

The Power to Vacate a Rule

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ABSTRACT

A vigorous debate has emerged concerning the legality and desirability of the “universal” or “nationwide” injunction. A key part of this debate implicates the meaning of the landmark statute that governs judicial review of agency action, the Administrative Procedure Act (“APA”). Many recent suits seeking nationwide injunctions have levied challenges to federal agency action and, in particular, to federal rules. If the APA authorizes a federal court deciding such a case to “set aside” a rule universally—not just to “set it aside as to the plaintiffs”—then the APA authorizes courts to provide exactly the kind of relief that opponents of universal injunctions say that courts should not be able to give: relief that reaches beyond the plaintiffs to everyone. Moreover, if the reviewing court can vacate a rule universally at the merits stage, then the APA plainly authorizes the court to issue a preliminary nationwide injunction that halts the enforcement of the rule universally pending the court’s merits decision on whether to vacate the rule.

In various lawsuits, the Department of Justice has argued that the APA does not authorize a federal court to vacate or enjoin a rule universally. Some scholars have voiced the same claim. This Article rebuts that reading of the APA. Drawing upon the APA’s text and structure, the landscape against which it was enacted, its legislative history, and evidence of how courts, Congress, and commentators have understood the APA in subsequent decades, this Article concludes that the APA authorizes the “universal vacatur” of federal rules, as well as universal injunctions against their enforcement. The Article then briefly addresses broader considerations of political legitimacy and institutional competence connected with this dispute over the APA’s remedial scheme.

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INTRODUCTION

When a federal court holds that a rule is unlawful, may the court vacate or “set aside” the rule so that it cannot thereafter be applied to anybody? To many practicing or teaching administrative law, it may be a surprise that this momentous question could be considered one worth asking. When a rule is procedurally or substantively defective, the “ordinary result” is that the court will set it aside, which means that the rule is vacated.¹ A court might set aside the rule as to some provisions and not others, but it generally does not set aside the rule (or its provisions) as to some parties and not others; vacatur leaves no rule (or provision) in place to enforce against anyone.²

Somewhat astonishingly, however, the question remains an open one, at least so far as the Supreme Court is concerned.³ And a mount-

1 Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (emphasis added); Harmon v. Thornburgh, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) (“When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.”); see also V.I. Tel. Corp. v. FCC, 444 F.3d 666, 671 (D.C. Cir. 2006) (“‘Set aside’ usually means ‘vacate.’”).

2 New York v. U.S. Dep’t of Commerce, 351 F. Supp. 3d 502, 672 (S.D.N.Y. 2019) (“[T]he ‘normal remedy’ is to set aside the agency action wholesale, not merely as it applies to the particular plaintiff or plaintiffs who brought the agency action before the court.”), *aff’d in part, rev’d in part*, 139 S. Ct. 2551 (2019).

3 Last Term, the Supreme Court granted certiorari on the question whether the district court erred in issuing a nationwide preliminary injunction in an APA case. See *Trump v. Pennsylvania*, 140 S. Ct. 918 (2020) (mem.). I filed an amicus brief in that case containing several of the arguments made in this Article. See Brief for Professor Mila Sohoni as Amica Curiae in Support of Respondents, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020) (Nos. 19-431 and 19-454), 2020 WL 1877916. The Court ultimately reversed and remanded without addressing the propriety of the nationwide injunction. *Little Sisters*, 140 S. Ct. at 2386; cf. *id.* at 2400, 2412 n.28 (Ginsburg, J., dissenting) (arguing that the nationwide injunction was not an abuse of discretion).

ing challenge is underway today to overthrow the widely shared notion that the Administrative Procedure Act (“APA”)⁴ *authorizes* a court to set aside a rule for everyone. In 2018, the Department of Justice (“DOJ”) adopted Litigation Guidelines instructing DOJ’s civil litigators to argue that “[u]niversal [v]acatur [i]s [n]ot [c]ontemplated by the APA” and that “*the APA’s text does not permit, let alone require, such a broad remedy.*”⁵ DOJ has thus sidled away from the conventional understanding—that the APA does not *require* universal vacatur—to instead press a critically different contention—that the APA does not *permit* a court to set aside a rule as to anyone other than the plaintiff. Under the latter reading, a court could set aside a defective rule as to the plaintiffs, but “universal vacatur” would be off the table. An agency would thus remain free to apply a rule that had been set aside to other parties *even within the same circuit or district* without running afoul of the earlier court’s mandate. If DOJ’s preferred reading of the APA were to gain traction, it is fair to wonder how often the relief that would result from a *successful* challenge to a rule would be worth the filing fee.

This effort to revisit the APA’s remedial scheme has not arisen in a vacuum. Rather, it is largely (though not entirely)⁶ an outgrowth of the current maelstrom over the propriety of the “universal” or “nationwide” injunction.⁷ In a number of recent cases, federal district

4 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

5 See Memorandum from the Office of the Att’y Gen. to the Heads of Civil Litigating Components U.S. Attorneys, Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions 7–8 (Sept. 13, 2018) [hereinafter Litigation Guidelines] (emphasis added), <https://www.justice.gov/opa/press-release/file/1093881/download> [<https://perma.cc/VE7K-6LWB>]; see *infra* note 35 (collecting examples of DOJ raising this argument). To the best of my knowledge, DOJ coined the term “universal vacatur.” Searches across multiple legal databases and in many books and treatises unearthed no instances of this term until DOJ’s Litigation Guidelines. Though this term therefore is relatively unfamiliar (and perhaps a bit loaded), it does crisply capture the concept of setting aside a rule not just as to the *plaintiffs*, but as to *anyone*, and so I will use this term to refer to that remedy.

6 See *infra* note 225.

7 Terminological variation bedevils discussions of these injunctions, which are variously called “national,” “nationwide,” “universal,” “absent-party,” and “defendant-oriented,” as well as less polite terms. Cf. GEORGE ORWELL, *Politics and the English Language*, in 4 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 127, 132 (Sonia Orwell & Ian Angus eds., 1968) (1946) (noting, of the word “democracy,” that “not only is there no agreed definition, but the attempt to make one is resisted from all sides”). For variety’s sake, I will use both “universal” and “nationwide.” See *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 n.1 (2018) (Thomas, J., concurring) (“[Universal] injunctions are distinctive because they prohibit the Government from enforcing a policy with respect to anyone, including nonparties—not because they have wide geographic breadth.”); Beth Williams, Assistant Att’y Gen., Remarks on Nationwide

courts have issued preliminary injunctions that have barred the executive branch from enforcing federal rules or policies not just against the plaintiffs, but also against large numbers of nonparties, and often against anybody at all.⁸ In some cases, litigation has culminated in final, not preliminary, relief—i.e., the district court has reached the merits and determined that the rule or policy is unlawful, and it has concomitantly issued a permanent injunction that bars the application of the rule or policy as to anyone.⁹ DOJ has vigorously objected to these injunctions, both preliminary and final, arguing that Article III and background principles of equity bar federal courts from affording injunctive relief to nonplaintiffs,¹⁰ and that such decrees have harmful policy consequences.¹¹ Several scholars¹² and two Supreme Court justices¹³ have expounded a consonant view. Others have defended the

Injunctions at The Heritage Foundation (Feb. 4, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-beth-williams-delivers-remarks-nationwide-injunctions-heritage> [<https://perma.cc/FWU4-LW2K>] (“Nationwide injunctions, as we define them in the Justice Department, are injunctions that grant relief to parties outside the case, and outside of the class action framework, when such relief is not necessary to redress the plaintiff’s injuries.”).

⁸ See, e.g., *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018) (affirming preliminary injunction against rules in five states, but vacating injunction as to rest of the nation); *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 511–12 (9th Cir. 2018) (nationwide preliminary injunction against agency rescission of a policy memorandum), *rev’d in part, vacated in part*, 140 S. Ct. 1891 (2020); *District of Columbia v. U.S. Dep’t of Agric.*, Civil Action No. 20-119 (BAH), 2020 WL 1236657, at *32–38 (D.D.C. Mar. 13, 2020) (issuing a nationwide preliminary injunction against food stamp rule); *Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 72 (D.D.C. 2019) (issuing preliminary injunction enjoining enforcement of the rule “to anyone to whom it would apply”), *rev’d and remanded sub nom.* *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).

⁹ See, e.g., *City & Cty. of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 970–73 (N.D. Cal. 2018) (holding DOJ sanctuary cities funding restriction arbitrary and capricious, issuing a permanent nationwide injunction against imposing same, but staying the nationwide scope of the injunction pending appeal), *aff’d in part, vacated in part sub nom.* *City & Cty. of San Francisco v. Barr*, No. 18-17308, No. 18-17311, 2020 WL 3957184 (9th Cir. July 13, 2020); *City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087, 1100–01 (C.D. Cal. 2018) (holding DOJ Office of Community Oriented Policing Services grant funding rules arbitrary and capricious and issuing a permanent nationwide injunction against imposing same), *rev’d sub nom.* *City of Los Angeles v. Barr*, 929 F.3d 1163 (9th Cir. 2019); see also *New York v. U.S. Dep’t of Health & Human Servs.*, 414 F. Supp. 3d 475, 580 (S.D.N.Y. 2019) (on summary judgment, ordering that challenged rule be vacated “in its entirety”).

¹⁰ Litigation Guidelines, *supra* note 5, at 2–3.

¹¹ *Id.* at 4–6; see also *infra* note 35 (collecting DOJ briefs).

¹² See, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 418 (2017); Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335, 336–37 (2018).

¹³ See *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay); *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring).

propriety of the universal injunction on both legal and policy grounds.¹⁴

Although it has received relatively less scholarly attention,¹⁵ the debate over the APA's remedial scheme is a critical front in this broader battle over the universal injunction; in fact, it is perhaps one of the *most* critical fronts in that battle, for the simple reason that many cases involving requests for universal injunctions also involve

¹⁴ See Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020) (arguing that injunctions that shield nonparties, including universal injunctions against federal laws, comport with Article III); *id.* at 924 n.17 (collecting sources); Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977 (2020).

¹⁵ For earlier treatments of the APA question, see Bray, *supra* note 12, at 454 n.220, 438 n.121; Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 56–61 (2019); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1100 (2018); Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651 (2019); Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1012–16 (2018); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2120–26 (2017); Sam Bray, *Does the Administrative Procedure Act Authorize National Injunctions?*, WASH. POST: THE VOLOKH CONSPIRACY (Nov. 20, 2017, 9:33 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/20/does-the-administrative-procedure-act-authorize-national-injunctions/> [<https://perma.cc/3CBC-Q4WS>]; John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, YALE J. REG. BULL. (April 12, 2020), <https://www.yalejreg.com/bulletin/section-706-of-the-administrative-procedure-act-does-not-call-for-universal-injunctions-or-other-universal-remedies/> [<https://perma.cc/8PKU-W6XK>]; Ronald M. Levin, *The National Injunction and the Administrative Procedure Act*, REG. REV. (Sept. 18, 2018), <https://www.theregreview.org/2018/09/18/levin-national-injunction-administrative-procedure-act> [<https://perma.cc/J4FU-HSF2>]; Ronald M. Levin & Mila Sohoni, *Universal Remedies, Section 706, and the APA*, YALE J. REG.: 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/RUG3-M283>]; Christopher J. Walker, *Quick Reaction to Bray's Argument that the APA Does Not Support Nationwide Injunctions*, YALE J. REG.: NOTICE & COMMENT (May 8, 2018), <http://yalejreg.com/nc/quick-reaction-to-brays-argument-that-the-apa-does-not-support-nationwide-injunctions/> [<https://perma.cc/749M-2TNP>]; see also *Rule by District Judge: The Challenges of Universal Injunctions Before the S. Comm. on the Judiciary*, 116th Cong. 4 n.20 (2020) [hereinafter Bagley Statement] (statement of Nicholas Bagley, Professor of Law, University of Michigan Law School); Brief for Nicholas Bagley & Samuel L. Bray as Amici Curiae Supporting Petitioners, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020) (Nos. 19-431 and 19-454), 2020 WL 1433996 [hereinafter Bagley-Bray Brief]; Beth A. Williams, Assistant Att'y Gen., Assistant Attorney General for the Office of Legal Policy Beth A. Williams Delivers Remarks at the Federalist Society's 2019 Texas Chapters Conference (Sept. 16, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-office-legal-policy-beth-williams-delivers-remarks-federalist> [<https://perma.cc/SSF9-TMGB>] (“[T]he text of the APA nowhere suggests that a rule should be set aside on its face, rather than as applied to the particular challenger. . . . Attorney General Sessions explained this point in a memorandum It’s a meaningful part of that memorandum that has not received much attention.”).

challenges to federal agency action and in particular to federal rules.¹⁶ The APA brings the lofty constitutional debate about the outer limits of equitable relief down to statutory brass tacks. If the APA allows universal vacatur, then the APA allows federal courts to provide exactly the kind of relief that critics of universal injunctions say they should *not* be able to provide: equitable relief that reaches beyond the parties to *anyone*.¹⁷ Moreover, if a court can ultimately “set aside” a rule for everyone once it reaches the merits, then the APA plainly authorizes the court to issue a *preliminary* injunction that bars the enforcement of the contested rule against anyone pending its merits decision on whether to vacate the rule.¹⁸ This seemingly simple question—can a court vacate a rule for everyone?—thus provides an entry point for engaging one of the most heated debates in modern American public law, a debate that itself implicates long-running and fundamental disagreements about the nature of judicial review and the separation of powers.

This Article’s primary contribution is to offer an answer to that question: does the APA *authorize* universal vacatur? Responding to that question requires an appraisal of the template for judicial review of agency action on which the APA was premised, an examination of the statutory text and its judicial and legislative backdrop, and an exploration of how that statutory language has been understood over time by courts, Congress, and commentators. Drawing on these materials, the Article contends that the APA allows universal vacatur of rules.¹⁹ The core objection levied against that reading is the structural argument that a single district court judge should not be able to stop the executive branch from applying a rule to nonparties, any-

¹⁶ See, e.g., *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019); sources cited *supra* notes 8–9 (collecting recent cases involving nationwide injunctions of federal rules or policies).

¹⁷ Vacatur is a form of equitable relief, but the Court has called it a “less drastic remedy” that should be preferred to the injunction. See *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010) (“An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. If a less drastic remedy (such as partial or complete vacatur of [the agency’s] deregulation decision) was sufficient to redress respondents’ injury, no recourse to the additional and extraordinary relief of an injunction was warranted.” (citation omitted)); see also *O.A.*, 404 F. Supp. 3d at 118 (on summary judgment, vacating rule entirely and noting that “vacatur—i.e., nullification—of the Interim Final Rule obviates any need for the issuance of an injunction”); Levin, *supra* note 15 (“[W]hen the challenged agency action is a rule, a judicial order that ‘sets it aside’ looks equivalent, in practical effect, to an injunction that prevents the rule from applying to anyone.”).

¹⁸ See 5 U.S.C. § 705 (2018) (authorizing “the reviewing court” to “issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings”); see *infra* text accompanying notes 183–88.

¹⁹ See *infra* Part II.

where.²⁰ That objection possesses a certain amount of intuitive appeal, but it lacks the foundation and force that would be necessary to overcome the fact that Congress can, and indeed has, authorized exactly that remedy in APA suits.²¹

Yet to treat the question of the APA's meaning purely as a matter of internal-point-of-view legal reasoning would be obtuse, if not naïve. Public law is rarely wholly autonomous from politics, and it certainly is not likely to be in this case. The challenge to the meaning of the APA's remedial scheme has arisen in the wake of, and because of, a series of judicial decrees against federal officers that the executive branch has cast as throwing a serious pall on the institutional legitimacy of Article III courts.²² A full answer to the question of how the Court should read the APA therefore requires some assessment of how these external pressures could or should bear on that question.

The Article thus turns to broach these broader theoretical stakes. The current dispute over the meaning of the APA is a particularly interesting instance of an archetypal problem in statutory interpretation, one that extends beyond administrative law and indeed beyond courts: the challenge of maintaining fidelity to old statutory language in a radically different world.²³ So much in law and politics has changed since the APA was enacted, yet the APA's language has remained largely unchanged.²⁴ The APA was enacted in a time when

20 See, e.g., William P. Barr, U.S. Att'y Gen., Attorney General William P. Barr Delivers Remarks to the American Law Institute on Nationwide Injunctions (May 21, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-american-law-institute-nationwide> [<https://perma.cc/5CUX-8PJM>] (“[N]ationwide injunctions violate the Separation of Powers. . . . Nationwide injunctions undermine the democratic process, depart from history and tradition, violate constitutional principles, and impede sound judicial administration . . .”).

21 See *infra* Section II.D.

22 See Barr, *supra* note 20; Mike Pence, Vice President, Remarks by Vice President Pence at the Federalist Society's Seventh Annual Executive Branch Review Conference (May 8, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-federalist-societys-seventh-annual-executive-branch-review-conference/> [<https://perma.cc/PK6T-KZTT>] (stating that nationwide injunctions have ushered in an “era of judicial activism” that threatens “our liberty, our security, our prosperity, and the separation of powers”).

23 See Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 4 (2014) (noting the “challenge of managing statutes over time . . . in a period of rapid change and limited congressional productivity”); Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. (forthcoming 2020) (manuscript at 13) (noting “democratic governance” concerns generated by the “temporal lag between legislative delegation and utilization of delegated authority”).

24 See Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599, 599 (2004) (“[M]any note that the nearly sixty-year-old APA is anachronistic, given the contemporary nature and scope of regulatory is-

public interest litigation was relatively less common,²⁵ when modern-day Congressional gridlock and polarization were yet to emerge,²⁶ when state standing was far more constrained,²⁷ when state attorneys general were not so politically active and litigious,²⁸ and when the era of muscular “presidential administration” lay beyond the horizon.²⁹ This utter transformation in the legal and political backdrop has produced a problem—or, at least, a state of affairs that the Court may well regard as problematic: the routine enlistment of Article III courts to resolve broad-scale, politically polarizing, public-law disputes against the executive branch that, at an earlier stage of American history, might either have been resolved by the political branches or else left unresolved.³⁰ To the Court, the quickest road back to a better *modus vivendi* may seem to be the one that bulldozes straight through the plain terms of sections 705³¹ and 706³² of the APA. As I explain below,³³ however, a wiser choice would be to leave that road untraveled—or, better yet, to take the road that runs in the opposite direction.

A final note: this Article evaluates a legal argument that has been largely, though not entirely,³⁴ advanced by DOJ—an interested liti-

sues.”); Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 630–31 (2017) (“Congress has only amended the APA sixteen times in more than seven decades, the last time in 1996.”).

²⁵ See Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1253–57 (2019) (describing a growth in public interest cases in federal courts beginning in the 1940s); cf. Jonathan Remy Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 NOTRE DAME L. REV. 1985, 1990–91 (2019) (“[A]lmost certainly the growth in public law litigation . . . has served to increase the role and importance of injunctive relief, and in particular injunctive relief that may have an impact on nonparties.” (footnotes omitted)).

²⁶ See Freeman & Spence, *supra* note 23, at 6 (“[C]ongressional gridlock has reached levels unseen in the last fifty years.”).

²⁷ See Davis, *supra* note 25, at 1242–50 (describing recent increase in cases brought by states against the federal government).

²⁸ See Tara Leigh Grove, *State Litigants as Federal Policymakers 8–12* (Mar. 2019) (unpublished manuscript) (on file with *The George Washington Law Review*).

²⁹ See Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 280 (2019) (“Today, presidential administration is entrenched and expansive.”).

³⁰ See Zachary S. Price, *Symmetric Constitutionalism: An Essay on Masterpiece Cakeshop and the Post-Kennedy Supreme Court*, 70 HASTINGS L. J. 1273, 1278–80 (2019).

³¹ 5 U.S.C. § 705 (2018).

³² *Id.* § 706.

³³ See *infra* Part III.

³⁴ See Bagley-Bray Brief, *supra* note 15, at 11–18 (arguing as *amici curiae* that nationwide injunctions lack a foundation in the APA’s text and legislative history); Bray, *supra* note 12, at 438 n.121, 454 n.220; Bray, *supra* note 15; cf. Harrison, *supra* note 15 (arguing that “[s]ection 706 does not tell courts to apply the remedy of setting aside agency action,” but stressing in footnote

gant, not a disinterested observer. DOJ is a uniquely influential party, and it is pressing its view of the APA before federal courts around the country.³⁵ The Article's immediate aim is to help those courts evaluate DOJ's contentions. It is also hoped, however, that the analysis offered here will prove useful to a more general audience of scholars and reformers interested in the broader subject of universal remedies in public law.

