shopping, as litigants seek out the most sympathetic court or individual judge to hear the case.<sup>125</sup> These objections have force, and they should carry weight in the courts’ balancing of competing considerations.

Professor Bray does not agree that the presence of competing policy considerations in this area warrants a “standard” as opposed to a “rule.”<sup>126</sup> He assumes that such a standard would revolve around the Supreme Court’s declaration in *Califano v. Yamasaki*<sup>127</sup> that “injunctive

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from receiving relief from such unlawful conduct. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1765 (1991) (“[T]he law of remedies is inherently a ‘jurisprudence of deficiency, of what is lost between declaring a right and implementing a remedy.’” (quoting Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983))). Common examples include stays of an agency’s action pending appeal, stays of a court’s mandate after judgment (a common alternative to remand without vacatur), exhaustion of administrative remedies, issue exhaustion, lack of clean hands, laches, and expiration of a statute of limitation. Surely the concept of voidness does not undermine all of these doctrines, and I do not see why remand without vacatur must stand on a different footing.

124 The situation in *United States v. Texas* is complicated by a targeted provision in the immigration laws, 8 U.S.C. § 1252(f)(1) (2018), which prohibits lower courts from awarding injunctive relief under circumstances that may or may not be present in that case. See *generally* *Biden v. Texas*, 142 S. Ct. 2528, 2538–40 (2022) (discussing § 1252(f)(1)); *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022) (same). An issue raised in the present litigation is whether that statute is equally applicable if the relief ordered by the court is characterized as a vacatur rather than an injunction. I do not take a stand on that issue here, because my concern is with principles of general application.

125 See *supra* note 3 and accompanying text.

126 Bray, *supra* note 3, at 480.

127 442 U.S. 682 (1979).

relief should be no more burdensome to the defendant than necessary to provide *complete relief* to the plaintiffs,”<sup>128</sup> which he interprets as implying the converse proposition that a court should provide as broad an injunction as complete relief requires.<sup>129</sup> Such a benchmark, he contends, would not be stable and would be almost wholly indeterminate.<sup>130</sup> Moreover, it would militate strongly in favor of nationwide injunctions.<sup>131</sup> Thus, he prefers a categorical rule that an injunction should be no broader than necessary to protect the *plaintiffs themselves*, as opposed to others.<sup>132</sup>

For reasons already discussed, I do not support Bray’s proposed rule on the merits. In addition, the Supreme Court did not say in *Yamasaki* that the complete-relief principle should operate symmetrically, and I agree with Judge Milan Smith, who writes in a thoughtful article that assuring “complete relief” is not an appropriate premise in this area.<sup>133</sup> As Bray himself notes, it neglects a host of factors that properly favor defendants.<sup>134</sup> Thus, a “standards” approach is desirable, although “complete relief” is not a suitable, or at least sufficient, baseline.

This Part undertakes to identify more specifically some prototypical situation in which vacatur or nationwide injunctive relief would normally be warranted or unwarranted. There is substantial literature on this line-drawing issue. I cannot explore it in depth here, but I will mention a few paradigmatic examples by way of illustration.

In line with the discussion earlier in this Article, universal relief should be *avored* where an administrative scheme is so tightly integrated that enjoining the violation of law as to the plaintiff(s) but not similarly situated persons would create unacceptable incoherence in the regulatory program. Similarly, a nationwide injunction will presumably be appropriate where providing relief to some regulated persons or statutory beneficiaries, but not all, would not be feasible. The Ninth Circuit’s holding in *Bresgal v. Brock*<sup>135</sup> is illustrative. This case required the Secretary of Agriculture to adopt a nationwide injunction that would prohibit independent labor contractors from engaging in misleading and exploitative conduct toward migrant forest workers.<sup>136</sup> The action had been filed by individual migrant workers, but the court

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128 *Id.* at 702 (emphasis added).

129 Bray, *supra* note 3, at 466.

130 *Id.* at 480.

131 *Id.* at 467.

132 *Id.* at 469.

133 Milan D. Smith, Jr., *Only Where Justified: Toward Limits and Explanatory Requirements for Nationwide Injunctions*, 95 NOTRE DAME L. REV. 2013, 2026 (2020).

134 Bray, *supra* note 3, at 468.

135 843 F.2d 1163 (9th Cir. 1987).