The Article proceeds as follows. Part I introduces universal vacatur and explains how that remedy follows from the appellate review model of judicial review that underpins the APA. Part II explains why the APA should be understood to authorize universal vacatur, consulting case law, statutory text, legislative history, and other materials; it then turns to assess (and reject) structural objections to that reading. Part III moves away from the internal perspective to frame some broader considerations implicated by this dispute. A brief conclusion follows.

I. THE LOGIC OF UNIVERSAL VACATUR

In the type of challenge to an agency rule that is the focus of this Article,³⁶ a plaintiff will sue an agency because the agency has promul-

10 that DOJ's Litigation Guidelines "do not take the position [Harrison] do[es], that section 706 does not concern remedies at all").

³⁵ See, e.g., *Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 32 (D.D.C. 2019), *rev'd and remanded sub nom.* *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020); *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 677 n.87 (S.D.N.Y. 2019), *aff'd in part, rev'd in part*, 139 S. Ct. 2551 (2019); *District of Columbia v. U.S. Dep't of Agric.*, Civil Action No. 20-119 (BAH), 2020 WL 1236657, at *32-38 (D.D.C. Mar. 13, 2020); Brief for the Petitioners at 48-49, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2386 (2020) (No. 19-454), 2020 WL 1190624; Reply in Support of Application for a Stay at 13, *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (No. 19A785) (mem.) [hereinafter *United States Public Charge Reply Brief*], https://www.supremecourt.gov/DocketPDF/19/19A785/129741/20200123160342975_19A785%20Reply.pdf [<https://perma.cc/MC4P-9C4T>]; Brief for the Federal Appellants at 85, *Pennsylvania v. Trump*, 930 F.3d 543 (3d Cir. 2019) (Nos. 17-3752, 18-1253, 19-1129, 19-1189), 2019 WL 721635 ("[T]he D.C. Circuit's practice represents an improper exception to the ordinary rule that relief should be limited to the parties."); Reply Brief for Appellant at 22-27, *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020) (No. 18-2885), 2018 WL 6605982 ("The term [set aside] does not itself indicate that the action should be 'set aside' as to anyone other than a plaintiff . . ."); Def.'s Mem. of Law in Opp'n to Pls.' Mot. for a Prelim. Inj. at 48, *California v. Azar*, 385 F. Supp. 3d 960 (N.D. Cal. 2019) (No. 3:19-cv-01184-EMC), 2019 WL 8357017 ("[T]he Court should construe the 'set aside' language in Section 706(2) as applying only to the named Plaintiffs . . .").

³⁶ Challenges to rules must be distinguished from challenges to ordinary adjudications, as when a claimant appeals a denial of social security disability benefits. In the latter type of case, the court's decision may *implicate* the rule's validity, but all that the court is formally being asked to decide is whether the agency handled that particular adjudication correctly. See, e.g., *Baeder*

gated a rule that is procedurally or substantively flawed and therefore unlawful. The agency might, for example, have promulgated the rule without going through notice and comment, or it might have inadequately explained its reasoning; the rule might exceed the agency's statutory authority, or it might be unconstitutional. Whatever the plaintiff's legal theory, the relief that such a plaintiff typically requests is that the rule be set aside or vacated. If the plaintiff prevails on the merits, the "ordinary result" is that the rule is vacated.³⁷

This pattern has important limitations and variations.³⁸ First, if the merits are reached and the plaintiff prevails, courts have traditionally claimed the equitable discretion to *decline* to vacate the rule or to enjoin unlawful agency action universally. For example, a court sometimes chooses to leave a flawed rule in place, while at the same time remanding it back to the agency to cure the procedural defects (e.g., a failure to supply an adequate statement of basis and purpose) that rendered the rule problematic.³⁹ This practice—remand without vacatur—is discussed below.⁴⁰ Second, and relatedly, a court might enjoin an invalid rule's enforcement only as to a particular plaintiff without also enjoining it nationwide. The Ninth Circuit, for example, has taken this avenue when other courts of appeals were on the verge of resolving parallel challenges to the same rule, and when a purely plaintiff-protective injunction would shield the plaintiff adequately while avoiding "great uncertainty for the government, Medicare contractors, and the hospice providers."⁴¹ Third, the APA allows agency action to be challenged in an enforcement suit, such as when a private plaintiff

v. Heckler, 768 F.2d 547, 553 (3d Cir. 1985); *see also infra* notes 287–97 and accompanying text (discussing this distinction and its relationship to nonacquiescence).

³⁷ Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("[When] agency regulations are unlawful, the ordinary result is that the rules are vacated" (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989))).

³⁸ I am grateful to Professor Levin for his thoughts on these points.

³⁹ *See infra* text accompanying notes 287–90 (discussing remand without vacatur).

⁴⁰ *See infra* text accompanying notes 287–90.

⁴¹ *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 665 (9th Cir. 2011). It is not impossible to find instances in which a lower court has said it is "setting aside" a regulation while issuing an injunction that only shields one plaintiff. *See, e.g., Russell-Murray Hospice, Inc. v. Sebelius*, 724 F. Supp. 2d 43, 60 (D.D.C. 2010) (declaring that Medicare regulation and a repayment demand issued to plaintiff "are unlawful and hereby set aside," enjoining the U.S. Department of Health and Human Services from applying the regulation to the plaintiff, and declining plaintiff's request for nationwide injunction of the regulation); *see also Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 704 (5th Cir. 2011) (holding regulation invalid, enjoining its enforcement against the plaintiff, and remanding to agency to allow it to recalculate amounts owed in a manner consistent with the statute). Courts sometimes read the term "set aside" in creative ways. *See, e.g., NAACP v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 160–61 (1st Cir. 1987) (holding that an agency "pattern" of failing to act could be "set aside"). The conventional understanding,

brings a private civil enforcement action against a private defendant to assert rights safeguarded by a federal rule or when the agency undertakes an enforcement action against a private defendant.⁴² If the defendant in such a suit successfully asserts in her defense that the relevant rule is invalid, the court will not vacate the rule; “[r]ather, the district court simply determines that the defendant is not liable.”⁴³

Setting these variations aside, a successful facial challenge to a rule generally has a simple structure. When a court holds on the merits that a rule is unlawful and should be “set aside,” the rule is vacated,⁴⁴ and it thereafter cannot be applied to anyone. Once the rule is vacated, there is no rule to enforce;⁴⁵ “[v]acatur obliterates the agency decision.”⁴⁶ The agency has to start over and make a new rule if it wishes to enforce the rule against a party.⁴⁷

however, is that set aside means universal vacatur. See *infra* notes 44–47 and accompanying text. I am grateful to Professor Levin for suggesting the last-cited case.

⁴² See 5 U.S.C. § 703 (2018) (“Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.”).

⁴³ PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2063 (2019) (Kavanaugh, J., concurring in the judgment) (“[I]n an enforcement action, a district court does not determine the validity of the agency order. . . . If the court of appeals in a facial, pre-enforcement action determines that the order is invalid and enjoins it, the agency can no longer enforce the order. By contrast, if the district court disagrees with the agency’s interpretation in an enforcement action, that ruling does not invalidate the order and has no effect on the agency’s ability to enforce the order against others.”). The “order” in this case was a Federal Communications Commission (“FCC”) regulation. See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Junk Fax Prevention Act of 2005, 21 FCC Rcd. 3787, 3814 (2006) (report and order and third order on reconsideration); *id.* at 2053 (majority opinion). For various reasons reaching back to the pre-APA period, FCC regulations are often called “orders.” See *New Eng. Tel. & Tel. Co. v. Pub. Utils. Comm’n of Me.*, 742 F.2d 1, 8–9 (1st Cir. 1984) (“The FCC commonly adopts rules in opinions called ‘orders.’”).

⁴⁴ See *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (“To ‘vacate,’ as the parties should well know, means ‘to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.’” (emphasis added)).

⁴⁵ See Administrative Conference Recommendation 2013–6, Remand Without Vacatur, 78 Fed. Reg. 76,272, 76,273 (Dec. 5, 2013) [hereinafter ACUS Report] (recommending that agencies should “work with the Office of the Federal Register to remove vacated regulations from the Code of Federal Regulations”); Levin, *supra* note 15 (“Virtually everyone understands ‘set aside’ to connote total nullification of the unlawful agency action. In the context of judicial review of regulations, this means that a rule that is ‘set aside’ no longer applies to anyone.”).

⁴⁶ Rodriguez, *supra* note 24, at 611; see KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 11.9, at 1235 (6th ed. 2019) (“[A] judicial decision vacating an agency rule may place an agency in a position in which it is powerless to enforce any rule governing an important area of activity pending the issuance of a new rule on remand that corrects the deficiencies the court detected in the statement of basis and purpose incorporated in the vacated rule.”).

⁴⁷ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983)

Viewed from the perspective of ordinary public law litigation against statutes, it may seem surprising, even shocking, that such a dramatic kind of relief could ever be, as the D.C. Circuit says, “the ordinary result.”⁴⁸ After all, it is commonly said to be anything but “ordinary” for a *statute* to be “vacated,” or—in the more conventional locution—to be held facially invalid. The Court has claimed time and again that the law disfavors facial challenges,⁴⁹ that parties have standing to sue only for themselves,⁵⁰ and that relief may not reach beyond what is necessary to remedy the harm to the plaintiff.⁵¹ Indeed, the very concept of facial invalidation has been characterized as an illusion; as Justice Thomas wrote in *Trump v. Hawaii*,⁵² courts decide only cases for the parties before them, not “general questions of legality.”⁵³ All challenges to statutes begin as “as applied” attacks, say skeptics of facial challenges, and they end that way, too; on this view, a court that says it is “striking down” a statute is (at best) speaking imprecisely, and (at worst) is propagating a distorted portrayal of the judicial power that misleads lower courts, lawmakers, and ordinary citizens.⁵⁴

(invalidating agency rescission of regulatory requirement and requiring that the agency “must either consider the matter further or adhere to or amend [its standard] along lines which its analysis supports”); see *V.I. Tel. Corp. v. FCC*, 444 F.3d 666, 671–72 (D.C. Cir. 2006) (treating an agency’s decision to “set aside” its own order as “vacat[ing]” that order and “restor[ing] the *status quo ante*,” and noting that “[t]he result would be the same as if a court, finding the *Suspension Order* arbitrary or capricious, set it aside pursuant to the [APA]’s directive in 5 U.S.C. § 706(2)”); *Env’tl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004) (“When a court vacates an agency’s rules, the vacatur restores the status quo before the invalid rule took effect . . .”); Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 263 (2017) (noting that vacatur may mean “the agency action will be put on hold—delayed, often for years”); see also Joshua I. Schwartz, *Nonacquiescence*, *Crowell v. Benson*, and *Administrative Adjudication*, 77 GEO. L.J. 1815, 1830 n.49 (1989) (“[F]aced with judicial invalidation of a rule, agencies seem to act as though their choices are: appeal, acquiescence, or renewed rulemaking.”).

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

49 *But see* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 966 (2011) (pointing out the “errors of [the] conventional wisdom” that facial challenges are categorically disfavored).

50 See *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (“We caution . . . that ‘standing is not dispensed in gross’: A plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury.” (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006))).

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

52 138 S. Ct. 2392 (2018).

53 *Id.* at 2428 (Thomas, J., concurring).

54 See, e.g., Mitchell, *supra* note 15, at 1012–19; Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1725–26 (2017); Wasserman, *supra* note 12, at 355–56.

In a legal culture favorably disposed to such critiques of facial attacks and increasingly suspicious of the notion of universal relief,⁵⁵ the remedy of universal vacatur naturally appears jarring and out of place. As Jonathan Mitchell has pointed out, however, administrative law calls for a different analysis.⁵⁶ The APA empowers courts to determine *rule validity*, not just whether the *application* of the rule is valid. That point can be made simply by attending to the grammar of the APA: the statute makes agency action the *object* of the court's review,⁵⁷ just as the Bill of Attainder Clause⁵⁸ makes Congressional lawmaking the *object* of constitutional analysis.⁵⁹ As Mitchell writes, the APA thereby makes the reviewing court into a true "veto-gate" for agency action.⁶⁰

Yet, identifying the grammar of the APA is just the beginning of the inquiry; we must further understand why the APA has that grammar. The chief reason derives from the appellate review model that supplied the rubric for judicial review of administrative action in the pre-APA period and that was then incorporated into the APA.⁶¹ In that framework, as Professor Merrill has explained, the relationship between the reviewing court and the agency structurally replicated the relationship between a reviewing court and a lower court.⁶² The APA treats the quasi-legislative work product of agencies—rules—as

⁵⁵ See, e.g., Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 605, 651–52 (2015) (contending that modern-day mandatory injunctive class actions pose due process concerns).

⁵⁶ See Mitchell, *supra* note 15, at 1012 ("[T]he APA and these organic statutes go further by empowering the judiciary to act directly against the challenged agency action. This statutory power to 'set aside' agency action is more than a mere non-enforcement remedy. It is a veto-like power that enables the judiciary to formally revoke an agency's rules, orders, findings, or conclusions—in the same way that an appellate court formally revokes an erroneous trial-court judgment.").

⁵⁷ See *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 672 (S.D.N.Y. 2018) ("[T]he statutory remedy is directed at the *entire* 'final agency action' that the APA subjects to judicial review . . ."), *aff'd in part, rev'd in part*, 139 S. Ct. 2551 (2019).

⁵⁸ See U.S. CONST. art. 1, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed . . .").

⁵⁹ See Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1019–20 (2011) (arguing that the Bill of Attainder Clause is a restriction on lawmaking by Congress). I am grateful to Professor Nielson for suggesting this point.

⁶⁰ Mitchell, *supra* note 15, at 1017 ("[I]n cases involving judicial review under the APA, . . . the court is truly functioning as a formal veto-gate for the challenged agency action."); see *id.* at 1015 ("[A] court that has 'set aside' an agency action has formally vetoed the agency's work in the same way that a President vetoes a bill.").

⁶¹ See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 940–43 (2011).

⁶² See *id.*

equivalent to their quasi-adjudicative work product—orders.⁶³ Furthermore, the APA conceptualizes *both* of these kinds of “agency action” as analogous to a lower-court decision that can be reviewed and set aside by an appellate court.⁶⁴ When a final decision of a lower court is vacated by an appellate court, that lower-court decision no longer has force. Similarly, when an agency promulgates a rule that is legally defective, that rule is an agency action that can likewise be vacated—“obliterate[d]”—by a reviewing court.⁶⁵

An additional explanation and justification for universal vacatur appears when one considers the APA’s purpose. It is no accident that the law was called the *Administrative Procedure Act*, not the *Judicial Review of Agency Action Act*. The law’s primary aim is to regulate the *procedures* used by agencies, and in particular the procedures by which agencies issue orders and promulgate rules.⁶⁶ Rules must not only be substantively permissible (i.e., in compliance with statutory and constitutional limits), but also procedurally valid, if they are to impose binding obligations on the public.⁶⁷ An agency may not issue a legislative rule without first giving notice of its contents and allowing interested parties an opportunity to comment on it.⁶⁸ Agencies also must comply with requirements of reasoned decision-making in setting rules.⁶⁹ Crucially, the APA does not merely treat these limitations on agencies as internal housekeeping details or as desirable best practices; it instead makes these limitations into rights enforceable by those injured by agency action.⁷⁰

63 See 5 U.S.C. § 551(13) (2018) (“[A]gency action’ includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act” (emphasis added)).

64 See *id.* § 706(2) (“The reviewing court shall . . . hold unlawful and set aside agency action”); Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1554–55 (2014) (“The prevailing view is that American administrative law follows the appellate model of judicial review, in that the interaction between agencies and reviewing courts is analogous to the interaction between trial courts and courts of appeals in civil litigation.”).

65 Rodriguez, *supra* note 24, at 611.

66 See TOM C. CLARK, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 5–7 (1947) [hereinafter ATTORNEY GENERAL’S MANUAL].

67 *E.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (“Certainly regulations subject to the APA cannot be afforded the ‘force and effect of law’ if not promulgated pursuant to the statutory procedural minimum found in that Act.”).

68 5 U.S.C. § 553.

69 *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

70 See, *e.g.*, 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”). It is worth recalling Professor Jaffe’s comment on the nature of these procedural “rights.” See Louis L. Jaffe, *Ripeness and Reviewable Orders in Admin-*

Again, for those accustomed to thinking in terms of non-APA litigation against statutes, the existence of such enforceable procedural rights will seem anomalous. There is no analogous judicially enforceable right for affected parties to have notice of, or to participate directly in, the process by which legislatures craft statutes.⁷¹ Nor is there any requirement that a statute duly enacted be able to survive a “hard look” or represent the fruits of a reasoned decision-making process.⁷² In the realm of economic regulation, at least, a statute will survive judicial scrutiny if it has a conceivable rational basis, no matter how thoughtlessly the legislature enacted it.⁷³

Once again, however, administrative law is different. An agency’s failure to meet the requisite procedural requirements of notice and comment when promulgating a rule renders the rule invalid, just as the agency’s order would be invalid if the agency failed to give notice of a hearing’s “time, place, and nature” to a person entitled to receive it.⁷⁴ Nobody would think that an adjudication conducted without giving the required notice could be sustained, even if the adjudication happened to reach the right substantive outcome. For exactly the same reason, a plaintiff with a valid procedural objection to a regulation may prevail in a suit attacking that regulation,⁷⁵ even if the rule has no substantive flaws.⁷⁶ When agencies engage in the quasi-legisla-

istrative Law, 61 MICH. L. REV. 1273, 1283 (1963) (“Judicial review is a phase of the administrative process and thus must in some measure partake of its ongoingness. Consider how little like the judgment in a lawsuit is the determination by a court that, because an agency has given a wrong reason for its action, it must reconsider its action! No ‘rights’ are as a consequence of such a decision ‘finally’ adjudicated. Time and again the agency responds simply by republishing its action with the right reasons.”).

⁷¹ Cf. *INS v. Chadha*, 462 U.S. 919, 966 (1983) (Powell, J., concurring in the judgment) (“Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights. The only effective constraint on Congress’s power is political” (footnote omitted)); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 225 (1976) (“Whatever may be required of agencies in the pursuit of stated goals, it is clear that due process imposes no such model of rational inquiry on legislative bodies that select and compromise opposing versions of truth and justice in a single act of lawmaking.”).

⁷² See Linde, *supra* note 71, at 225.

⁷³ See *id.* at 200, 225.

⁷⁴ 5 U.S.C. § 554.

⁷⁵ See *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1109 (D.C. Cir. 2014) (explaining that agency circumvention of 5 U.S.C. § 553 “can be analogized to an illegal failure to afford a formal hearing under § 554,” and that in the latter type of case “we decline to even consider whether a petitioner would be successful if it had had the benefit of a formal hearing”).

⁷⁶ See *Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 72 (D.D.C. 2019) (“[T]he true gravamen of an APA claim is *not* that the agency has exercised its discretion to select a policy with which the plaintiff disagrees and to promulgate a rule that the plaintiff does not endorse.

tive task of rulemaking—even, that is to say, when they act as a kind of “junior-varsity Congress,”⁷⁷ in Justice Scalia’s memorable words—they must comply with procedural requirements that the “varsity” bench is free to skip.

In short, whatever one might think of facial challenges to statutes, there are strong conceptual and legal reasons to think twice before doubting the availability of, and the justifications for, universal relief against federal rules. There is, moreover, a practical basis on which to distinguish the two kinds of suit. Unlike suits challenging statutes, APA challenges to rules arrive in court with a premade record that the court is barred from supplementing.⁷⁸ A foundational principle of administrative law is that courts must assess the validity of rules on the basis of the record made by the agency and the grounds invoked by the agency, and *only* on the basis of that record and those grounds.⁷⁹ The reviewing court does not itself make the record, nor can the court invoke new grounds that might justify the agency’s rule.⁸⁰ The court

Instead, under the APA, the plaintiff’s claim is that the agency has breached the plaintiff’s (and the public’s) entitlement to non-arbitrary decision making and/or their right to participate in the rulemaking process when the agency undertook to promulgate the rule. Consequently, to provide the relief that any APA plaintiff is entitled to receive for establishing that an agency’s rule is procedurally invalid, the rule must be invalidated, so as to give interested parties (the plaintiff, the agency, and the public) a meaningful opportunity to try again.”), *rev’d and remanded sub nom.* *Make the Rd.* N.Y. v. Wolf, 962 F.3d 612 (D.C. Cir. 2020); Bagley, *supra* note 47, at 265 (“[N]otice-and-comment errors are almost never held harmless.”).

⁷⁷ *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). He was using this phrase to describe not a typical agency but an entity that did nothing *but* make laws, but the phrase is worth quoting anyway. See *id.* at 369 (majority opinion).

⁷⁸ *Edison Elec. Inst. v. OSHA*, 849 F.2d 611, 617–18 (D.C. Cir. 1988) (“Ordinarily, judicial review of informal agency rule-making is confined to the administrative record; neither party is entitled to supplement that record with litigation affidavits or other evidentiary material that was not before the agency.”).

⁷⁹ See *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 196 (1947) (“[A] reviewing court, in dealing with [an agency action,] . . . must judge the propriety of such action solely by the grounds invoked by the agency.”); *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 87 (1943) (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”); see also 5 U.S.C. § 706 (“[T]he court shall review the whole record or those parts of it cited by a party”); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”).

⁸⁰ *Chenery II*, 332 U.S. at 196. If the record or the agency’s justification are “inadequate or improper,” the court must remand the matter to the agency rather than itself supplementing or adding to that record. *Id.*; see also Walker, *supra* note 64, at 1563–64. As Professor Walker emphasizes, *Chenery I* recognized that this restriction on the reviewing court’s authority represents a departure from the appellate review model, because a trial court’s decision may be affirmed even if it “relied upon a wrong ground or gave a wrong reason.” Walker, *supra* note 64, at 1562 (quoting *Chenery I*, 318 U.S. at 88); see also Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 *YALE L.J.* 952, 955 (2007).

adjudicating the validity of a rule is not staring at a complaint and a blank evidentiary canvas, but rather at a closed set of justifications and evidence contained in the agency record.⁸¹ In contrast, a court adjudicating a challenge to a *statute* occupies a different position, even when the challenge is a “facial” one: the parties must build the record in the trial court from the ground up.⁸²

This difference should not be overstated. Litigants may bring APA challenges to agency guidance documents, memoranda, notices, and a whole menagerie of other types of agency actions, which do not always arrive in court with ready-made records accompanying them; even in cases challenging rules, settling on the precise content of the record can involve prolonged procedural skirmishes.⁸³ Once the content of the record is settled, however, that record is the whole ballgame.⁸⁴ What that means is that a court adjudicating a challenge to a *rule* is in an entirely different posture than a court adjudicating a challenge to a *statute*. In cases challenging rules (or the functional equivalent of rules), the reviewing court’s role is to act *not* as a frontline factfinder but as *an appellate tribunal*, including when the reviewing court happens to be a district court.⁸⁵ And what that means in turn is that in many challenges to agency rules, questions of pure legality can be teed up much more quickly, and determined with more confidence, than in challenges to statutes.

In sum, one must be careful not to be led astray by the superficial resemblance between suits seeking the universal vacatur of regulations and facial challenges seeking to “strike down” statutes; in important senses, they are *faux amis*. That lower courts appear so surprisingly willing to award the relief of universal vacatur of regulations (and universal preliminary injunctive relief against their enforcement) becomes much less surprising when one considers the template of the appellate review model and how it is reflected in the grammar

⁸¹ See *Nat’l Ass’n of Chain Drug Stores v. U.S. Dep’t of Health & Human Servs.*, 631 F. Supp. 2d 23, 26 (D.D.C. 2009) (“An informal rulemaking record consists of the following materials: (1) the notice of proposed rulemaking; (2) comments submitted by interested persons; (3) hearing transcripts, if any; (4) other factual information considered by the agency; (5) reports of advisory committees, if any; and (6) the agency’s statement of basis and purpose.”).

⁸² See, e.g., *Planned Parenthood Fed’n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 979 (N.D. Cal. 2004), *rev’d sub nom. Gonzales v. Carhart*, 550 U.S. 124 (2007).

⁸³ See, e.g., *Ad Hoc Metals Coal. v. Whitman*, 227 F. Supp. 2d 134, 136–37 (D.D.C. 2002).

⁸⁴ See, e.g., *Nat’l Ass’n of Chain Drug Stores*, 631 F. Supp. 2d at 27.

⁸⁵ *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083–84 (D.C. Cir. 2001) (“[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The ‘entire case’ on review is a question of law. Absent very unusual circumstances the district court does not take testimony.” (footnote omitted) (citations omitted)).

of the APA. Likewise, the seemingly broad remedial rights on display in administrative law challenges are only a natural consequence of the APA's scheme, which places procedural requirements upon agencies and then enlists the courts to enforce those requirements at the behest of private litigants upon a record compiled by the agency. Universal vacatur is not the system going haywire; it is the system operating according to its blueprint. The next Part sets out the evidence that establishes that point.

II. THE APA AND UNIVERSAL VACATUR

The Supreme Court has often used the term “set aside” to denote the act of invalidating a regulation.⁸⁶ It has affirmed lower court decisions that have invalidated rules universally.⁸⁷ It has itself stayed agency action universally.⁸⁸

Yet this is an unstable time in administrative law, a period in which longstanding and foundational doctrines are being called into question.⁸⁹ One cannot safely assume that the status quo will persist.⁹⁰

⁸⁶ See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 n.18 (1979) (“[W]e affirm the lower court’s determination to set aside the amalgam of rules”); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (“Courts enforce this principle [requiring rational agency decision-making] with regularity when they set aside agency regulations which, though well within the agencies’ scope of authority, are not supported by the reasons that the agencies adduce.”); *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 364 (1986) (“The Court of Appeals set aside both . . . aspects of the Board’s regulation.”); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 841–42 (1984) (“[The D.C. Circuit] therefore set aside the regulations embodying the bubble concept as contrary to law.”).

⁸⁷ See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 486 (2001) (affirming in part the lower court’s vacatur of air pollution regulations); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 161 (2000) (affirming lower court’s vacatur of tobacco regulations); *Dimension Fin. Corp.*, 474 U.S. at 364–65 (affirming lower court’s vacatur of demand deposit and commercial loan regulations); *Midwest Video Corp.*, 440 U.S. at 708 n.18 (affirming lower court’s setting aside of rules on public access to cable channels); see also *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020) (affirming lower court’s vacatur of rescission of immigration relief program); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983) (invalidating agency’s rescission of passive-restraint standard); *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 619–20 (1971) (holding that the Comptroller of the Currency’s Regulation 9, 12 C.F.R. pt. 9 (1970), was invalid).

⁸⁸ See, e.g., *West Virginia v. EPA*, 136 S. Ct. 1000, 1000 (2016) (mem.) (staying EPA regulation pending disposition of petitions for review).

⁸⁹ See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2131–42 (2019) (Gorsuch, J., dissenting) (urging the reinvigoration of nondelegation doctrine); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (stating that Justice Gorsuch’s *Gundy* dissent “raised important points that may warrant further consideration in future cases”); Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2–33, 95 (2017).

⁹⁰ See Mila Sohoni, *A Bureaucracy—If You Can Keep It*, 131 HARV. L. REV. F. 13, 26 (2017) (“To assume that the status quo on delegation will persist is to elide a key lesson of the

And the Court has never *squarely decided* that the term “set aside” authorizes universal vacatur.⁹¹ Purely as a matter of stare decisis, the Court could tomorrow—without overruling any of its *own* earlier holdings—embrace DOJ’s contention that the APA does *not* permit universal vacatur.⁹² Should it do so?

This Part approaches that question as a conventional problem of statutory interpretation. It discusses the backdrop of equitable remedies against which the APA was enacted, the APA’s legislative history, text, and structure, and evidence of how courts, Congress and commentators have understood the provisions of the APA in subsequent decades. Thus, while it largely adopts an approach of “APA originalism” that looks back to the original public meaning of that statute,⁹³ it

1930s—that constitutional revolutions happen.”); Aaron L. Nielson, *Confessions of an “Anti-Administrativist,”* 131 HARV. L. REV. F. 1, 8 (2017) (discussing political and social changes that “have implications for the internal world of administrative law”).

⁹¹ Several litigants and courts have cited *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), as adequate authority for the proposition that universal vacatur is the remedy authorized by the APA. *See, e.g.,* Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998). Justice Blackmun’s *dissent* points out that if an APA plaintiff prevails in a challenge to “a rule of broad applicability . . . , the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain ‘programmatically’ relief that affects the rights of parties not before the court.” *Lujan*, 497 U.S. at 913 (Blackmun, J., dissenting). The *Lujan* majority endorsed this point, but in a hypothetical dictum: “If there is in fact some specific . . . regulation, applying some particular measure across the board . . . , and if that . . . regulation is final[] and has become ripe for review . . . , it can of course be challenged under the APA by a person adversely affected—and the *entire* ‘land withdrawal review program,’ insofar as the content of that particular action is concerned, would thereby be affected.” *Id.* at 890 n.2 (majority opinion) (emphasis added).

⁹² The Supreme Court frequently leaves important questions of law unresolved for extended periods of time, notwithstanding persistent patterns of lower-court practice and precedent that assume a particular answer to those questions. To select a well-known instance from administrative law, consider the question whether the APA conferred subject matter jurisdiction on federal courts to hear challenges to agency action. Seven circuits had said it *did*, but the question remained unaddressed until *Califano v. Sanders*, 430 U.S. 99 (1977), when the Court held that the APA was *not* an independent conferral of subject matter jurisdiction. *See id.* at 104–05, 107; RONALD A. CASS ET AL., *ADMINISTRATIVE LAW* 245 (7TH ed. 2016).

⁹³ *See* Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 815–33 (2018); Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1643 (2019). One may reasonably question whether statutory originalism is the correct frame to apply to the APA. The Court has at various points emphasized that the federal courts have no roving license to revise the language of the APA. *See, e.g.,* *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 101–02 (2015); *see also* *Kisor v. Wilkie*, 139 S. Ct. 2400, 2432 (2019) (Gorsuch, J., concurring in the judgment) (“When this Court speaks about the rules governing judicial review of federal agency action, we are not (or shouldn’t be) writing on a blank slate or exercising some common-law-making power. We are supposed to be applying the [APA].”). Yet the Court has also decided seminal cases in a way not obviously dictated by the APA’s strict text—most famously, perhaps, in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). *See* Sunstein, *supra*, at 1625–27 (offering a

also treats subsequent interpretations and events as evidence relevant to the question of how the APA should be understood today. This Part concludes that the best reading of the APA is that it authorizes universal vacatur of rules.

A. *The Backdrop of Equitable Remedies*

DOJ has contended that because the APA incorporates traditional principles of equity, courts should conclude that the APA “was not originally understood to authorize courts to issue” relief that would invalidate the rule “on its face.”⁹⁴ Equitable relief, it contends, “traditionally has been limited to determining the rights of the parties before the court,” and the APA should be read to incorporate that limit because it does not contain “a clear statement . . . that it displaces traditional rules of equity.”⁹⁵ On this logic, argues DOJ, both the universal vacatur of agency action and the universal preliminary injunction against agency action are illegitimate.⁹⁶

rich discussion of *Chevron’s* compatibility with the APA). Lower courts have done so as well, as for example by developing the practice of remand without vacatur. *See infra* text accompanying notes 288–90. A body of formidable scholarship, as well as some of my own work, attests to the importance of judicial glossing of the APA. *See, e.g.*, Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1311 (2012); Richard B. Stewart, Vermont Yankee and the Evolution of Administrative Procedure, 91 HARV. L. REV. 1805, 1815 (1978) (casting the APA as “a flexible restatement of evolving judge-made law that should not be read to embalm doctrines three decades old by precluding continuing judicial innovation”); *see also* Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1608 (2013) (“The APA’s formulations are highly elastic. The standards for judicial review in administrative law invite judicial gloss, and courts oblige by providing that gloss.” (footnotes omitted)). Some of the APA’s drafters anticipated and indeed welcomed the possibility that courts would exercise leeway in interpreting the provisions of the APA. *See, e.g.*, 92 CONG. REC. 2159 (1946) (statement of Sen. McCarran), *reprinted in* S. COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 322, 326 (2d Sess. 1946) [hereinafter APA LEGISLATIVE HISTORY] (“[T]he enforcement of the bill by the independent judicial interpretation and application of its terms is a function which, in the final analysis, is clearly conferred upon the courts. Therefore, it will be the duty of reviewing courts . . . to determine the meaning of the words and phrases used, insofar as they have not been defined in the bill itself.”).

⁹⁴ Litigation Guidelines, *supra* note 5, at 7.

⁹⁵ *Id.* at 7–8.

⁹⁶ *Id.*; Brief for the Petitioners, *supra* note 35, at 49 (arguing that section 706 “does not mandate that ‘agency action’ shall be set aside globally, rather than as applied to the plaintiffs who brought the suit” and that “the party-specific understanding . . . is consistent with ordinary remedial limitations” (quoting 5 U.S.C. § 706(2) (2018))); United States Public Charge Reply Brief, *supra* note 35, at 13 (arguing that section 705 “does not address the *scope* of such a stay”); *id.* at 14 (“[R]espondents’ expansive reading of Section 705 [to authorize universal stays] would raise serious constitutional doubts and so should be rejected on that basis too.”).

DOJ is correct insofar as it contends that the APA subsumed an extant body of law concerning judicial review largely derived from suits for equitable relief against official action.⁹⁷ “As administrative agencies began to emerge, equity actions became one route by which citizens could obtain access to court to challenge wrongful executive action.”⁹⁸ By “the early part of the twentieth century, the most common path for plaintiffs who wanted courts to control the behavior of federal officials was to bring a suit in equity for an injunction.”⁹⁹ The drafters of the APA did not attempt to make fundamental changes to that system of equitable remedies; instead, as Representative Sam Hobbs put it, the APA could be regarded as “plac[ing] into statutory language existing methods of review” of agency action.¹⁰⁰

⁹⁷ See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 147 (1998) (“[J]udicial review prior to the enactment of the APA was grounded in the judge-made law of federal equity . . .”). Note, however, that the APA’s remedial scheme may also be seen as extending a broader tradition of remedies against official action founded upon a suite of common law, not equitable, writs. See 92 CONG. REC. 2159 (1946) (statement of Sen. McCarran), reprinted in APA LEGISLATIVE HISTORY, *supra* note 93, at 322, 325–26 (stating that prohibition, quo warranto, and certiorari would be available avenues for review of agency action); James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex Parte Young*, 72 STAN. L. REV. 1269, 1275–78 (2020) (discussing administrative writs of certiorari, mandamus, and prohibition used by English courts to “disable an illicit course of government action as a general matter”).

⁹⁸ Ronald M. Levin, “Vacation” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 318 (2003).

⁹⁹ Caleb Nelson, “Standing” and Remedial Rights in *Administrative Law*, 105 VA. L. REV. 703, 713 (2019); see KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 23.04, at 307 (1958) (“Before the adoption of the Declaratory Judgments Act, the mainstay for review of federal administrative action in absence of a special statutory method was the equity injunction. Availability of declaratory judgments has not substantially changed the use of the injunction, except that the two remedies are usually combined in a single proceeding and occasionally declaratory relief is sought without injunctive relief.”); ERNST FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 247 (1929) (“The important point, then, is that the Supreme Court recognizes the appropriateness of equitable relief by injunction to correct administrative error which the court believes should be corrected judicially.”); *id.* at 248 (“The relief in equity has thus by force of circumstances become the normal form of relief where it is not (as in revenue cases) shut out by statute.”).

¹⁰⁰ 92 CONG. REC. APP. A2988 (1946) (extension of remarks of Hon. Sam Hobbs), reprinted in APA LEGISLATIVE HISTORY, *supra* note 93, at 406, 415 (“Section 10 as to judicial review does not, in my view, make any real changes in existing law. This section in general declares the existing law concerning judicial review. It is an attempt to restate in exact statutory language the doctrine of judicial review as expounded in various statutes and as interpreted by the Supreme Court . . . We may in a sense look at section 10 as an attempt by Congress to place into statutory language existing methods of review.”); H.R. REP. NO. 79-1980, at 42 (1946), reprinted in APA LEGISLATIVE HISTORY, *supra* note 93, at 233, 276 (“The first sentence of this section [section 10(b), which is now 5 U.S.C. § 703 (2018)] is an express statutory recognition and adoption of the so-called common law actions as being appropriate and authorized means of judicial review, operative whenever special statutory forms of judicial review are either lacking or insufficient.”).

So, what were those “existing methods” of judicial review, and what do they mean for how we should understand the remedial scheme of the APA? This Section addresses that question. Section A.1 begins by reviewing the background principles of equity that authorized challenges to laws and federal agency action in the pre-APA period; it then describes various suits in which litigants won universal relief against federal agency action. Section A.2 turns to discuss the relevant portions of the APA’s legislative history. Section A.3 reviews the implications of this material for how the APA should be construed.

1. Equity and “Set Aside” in the Pre-APA Period

It is useful to begin by reviewing three key features of the landscape of equitable remedies against official action in the pre-APA period. First, litigants could bring *pre-enforcement* challenges to laws when those laws had coercive effects on private conduct or threatened irreparable harm.¹⁰¹ A suit in equity for an injunction against enforcement was the established mechanism for coping with the “dilemma of compliance: obey now, or take action in possible violation of the rule and wait until enforcement to raise claims and defenses against the validity of agency action, at risk of suffering penalties for the violations if those claims and defenses fail.”¹⁰² Federal courts decided myriad suits seeking pre-enforcement relief against federal or state statutes.¹⁰³

Second, the same principles that authorized pre-enforcement equitable relief against state and federal laws also authorized pre-en-

¹⁰¹ A line of cases, the most famous of which is *Ex parte Young*, 209 U.S. 123 (1908), allowed pre-enforcement injunctive relief against state laws. See, e.g., *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 530, 535–36 (1925) (affirming universal injunction barring enforcement of a state statute that would not become effective until 1926); DAVIS, *supra* note 99, § 21.04, at 140 n.17 (noting that *Adams v. Tanner*, 244 U.S. 590 (1917) held unconstitutional a state statute though “[t]he statute was not yet effective at the time suit was brought, and nothing in the case indicates that any threat of enforcement had been made”). The “principle” enunciated in *Young* was “easily absorbed in suits challenging *federal* official action.” RICHARD H. FALLON, JR., ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 959 (5th ed. 2003).

¹⁰² Adrian Vermeule, *Reviewability and the “Law of Rules”*: An Essay in Honor of Justice Scalia, 92 NOTRE DAME L. REV. 2163, 2174 (2017); see also Nelson, *supra* note 99, at 727 (“Under the prevailing ideas about what had previously been called ‘nonstatutory review,’ plaintiffs had long been eligible to seek injunctive relief against administrative officials who were invading or threatening to invade the plaintiffs’ ‘legal rights’ . . .”).

¹⁰³ See, e.g., *Stafford v. Wallace*, 258 U.S. 495, 512 (1922); DAVIS, *supra* note 99, § 21.04, at 136 n.4 (noting that *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), allowed a stockholder to “raise constitutional issues concerning a part of the [federal] statute that was not yet operative and therefore had not yet been applied to the company”); see also *supra* note 101.

forcement equitable relief against federal agency rules.¹⁰⁴ It is commonplace to cite *Abbott Laboratories v. Gardner* (“*Abbott Labs*”)¹⁰⁵ for the proposition that rules may be challenged in advance of their enforcement.¹⁰⁶ *Abbott Labs* did not, however, invent the notion of pre-enforcement attacks upon rules.¹⁰⁷ For example, in the 1919 case of *Houston v. St. Louis Independent Packing Co.*,¹⁰⁸ a sausage manufacturer filed a suit in equity “[i]mmediately after the effective date” of new federal regulations concerning sausage-making; the plaintiff prayed, inter alia, “that the regulation be declared to be unauthorized by law, null and void.”¹⁰⁹

Another example is *CBS v. United States*.¹¹⁰ In reversing the district court’s dismissal of the bill, the Court recapitulated the logic of using the injunctive suit to solve the dilemma of compliance:

[A] valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal

¹⁰⁴ David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 40 (1975) (noting that because of the “quasi-legislative nature of administrative regulations,” courts “tended to treat them like statutes for purposes of judicial review”).