136 *Id.* at 1165, 1172.

saw no way in which it could write an injunction that would protect only the named plaintiffs or that would apply only in the Ninth Circuit, especially since these workers sometimes traveled around to different parts of the country, and the contractors wouldn't always know which workers they were dealing with.<sup>137</sup>

On the other hand, several situations in which universal injunctive relief should be *disfavored* can be identified. First, a court should be disinclined to grant universal relief where enjoining a violation within the court's geographical state or region would be feasible and administrable.<sup>138</sup> This premise, the converse of the court's decision in *Bresgal*, is an appropriate concession to the policies that militate against nationwide injunctions, such as the goal of promoting percolation.

Second, a rule should not be vacated under circumstances in which remand without vacatur is now considered appropriate. As discussed above, a large body of caselaw identifying these situations already exists.<sup>139</sup>

Third, a court should not enjoin or vacate a rule that an agency has enforced or applied to the disadvantage of a litigant in an administrative adjudication, if the litigant can be made whole in an appeal from the order in which the agency applied the rule.<sup>140</sup> This standard practice follows directly from the *Yamasaki* principle just mentioned: the reviewing court should not bestow broader relief than is necessary to vindicate the challenger's rights. Note that, although some have thought otherwise, this situation does not entail any narrow interpretation of "set aside"; it focuses on the individual agency action, which the court *does* set aside, in the sense of nullifying it, if the appeal is successful.<sup>141</sup>

The well-known practice of agency nonacquiescence has developed in this context. In subject areas such as Social Security disability benefits or immigration, an agency might refuse to "acquiesce" in one circuit's finding that its rule is invalid, so that it can continue to argue in another circuit that the first holding was mistaken.<sup>142</sup> Such inter-circuit nonacquiescence is entirely compatible with "percolation" among

137 *Id.* at 1170–71.

138 See *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028–30 (9th Cir. 2019) (finding the record insufficiently developed to warrant nationwide relief), *stay granted on other grounds*, 140 S. Ct. 3 (2019); *California v. Azar*, 911 F.3d 558 (9th Cir. 2018) (same); *City & Cnty. of S.F. v. Trump*, 897 F.3d 1225, 1244–45 (9th Cir. 2018) (same).

139 See *supra* note 122 and accompanying text.

140 See *Baeder v. Heckler*, 768 F.2d 547, 553 (3d Cir. 1985); Allan D. Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C. L. Rev. 123 (1977).

141 Levin & Sohoni, *supra* note 6.

142 See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989). In theory, nonacquiescence among courts *within* a single

various courts of appeals, and a litigant who has shopped for a friendly reviewing court will not cut less sympathetic courts out of the debate over whether the rule is valid.

Fourth, a universal injunction or universal vacatur may be inappropriate when a “facial” holding of illegality would be overbroad. Often, in constitutional law, the relevant legal principle would be appropriate as applied to some persons but not others—or might turn out to be, so that the court should not foreclose that possibility in advance. This consideration, however, usually doesn’t apply in APA judicial review proceedings (other than those based on a constitutional violation).<sup>143</sup> In a rulemaking proceeding, there are no parties. The agency has *duties* to the public at large, but if it breaches one or more of these duties, such as a failure to allow required notice-and-comment procedure, with respect to one member of the public, it *necessarily* will have committed the same violation with respect to everyone else.

This analysis helps to explain why, in routine administrative law appeals, the *Abbott Labs* ripeness balance is usually (not always) struck in favor of allowing preenforcement review of a rule: the rule is “fit” for immediate review, even if the potential injunction or vacatur would operate universally. However, ripeness is not the only consideration at issue. A court may be better advised to refrain from issuing nationwide injunctive relief for reasons of judicial administration, such as the desire to facilitate percolation or counteract forum shopping. In such a case, it should eschew vacatur and should issue a limited injunction, declaratory relief, etc.

The guideposts just mentioned do not cover all situations by any means, and some of them are too open-ended to provide much guidance. A general admonition to courts to apply current doctrine with sensitivity to the disadvantages of nationwide relief may be helpful, but many would no doubt argue that it is unlikely to be sufficient by itself. In the next Part, therefore, I will take up some possible additional steps that could be taken.