¹⁰⁵ 387 U.S. 136 (1967).

¹⁰⁶ See, e.g., STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 1136 (2d ed. 1985) (“Before *Abbott Laboratories* the courts typically reviewed the lawfulness of an agency’s rule, not when it was promulgated, but when it was enforced. After *Abbott Laboratories* reviewing practice changed radically.”); cf. Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733, 734 (1983) (noting that *Abbott Labs* resulted in the “functional expansion of jurisdiction by the Court over administrative rulemaking”).

¹⁰⁷ See Nelson, *supra* note 99, at 731 n.119 (“[P]re-existing principles unquestionably did authorize the [*Abbott Labs*] plaintiffs to seek relief against enforcement of the regulation that they were challenging.”); cf. *Abbott Labs.*, 387 U.S. at 154 (“[T]here is no question in the present case that petitioners have sufficient standing as plaintiffs: the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner’s rule they are quite clearly exposed to the imposition of strong sanctions.”). The best understanding of *Abbott Labs* is that it displaced the former default presumption—which itself had not been entirely consistently applied—that challenges to rules were not ripe until enforcement. See *infra* text accompanying note 113.

¹⁰⁸ 249 U.S. 479 (1919).

¹⁰⁹ *Id.* at 480–81. The *Houston* Court ultimately sustained the regulations, on the grounds that the agency determination rested on the agency’s resolution of a “question of fact” that should not be overturned “where it is fairly arrived at with substantial evidence to support it.” *Id.* at 484.

¹¹⁰ 316 U.S. 407 (1942).

consequences which failure to conform entails. . . . Such regulations have the force of law before their sanctions are invoked as well as after. When, as here, they are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack¹¹¹

The Federal Communications Commission (“FCC”) regulations at issue in *CBS* were “promulgated by order,” but they were “regulations” nonetheless—and because they were expected to be complied with, they were “appropriately the subject of attack” by a suit in equity “in advance of the imposition of sanctions upon any particular individual.”¹¹² As these examples illustrate, before the APA’s enactment, litigants could seek pre-enforcement equitable relief against *rules* (whether those rules were promulgated as rules or promulgated by order).¹¹³

Third, equitable relief was not limited in scope to protecting *only* the plaintiffs before the court. As I have elsewhere written, in 1913 the Court had itself issued a universal, nationwide injunction that temporarily barred the enforcement of a federal statute as to *anyone* pending its disposition of the case,¹¹⁴ and in 1925 the Court had af-

¹¹¹ *Id.* at 418–19; *see also id.* at 421 (“The regulations are the effective implement by which the injury complained of is wrought, and hence must be the object of the attack.”).

¹¹² *Id.* at 418–19.

¹¹³ As Professor Levin has noted, it is true that generally pre-enforcement review involved agency action expressly made subject to review through special statutory proceedings (as in *CBS*) and that nonstatutory pre-enforcement review of rules was not frequent until *Abbott Labs*. *See* Levin, *supra* note 15. But—as Levin notes and as also explained in the text—pre-enforcement challenges to rules through nonstatutory review did *exist* prior to *Abbott Labs* and was not *invented* by it. *See id.* Thus, the effect of the decision in *Abbott Labs*, as Levin succinctly says, was to increase “the prevalence of ‘set aside’ remedies,” not to “change the meaning of that concept.” *Id.*

¹¹⁴ *See* Sohoni, *supra* note 14, at 924–25 (discussing *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913), and *Journal of Commerce & Commercial Bulletin v. Burlison*, 229 U.S. 600 (1913) (per curiam)). The plaintiffs asserted that the federal government “had agreed *not* to enforce the Act against [them] ‘or other newspaper publishers throughout the country’ pending the Court’s decision.” *Id.* at 945 (quoting Motion by Appellant for Restraining Order at 5–6, *Journal of Commerce*, 229 U.S. 600 (No. 818)). Then, claimed the plaintiffs, the federal government had reneged and taken steps to enforce the law. *Id.* The Court’s order barred that enforcement *universally* pending its decision in the case. *Id.* at 945–46.

Professor Bray has most recently argued that the Court’s order “does not support today’s national injunctions” because it “was based in a contract”—by which he means the asserted representation of nonenforcement by the federal officers. *See Rule by District Judge: The Challenges of Universal Injunctions: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 2 n.2 (2020) (statement of Samuel L. Bray, Professor of Law, Notre Dame Law School) [hereinafter Bray Testimony]; *see also* Bagley-Bray Brief, *supra* note 15, at 6. But labeling this order as “based in a contract” attempts a distinction that makes no difference. Professor Bray’s argument

firmed a universal injunction against a state law in a suit brought by two schools suing for themselves alone.¹¹⁵ By 1943, the Court had affirmed or itself issued preliminary or final decrees that reached beyond just the plaintiffs (though not nationwide) as to federal statutes,¹¹⁶ state laws,¹¹⁷ and a city law.¹¹⁸ The decrees in these cases enabled nonplaintiffs to enjoy the protection of decrees secured by unrelated litigants, while also *not* exposing these nonplaintiffs to the burdens of an adverse judgment if the initial suit had failed.¹¹⁹ As

is one of constitutional infirmity, and he offers no theory for why the Court had the power to issue such an injunction if (as he believes) the plaintiffs had no standing to seek it and traditional equity would forbid it.

Professor Bray earlier characterized the Court's order as "a matter of estoppel." See Samuel Bray, *Response to The Lost History of the "Universal" Injunction*, REASON: VOLOKH CONSPIRACY (Oct. 6, 2019, 12:53 PM), <https://reason.com/2019/10/06/response-to-the-lost-history-of-the-universal-injunction/printer/> [<https://perma.cc/PM8R-S9S7>]. I have elsewhere explained the flaws with the estoppel argument. See Mila Sohoni, *A Reply to Bray's Response to The Lost History of the "Universal" Injunction*, YALE J. REG.: NOTICE & COMMENT (Oct. 10, 2019), <http://yalejreg.com/nc/a-reply-to-brays-response-to-the-lost-history-of-the-universal-injunction-by-mila-sohoni/> [<https://perma.cc/P8BA-2UJ6>].

¹¹⁵ Sohoni, *supra* note 14, at 959–63 (discussing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)). In a recent writing, Professor Harrison appears to mistake the import of *Pierce*. See Harrison, *supra* note 15. He describes the *Pierce* decree as merely "an injunction against enforcement of the law as to parents, who were not parties." *Id.* But the two plaintiff schools in *Pierce* did not seek an injunction shielding *only* the parents of students attending *their* two schools. Instead, the plaintiffs sought and received injunctions against enforcement of the law *full stop*, against anyone. Sohoni, *supra* note 14, at 959–60; see *Pierce*, 268 U.S. at 521, 528. The decrees were understood to affect all private schools in Oregon, not just the two plaintiff schools. Sohoni, *supra* note 14, at 960–61; see *Pierce*, 268 U.S. at 530. The Court twice described that prayer for relief as "appropriate." *Pierce*, 268 U.S. at 530, 533.

¹¹⁶ See, e.g., *Hill v. Wallace*, 259 U.S. 44, 72 (1922) (affirming an injunction reaching beyond the plaintiffs against a federal agricultural statute held unconstitutional); see also Sohoni, *supra* note 14, at 947–54 (describing *Hill* and *Board of Trade of Chicago v. Olsen*, 262 U.S. 1 (1923)).

¹¹⁷ See, e.g., *Pierce*, 268 U.S. at 535–36 (affirming a universal injunction barring enforcement of a state statute that mandated all children attend public school); see also Sohoni, *supra* note 14, at 958–70 (describing *Pierce* and other injunctions against enforcement of state statutes).

¹¹⁸ See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 518 (1939) (opinion of Roberts, J.) (affirming an injunction barring enforcement of Jersey City, New Jersey, municipal ordinances against plaintiffs "and their sympathizers"); see also Sohoni, *supra* note 14, at 987–89 (describing *Hague*).

¹¹⁹ Sohoni, *supra* note 14, at 962–64, 976 n.364. Plaintiffs in these suits sometimes styled their suits as representative suits under Equity Rule 38 by alleging that they were seeking relief on behalf of those similarly situated. As I explain in *The Lost History of the "Universal" Injunction*, these similarly situated absentees received the protection of the interim or final injunctive decrees described, but they remained nonparties to the suit. *Id.* at 976 n.364. Had the initial suit failed on the merits, the absentees would not have been bound by the initial adjudication. See *id.* (explaining differences between Equity Rule 38 representative suits and certified injunctive class actions under modern-day Federal Rule of Civil Procedure 23); *Hansberry v. Lee*, 311 U.S. 32, 44–45 (1940) (distinguishing representative suits involving "a common right" from those involv-

these cases collectively demonstrate, federal courts gave injunctive relief that shielded broad swaths of nonplaintiffs in the decades predating the enactment of the APA.

The bottom line is that before the APA's enactment, three critical elements of the law of equitable relief had coalesced. A plaintiff in equity could bring a *pre-enforcement challenge* to a state or federal statute; a suit in equity could be used to challenge *federal agency action*, including *federal rules*; and a federal court could offer preliminary or final equitable relief that extended *beyond just the plaintiffs* and that *shielded nonplaintiffs, too*.

Deploying these principles in concert against federal agency action, lower three-judge federal courts set aside or enjoined the enforcement of rules universally in at least three important cases in the pre-APA period.¹²⁰ Moreover, they granted those remedies under the auspices of statutory language that was later echoed in the APA's judicial review provisions.¹²¹

ing rights that may be separately asserted); *Wabash R.R. v. Adelbert Coll. of the W. Reserve Univ.*, 208 U.S. 38, 58 (1908) (“The allegation that the suit is brought in behalf of all who should join and share in the expense cannot make the judgment binding on those who do not join.”). That a suit was styled as one brought in a “representative” capacity does not change the fact that the absentees remained nonparties. The suit in *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518 (D.C. Cir. 1963), for example, was a suit brought by the plaintiffs “on behalf of themselves and all other United States manufacturers of electric motors and generators similarly situated,” *id.* at 533, but the decree in *Wirtz* was nonetheless a “universal” injunction. *Trump v. Hawaii*, 138 S. Ct. 2392, 2428 (2018) (Thomas, J., concurring) (citing *Wirtz* as a “universal” injunction); *see also* *Bray*, *supra* note 12, at 438 (citing *Wirtz* as a “national injunction”).

Modern-day law continues to recognize that merely framing a suit as brought in a “representative” capacity does not make absentees into parties. Consider a suit that is *filed* on behalf of a class, but in which the class is *not yet certified*. Until the moment of class certification, absentees—sometimes called “putative” class members—“are always treated as nonparties.” *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 297 (D.C. Cir. 2020); *see* *Smith v. Bayer Corp.*, 564 U.S. 299, 318 (2011) (“[T]he mere proposal of a class . . . could not bind persons who were not parties . . .”).

¹²⁰ Prominent commentators have discussed all three cases described below as important on the issue of ripeness. *See* Jaffe, *supra* note 70, at 1276 (describing two of three cases discussed below as “hav[ing] done [the] most to develop and shape the current concept of ripeness”); Kenneth Culp Davis, *Ripeness of Governmental Action for Judicial Review*, 68 HARV. L. REV. 1326, 1326–27 (1955) (discussing all three cases discussed below). The discussion below unpacks their lessons for the issue of scope of relief.

¹²¹ *See, e.g.*, Communications Act of 1934, Pub. L. No. 73-416, § 402(a), 48 Stat. 1064, 1093 (applying Urgent Deficiencies Act provisions “relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission [“ICC”]) . . . to suits to enforce, enjoin, set aside, annul, or suspend any order of the [Federal Communications Commission] under this Act”); Urgent Deficiencies Act, Pub. L. No. 63-32, 38 Stat. 208, 219–20 (1913) (establishing “venue of any suit . . . brought to enforce, suspend, or set aside, in whole or in part, any order of the [ICC] and authorizing three-judge courts to issue “interlocutory injunction[s] suspending or

One example is *The Assigned Car Cases*,¹²² a consolidated set of five challenges to an Interstate Commerce Commission (“ICC”) rule directing how railroads should distribute their cars among coal mines in times of car shortages.¹²³ The various plaintiffs (private car owners and railroad fuel car owners) challenged the rule on the grounds that it exceeded the ICC’s statutory authority, was “inherently unreasonable,” and that it invaded the plaintiffs’ property rights.¹²⁴ The three-judge district court in the Eastern District of Pennsylvania issued a decree in all five cases that set aside that rule and that permanently enjoined the federal defendants “from enforcing or in any manner attempting to enforce or carry out the said order or any of the terms thereof.”¹²⁵ Although the Court reversed on the merits,¹²⁶ finding the rule was valid,¹²⁷ it took no issue with the *scope* of the lower court’s decree, which had barred the ICC rule from being enforced not just against the 35 plaintiff railroads but also against thousands of other railroads that had *not* sought relief.¹²⁸

Some years later, the Court decided *United States v. Baltimore & Ohio Railroad Co.* (“*B & O*”).¹²⁹ That case involved the validity of an ICC order (really, a rule) that imposed a costly new regulatory obligation on each of the railroads individually—namely, the requirement

restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the [ICC].”)

¹²² 274 U.S. 564 (1927).

¹²³ *Id.* at 575 (“All of the plaintiffs insist that in prescribing a universal rule the [ICC] has exceeded the powers conferred by Congress.”).

¹²⁴ *Id.* at 575; *see id.* at 568–69 (describing the suits); *Berwind-White Coal-Mining Co. v. United States*, 9 F.2d 429, 431 (E.D. Pa. 1925), *rev’d sub nom. The Assigned Car Cases*, 274 U.S. 564 (“These suits were brought for the purpose of enjoining, setting aside, and annulling an order of the [ICC] relating to the distribution of coal cars among bituminous coal mines in times of car shortage.”). The railroads’ suit was brought “in behalf of themselves and in behalf of such other railroads as have an interest and may by proper proceedings become parties hereto.” Transcript of Record at 4, *The Assigned Car Cases*, 274 U.S. 564 (Nos. 606, 638).

¹²⁵ Transcript of Record, *supra* note 124, at 75 (“[I]t was ordered, adjudged, and decreed as follows, viz: 1. That the order of the [ICC] in the case entitled ‘Assigned cars for bituminous coal mines’ . . . be and the same is hereby set aside, annulled, and suspended. 2. That a permanent injunction be and the same is hereby granted and issued out of this court as prayed in the bill of complaint and the defendants and each of them, their officers, members, examiners, agents, and attorneys, and any and all persons whomsoever, be, and they are hereby, permanently restrained and enjoined from enforcing or in any manner attempting to enforce or carry out the said order or any of the terms thereof.”).

¹²⁶ *See The Assigned Car Cases*, 274 U.S. at 584. Justice McReynolds would have affirmed the decision below. *Id.* at 587 (McReynolds, J., dissenting).

¹²⁷ *Id.* at 584 (majority opinion).

¹²⁸ *Id.* at 569 (“The number of the railroads to which the prescribed rule applies is 3073. Of these, all except the 35 plaintiffs in No. 606 have acquiesced in the order.”).

¹²⁹ 293 U.S. 454 (1935).

that the railroads use a certain kind of reverse gear on steam locomotives.¹³⁰ Before the ICC adopted the rule, nearly 700 railroads¹³¹— “[p]ractically all the railroads of the United States”¹³²—unsuccessfully urged the ICC not to adopt the rule.¹³³ Subsequently, 20 railroads filed a petition in the Northern District of Ohio seeking to enjoin the rule’s enforcement as to “substantially all of the steam operated carriers of the country.”¹³⁴ In its findings of fact, the three-judge court noted that the suit was brought in a “representative capacity” to annul the ICC rule,¹³⁵ and found that the ICC had ignored pertinent evidence in formulating that rule.¹³⁶ In its conclusions of law, the district court held that “[u]nless the said [rule] . . . [were] set aside, . . . [the] petitioners *and the other railroads represented by them* [would] suffer irreparable injury.”¹³⁷ It issued, therefore, a final decree that the ICC rule be “vacated, set aside, and annulled,” and that its enforcement by the ICC be “perpetually enjoined.”¹³⁸ Agreeing that the ICC had failed to make the findings requisite to support its action, the *B & O* Court affirmed the decree of the three-judge court.¹³⁹

130 See *Balt. & Ohio R.R. v. United States*, 5 F. Supp. 929, 930 (N.D. Ohio 1933) (per curiam) (“The order sought to be enjoined entails an ultimate expense upon the carriers of between seven and eight million dollars in the changing of gears on more than 20,000 locomotives now in use.”), *aff’d*, 293 U.S. 454. In today’s dollars, that amount is in the neighborhood of \$150,000,000.

131 See Transcript of Record at 4, *B & O*, 293 U.S. 454 (No. 221).

132 *B & O*, 293 U.S. at 457.

133 *Id.*

134 *Balt. & Ohio R.R.*, 5 F. Supp. at 930; Transcript of Record, *supra* note 131, at 4–5 (“The said railroads are so numerous as to make it impracticable to bring them all before this court; and they constitute a class which is fairly represented by the petitioners herein This suit is filed by these petitioners, who sue on behalf of themselves and of all other railroads subject to the Interstate Commerce Act which may have an interest in the subject matter of this suit.”).

135 Transcript of Record, *supra* note 131, at 218.

136 See *id.* at 223 (noting that the power reverse gear requirement was “substantially unsupported by the evidence” and that the ICC had refused to consider the railroads’ “precarious financial condition[.] . . . the general depression and the inroads upon railroad revenues of motor and water competition[.] . . . and the cost of complying with the order”).

137 *Id.* at 224 (emphasis added).

138 *Id.* at 225; *accord id.* at 224–25 (“[T]he court being duly advised in the premises, rendered its opinion herein per curiam; and having made and filed its findings of fact and conclusions of law, upon due consideration thereof, it is now [o]rdered, adjudged, and decreed that the order of the [ICC] . . . is hereby, vacated, set aside, and annulled, and the enforcement thereof by the [ICC] or otherwise, perpetually enjoined.”); Statement as to Jurisdiction on Appeal at 4, *B & O*, 293 U.S. 454 (No. 221) (“A final decree was entered permanently annulling, enjoining, and setting aside the [ICC’s] order.”).

139 See *B & O*, 293 U.S. at 463–64 (“[W]hether the use of any or all types of steam locomotives ‘equipped with hand reverse gear as compared with power reverse gear causes unnecessary peril to life or limb’ is left entirely to inference. This complete absence of ‘the basic or essential

A final example is *CBS*, which addressed the FCC's new chain broadcasting regulations. Two television networks (National Broadcasting Company ("NBC") and Columbia Broadcasting System ("CBS")) sought an injunction against enforcement of the new regulations *before* the agency had taken any action to deny licenses on the basis of those regulations.¹⁴⁰ After the three-judge district court initially dismissed their suits, the two networks sought a stay barring the regulations' enforcement pending review by the Supreme Court.¹⁴¹ The three-judge district court granted the stay "to preserve the status quo."¹⁴² Its justification deserves emphasis: the lower court issued the order, it said, in part because the FCC had *not* said it would *not* enforce the regulations "except as to a station itself seeking to test their validity."¹⁴³ Noting that "if the regulations are enforced the networks will be obliged to revise their whole plan of operations to their great

findings required to support the [ICC's] order' renders it void." (quoting *Florida v. United States*, 282 U.S. 194, 215 (1931)).

¹⁴⁰ See *NBC v. United States (NBC I)*, 44 F. Supp. 688, 690 (S.D.N.Y. 1942) ("These actions were brought to declare invalid and set aside certain regulations When the regulations appeared, the 'networks' brought the two actions at bar . . . to set them aside as beyond the powers of the [FCC] and as arbitrary, unreasonable and without basis in the evidence. Upon the complaints so filed and voluminous affidavits [the networks] then moved for a preliminary injunction against their enforcement *pendente lite*."), *rev'd*, 316 U.S. 447 (1942).

¹⁴¹ See *id.* at 696–97 (per curiam) (supplemental opinion). See *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 7 (1942) (explaining that the Urgent Deficiencies Act, as incorporated in Section 402(a) of the Communications Act of 1934, "authorizes the District Court, in cases 'where irreparable damage would otherwise ensue to the petitioner,' to allow a temporary stay of the order under review, subject to specified safeguards") (quoting Urgent Deficiencies Act, Pub. L. No. 63-32, 38 Stat. 208, 220 (1913)).

¹⁴² Transcript of Record at 482, *CBS v. United States*, 316 U.S. 407 (1942) (No. 1026) ("[I]t appearing that the relief herein granted is necessary to preserve the status quo pending an appeal by the plaintiff to the Supreme Court, . . . it is Ordered, Adjudged and Decreed that until May 1st, 1942, or the argument of the appeal [at the Supreme Court] . . . , the [FCC] be and the same hereby is restrained from enforcing those regulations . . . which are known as 'Order in Docket No. 5060.'"); see also *NBC I*, 44 F. Supp. at 697 (per curiam) (supplemental opinion) ("[W]e should use our discretion in the plaintiffs' favor to stay enforcement of the regulations until they can argue their appeal.").

¹⁴³ Transcript of Record, *supra* note 142, at 481 ("Findings of Fact: . . . the [FCC] has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity."); accord Transcript of Record at 450, *NBC v. United States (NBC II)*, 316 U.S. 447 (1942) (No. 1025) (same); see also Motion for Temporary Restraining Order at 6, *NBC II*, 316 U.S. 447 (No. 1025) ("The [FCC] took the position that it would not suspend the Order pending the determination of cases . . . except as to an individual litigant."); DAVIS, *supra* note 99, § 21.06, at 151–52 ("[O]ne day after the bill of complaint was filed, the [FCC] adopted a minute enabling a licensee to contest the validity of the regulations without fear of losing its license, providing specifically that 'the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision.'" (quoting *CBS*, 316 U.S. at 414)).

disadvantage,”¹⁴⁴ the lower court wholly barred the FCC from enforcing the regulations for the period specified.¹⁴⁵ This order thus protected not just CBS and NBC, but also the third national network, Mutual Broadcasting System, which was *not* a plaintiff, as well as the hundreds of *nonparty* radio stations, including nonparty affiliates of Mutual, that would otherwise have been adversely affected by enforcement of the new rules.¹⁴⁶ The Court then continued the stay until the lower court addressed the case on remand.¹⁴⁷ On remand, the lower court continued to stay the regulations.¹⁴⁸ And while considering the merits on appeal, the Court *again* continued the stay¹⁴⁹—over some objection from the government¹⁵⁰—until 10 days *after* the Court rendered its final decision. The collective upshot was that the chain broadcasting regulations initially announced in 1941 did not go into effect at all *as to any station or network, plaintiff or nonplaintiff*, until 10 days after the Supreme Court eventually decided the case in 1943.¹⁵¹

¹⁴⁴ *NBC I*, 44 F. Supp. at 697 (per curiam) (supplemental opinion); *id.* at 696 (noting the risk that “the plaintiffs will not be adequately protected . . . if the [FCC] does not withhold enforcement in all cases”).

¹⁴⁵ See Transcript of Record, *supra* note 142.

¹⁴⁶ Mutual wanted the regulations to be held *valid*—indeed, it had intervened as a *defendant* in the suit—but Mutual had nonetheless entered into some contracts that violated the new regulations. See Brief of Mutual Broadcasting System, Inc., Appellee at 10, *NBC v. United States (NBC IV)*, 319 U.S. 190 (1943) (Nos. 554, 555) (“These contracts are not consistent with the [FCC’s] regulations at issue in these proceedings, but the contracts expressly provide that these clauses shall be terminated in the event the regulations become effective or in the event Mutual’s competitors voluntarily abandon similar clauses”), *aff’g* *NBC v. United States (NBC III)*, 47 F. Supp. 940, 947 (S.D.N.Y. 1942); Brief of Mutual Broadcasting System, Inc., Intervenor at 2, *NBC II*, 316 U.S. 447 (No. 1025) (explaining that Mutual had intervened as a defendant).

¹⁴⁷ *CBS*, 316 U.S. at 425 (“The stay now in effect will be continued, on terms to be settled by the court below.”); see also *NBC II*, 316 U.S. at 449 (“As in the [*CBS*] case the stay now in effect will be continued, on terms to be settled by the court below.”).

¹⁴⁸ *NBC III*, 47 F. Supp. at 947; Motion for Temporary Restraining Order at 5, *NBC IV*, 319 U.S. 190 (Nos. 554, 555).

¹⁴⁹ See *Friday, March 12, 1943*, 1942 J. SUP. CT. U.S. 1, 184 (“No. 554 . . . and No. 555 [*NBC IV*]. . . . The motion for a temporary restraining order in each case is granted, and the stay entered by the District Court is continued until 10 days after the filing in the District Court of this Court’s mandates upon decision of the appeals.”).

¹⁵⁰ Response to Motion for Temporary Restraining Order at 3, *NBC IV*, 319 U.S. 190 (Nos. 554, 555) (noting that the government did not oppose a stay until the Court decided the appeal or a further stay if the Court reversed, but did oppose a stay in the event of an affirmance of the decision below).

¹⁵¹ The FCC ultimately prevailed. See *NBC IV*, 319 U.S. at 227. To be clear, for portions of this period, the FCC itself delayed its rules or stipulated to nonenforcement; litigants sought and obtained the judicial stays to preserve the status quo either when the FCC refused to further delay its rules or in order to extend protection to parties that had not sought to contest the rules’

As *The Assigned Car Cases*, *B & O*, and *CBS* illustrate, both the setting aside of rules (though promulgated by order) and broadscale preliminary or final injunctions against enforcement of those rules formed a part of the landscape of equitable practice in the pre-APA period. Then, as today, the target of judicial review was *the rule*. A reviewing court could preliminarily enjoin a rule on a wholesale basis. And when the reviewing court determined the rule was illegal on the merits, the rule was set aside and permanently enjoined on a wholesale basis.

A final case is worth describing in which sweeping equitable relief against federal administrative action issued in the pre-APA period.¹⁵² In *Lukens Steel Co. v. Perkins*,¹⁵³ seven steel and iron companies challenged an administrative determination by the Secretary of Labor of the minimum wages to be paid to employees by government contractors in their industries.¹⁵⁴ The companies sought a universal injunction against that determination, arguing that the U.S. Department of Labor had misinterpreted its statutory authority.¹⁵⁵ The D.C. Circuit granted a temporary injunction that suspended the wage determination for the entire industry.¹⁵⁶

The Supreme Court then reversed the D.C. Circuit,¹⁵⁷ holding that the plaintiffs lacked standing and were thus not entitled to *any*

validity. *See id.* at 196 (“Since October 30, 1941, when the present suits were filed, the enforcement of the Regulations has been stayed either voluntarily by the Commission *or by order of court.*” (emphasis added)).

¹⁵² This paragraph and the next are drawn from *The Lost History of the “Universal” Injunction*. Sohoni, *supra* note 14, at 983–93.

¹⁵³ 107 F.2d 627 (D.C. Cir. 1939) (per curiam), *rev’d*, 310 U.S. 113 (1940).

¹⁵⁴ *Id.* at 630.

¹⁵⁵ *Perkins*, 310 U.S. at 120–21 (“The seven companies named as complainants by the bill did not merely pray relief for themselves against the Secretary’s wage determination but insisted that all these Government officials be restrained from requiring the statutory stipulation as to minimum wages in contracts with any other steel and iron manufacturers throughout the United States.”).

¹⁵⁶ *Id.* at 122 (“[T]he temporary injunction, rendering the Act wholly inoperative as to the iron and steel industry was kept in effect . . .”).

¹⁵⁷ *Id.* at 132. Professor Bray has recently contended that it is not clear that the *Perkins* decree was a universal injunction “because its entire scope was meant to protect the plaintiff.” *See Bray Testimony, supra* note 114, at 2 n.2. “Was meant” by whom? Before the D.C. Circuit, the plaintiffs’ brief argued in passing that a plaintiff-specific injunction would be inadequate to protect them because federal competitive bidding rules would make their contracts “of doubtful validity.” *See Transcript of Record* at 350, *Perkins*, 310 U.S. 113 (No. 593). The plaintiffs then pressed the point that *all* government contracts made to *any* bidder would be unlawful if the determination was allowed to go into effect as to others. *See id.* at 350–51 (noting that allowing the determination to become effective would “cast the pall of illegality on all contracts”). The latter justification aimed not at protecting the seven plaintiffs, but instead at persuading the D.C. Circuit that enjoining the illegal minimum-wage term universally was the “only type of injunc-

kind of relief, not even purely plaintiff-protective relief.¹⁵⁸ The *Perkins* Court sharply criticized the D.C. Circuit's "action," stressing that it extended "beyond any controversy that might have existed between the complaining companies and the [enjoined] Government officials."¹⁵⁹ The *Perkins* Court did not, however, hold—or even say in dictum—that universal vacatur or the universal injunction against federal agency action would be improper in a suit brought by parties that *had* standing or in suits that *did* implicate private rights.¹⁶⁰ Indeed, the thrust of the Court's criticism of the injunction's scope was *not* that the injunction's "benefits" extended beyond the plaintiffs, but rather that the injunction's benefits extended beyond the "locality" in which the plaintiffs were doing business.¹⁶¹ In sum, though *Perkins* did not affirm the D.C. Circuit's nationwide injunction against federal agency action, the decision did not foreclose the possibility that such a rem-

tion" that would prevent a "chaotic situation" and "impending confusion" in government contracts across the board. *Id.* Although the record does not disclose why the D.C. Circuit entered the injunction, the Supreme Court unquestionably did not view the decree as "meant to protect the plaintiff." See *Perkins*, 310 U.S. at 120–21 ("The seven companies named as complainants by the bill *did not merely pray relief for themselves* against the Secretary's wage determination but insisted that all these Government officials be restrained from requiring the statutory stipulation as to minimum wages in contracts with any other steel and iron manufacturers throughout the United States." (emphasis added)). The presence of *an* argument in the plaintiff's brief that was never endorsed by *any* court is not enough to make the *Perkins* decree non-universal.

¹⁵⁸ *Perkins*, 310 U.S. at 127–29, 132; see *id.* at 127 ("Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.").

¹⁵⁹ *Id.* at 123; *id.* at 117 ("In this vital industry, by action of the Court of Appeals for the District of Columbia, the Act has been suspended and inoperative for more than a year.").

¹⁶⁰ See Sohoni, *supra* note 14, at 987 ("To the contrary, the *Perkins* Court took care to note that the case involved neither 'regulatory power over private business or employment' nor an official action that 'invade[d] private rights in a manner amounting to a tortious violation,' and to distinguish cases that did—including *Pierce v. Society of Sisters*[,]" which had affirmed a universal injunction against enforcement of a state law. (first alteration in original) (footnotes omitted) (first quoting *Perkins*, 310 U.S. at 128; and then quoting *id.* at 129)); *Perkins*, 310 U.S. at 128–29 ("The Act does not represent an exercise by Congress of regulatory power over private business or employment. . . . The contested action of the restrained officials did not invade private rights in a manner amounting to a tortious violation."); see also *id.* at 129–30 & 129 n.21 (distinguishing, *inter alia*, *Pierce* as one of the cases that "relate to problems different from those inherent in the imposition of judicial restraint upon agents engaged in the purchase of the Government's own supplies").

¹⁶¹ *Perkins*, 310 U.S. at 123 ("The benefits of its injunction, and of that ordered by it, were not limited to the potential bidders in the 'locality,' however construed, in which the respondents do business. All Government officials with duties to perform under the Public Contracts Act have been restrained from applying the wage determination of the Secretary to bidders throughout the Nation who were not parties to any proceeding, who were not before the court and who had sought no relief.").

edy might issue in a case in which plaintiffs had standing and a valid cause of action.¹⁶²

At this point, the executive branch had begun to set the table for the subsequent enactment of the APA. It did so with full awareness of the *Perkins* litigation.¹⁶³ *Perkins* makes an appearance in a crucial passage from the Attorney General's 1941 Report that describes the law concerning judicial review of regulations.¹⁶⁴ The Report explained—citing *Perkins*—that “judicial review of administrative regulations” can involve “the validity of a regulation as a whole,” in a manner akin to an attack on the facial constitutionality of a statute—“the constitutionality of the measure as a whole.”¹⁶⁵ The Report did not treat *Perkins* as having *rejected* such challenges to the validity of a regulation “as a whole;” rather, it cited *Perkins* (correctly) as an illustrative example of such a challenge.¹⁶⁶ The Report then went on to describe these two categories of actions. First, it noted, “[w]here the legality of applying a regulation to particular objector is in question, the issue is comparatively narrow. . . . [T]he pertinent legal question is the appli-

¹⁶² It is noteworthy that in other cases decided close in time to *Perkins*, the Court continued to affirm the propriety of injunctions that shielded nonplaintiffs. *See, e.g.*, *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941) (affirming a universal injunction of a Pennsylvania alien-registration statute); *see also* *Sohoni, supra* note 14, at 987–91 (describing injunctions affirmed by *W. Va. State Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939)). Moreover, when Congress subsequently legislatively overrode *Perkins* by amending the pertinent statute to allow aggrieved bidders standing to sue, the D.C. Circuit granted another nationwide injunction against an improper minimum-wage determination by the Secretary of Labor. *See Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 535 (D.C. Cir. 1963); *see also* *Sohoni, supra* note 14, at 991–93 (describing *Wirtz*). That action indicates that the D.C. Circuit understood *Perkins* to speak to standing, not to remedial scope.

¹⁶³ The *Perkins* suit drew coverage from a variety of publications. *See, e.g.*, *7 Steel Firms Win Injunction on Wage Rates: Court of Appeals Enjoins U.S. from Enforcing Walsh-Healey Act*, *BALT. SUN*, Mar. 28, 1939, at 3 (“The case, the companies said, was of concern to forty companies employing 25,000 men.”); *Court Blocks Steel Wage Minimums: 7 Firms Win Round in Tilt with New Deal*, *RACINE J.-TIMES*, Mar. 27, 1939, at 1 (“The government’s right to dictate minimum wages for industries filling federal contracts was threatened this morning when the [D.C. Circuit] suspended a schedule of minimum wages for the entire steel industry.” (emphasis added)); *Steel Firms Sue to Void Pay Set by Miss Perkins: 7 Independents Cite Six in Cabinet, Charging Rate Will Result in Monopoly*, *N.Y. HERALD TRIB.*, Feb. 26, 1939, at 23 (reporting filing of the suit).

¹⁶⁴ *See* ATT’Y GEN.’S COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8 (1st Sess. 1941) [hereinafter ATTORNEY GENERAL’S REPORT].

¹⁶⁵ *See id.* at 115 (noting that in actions concerning the “judicial review of administrative regulations . . . the issue may be either the validity of a regulation as a whole or the legality of applying it to the person who is challenging it, in the same way that an attack upon a statute may involve either the constitutionality of the measure as a whole or the constitutionality of applying it to a particular party.” (footnote omitted) (citing *Perkins*, 310 U.S. 113)).

¹⁶⁶ *See id.*

cability of the statute under which the regulation was promulgated to the facts thus revealed.”¹⁶⁷ Next, it explained,

[w]here *the validity of the entire regulation* is in question . . . the central issue is one of law, involving the relation of the regulation to the governing statute or occasionally to the Constitution. Evidence will be necessary to the solution of the issue only insofar as the facts bearing upon the legality of the regulation are not within the knowledge of the court Conceivably, a legal argument may be all that is necessary to aid in determining the validity of a regulation, as of a statute.¹⁶⁸

It is thus manifest that—with *Perkins* in mind—the Report conceived of judicial review of administrative regulations as capable of determining “the validity of the entire regulation,” a type of review that the Report explicitly set out in contradistinction from (and in addition to) judicial review to determine “the legality of *applying* a regulation.”¹⁶⁹

2. *The APA’s Legislative History*

In 1946, Congress enacted the APA.¹⁷⁰ There is woefully (if unsurprisingly) little in the APA’s “proximate” legislative history¹⁷¹ about judicial review of rules or remedies against rules. In particular, there is nothing that explicitly addresses the precise question that is our concern here—whether *universal* vacatur of rules is authorized. (*Perkins*, for example, is only discussed as a case relating to standing and public contracts; the APA’s drafters evidently and correctly understood that *Perkins* did *not* reach a holding on scope of relief.¹⁷²)

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 115–16 (emphasis added).

¹⁶⁹ *See id.* at 115 (emphasis added). The Attorney General’s Report elsewhere described *Perkins* as an instance of “the category of cases in which judicial review is denied because it is thought that the cases deal with matters which are more fittingly lodged in the exclusive discretion of the administrative branch, subject to controls other than judicial review. . . . It relates, of course, to matters which do not involve private right” *Id.* at 86 (citing *Perkins*, 310 U.S. 113). This passage accurately treated *Perkins* as a case addressing a plaintiff’s (lack of) standing to vindicate public rights. *See id.*

¹⁷⁰ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

¹⁷¹ By “proximate” legislative history, I mean the legislative history of the bill that was ultimately enacted in 1946. *See* APA LEGISLATIVE HISTORY, *supra* note 93. For an exhaustive mapping of the long road to the APA, see generally George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. REV. 1557 (1996).

¹⁷² *See* 92 CONG. REC. APP. A2985 (1946) (extension of remarks of Hon. Sam Hobbs),

With that said, to the limited extent that the proximate legislative history of the APA *does* address judicial review of regulations, it suggests that the drafters anticipated that courts would review the validity of rules and that invalid rules could be set aside.¹⁷³ For example, in discussing the meaning of the provision (section 10(e)) that is now section 706, both the Senate and House Judiciary Committee Reports stated that “where . . . an affected party claims in a judicial proceeding that a rule issued without an administrative hearing (and not required to be issued after such hearing) is invalid, he may show the facts upon which he predicates such invalidity.”¹⁷⁴

reprinted in APA LEGISLATIVE HISTORY, *supra* note 93, at 406, 413 (featuring a letter from Attorney General Tom Clark to the Chairman of the House Judiciary Committee, including an appendix which cited *Perkins* as a case that has “an important bearing on th[e] subject” of who is entitled to judicial review); *see also* 92 CONG. REC. 5654 (1946) (statement of Rep. Walter), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 93, at 349, 368 (“Every form of statutory right or limitation would thus be subject to judicial review under the bill. It would not be limited to constitutional rights or limitations alone—*see Perkins v. Lukens Steel Co.* (310 U. S. 113).”). The Attorney General’s Manual likewise treated *Perkins* as a case relevant to standing. *See* ATTORNEY GENERAL’S MANUAL, *supra* note 66, at 96 (in describing section 10(a), Right of Review: “The Attorney General . . . indicated his understanding that section 10(a) [now the first sentence of 5 U.S.C. § 702] preserved the rules developed by the courts in such cases as . . . *Perkins*”); *id.* at 28 (citing *Perkins* as a case relevant to public contracts and noting that “[a]ll rules relating to public contracts are exempt from section 4 [the provision on rulemaking]”). No mention of *Perkins* appears in the portions of the Attorney General’s Manual that discussed the APA’s authorization of suits for injunctive relief (section 10(b)) or that address the “scope of review” (section 10(e)). *See id.* at 96–101 (section 10(b)); *id.* 107–10 (section 10(e)).

¹⁷³ *See* S. REP. NO. 79-752, at 9 fig.2 (1945), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 93, at 185, 195 fig.2 (“Section 10 on judicial review relates not only to decisions made after agency hearing but, in appropriate cases, to the exercise of any other administrative power or authority.”); *id.* at 197–98 (“The term ‘agency action’ [which includes ‘rule’] brings together previously defined terms in order to simplify the language of the judicial review provisions of section 10 and to assure the complete coverage of every form of agency power, proceeding, action, or inaction.”); H.R. REP. NO. 79-1980, at 42 (1946), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 93, at 233, 276 (“Declaratory judgment procedure . . . may be utilized to determine the validity or application of any agency action. By such an action the court must determine *the validity* or application of a rule or order” (emphasis added)); 92 CONG. REC. 5657 (statements of Rep. Scrivner and Rep. Springer), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 93, at 377, 377 (Mr. Scrivner: “Does the gentleman feel that [section 10(e)] would correct the evils that might exist where a regulation was contrary to the intent, spirit, or purpose of the act?” Mr. Springer: “I think, unquestionably, it would. . . . That is the purpose and that is the intention of that provision In those cases where these decisions are found to be arbitrary, . . . capricious or an abuse of discretion or otherwise not in accordance with the law, the decision can be set aside. That is certainly fair, that is certainly equitable, and that is certainly based upon a sound philosophy.” (emphasis added)).