## VI. REFORM SUGGESTIONS

The thrust of the foregoing discussion is that the APA should be interpreted to authorize vacatur or other nationwide injunctive relief under at least some circumstances. Perhaps, however, procedural statutes and norms can be revised in a manner that would ameliorate some

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circuit can also occur, although that practice is widely criticized as disrespectful of the appellate court’s authority. See *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1091 (D.C. Cir. 1992) (noting broad disapproval of intracircuit nonacquiescence among the circuits).

143 See 5 U.S.C. § 706(2)(B) (2018).

of the costs of such relief, in particular its tendency to impede percolation among multiple courts.

A. *Presumption Favoring Stays of Vacatur or Universal Injunctions Pending Appeal*

The SG's solution of allowing a court to provide injunctive relief only to the individual litigant would seem to mean that a regulation could *never* be vacated or "set aside" as a whole, no matter how many courts have spoken to its validity, until the Supreme Court has reviewed it. That seems excessive, in part because as the number of courts that have addressed an issue increases, the marginal benefit of additional percolation would presumably decline. After three or four circuits have spoken to the issue, the payoff from adding still another appellate voice would seem relatively small. Meanwhile, litigants who are identically situated to the plaintiffs but outside the scope of a plaintiff-only injunction might have a compelling interest that apparently deserves to be protected.

However, I do have a suggestion that might help to reduce the number of situations in which a nationwide injunction issued by a single court effectively prevents any other court from opining on the same issue. The suggestion is that there should be a presumption in favor of staying the effectiveness of a nationwide injunction or vacatur pending an appeal.

That expectation could be built directly into the familiar four-factor test for determining whether a stay should be granted. The test considers probability of success on the merits, the risk of irreparable injury to the plaintiff, the potential harm to other parties, and the public interest.<sup>144</sup> The test does not have to apply the same way in all contexts.<sup>145</sup> In the context of universal relief against a rule, the Supreme Court could interpret the public interest factor as encompassing the public interest in allowing time for multiple courts to address the underlying substantive issue. Over time the Court could build up a body of doctrine amplifying on and refining the presumption favoring a stay in most nationwide injunction cases. It could use that doctrine, to-

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144 *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (first citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008); then citing *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987); and then citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–12 (1982)).

145 *Cf. Sampson v. Murray*, 415 U.S. 61, 83–84 (1974) (adapting the standard formula to require an especially strong showing of irreparable injury when a government employee sues to avoid termination).

gether with caselaw on the appropriate province of nationwide injunctions as discussed in the preceding Part, to oversee practice in the lower courts, without necessarily addressing the merits in such cases.

To be sure, I doubt that the Court would want to adhere unbendingly to this presumption.<sup>146</sup> The other three factors would remain part of the stay formula and might be deployed when the probability of the challengers' success is exceptionally high (or low) or the parties' equities are especially compelling. The Court's increasing use of its emergency docket to resolve politically charged issues<sup>147</sup> seems to suggest that it will often be perfectly willing to forgo the potential benefits of percolation in order to achieve what it considers a fair result in such cases. A doctrinal move that depends on patience cannot be effective except when, or to the extent that, the judges who apply it are actually patient.

But the Court would be able to enforce the presumption to the extent it actually does desire broader percolation of issues in cases involving vacatur or nationwide injunctions. In mundane cases, where ideology may exert a relatively small influence, one can imagine the Court taking a stand in favor of curbing abuses of such injunctions.

Relatedly, Judge Smith has recommended that lower courts that impose nationwide injunctions should be expected to write opinions explaining why they resorted to that remedy as opposed to less drastic choices.<sup>148</sup> This is another good suggestion. Such a requirement would facilitate appellate review of those choices. Judge Smith further recommends that the court should hold a special hearing on the matter before going forward.<sup>149</sup> I am not immediately convinced that the benefits of that expectation would usually outweigh its costs in terms of slowing down the process, but others with firsthand experience in this area might disagree.

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146 The presumption could be made inapplicable to cases in which the likelihood of subsequent litigation appears remote, such as where the stakes are low or where all interested stakeholders have been represented in the initial appeal. Contestation of rulings adverse to such previously represented parties might also be foreclosed by issue preclusion. See, e.g., *W. Coal Traffic League v. ICC*, 735 F.2d 1408, 1410 (D.C. Cir. 1984) (R.B. Ginsburg, J.).

147 Kimberly Strawbridge Robinson, *Supreme Court Conservatives Want More Robust 'Shadow Docket' (I)*, BLOOMBERG L. (July 8, 2022, 12:51 PM), <https://news.bloomberglaw.com/us-law-week/supreme-courts-conservatives-want-more-robust-shadow-docket> [<https://perma.cc/TN8N-PY8X>] (noting that the Court had issued sixty-six emergency orders during the past year).