¹⁷⁴ S. REP. NO. 79-752, at 28, *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 93, at 185, 214; *accord* H.R. REP. NO. 79-1980, at 45, *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 93, at 233, 279.

The Attorney General's Manual, written just after the APA's enactment, also did not discuss the precise question of universal vacatur. It is worth noting that in its discussion of section 10(c)—not section 10(e)—the Manual did address whether the APA “provides for direct judicial review of all rules.”¹⁷⁵ The Manual said that the APA's legislative history made it clear that a rule's validity could be determined in either an enforcement proceeding or, “in appropriate circumstances,” through a suit for a declaratory judgment, but that the APA “was not intended to provide for judicial review in the abstract of all rules.”¹⁷⁶ That language—“judicial review in the abstract of all rules”—hearkened back to a previous standoff between Congress and the executive branch over judicial review of rules. An earlier failed attempt at reforming administrative procedure—the vetoed Walter-Logan bill¹⁷⁷—had contemplated judicial review of rules “upon petition filed by any person substantially interested in the effects of any administrative rule.”¹⁷⁸ In a memorandum accompanying that bill's veto message in 1940, then-Attorney General Robert Jackson explained that this “innocent-looking provision [would] . . . open[] the door to *abstract litigation over the validity of administrative rules*, and . . . throw[] overboard” the requirement of an actual case or controversy.¹⁷⁹ Attorney General Jackson stressed that under the Declaratory Judgment Act,¹⁸⁰ “any person may now obtain a judgment as to the validity of such administrative rules, if he can show such an interest and present injury therefrom as to constitute a ‘case or controversy,’” and warned that the Walter-Logan bill “must be interpreted as expanding that power, or it has no effect whatever.”¹⁸¹ The Manual's reference to “abstract”

¹⁷⁵ See ATTORNEY GENERAL'S MANUAL, *supra* note 66, at 102.

¹⁷⁶ *Id.* (“Many statutes which give rule making powers (particularly rules of general applicability) to agencies make no provision for judicial review of such rules. The validity of such rules has generally been open to challenge in proceedings for their enforcement. In addition, it has been suggested that in appropriate circumstances review could be obtained in proceedings under the Declaratory Judgment Act . . . It is clear from the legislative history that section 10(c) was not intended to provide for judicial review in the abstract of all rules.”); see *id.* at 102–03 (noting that “even the proponents of detailed provisions for judicial review of rules did not intend to prescribe an abstract form of review going far beyond the limitations of the Declaratory Judgment Act,” and inferring therefrom that section 10(c) “was not intended to achieve such a result”).

¹⁷⁷ H.R. 6324, 76th Cong., 1st Sess. (1940); S. 915, 76th Cong. (1939).

¹⁷⁸ H.R. 6324, 76th Cong., 3d Sess. § 3 (1940), *reprinted in* PRESIDENT FRANKLIN D. ROOSEVELT, PROVIDING FOR THE EXPEDITIOUS SETTLEMENT OF DISPUTES WITH THE UNITED STATES, H.R. DOC. NO. 76-986, at 12, 13 (1940).

¹⁷⁹ H.R. DOC. NO. 76-986, at 7 (emphasis added).

¹⁸⁰ 28 U.S.C. § 400 (1934) (current version at 28 U.S.C. §§ 2201–2202 (2018)).

¹⁸¹ H.R. DOC. NO. 76-986, at 7.

judicial review of all rules must be read in light of this earlier debate over the relaxation of standing. The Manual's conclusion that the APA "was not intended to provide for judicial review in the abstract of all rules" therefore is best understood as a recognition that the APA did not alter what is still the law today—a plaintiff must have standing in order to obtain a judgment as to the validity of a rule.¹⁸²

The proximate legislative history of section 705 of the APA is a bit more lucid on the issue of universal relief.¹⁸³ Section 705 was intended to authorize reviewing courts to "maintain the status quo" pending judicial review,¹⁸⁴ a power that Representative Walter described as but a statutory codification of what "has generally been regarded as an essential and inherent right of the court."¹⁸⁵ There is no

¹⁸² See *infra* note 303 and accompanying text (discussing Article III standing and universal vacatur). For a discussion of how standing in administrative law has evolved over time, see generally Nelson, *supra* note 99.

¹⁸³ See 5 U.S.C. § 705 (2018) (authorizing the "reviewing court . . . [to] issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings"). On what I mean by "proximate," see *supra* note 171.

¹⁸⁴ S. REP. NO. 79-752, at 27 (1945), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 93, at 185, 213 ("This section permits either agencies or courts, if the proper showing be made, to maintain the status quo."); accord H.R. REP. NO. 79-1980, at 43 (1946), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 93, at 233, 277 (regarding section 10(d), Temporary Relief Pending Full Review: "This section permits either agencies or courts, if the proper showing be made, to maintain the status quo. The section is in effect a statutory extension of rights pending judicial review, although the reviewing court must order the extension; or, to put the situation another way, *statutes authorizing agency action are to be construed to extend rights pending judicial review* and the exclusiveness of the administrative remedy is diminished so far as this section operates. While the section would not permit a court to grant an initial license, it *provides intermediate judicial relief for every other situation in order to make judicial review effective*. The authority granted is equitable and should be used by both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy. Such relief would normally, if not always, be limited to the parties complainant and may be withheld in the absence of a substantial question for review." (emphasis added)); see also *Sampson v. Murray*, 415 U.S. 61, 68 n.15 (1974) ("The relevant legislative history of [section 705] . . . indicates that it was primarily intended to reflect existing law under the *Scripps-Howard* doctrine . . .").

¹⁸⁵ 92 CONG. REC. 5654 (1946) (statement of Rep. Walter), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 93, at 349, 369–70 (regarding Temporary Relief, Section 10(d): "Of importance in the field of judicial review is the authority of courts to grant temporary relief pending final decision of the merits of a judicial-review action. Accordingly, section 10(d) provides that . . . upon conditions and as may be necessary to prevent irreparable injury, reviewing courts may postpone the effective date of contested action or preserve the status quo pending conclusion of judicial-review proceedings. The section is a definite statutory statement and extension of rights pending judicial review. It thus, so far as necessary, amends statutes conferring exclusive authority upon administrative agencies to take or withhold action. Its operation will involve no radical departures from what has generally been regarded as an essential and inherent right of the courts; but, however that may be, this provision confers full authority to courts to protect the review process and purpose otherwise expressed in section 10.").

question that this judicial power to preserve the status quo was understood to encompass the power to suspend a rule on a wholesale basis: as the Senate Judiciary Committee explained, section 10(d) “authorizes courts to *postpone the effective dates of* administrative judgments *or rules* in cases in which, as by subjection to criminal penalties, parties could otherwise have no real opportunity to seek judicial review except at their peril.”¹⁸⁶ Moreover, as the Manual later explained, the procedural tool that courts were to use to wield this power to stay rules was the garden-variety preliminary injunction or restraining order; no bespoke statutory authorization was thought to be necessary.¹⁸⁷ Modern courts reviewing agency action under the APA are therefore on firm footing when they issue universal preliminary injunctions against rules to preserve the status quo pending judicial review.¹⁸⁸

3. *Summary and Implications*

The material surveyed in this Section can be summarized as follows. Well before the APA was enacted, the suit in equity had evolved into a tool for challenging the validity of statutes and agency action (including rules) in advance of their enforcement.¹⁸⁹ By the early 20th century, federal courts had granted broad-scale equitable relief that reached well beyond the plaintiffs—and occasionally universally—

¹⁸⁶ S. COMM. ON THE JUDICIARY, 79TH CONG., ADMINISTRATIVE PROCEDURE ACT (Comm. Print 1945), reprinted in APA LEGISLATIVE HISTORY, *supra* note 93, at 11, 38 (emphasis added) (“There is no reason why such a rule should not be recognized as to administrative agencies, since it is applied in the case of legislation of Congress itself.”).

¹⁸⁷ See ATTORNEY GENERAL’S MANUAL, *supra* note 66, at 107 (“Section 10(d) prescribes no procedure for the exercise of the power which it confers upon reviewing courts to postpone the effective date of agency action. Section 381 of Title 28, U.S. Code, contains general procedural provisions governing the issuance of preliminary injunctions and restraining orders. Since these procedural provisions are in no way inconsistent with section 10(d), they appear to be applicable to the exercise of the power conferred by that subsection.” (footnote omitted)); *id.* at 107 n.20 (citing FED. R. CIV. P. 65); *id.* at 106 (noting that the “stay power conferred upon reviewing courts” turned on the “indispensable condition” of “irreparable injury, the historic condition of equity jurisdiction,” and that the power was “an equitable power,” not “automatic[]” and that the court “may do so under such conditions as the equities of the situation may require”).

¹⁸⁸ See *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 562 (D.C. Cir. 2015) (Kavanaugh, J., dissenting in part) (“Section 705 of the APA authorizes courts to stay agency rules *pending judicial review* without any time limit on the duration of the stay.”); *Portland Cement Ass’n v. EPA*, 665 F.3d 177, 189 (D.C. Cir. 2011) (per curiam). For a helpful analysis of section 705, see Frank Chang, *The Administrative Procedure Act’s Stay Provision: Bypassing Scylla and Charybdis of Preliminary Injunctions*, 85 GEO. WASH. L. REV. 1529 (2017).

¹⁸⁹ See *supra* Section II.A.1.

against both federal and state laws.¹⁹⁰ By the late 1930s, under the auspices of statutory language that would later be echoed in the APA,¹⁹¹ three-judge courts had issued final decrees that universally set aside and permanently enjoined federal rules (though those rules were formally promulgated as orders) in *The Assigned Car Cases*¹⁹² and in *B & O*,¹⁹³ the Court affirmed the latter decree.¹⁹⁴ In 1939, the D.C. Circuit universally enjoined federal agency action nationwide.¹⁹⁵ The *Perkins* Court reversed the D.C. Circuit's decision, but did so because the plaintiffs lacked standing to vindicate a *public* right.¹⁹⁶ Indeed, immediately after *Perkins*, the extended saga of the FCC's chain broadcasting litigation would demonstrate beyond a doubt that when "regulations [that] have the force of law . . . cause[] injury cognizable by a court of equity, they are appropriately the subject of attack,"¹⁹⁷ and that such regulations could be enjoined universally in order "to preserve the status quo" until the legality of the regulations could be resolved on appeal.¹⁹⁸ In the wake of these decisions, Congress enacted the APA.¹⁹⁹ The legislative history of the APA said little about the *scope* of equitable remedies against rules, but it *did* contemplate that rules—like other forms of agency action—may be reviewed for their validity, and that pending a merits decision a rule's effective date may be "postponed" by a reviewing court to preserve the status quo.²⁰⁰ And when Congress enacted the APA, it did not disturb "existing methods" of judicial review of agency action,²⁰¹ but instead incorporated them.

190 See *supra* Section II.A.1.

191 See Urgent Deficiencies Act, Pub. L. No. 63-32, 38 Stat. 208, 219–20 (1913) (establishing "venue of any suit . . . brought to enforce, suspend, or *set aside, in whole or in part*, any order of the [ICC]" (emphasis added)).

192 See, e.g., *Berwind-White Coal-Mining Co. v. United States*, 9 F.2d 429, 448 (E.D. Pa. 1925), *rev'd sub nom.* *The Assigned Car Cases*, 274 U.S. 564 (1927).

193 See *Balt. & Ohio R.R. v. United States*, 5 F. Supp. 929, 936 (N.D. Ohio 1933) (per curiam), *aff'd*, 293 U.S. 454 (1935).

194 See *B & O*, 293 U.S. at 465, *aff'g* 5 F. Supp. 929.

195 *Lukens Steel Co. v. Perkins*, 107 F.2d 627, 629 (D.C. Cir. 1939) (per curiam), *rev'd*, 310 U.S. 113 (1940).

196 See *Perkins*, 310 U.S. at 132.

197 *CBS v. United States*, 316 U.S. 407, 418–19 (1942).

198 See Transcript of Record, *supra* note 142, at 482 (granting temporary restraining order against enforcement of regulations "to preserve the status quo" pending an appeal to the Supreme Court).

199 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

200 See *supra* Section II.A.2; see also *supra* notes 163–69 and accompanying text.

201 See 92 CONG. REC. APP. A2988 (1946) (extension of remarks of Hon. Sam Hobbs), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 93, at 406, 415.

This account has simple and important implications for how we should understand the APA's remedial scheme. At a bare minimum, this account wholly negates any claim that at the time of the APA's enactment the notion of universal vacatur was some heretical fancy or that the first universal injunction against federal agency action lay decades in the future.²⁰² In fact, we should go one step further: this fuller picture of the background law in the run up to the APA should flip the presumption on how we read the APA. The APA was *not* an explicit prospective delegation to the federal courts to elaborate new equitable remedies.²⁰³ But it *was* an incorporation of a system of equitable remedies that could be used—and in fact *had been* used—to secure sweeping relief for nonplaintiffs against official action, to set aside federal regulatory action universally, and to suspend federal regulatory action universally for extended periods of time pending merits review of its validity.

DOJ and some commentators have contended that because the APA does not contain a crystal-clear statement that courts should grant relief universally, the statute should not be read to authorize that relief.²⁰⁴ Both the premise and the conclusion are flawed. One, given the pre-APA caselaw in which courts set aside regulatory action

202 *Contra* Bray, *supra* note 12, at 438 n.121 (“National injunctions were not contemplated when the APA was enacted. No court had previously given a national injunction.”); *id.* at 454 n.220 (claiming that no court had issued a national injunction prior to the APA’s enactment); Samuel Bray & Amanda Frost, *One For All: Are Nationwide Injunctions Legal?*, JUDICATURE, Fall/Winter 2018, at 70, 72–73 (Bray: “Nor should the APA be understood as authorizing, much less requiring, national injunctions. When the APA was enacted, national injunctions were not being given by federal courts.”); Litigation Guidelines, *supra* note 5, at 3 (“Before [1963]—for close to two hundred years of American judicial history—courts issuing injunctions consistently limited relief to the plaintiffs to a case. . . . [I]njunctions with nationwide scope simply were not contemplated; litigants did not request them, and courts did not issue them.”).

203 For an example of an explicit prospective delegation to courts to elaborate the law through doctrinal development, see FED. R. EVID. 501 (“The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege”); see also Mila Sohoni, *The Power to Privilege*, 163 U. PA. L. REV. 487, 549 n.264 (2015) (discussing delegation and evidentiary privilege).

204 See Litigation Guidelines, *supra* note 5, at 7 (arguing that the APA does not authorize universal vacatur because it does not contain “a clear statement . . . that it displaces traditional rules of equity”); United States Public Charge Reply Brief, *supra* note 35, at 13–14 (“At a minimum . . . respondents’ expansive reading of Section 705 [to authorize universal stays] would raise serious constitutional doubts and so should be rejected on that basis too.”); Bagley Statement, *supra* note 15, at 5 n.20 (claiming a lack of “requisite clarity” in the APA); Bray, *supra* note 12, at 438 n.121 (“[W]hatever one’s view of how much the APA codified or changed existing practice, it never speaks with the clarity required to displace the longstanding practice of plaintiff-protective injunctions.”); cf. *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (“No statute expressly grants district courts the power to issue universal injunctions.”).

wholesale,²⁰⁵ and the courts' uniform understanding that the APA continued to allow regulatory action to be set aside wholesale,²⁰⁶ the APA was evidently designed to give, and did indeed give, a clear statement. Two, to posit that Congress had to *explicitly authorize* a particular equitable remedy imposes the wrong background presumption—and by “wrong” I simply mean factually wrong. The statutory default presumption at the time of the APA's enactment was that courts retained the power to review and to offer equitable relief unless Congress *divested* them of that power by explicit statutory language. In just the first half of the 1940s, the Court had made that point plain in a trio of decisions.²⁰⁷ The drafters of the APA had absorbed that message by the time Congress was deliberating on the APA, noting that “[l]egislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under this bill.”²⁰⁸

Then as now, Congress understood that it must speak clearly—in terms “clear, convincing, and unmistakable”²⁰⁹—when Congress wished to preclude judicial review or to strip courts of their capacity to offer equitable relief.²¹⁰ If Congress had wished to *divest* the federal

²⁰⁵ See *supra* Section II.A.1.

²⁰⁶ See cases cited *supra* notes 1–2, 44–47; cases cited *infra* notes 270–72.

²⁰⁷ See *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944) (“[I]f Congress desired to make such an abrupt departure from traditional equity practice . . . it would have made its desire plain.”); *Stark v. Wickard*, 321 U.S. 288, 309–10 (1944) (“[T]he silence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. . . . The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction.”); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11 (1942) (“Here Congress said nothing about the power of the Court of Appeals to issue stay orders . . . [b]ut denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts.”); cf. *Yakus v. United States*, 321 U.S. 414, 442 n.8 (1944) (noting instances in which Congress has regulated the power of the federal courts to grant injunctions).

²⁰⁸ 92 CONG. REC. 5654 (1946) (statement of Rep. Walter), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 93, at 349, 368 (“The mere fact that Congress has not expressly provided for judicial review would be completely immaterial—see *Stark v. Wickard*”); accord H.R. REP. NO. 79-1980, at 41 (1946), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 93, at 233, 275 (“To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.”).

²⁰⁹ 92 CONG. REC. 5654 (1946) (statement of Rep. Walter), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 93, at 349, 368.

²¹⁰ See *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) (“Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.”).

courts of their powers to review, enjoin, and set aside rules, it would have understood that it needed to say so explicitly when it enacted the APA. Instead, because the APA contains no such statement, the correct inference is that the APA made no departure from the pre-existing baseline, under which it was established that federal courts could universally vacate and enjoin federal agency action, including regulations.

B. *The APA's Text and Structure*

There is a straightforward textual case that the APA authorizes universal vacatur of rules, as well as universal injunctions against them.²¹¹

Section 702 of the APA provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”²¹² The next section, section 703, specifies the form and venue for suits seeking judicial review.²¹³ This section specifies that the “form of proceeding for judicial review is [either] the special statutory review proceeding relevant to the subject matter in a court specified by statute,” or else—if a special statutory review proceeding is unavailable or inadequate—“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.”²¹⁴ Section 703 does not speak to the *relief* that may be sought in such an action;²¹⁵ that is the task of section 705 (“Relief Pending Review”)²¹⁶ and section 706 (“Scope of Review”).²¹⁷ Section 705 authorizes the “reviewing court . . . [to] issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.”²¹⁸ And section 706 says that “[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions” that are arbitrary and capricious, illegal, unconstitutional, and so

²¹¹ This textual case was alluded to above. See *supra* notes 57–60 and accompanying text.

²¹² 5 U.S.C. § 702 (2018).

²¹³ *Id.* § 703.

²¹⁴ *Id.*

²¹⁵ See, e.g., *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987) (“While the Hobbs Act specifies the form of proceeding for judicial review of ICC orders, see 5 U.S.C. § 703, it is the [APA] that codifies the nature and attributes of judicial review . . .”). For more discussion of section 703, see *infra* notes 222, 234.

²¹⁶ 5 U.S.C. § 705.

²¹⁷ *Id.* § 706.

²¹⁸ *Id.* § 705.

forth.²¹⁹ Section 706 does not specify that different relief should be available depending on the “form” or “venue” of the proceeding for judicial review through which the agency action was challenged. Instead, the relief it specifies is uniform: if the agency action runs afoul of any of the provisions set out in section 706, the court “shall hold unlawful and set aside [the] agency action”²²⁰—a term that section 551 defines to include “the whole or a part of an agency rule, . . . or the equivalent or denial thereof.”²²¹ Thus, in a generic APA review proceeding, section 705 authorizes a “reviewing court” to “preserve status or rights” or “postpone the effective date” of a rule pending judicial review, and—at the merits stage—section 706 authorizes “a court of competent jurisdiction” to “set aside” a “rule” held “unlawful.”²²²

I set out these elementary points at somewhat embarrassing length for the simple reason that DOJ has advanced quite a different view of how these components of the APA fit together. In DOJ’s view, it is *only* in the context of special statutory review proceedings

²¹⁹ *Id.* § 706(2).

²²⁰ *Id.*

²²¹ *See id.* § 551(13) (defining “agency action” to include a “rule”).

²²² *Id.* §§ 705–706. Professor Harrison has contended that section 706 “does not address remedies,” and that instead section 703 does. *See* Harrison, *supra* note 15 (“The APA addresses remedies[] not in section 706, but in section 703.”). My view—which I cannot claim is original—is the opposite. *See* Levin & Sohoni, *supra* note 15. The plain language of section 706 shows that it speaks to relief. Section 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,” 5 U.S.C. § 706(1)—with its converse remedy: the negative power to “hold unlawful and set aside agency action,” *id.* § 706(2). Consider, too, the structure of the APA’s judicial review provisions. These provisions progress in a logical fashion from section to section. Section 702 addresses who can sue; section 703 addresses where and how to sue; section 704 addresses what sorts of agency action can be challenged; section 705 addresses interim remedies pending judicial review; and section 706 addresses final remedies and scope of judicial review. Section 703, like Federal Rule of Civil Procedure 2, speaks to the “form” of action, not to remedies. *Compare* 5 U.S.C. § 703 (“Form and venue of proceeding”), with FED. R. CIV. P. 2 (“There is one form of action—the civil action.”). Remedies come later, as they logically should. *Compare* 5 U.S.C. § 705 (“Relief pending review”) and 5 U.S.C. § 706 (“Scope of review”), with FED. R. CIV. P. tit. VIII (“Provisional and Final Remedies,” containing FED. R. CIV. P. 64–71). The view that section 706 addresses remedies is (as Professor Harrison acknowledges) “widespread.” *See, e.g.,* 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 8:30 (3d ed. 2010) (“*The forms of proceeding . . . which initiate the litigation do not affect the choice of remedies ultimately compelled by the litigation. Because these forms are couched in remedy sounding language, they might be thought to dictate the remedy but they do not.* Thus, whether the case begins through a ‘petition for review’ or a ‘nonstatutory’ traditional form, a court might nonetheless resort to the full range of remedies” (emphasis added)); 33 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 8381 (2nd ed. 2002) (commencing its discussion of “Remedies” with a section entitled “Vacation and Remand of Agency Action,” which addresses 5 U.S.C. § 706). For more on the meaning of section 706, see *infra* note 234.

that the rule may serve as the reviewable “agency action.”²²³ In *generic* APA review proceedings, it contends, the “final agency action that is the proper object of judicial review must be” the *application* of the regulation to the party—not the regulation itself.²²⁴ Even if the court finds that the regulation being applied is “legally flawed,” DOJ says, the regulation *itself* cannot be set aside under the APA because the *regulation* is not the “final agency action” and is thus not “properly before the court.”²²⁵ The “appropriate relief” in such a case, in DOJ’s

223 See *Litigation Guidelines*, *supra* note 5, at 6 (noting “limited and specific contexts in which a single court has the authority to review agency actions with nationwide applicability,” such as when a statute vests challenges to a rule in a single judicial circuit). DOJ appears to concede that when a special statutory review scheme vests authority to review rules in “a single court,” the *rules* are under review rather than their application. See *id.* at 6–7. Yet it then caveats that concession by noting that “even where the rule itself is the subject of legal challenge, the text of section 706 does not specify whether the rule, if found invalid, should be set aside *on its face* or *as applied to the challenger*. In the absence of a clear statement in the APA that it displaces traditional rules of equity, courts should adopt the latter reading of the ‘set aside’ language.” *Id.* at 7. As pointed out below, the channeling statutes that concentrate review of certain rules in select courts likewise do not contain a “clear statement” that the rule should be “set aside on its face” rather than “as applied to the challenger.” See *infra* note 312 and accompanying text.

224 *Litigation Guidelines*, *supra* note 5, at 7 (“When no special statutory provision ‘permit[s] broad regulations to serve as the “agency action,” and thus to be the object of judicial review directly,’ the final agency action that is the proper object of judicial review must be ‘some concrete action applying the regulation to the claimant’s situation in a fashion that harms or threatens to harm him.’ If the court finds that a regulation on which the agency relied in taking the concrete action that is the proper subject of legal challenge is legally flawed, the appropriate relief is for the court to invalidate the *concrete action*—that is, to ‘hold unlawful’ the reviewable ‘agency action,’ in the APA’s terminology.” (citation omitted) (quoting *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990))). As noted below, this selective quotation from *Lujan* misreads the case. See *infra* notes 236–39 and accompanying text.

225 *Litigation Guidelines*, *supra* note 5, at 7 (“The court should not go beyond the boundaries of the case and invalidate the regulation itself, which was not properly before the court. Section 706 cannot authorize ‘setting aside’ an entire regulation under these circumstances.”). This position was not entirely cut from whole cloth by the present DOJ. In 2008, the Solicitor General advanced a somewhat similar position, but with an important difference: the Solicitor General did not contest that where “regulations govern primary conduct and impose serious penalties for violations,” courts may review the *rules*, not merely the *application* of the rules to individual parties. Brief for the Petitioners at 9–10, *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (No. 07-463), 2008 WL 976399; *id.* at 19–20 (recognizing that regulations can be “agency action”); Reply Brief for the Petitioners at 2–3, *Summers*, 555 U.S. 488 (No. 07-463), 2007 WL 4555588. *But see* Brief for the Petitioners, *supra*, at 43 n.15 (“[A] court that finds a rule to be invalid should ‘set aside’ the regulation only in the sense of putting the rule to one side and removing it from consideration as a lawful basis for sustaining the application of the regulation to the plaintiff.”). The *Summers* Court ultimately held that the plaintiffs lacked standing, so did not address the remedial issue. See *Summers*, 555 U.S. at 500–01; see also Opening Brief for Appellant at 35, *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644 (9th Cir. 2011) (No. 09-56391), 2010 WL 1684725 (“[T]he final agency action that is the proper subject of judicial review . . . is the agency decision at issue—not the regulation itself.”).

view, is for the court to “invalidate the *concrete action*”—that is, the application of the regulation.²²⁶

There are several problems with DOJ’s reading of the APA. First, DOJ makes an unwarranted distinction between the relief available in a special statutory review proceeding and the relief available in a generic APA review proceeding.²²⁷ This distinction incorrectly treats the statutory selection of a venue for a particular class of cases as if it were an implicit constriction of remedial authority in cases that fall outside that class. To elaborate: a special statutory review provision may make a particular venue into a proper or exclusive venue for challenges to a selected class of agency actions. But such a provision does not alter the remedial powers of *other* courts reviewing agency actions that fall *outside* the set of suits picked out by the special statutory review provision, or for which review through the special statutory review provision is unavailable or inadequate.²²⁸ As *Scripps-Howard Radio, Inc. v. FCC*²²⁹ explained regarding the bifurcated provisions for judicial review in the Communications Act of 1934,²³⁰ Congress can provide “two roads to judicial review,” but the routing of appeals to different courts “ha[s] no relation to the scope of the judicial function which the courts were called upon to perform.”²³¹ Similarly, in *Abbott Labs*, the Court rejected the federal government’s contention that “because the statute includes a specific procedure for . . . review of certain enumerated kinds of regulations, not encompassing those of the kind involved here, other types were necessarily meant to be excluded from any pre-enforcement review.”²³² These and

²²⁶ Litigation Guidelines, *supra* note 5, at 7.

²²⁷ *See id.*

²²⁸ *See, e.g.,* *Abbott Labs. v. Gardner*, 387 U.S. 136, 144 (1967) (noting that a purpose of the special review provision of Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–388i (2018), “was to provide broader venue to litigants” challenging specific kinds of agency determinations and that the provision “does not manifest a congressional purpose to eliminate judicial review of other kinds of agency action”); *Shields v. Utah Idaho Cent. R.R. Co.*, 305 U.S. 177, 182–83 (1938) (allowing nonstatutory review of an ICC order through a district court injunctive suit, notwithstanding that a special statutory review provision gave the court of appeals exclusive jurisdiction over ICC orders); *see also* *Leedom v. Kyne*, 358 U.S. 184, 188 (1958); *United States v. Interstate Commerce Comm’n*, 337 U.S. 426, 434 (1949); DAVIS, *supra* note 99, § 23.04, at 309 (“But even when a statutory form of proceeding is made exclusive, an injunctive or declaratory proceeding may be the appropriate means of review when the statutory method is unavailable.”).

²²⁹ 316 U.S. 4 (1942).

²³⁰ Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

²³¹ *Scripps-Howard Radio*, 316 U.S. at 15–16.

²³² *Abbott Labs.*, 387 U.S. at 141 (footnote omitted).

other cases are clear that even the provision of a specific avenue to judicial review within one part of a statute for select agency actions does not give rise to an inference that judicial review is precluded for other agency actions taken under the auspices of that same statute.²³³ A fortiori, the provision of a special statutory review scheme for a given set of agency actions should not suffice to support the inference that other types of agency actions taken under other statutes are either not reviewable or are subject to a lesser form of judicial review. In short, a special statutory review provision channels jurisdiction over a specified class of agency actions to specified courts. But such a provision should not be read to collaterally and implicitly restrict the relief that may be offered by *other* courts adjudicating challenges to agency action with respect to which a special statutory review mechanism is inapplicable, unavailable, or inadequate.²³⁴

²³³ See *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (“[G]iven ‘the APA’s presumption of reviewability for all final agency action,’ ‘[t]he mere fact’ that permitting decisions are ‘reviewable should not suffice to support an implication of exclusion as to other[]’ agency actions” (alterations in original) (first quoting *Sackett v. EPA*, 566 U.S. 120, 129 (2012); and then quoting *Abbott Labs.*, 387 U.S. at 141)); *Sackett*, 566 U.S. at 129 (“[I]f the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA’s presumption of reviewability . . . it would not be much of a presumption at all.”); *Bennett v. Spear*, 520 U.S. 154, 175 (1997) (“No one contends (and it would not be maintainable) that the causes of action against the Secretary [of the Interior] set forth in the [statute] provision are exclusive, supplanting those provided by the APA.”).

²³⁴ Section 706 authorizes courts to “hold unlawful and set aside agency action,” and the same language applies in both generic APA suits that seek to set aside rules and to many special statutory review suits. See 5 U.S.C. § 706(2) (2018). Professor Harrison appears to accept that a reviewing court may make a rule “ineffective” universally, but he argues that the court may do so *only* if the court is proceeding “[u]nder an appellate-type special review statute” (such as, for example, the Hobbs Act) and *not* when the court is reviewing the agency action via a generic APA suit. Harrison, *supra* note 15, at n.33 (“[S]ection 706 tells the court not to decide in accordance with the agency action Under an appellate-type special review statute, not deciding according to the action means making it ineffective.”). Professor Harrison’s argument requires that we give two sharply different meanings to the exact same phrase in section 706 (“hold unlawful and set aside”) depending on which section 703 “form” of proceeding is used. The text of section 706 and section 703 do not, however, distinguish between special statutory review suits and generic APA suits and the relief available in each. See *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.19 (D.C. Cir. 1989) (“Nor is it especially relevant that this case involves a suit for injunctive relief in district court rather than a petition for review to the Court of Appeals. The [APA] strongly suggests that the two avenues of review are analogous.”). More broadly, accepting Professor Harrison’s approach would ignore the appellate review model that supplied the template for the APA. See *supra* notes 61–65 and accompanying text. In that model, the reviewing court—even if it is a district court—acts *as if it were* an “appellate-type” court reviewing the agency’s action. See *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083–84 (D.C. Cir. 2001) (“[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal.” (emphasis added)); *Hameetman v. City of Chicago*, 776 F.2d 636, 640 (7th Cir. 1985) (noting that a generic APA suit filed in a district court “resembles an equity suit but is actually a review proceeding rather than an original proceeding”). Thus, whether a litigant is seeking judi-

Second, DOJ's argument misreads *Lujan v. National Wildlife Federation*²³⁵ while ignoring *Abbott Labs*. In *Lujan*, the Court stated that *regulations*—not just the application of regulations—may be reviewed when the regulations effectively require or forbid primary conduct.²³⁶ Immediately after the language quoted by the Litigation Guidelines,²³⁷ *Lujan* confirmed that—as *Abbott Labs* had unequivocally held²³⁸—a special statutory review proceeding is *not* necessary to obtain judicial review of rules that impose the dilemma of compliance: “whether or not explicit statutory review apart from the APA is provided,” a court may review a “substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately.”²³⁹ In such a case, the reviewable “final agency action” must be *the rule*, not *the application of the rule* to individuals. It could not be otherwise; the whole point of bringing an *Abbott Labs*-type facial, pre-enforcement challenge is to seek judicial review *before* any enforcement action (“application of the rule”) has been attempted.

cial review through the “form” of a special statutory review scheme or through the “form” of a generic APA suit, the reviewing court’s role and function is the same: to determine the validity of the challenged agency action and to offer an appropriate remedy. See KOCH, *supra* note 222, § 8:30 (“The forms of proceeding . . . do not affect the choice of remedies [W]hether the case begins through a ‘petition for review’ or a ‘nonstatutory’ traditional form, a court might nonetheless resort to the full range of remedies”); *id.* § 8:31 (“The nonstatutory forms are derived from common law remedies, e.g., injunction or declaratory judgment. Despite the fact that the proceeding is necessarily begun by asking for one of these remedies, modern courts recognize that they are really requests for review and the remedy should be fashioned accordingly.”); *supra* note 222. What remedy is appropriate in a given case will depend upon the facts and law of the case, not upon the “form” of proceeding.

²³⁵ 497 U.S. 871, 891 (1990).

²³⁶ *Id.*

²³⁷ Litigation Guidelines, *supra* note 5, at 7 (“When no special statutory provision ‘permit[s] broad regulations to serve as the “agency action,” and thus to be the object of judicial review directly,’ the final agency action that is the proper object of judicial review must be ‘some concrete action applying the regulation to the claimant’s situation in a fashion that harms or threatens to harm him.’” (alteration in original) (quoting *Lujan*, 497 U.S. at 891)).

²³⁸ *Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967).

²³⁹ *Lujan*, 497 U.S. at 891 (“Some statutes permit broad regulations to serve as the ‘agency action,’ and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt. Absent such a provision, however, a regulation is not ordinarily considered the type of agency action ‘ripe’ for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant’s situation in a fashion that harms or threatens to harm him. (*The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is ‘ripe’ for review at once, whether or not explicit statutory review apart from the APA is provided.*)” (emphasis added) (citing the *Abbott Labs* trilogy)).

Third, DOJ's understanding of agency action would make nonsensical at least two other staple elements of administrative law. First, agency action has been held to include final agency guidance that binds the agency to act in a particular way.²⁴⁰ If agency action meant only the *application* of a rule to a particular party, then final agency guidance could not be challenged, because it would not be the *application* of a rule but merely the announcement of a policy creating binding obligations on the agency. Yet that is not the law. Second, as Professor Levin has pointed out, agency action held unlawful is generally remanded back to the agency, so that the agency and not the court may exercise primary authority in the task of fixing the problems that rendered the action unlawful.²⁴¹ If agency action meant the *application* of a rule to a particular party, and, on DOJ's theory, a court could only hold unlawful the "concrete action" of applying the rule to a particular party, then what would be left to remand back to the agency? The agency could not fix anything on remand with respect to that particular "agency action." The alternative and conventional reading—that when a *rule* is held unlawful, the *rule* may be remanded—allows agencies to fix the flaws in the rule or in its promulgation on remand.²⁴²

It is thus untenable to treat the phrase "agency action" as referring only to "the application of the regulation" to the party challenging the regulation. In a generic APA review proceeding challenging a rule, the *rule* is the reviewable agency action, not the *application* of the rule. Before the merits are reached, that reviewable agency action—the rule—may be enjoined by the court, universally if necessary, in order to preserve the status quo pending judicial review.²⁴³

²⁴⁰ See, e.g., *NRDC v. EPA*, 643 F.3d 311, 320 (D.C. Cir. 2011) ("[T]he Guidance binds EPA regional directors and thus qualifies as final agency action."); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 385 (D.C. Cir. 2002) ("The Guidance Document is therefore undisputedly a 'rule'"); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) ("[T]he Guidance . . . is final agency action, reflecting a settled agency position which has legal consequences . . . for State agencies administering their permit programs . . ."); *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987) ("For here, we are convinced that FDA has bound itself. . . . [T]his type of cabining of an agency's prosecutorial discretion can in fact rise to the level of a substantive, legislative rule.").

²⁴¹ Levin, *supra* note 15 ("In the context of judicial review of regulations, this means that a rule that is 'set aside' no longer applies to anyone. . . . [I]f this were not so, it is hard to understand how a court could effectively remand a rule to an agency for further consideration. The rule must be either remanded or not remanded—or remanded as to some provisions only").

²⁴² *Id.*

²⁴³ See 5 U.S.C. § 705 (2018).

And if and when the rule is found to be unlawful, the court at a minimum *may*—I bracket whether it *must*—set aside the rule.²⁴⁴

Much, then, turns on the semantic content of the phrase “set aside.” The conventional thinking on that issue has been that invalid rules are set aside *universally*, thereby leaving no rule in place to enforce.²⁴⁵ This conventional thinking follows from the APA’s text: as noted, section 551(13) defines “agency action” to include a “rule,”²⁴⁶ and section 706 says that unlawful “agency action” shall be “set aside.”²⁴⁷ Today, however, this reading of the phrase “set aside” is contested. Pointing to the expectations of the drafters of the APA, Professor Cass has argued that section 706 “was expected to involve requests to have *specific decisions* set aside or to have regulations that would apply to a narrow set of entities or circumstances *declared unlawful and therefore not applied to them*,” and was not anticipated to authorize “broad-based rule invalidation.”²⁴⁸ Professor Bray has similarly stressed that at the time of the enactment of the APA, agencies generally made policy by adjudication, not by rulemaking.²⁴⁹ This fact has led Professor Bray to make the textual argument that the term

244 See *id.* § 706. In arguing that section 706 does not authorize universal remedies, Professor Harrison places considerable stress on the point that invalidity is “found by the courts, not made,” as well as on the point that an injunction is an order that runs against an officer, not against a law or rule. See Harrison, *supra* note 15. Even if we were to adopt Professor Harrison’s perspective and locution, however, it is not apparent what would change. A court may *find* that a rule is invalid as to all potential targets of the rule, not just as to a given plaintiff. (Harrison himself acknowledges that “set aside” in section 706 may be read this way: as he notes, a court may make a rule “ineffective” when review occurs under a special statutory review statute. See *id.* at n.33.) Similarly, an order that runs *against the defendant officer* (not “against a rule”) might enjoin the officer from enforcing a rule against all potential targets of the rule, not just against a given plaintiff. (Although noting the existence of a debate over the propriety of orders that shield nonparties, Professor Harrison does not quite say whether he believes such an order would be improper, nor does he discuss section 705, which is one obvious source of authority for such an order.) I do not doubt that Professor Harrison’s conceptual apparatus may have valuable jurisprudential payoffs for other debates. But for the particular question that is our concern here—are *universal* vacatur and the *universal* preliminary injunction authorized by the APA?—it is unclear what turns on these carefully drawn distinctions.

245 See *supra* notes 44–47 and accompanying text.

246 5 U.S.C. § 551(13).

247 *Id.* § 706(2).

248 Cass, *supra* note 15, at 75. It is not clear to me, however, why the nullification of regulatory action affecting every operator of steam locomotives or every radio station in the country, see *supra* Section II.A.1, should not be thought of as just the kind of “broad-based rule invalidation” that a court today performs when it, for example, vacates a rule that regulates every private health insurer or every potential asylum recipient.

249 Bray & Frost, *supra* note 202, at 73 (Bray: “The language used—‘set aside’—was typical for reversal of judgments, which is consistent with Congress’s expectation that agencies would predominantly make policy through adjudication.”).