148 Smith, *supra* note 133, at 2036.

149 *Id.*; see also Frost, *supra* note 2, at 1116 (endorsing both suggestions).



### B. Three-Judge Courts

Judge Gregg Costa of the Fifth Circuit has suggested that Congress should enact legislation to apply to cases that involve a demand for a nationwide injunction and that, under present law, would be tried by a single district judge.<sup>150</sup> He proposes that a three-judge district court, including one circuit judge, should hear these cases instead, and that such a panel's decision should be appealable as a matter of right to the Supreme Court.<sup>151</sup> As he notes, such panels have a long history in federal practice, although the statutory schemes that provided for them have now been almost entirely discontinued.<sup>152</sup> Judge Costa explains that this plan would ensure that a case involving a nationwide injunction will have been reviewed by at least three judges; it may not be precisely equivalent to review by multiple courts but would straightforwardly avoid the single-judge problem.<sup>153</sup> Actually, many rules are already subject to initial court of appeals review, without an initial stop at a district court,<sup>154</sup> so the judge's plan would affect only the fraction that are not.

I would add that judicial review of an administrative rule is well suited to initial consideration by three-judge panels anyway. As the Supreme Court wrote in *Florida Power & Light Co. v. Lorion*:

The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court. . . . The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry. . . . The factfinding capacity of the district court is thus typically unnecessary to judicial review of agency decisionmaking. Placing initial review in the district court does have the negative effect, however, of requiring duplication of the identical task in the district court and in the court of appeals; both courts are to decide,

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150 See Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV.: BLOG (Jan. 25, 2018), <https://harvardlawreview.org/blog/2018/01/an-old-solution-to-the-nationwide-injunction-problem/> [<https://perma.cc/9XWE-FABU>]; Alan Morrison, *Opinion, It's Time to Enact a 3-Judge Court Law for National Injunctions*, BLOOMBERG L. (Feb. 6, 2023, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/its-time-to-enact-a-3-judge-court-law-for-national-injunctions> [<https://perma.cc/7DX5-TSJA>] (similar proposal).

151 Costa, *supra* note 150.

152 *Id.* For discussion of this history, see, e.g., Michael E. Solimine, *Three-Judge District Courts, Direct Appeals, and Reforming the Supreme Court's Shadow Docket*, 98 IND. L.J. SUPPLEMENT 37, 42–46 (2023).

153 See Costa, *supra* note 150.

154 See JONATHAN R. SIEGEL, ADMIN. CONF. OF THE U.S., THE ACUS SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES 52–54 (2022).

on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review.<sup>155</sup>

The Costa plan has been criticized on the ground that mandatory appeals to the Supreme Court would impose a substantial time burden on that Court to hear cases that it would not otherwise choose to hear.<sup>156</sup> Indeed, this is among the main reasons why previous three-judge court requirements were construed extremely narrowly during their heyday and then virtually abolished.<sup>157</sup>

That problem could be solved, however, by excluding from the enabling legislation the provision for appeal as of right to the Supreme Court. Parties who seek Supreme Court review of the three-judge court's decision could be required to petition for certiorari, and the Court could deny the petition if it so chose. After all, one rationale for mandatory appellate jurisdiction in the former three-judge court schemes was Congress's judgment that the matters subject to that court's jurisdiction would be so pressing and important that their resolution should be expedited by omitting a time-consuming stop at the court of appeals.<sup>158</sup> In the present context, however, the purpose would be the opposite—to *slow down* the resolution of the underlying debate so that, in appropriate instances, other courts would have an opportunity to weigh in on the issue.

Anyway, most of the cases that now present vacatur for review are mundane administrative appeals. Out of the five cases that the D.C. Circuit vacates before breakfast, at least in Chief Justice Roberts's metaphor, four would probably be too narrow and technical to deserve Supreme Court review; the fifth might or might not. *Denials* of a request for a nationwide injunction (or any injunction) would seem to be, in general, all the more unlikely to be urgent or significant enough to warrant Supreme Court review.

Congress would have to work out some complications if it were to adopt the sort of three-judge panel plan that I have just put on the table for consideration.<sup>159</sup> Although, as I just said, the validity of the rule would almost certainly not depend on factfinding by the district court, other issues raised by the plaintiff or the government might. In

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155 Fla. Power & Light Co. v. Lorion, 470 U.S. 729 743–44 (1985) (citations omitted).

156 DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 288 (5th ed. 2019); Smith, *supra* note 133, at 2035–36.

157 Solimine, *supra* note 152, at 45–46.

158 See *id.* at 41–42 (quoting Stephen I. Vladeck, Opinion, *F.D.R.'s Court-Packing Plan Had Two Parts. We Need to Bring Back the Second.*, N.Y. TIMES (Jan. 7, 2022), <https://www.nytimes.com/2022/01/07/opinion/supreme-court-vaccine-mandate.html> [https://perma.cc/5A4B-FQL6]).

159 Congress would need to take account of the variety of agency actions that technically are rules. See *supra* note 7.

some cases, the panel could handle all of those issues, but for more complex cases there might have to be a procedure for transferring the case between the three-judge court and a single district judge. Another question would be whether the three-judge district court would be bound by precedents of the circuit in which it sits.<sup>160</sup> Similar issues have arisen under past three-judge plans,<sup>161</sup> and Congress could consult that experience in addressing them.

An even simpler alternative to Judge Costa's plan would be for Congress to provide that when a case presents a substantial question as to whether a nationwide injunction should issue, the case should be immediately transferred to the court of appeals in which the district court sits. Under the reasoning of *Florida Power & Light*, such a case would be functionally suitable for immediate court of appeals review anyway.<sup>162</sup> This procedure would obviate the need for the cumbersome task of assembling a three-judge district court panel. Under this alternative plan, it would be all the clearer that Supreme Court review should occur through certiorari rather than mandatory appeal.

### C. *Geographical Forum Shopping*

It may be argued, however, that even a provision for three-judge panels would leave too much room for geographical forum shopping.<sup>163</sup> It is well known that the circuit courts are not interchangeable. Some are dominated by conservatives and others by liberals,<sup>164</sup> and naturally challengers to a rule that applies nationally tend to bring suit in circuits that they expect will be sympathetic to their cause. Presumably, the current political divergence among the circuits is largely a product of the fact that, these days, partisan differences are closely related to

160 This question has arisen in the context of the Voting Rights Act, which still requires three-judge district courts for some functions. Compare Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 419 (2019) (“[C]ircuit precedent is not formally binding on three-judge district courts . . .”), with Michael T. Morley, *Vertical Stare Decisis and Three-Judge District Courts*, 108 GEO. L.J. 699, 766 (2020) (arguing that “a three-judge district court should follow the precedent of its regional court of appeals”).

161 See 28 U.S.C. § 2284(b)(3) (2018); 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, *FEDERAL PRACTICE AND PROCEDURE* § 4235, at 218–25 (3d ed. 2007).

162 The Administrative Conference has taken a similar, though more nuanced, position. The Choice of Forum for Judicial Review of Administrative Action (ACUS Recommendation No. 75-3), 1 C.F.R. § 305.75-3, para. 5(b) (1993).

163 See generally Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIA. L. REV. 267, 300 (1996).

164 See Mark A. Lemley, *Red Courts, Blue Courts 1–9* (Feb. 16, 2023) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4266445](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4266445) [<https://perma.cc/6PC6-6UGM>].

geographical differences. Federal judges in the respective circuits tend to reflect the political orientations of their localities, because local senators and bar committees are deeply involved in their selection, and those actors reflect the political attitudes of the legal communities in which they are located.

Existing statutes do not appear to lend themselves very well to curtailment or ameliorating geographical forum shopping. When two competing petitions are filed in different courts of appeals within a ten-day period to contest the same rule, a lottery is held to decide which circuit will keep the case;<sup>165</sup> but persons who fear geographical forum shopping by opponents of a rule are more likely to be *supporters* of the rule than persons who would prefer to *contest* the rule in a different circuit. Speaking more generally, change-of-venue statutes authorize transfer of a case from one district court to another “[f]or the convenience of parties and witnesses, in the interest of justice,”<sup>166</sup> or from one circuit to another “[f]or the convenience of the parties in the interest of justice,”<sup>167</sup> but “convenience” is not a very apt description of the objective of promoting percolation.

Against this background, the possibility of ameliorative legislation can be considered. Judge Costa suggested that, if Congress wants to neutralize the forum-shopping incentive, it could provide for random selection among circuits.<sup>168</sup> This idea would doubtless curtail or eliminate geographical forum-shopping concerns, but I suspect that the chances that it could be enacted are rather low. Proponents would presumably have to overcome not only political opposition rooted in the fact that the status quo works very well for petitioners who are resorting to geographical forum shopping now, but also a likely reluctance to force a challenger to litigate in a part of the country with which it has no ties. Indeed, the practice of allowing parties that seek to contest government action to bring suit where they reside is intrinsically appealing.

A related proposal has been that all cases of this type should be routed to the District Court for the District of Columbia.<sup>169</sup> Professor Solimine writes that “it makes some sense for the case to be litigated in the national seat of the federal government.”<sup>170</sup> He adds that the administrative law expertise of federal judges in the District also militates

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165 28 U.S.C. § 2112(a)(1), (3) (2018). For a prominent recent example, see *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA*, 142 S. Ct. 661 (2022).

166 28 U.S.C. § 1404(a) (2018).

167 *Id.* § 2112(a)(5).

168 Costa, *supra* note 150.

169 See Solimine, *supra* note 152, at 50–52 (citing such proposals).

170 *Id.* at 50.

in favor of this option.<sup>171</sup> Ultimately, however, he is skeptical about this proposal: “No doubt that it would achieve the worthy goal of limiting forum shopping. But it does so at the cost of prohibiting any percolation in the lower courts, and of violating the general norm of the regional dispersion of venue in the federal courts . . . .”<sup>172</sup> That norm is deeply rooted. Indeed, the present venue statute, permitting venue to be laid in a district where the plaintiff resides,<sup>173</sup> was adopted in 1962 precisely because the prior law, which forced plaintiffs to sue in the District of Columbia district court, was considered too burdensome.<sup>174</sup> A subsequent proposal in the 1980s to unsettle this equilibrium proved to be quite divisive—and this was in an era in which ideological polarization along geographical lines was less prominent than it is today.<sup>175</sup>

There is, however, a variation on this theme that may be more susceptible of structural resolution. As Professor Stephen Vladeck has pointed out,<sup>176</sup> many federal district courts are divided into divisions. In some of these divisions in the Texas district courts, only one judge is assigned to hear all or most of the cases filed in the division. Thus, state officials who bring suit against the United States can strategically choose a division in which to file suit and thereby essentially handpick the judge who will adjudicate their case. They can and often do choose solidly conservative judges to sit in politically charged suits, sometimes culminating in a universal injunction that adopts the state’s position nationwide.

It is difficult to conceive of any public policy that could justify allowing such stark judge shopping.<sup>177</sup> The practice is somewhat analogous to a hypothetical system in which an appellant at the court of appeals level were permitted to choose which three members of the court should hear its appeal. That procedure would surely be recognized as improper, and that recognition would not depend on an assumption

171 *Id.*

172 *Id.* at 56.

173 28 U.S.C. § 1391(e)(1)(C) (2018).

174 Clifton B. Cates, III, *Venue in Corporate Suits Against Federal Agencies and Officers*, 60 MINN. L. REV. 81, 83–85 (1975).

175 See Federal Venue Provisions Applicable to Suits Against the Government (Recommendation No. 82-3), 47 Fed. Reg. 30706 (July 15, 1982). The recommendation criticized a legislative proposal that would elevate the importance of local impact in the venue determination—but a dissenting statement by twenty ACUS members endorsed the proposal. For background and critique of that proposal, see Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976 (1982).

176 Stephen I. Vladeck, Opinion, *Don’t Let Republican ‘Judge Shoppers’ Thwart the Will of Voters*, N.Y. TIMES (Feb. 5, 2023), <https://www.nytimes.com/2023/02/05/opinion/republicans-judges-biden.html> [<https://perma.cc/8DY4-F37P>]; see also Alex Botoman, Note, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297, 300–08 (2018).

177 See Botoman, *supra* note 176, at 321–24, 328–30.

that any of the circuit's judges, considered individually, would render a biased decision. Rather, it would be improper because an element of randomization in the assignment of judges to significant cases tends to promote stability and moderation in the legal system. Similarly, judge shopping within the divisions of a district court subverts that safeguard. Yet the capacity of the legal system to curtail this practice through motions for change of venue is uncertain at best.<sup>178</sup>

Vladeck suggests that district courts should allocate judges among divisions more evenly, or Congress should require them to do so.<sup>179</sup> Such a reform was actually instituted recently to ameliorate a notorious situation in the realm of patent litigation.<sup>180</sup> A single district court judge in the Waco Division of the Western District of Texas had adopted special rules to attract patent cases. As a result, twenty-five percent of all patent litigation nationwide was pending in that division as of 2022. Following criticism of this situation, including by Chief Justice Roberts, the chief judge of the district ordered that future patent filings in the district must be randomly assigned to any of the district's twelve judges.<sup>181</sup> A similar measure to curb abuses of district allocations affecting suits that seek nationwide injunctions or vacatur of administrative rules would seem to be workable and politically credible.<sup>182</sup>

## CONCLUSION

The recent upsurge in courts granting vacatur or universal injunctions does not have to be interpreted as a sign that these tribunals have lost touch with traditional remedial principles. Probably, much of the recent increase can be better explained as a response to the ideologically polarized and politically charged ethos of our times. As Charlton Copeland has written in a thoughtful essay about the political context of the nationwide injunction, “[c]ourts are embedded within a larger

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178 See *id.* at 325–28. In *Texas v. United States Department of Homeland Security*, No. 23-CV-00007, 2023 WL 2457480 (S.D. Tex. Mar. 10, 2023), the court denied a motion to transfer, largely on the ground that the parties did not contend that the judge was himself biased. For reasons discussed in the text, that rationale was dubious.

179 Vladeck, *supra* note 176.

180 Samantha Handler, *West Texas Spreads Patent Case Duties, Curbing Judge Albright*, BLOOMBERG L. (July 25, 2022, 7:38 PM), <https://news.bloomberglaw.com/ip-law/west-texas-spreads-patent-case-duties-curbing-judge-albright> [<https://perma.cc/W7MG-25JK>].

181 *Id.*

182 See Botoman, *supra* note 176, at 337 (proposing that, “in suits challenging the validity of generally applicable state and federal laws and regulations,” Congress should “mandate that courts assign these cases across all of the district’s judges”).

institutional ecosystem made up of Congress, the President, the bureaucracy, and the wider public.”<sup>183</sup> More particularly, he hypothesizes that “a key component of the recent increase in nationwide injunction deployment likely was increased partisan polarization in Congress that led to increasingly gridlocked legislative processes, which in turn led to increased presidential unilateral action.”<sup>184</sup> Such executive action has often taken the form of bold and creative rulemaking, which typically reflects the priorities of the incumbent administration’s party. Leaders of the opposing party and their allies have predictably stepped forward with litigation to contest those rules in court. The high stakes and politically charged subject matter of many of these rules creates a demand for dramatic judicial relief, often in the form of vacatur or nationwide injunction.

Even if the increase in universal relief can be explained in these terms, this development presents practical challenges that the legal system should take seriously. This Article has argued that these challenges do not require a radical rethinking of longstanding APA interpretations, but they do provide reasons for courts and perhaps Congress to explore new directions that grow naturally out of the current regime. Hopefully, some of the Article’s suggestions will contribute to progress along these lines.

*Author’s Postscript: As this Article was almost ready for the printer, the Supreme Court decided United States v. Texas.*<sup>185</sup> *In a majority opinion by Justice Kavanaugh, the Court held that the plaintiff states lacked standing to sue; thus, it did not address the remedy issues discussed in this Article.*<sup>186</sup> *In an opinion concurring in the judgment, however, Justice Gorsuch deployed a variety of doubts about the legality and practical disadvantages of vacatur and nationwide injunctions, echoing previous criticisms that this Article has sought to answer.*<sup>187</sup>

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183 Charlton C. Copeland, *Seeing Beyond Courts: The Political Context of the Nationwide Injunction*, 91 U. COLO. L. REV. 789, 791 (2020).

184 *Id.* at 796; *see id.* at 808–32 (developing this explanation in great detail). I have recently examined congressional gridlock, with extensive documentation, in a different context. Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. (forthcoming 2024) (manuscript at 49–55), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4304404](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304404) [<https://perma.cc/7ZV6-F5ZG>].

185 No. 22-58, 2023 WL 4139000 (U.S. June 23, 2023).

186 *Id.* at \*4.

187 *Id.* at \*13–17 (Gorsuch, J., concurring in the judgment).