“set aside” should not be read to apply to *rules*, but rather only to *orders*. As Bray has argued, “[t]his expectation—that agencies would generally make policy through adjudication—is consistent with the choice of ‘set aside’ in the text of the APA, for in prior judicial usage the phrase was used for reversing judgments.”²⁵⁰

There are several problems with imputing such a narrow scope to the APA’s language based on the expectations of its drafters.²⁵¹ To begin with, the drafters’ expectation that *most* agency action would take the form of adjudication is neither here nor there. It does not shed any light on the pertinent question: what type of relief did the APA’s drafters think that courts would offer when broad-gauged regulatory action *was* under review?²⁵² As noted earlier, agencies *did* issue such regulations in the pre-APA period, though these rules were formally promulgated as “orders.”²⁵³ Reviewing courts set aside and enjoined that type of broad-gauged regulatory action wholesale under the auspices of statutes upon which the APA was modeled.²⁵⁴ The ju-

²⁵⁰ Bray, *supra* note 12, at 438 n.121; *see* Bray, *supra* note 15 (“If agencies were expected to make policy through adjudication, and courts were supposed to review the actions of agencies, it makes complete sense to use a term for reversing judgments (‘set aside’).”); *accord* Bagley Statement, *supra* note 15, at 4 n.20 (“Given the expectation that agencies would conduct most of their business through adjudication, ‘set aside’ was a natural phrase for Congress to use.”).

²⁵¹ I assume *arguendo* that the expectations of the drafters, as opposed to the text alone, should matter. *But see* *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998) (“[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”).

²⁵² The same basic point applies to Professor Cass’s observation that before the APA’s enactment, the type of administrative activity that could be “nullified by reviewing courts . . . tended to be in the nature of ratemaking (or similar acts of utility governance) or administrative enforcement orders . . . [that] essentially involved agencies acting in lieu of . . . [courts in order] to implement constraints on common carriers for hire and on business activities in restraint of trade.” Cass, *supra* note 15, at 74–75. The issue, however, is not what kind of judicial review was common or uncommon, but rather what type of remedies courts gave when agencies *were* imposing broad-gauged regulatory obligations. I am grateful to Professor Fallon for his thoughts on this point.

²⁵³ Consider, for example, a case touched upon above, *NBC v. United States*, 44 F. Supp. 688 (S.D.N.Y. 1942), *rev’d*, 316 U.S. 447 (1942). The three-judge district court was formally reviewing an FCC *order*, yet it sensibly described the suit as an action “to declare invalid and set aside certain *regulations* promulgated by the [FCC].” *Id.* at 690 (emphasis added). The Court echoed that characterization on appeal and in subsequent decisions. *See* *CBS v. United States*, 316 U.S. 407, 425 (1942) (“We conclude that the [FCC’s] promulgation of the regulations is an order reviewable under [the Communications Act]”); *Abbott Labs. v. Gardner*, 387 U.S. 136, 149–50 (1967) (describing *CBS* as a suit in which “this Court held reviewable a regulation of the [FCC] . . .”).

²⁵⁴ *See supra* note 121 and accompanying text (first citing Urgent Deficiencies Act, Pub. L. No. 63-32, 38 Stat. 208 (1913); and then Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.)).

dicial authority to afford such relief—however often exercised—was not questioned.²⁵⁵

In addition, it is incorrect to imagine that the term “set aside” was confined in its usage only to the judicial act of reversing or vacating judgments, as opposed to rules of general applicability.²⁵⁶ Certainly, the term was—and still is—used to refer to that judicial act. But set aside was *also* a term used to denote judicial invalidation of *laws* and *regulations* by the time of the APA’s enactment.

To take one prominent example highly relevant to Congress’s understanding of the term “set aside” when it enacted the APA, consider the 1941 Attorney General’s Report.²⁵⁷ That report described certain statutes in which Congress had conferred rulemaking power upon agencies but had also imposed a requirement of formal rulemaking and had required further that proceedings to review such rules be instituted within a prescribed time by parties aggrieved.²⁵⁸ It then explained that a “*judgment adverse to a regulation results in setting it aside.*”²⁵⁹ In one crisp sentence, the report reflected the notion that adverse judicial review results in *a judgment that sets aside a regulation*; it clearly conceived of *the regulation* as the object of the review, not its application.²⁶⁰ As Professor Levin has explained, this passage reflects that “at the time the APA was written, ‘set aside’ was understood to mean, in a rulemaking context, the same thing as it does today.”²⁶¹

Nor was the usage of “set aside” in the Attorney General’s Report an anomaly. Congress also used “set aside” to apply to federal statutes and federal regulations in the period immediately preceding the APA. In 1937, Congress enacted a law that routed cases seeking injunctions against federal statutes to three-judge courts.²⁶² The statute provided:

No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, *or setting aside, in whole or in part, any Act of Congress* upon the ground that such Act or any part thereof is repugnant to the

²⁵⁵ See *supra* Section II.A.1.

²⁵⁶ See *supra* note 250 and accompanying text.

²⁵⁷ See ATTORNEY GENERAL’S REPORT, *supra* note 164, at 109.

²⁵⁸ *Id.* at 116–17.

²⁵⁹ *Id.* at 117 (emphasis added).

²⁶⁰ *Id.* (“The regulation does not speak for itself, with a limited amount of evidence or argument to aid in judging it; the entire administrative record must be examined.”).

²⁶¹ Levin, *supra* note 15.

²⁶² Act of Aug. 24, 1937, Pub. L. No. 75-352, § 3, 50 Stat. 751 (repealed 1976).

Constitution of the United States shall be issued or granted [except under specified conditions].²⁶³

Another example is the Emergency Price Control Act of 1942 (“EPCA”).²⁶⁴ That statute vested exclusive original jurisdiction in the Emergency Court of Appeals to determine the validity of price control regulations, orders, and schedules. It provided that no other court:

shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or *set aside*, in whole or in part, *any provision of this Act* authorizing the issuance of such regulations or orders, or making effective any such price schedule, *or any provision of any such regulation*, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.²⁶⁵

As these examples show, Congress spoke in terms of a court “set[ting] aside” an “Act of Congress,” the “provision[] of [a federal statute]” and the “provision[] of any . . . regulation.” Congress evidently understood that federal *laws* and *regulations*, not just court judgments or agency orders, could be “set aside.”²⁶⁶

²⁶³ *Id.* (emphasis added).

²⁶⁴ Pub. L. No. 77-421, 56 Stat. 23 (repealed 1947).

²⁶⁵ *Id.* § 204(d) (emphasis added).

²⁶⁶ Professor Harrison contends that the 1937 three-judge court statute “did not assume that a court can set aside a statute the way an appellate court sets aside a lower court’s judgment.” See Harrison, *supra* note 15. He reads the 1937 law as reflecting its drafters’ understanding that “set aside” meant *not* the power to annul or invalidate a law, but instead the power to “treat [it] as non-binding.” *Id.* (“The three-judge court statute did not assume that a court can set aside a statute the way an appellate court sets aside a lower court’s judgment. . . . For the drafters of the 1937 three-judge court statute, ‘set aside’ meant treat as non-binding.”) To establish that claim, Professor Harrison relies on the Senate Report on the 1937 law, S. REP. NO. 75-963 (1937). But the portion of the Senate Report that he cites is actually *not* discussing the “set aside” provision of the 1937 law. It instead pertains to the provisions of the 1937 law that authorized the Attorney General to intervene in suits challenging the constitutionality of federal statutes and to appeal adverse decisions directly to the Supreme Court. See *id.* at 1 (“Interventions and Appeals”). In the context of discussing the (im)propriety of advisory opinions and canvassing the requisites of standing doctrine, the Senate Report cites *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923), as an instance in which the Court “refused to pass on . . . the naked question of the unconstitutionality of an act of Congress.” S. REP. NO. 75-963, at 3 (listing cases such as *Muskrat v. United States*, 219 U.S. 346 (1911), in which “the Court has rejected overtures for opinions on constitutional questions”). This section of the Senate Report concludes that the intervention and appeal provisions of the 1937 law are consistent with Article III; it does not address what it means for a court to “set aside” a law. See *id.* at 3–4.

The portion of the Senate Report concerning the *relevant* provision of the 1937 law—quoted *supra* note 263 and accompanying text—appears on page 4. See S. REP. NO. 75-963, at 4 (“Injunctions”). As that passage reflects, Congress modeled the provision requiring three-judge courts to “set aside” federal statutes on the Urgent Deficiencies Act and on the law requiring three-judge courts for suits seeking to enjoin state laws. See *id.* (“This provision corresponds to

In short, usage of the term “set aside” was not confined to denoting the reversal of judgments or to the vacatur of agency orders. Well before and right up to the threshold of the APA’s enactment, that term was used by Congress, by executive-branch lawyers advising on the APA’s drafting, and by other noteworthy actors²⁶⁷ to mean the act of recognizing the invalidity of rules of general applicability—a category that includes not only federal and state statutes but also federal regulations. It is therefore incorrect to contend that the term “set aside” had some technical meaning limited to the reversal of judicial judgments and narrow-gauged orders, or that the drafters of the APA could not have envisioned that this term might be applied to vacate a rule of general applicability. The term “set aside” means invalidation²⁶⁸—and an invalid rule may not be applied to anyone.²⁶⁹

the provisions of existing law relating to injunctive proceedings where orders of the [ICC] are involved. There is also a similar provision for hearing and determination by a court composed of three judges in cases involving the validity of State statutes.”). As described above, federal courts deciding cases under these earlier statutes had issued, by 1937, multiple decrees that enjoined federal regulatory action and state laws on a wholesale basis. See *supra* Section II.A.1. One can thus draw a through line from the Urgent Deficiencies Act’s usage of the term “set aside,” to the application of that language by courts to set aside agency action wholesale in the 1920s and 1930s, to the 1937 law’s considered repetition of the phrase “set aside,” to the APA’s adoption of the identical phrase in 1946.

²⁶⁷ When President Franklin Delano Roosevelt urged Congress to enact his court-packing plan in 1937, he complained that “[s]tatutes which the Congress enacts are set aside or suspended for long periods of time, even in cases to which the Government is not a party.” President Franklin D. Roosevelt, The Three Hundred and Forty-Second Press Conference (Feb. 5, 1937), in 1937 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 35, 47 (Samuel I. Rosenman ed., 1941). He argued that the federal judiciary “by postponing the effective date of Acts of the Congress . . . [was] coming more and more to constitute a scattered, loosely organized and slowly operating third house of the National Legislature.” *Id.* Though he was obviously not pleased by the fact, President Roosevelt’s statement reflects that federal laws were spoken of as being “set aside” and “postpon[ed]” by court decisions. Lower courts likewise used the term “set aside” to denote the act of finding a law wholly invalid. As the three-judge federal district court wrote in issuing a universal injunction in the decision upheld by *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the legislative enactments of a state “will be *set aside* when found to be unwarranted and arbitrary interference with rights protected by the Constitution.” *Soc’y of the Sisters of the Holy Names of Jesus & Mary v. Pierce*, 296 F. 928, 935 (D. Or. 1924), *aff’d*, 268 U.S. 510 (1925) (emphasis added).

²⁶⁸ See *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (“To ‘vacate[]’ . . . means ‘ . . . to deprive of force; to make of no authority or validity; to set aside.’”).

²⁶⁹ The argument has been made that the nationwide class action is the *only* proper way to get such universal relief against federal agency action. See Sohoni, *supra* note 14, at 976 n.364 (collecting sources). The text of the APA, however, contains no such requirement; nor does Rule 23 of the FRCP. Beyond that, the modern-day Rule 23 injunctive class action was only created in 1966, twenty years after the APA’s enactment. See FED. R. CIV. P. 23. The 1966 amendments to the FRCP left Rule 65—which does *not* limit preliminary or final injunctive relief to plaintiffs—untouched. See FED. R. CIV. P. 65. Courts deciding APA cases issued universal relief against

C. *Subsequent Understandings*

In the decades following the enactment of the APA, many courts would proceed on the understanding that the APA authorizes courts to give the relief of universal vacatur.²⁷⁰ Indeed, some courts have expressed frank bewilderment at the idea that rules could be set aside only as to the plaintiffs.²⁷¹ The Court, as noted, has not squarely held

federal agency action both *before* 1966 and *after* 1966. Indeed, courts have frequently said that class certification is an unnecessary “formality” in suits seeking injunctive relief against federal officers, because a “court can properly assume that an agency of the government would not persist in taking actions which violate . . . rights.” *McDonald v. McLucas*, 371 F. Supp. 831, 834 (S.D.N.Y. 1974), *aff’d*, 419 U.S. 987 (1974); *see also* *Sepulveda v. Block*, No. 84 Civ. 1448 (MJJ), 1985 WL 1095, at *5 (S.D.N.Y. Apr. 26, 1985) (noting the Secretary of Agriculture’s argument that “class certification is not necessary . . . [because] as a government official the relief sought by the named plaintiffs would benefit the proposed class”), *aff’d*, 782 F.2d 363 (2d Cir. 1986). Finally, the extant rules for representative suits at the time of the APA’s enactment allowed plaintiffs to obtain injunctive relief on behalf of similarly situated nonparties *without* imposing onerous procedural hoops for class certification and *without* levying the price tag of potential class-wide preclusion on absent parties if the suit failed. *See* *Sohoni*, *supra* note 14, at 962–64, 976 n.364, 1001 n.530; Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 348 (1988). Against that backdrop, it makes sense that the APA should have similarly authorized courts to issue relief extending beyond the parties without requiring anything by way of procedural hoops or preclusive price tags.

²⁷⁰ *See, e.g.*, *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989); *N.H. Hosp. Ass’n v. Azar*, 887 F.3d 62, 77 (1st Cir. 2018); *Nat’l Black Media Coal. v. FCC*, 791 F.2d 1016, 1020 (2d Cir. 1986); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453–54, 453 n.25 (3d Cir. 2011); *N.C. Growers’ Ass’n v. United Farm Workers*, 702 F.3d 755, 759 (4th Cir. 2012); *Chamber of Commerce of the U.S. v. U.S. Dep’t of Labor*, 885 F.3d 360, 363 (5th Cir. 2018); *Mason Gen. Hosp. v. Sec’y of Dep’t of Health & Human Servs.*, 809 F.2d 1220, 1231 (6th Cir. 1987); *H & H Tire Co. v. U.S. Dep’t of Transp.*, 471 F.2d 350, 355–56 (7th Cir. 1972); *Menorah Med. Ctr. v. Heckler*, 768 F.2d 292, 297 (8th Cir. 1985); *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987); *Zen Magnets, LLC v. Consumer Prod. Safety Comm’n*, 841 F.3d 1141, 1155 (10th Cir. 2016); *Legal Envtl. Assistance Found., Inc. v. EPA*, 118 F.3d 1467, 1469 (11th Cir. 1997); *see also* *United States v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380, 385 (8th Cir. 1992) (reversing criminal convictions when jury verdict may have been reached in reliance on a regulation earlier invalidated by the D.C. Circuit).

²⁷¹ *District of Columbia v. U.S. Dep’t of Agric.*, Civil Action No. 20-119 (BAH), 2020 WL 1236657, at *32 (D.D.C. Mar. 13, 2020) (calling the federal government’s reading of the APA “implausible,” “off-the-wall,” and “brazen in its ignorance of longstanding practice and precedent”); *O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019) (“[T]he Court would be at a loss to understand what it would mean to vacate a regulation, but only as applied to the parties before the Court. . . . [H]ow could this Court vacate the Rule with respect to the organizational plaintiffs in this case without vacating the Rule writ large? What would it mean to ‘vacate’ a rule as to some but not other members of the public? What would appear in the Code of Federal Regulations?”); *N.M. Health Connections v. U.S. Dep’t of Health & Human Servs.*, 340 F. Supp. 3d 1112, 1183 (D.N.M. 2018) (“The Court does not know how a court vacates a rule only as to one state, one district, or one party. The main [DOJ] lawyer advised that he was not sure if the department had ever asked for relief to be limited to one state before doing so in this case and did not know of anyone else in the United States asking for such relief.”), *rev’d and remanded*, 946 F.3d 1138 (10th Cir. 2019).

that the APA authorizes universal vacatur, but several of its decisions have lent support to that understanding.²⁷²

Notably, Congress has not disturbed this remedy. By 1967, *Abbott Labs* had eliminated any doubt that the APA allowed for pre-enforcement facial challenges to regulations, even in the absence of express statutory authorization of such suits.²⁷³ Justice Fortas’s dissent clearly set out the stakes of the Court’s holding: the decision in *Abbott Labs*, he wrote, “authorize[d] threshold or pre-enforcement challenge by action for injunction and declaratory relief to *suspend the operation of the regulations in their entirety and without reference to particular factual situations.*”²⁷⁴ Yet nine years later, when Congress enacted the 1976 amendments to the APA’s judicial review provisions, Congress did not reduce the remedial powers of federal courts adjudicating challenges to agency rules.²⁷⁵ Indeed, Congress has subsequently enacted other statutes—including, for example, the Dodd-Frank Act²⁷⁶ and the Affordable Care Act²⁷⁷—that have left myriad agency rules to the tender mercies of generic review proceedings under the APA.²⁷⁸

²⁷² See *supra* notes 86–88 (listing cases in which the Court has used the term “set aside” to denote the act of invalidating a regulation, has affirmed lower court decisions that have vacated rules universally, and has itself stayed agency action universally); *supra* note 91 (describing *Lujan*); *infra* note 273 (describing *Abbott Labs*).

²⁷³ See *Abbott Labs. v. Gardner*, 387 U.S. 136, 144 (1967) (“[W]e think it quite apparent that the special-review procedures . . . were simply intended to assure adequate judicial review . . . and that their enactment does not manifest a congressional purpose to eliminate judicial review of other kinds of agency action.”); see also *id.* at 154 (“[A] pre-enforcement challenge by nearly all prescription drug manufacturers is calculated to speed enforcement. If the Government prevails, a large part of the industry is bound by the decree; *if the Government loses, it can more quickly revise its regulation.*” (emphasis added)).

²⁷⁴ *Id.* at 175 (Fortas, J., dissenting) (emphasis added). Justice Fortas rested his criticism of the *Abbott Labs* holding on the grounds that the challengers were not asserting objections to constitutionality, statutory authorization, or “arbitrary procedure,” but instead were merely contending that the agency was erroneous. See *id.* at 176–77 (“The difference between the majority and me in these cases is not with respect to the existence of jurisdiction to enjoin, but to the definition of occasions on which such jurisdiction may be invoked.”); *id.* at 177–78 (distinguishing between a claim of “erroneous action” and a claim of “lack of jurisdiction or denial of procedural due process”).

²⁷⁵ See Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (amending 5 U.S.C. §§ 702–703).

²⁷⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 780).

²⁷⁷ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

²⁷⁸ See *First Premier Bank v. CFPB*, 819 F. Supp. 2d 906, 923 (D.S.D. 2011) (“The effective date of the 2011 amendment to § 226.52 of Regulation Z is postponed, and the [CFPB] is enjoined from enforcing it.”); *Truth in Lending (Regulation Z)*, 78 Fed. Reg. 18,795, 18,795 (Mar. 28, 2013) (codified at 12 C.F.R. pt. 1026) (“As a result of the [*First Premier Bank*] court’s order, the portion of the [CFPB’s] 2011 final rule applying § 226.52(a) to pre-account opening fees has

Various other statutes enacted after the APA are also instructive, for they have multiplied the contexts in which broad-scale agency rules may be challenged nationwide. This series of laws includes, among others, the Administrative Orders Review Act (more commonly known as the Hobbs Act),²⁷⁹ the Clean Water Act,²⁸⁰ the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”),²⁸¹ and the Clean Air Act.²⁸² These so-called “channeling” statutes allow a single circuit court to determine the validity of a rule within a specified time after the rule’s promulgation.²⁸³ Crucially, like the APA, these statutes do not *expressly* say that the reviewing court may “set aside” a rule “for everyone,” as opposed to *just* the parties challenging the rule or order.²⁸⁴ And yet these chan-

not become effective.”); Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 16 (2015) (“The most recent major expansion of the administrative state came with the 2010 creation of the Consumer Financial Protection Bureau (CFPB). Except for a few narrow categories of actions which may be challenged directly in the court of appeals, including challenges brought by other federal agencies, Congress left CFPB review in the federal district courts.” (footnotes omitted)).

²⁷⁹ 28 U.S.C. §§ 2341–2351 (2018).

²⁸⁰ 33 U.S.C. §§ 1251–1387 (2018).

²⁸¹ Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 26, 33, and 42 U.S.C.).

²⁸² 42 U.S.C. §§ 7401–7671q (2018).

²⁸³ See Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203, 2216 (2011); Verkuil, *supra* note 106, at 734, 771. Such “now or never” requirements for challenging specified types of rules are thought to be beneficial because they eliminate wasteful, repetitive, litigant-by-litigant determinations of identical legal questions, promote national uniformity, protect reliance interests, and secure values of fair notice. See PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2041, 2059 (2019) (Kavanaugh, J., concurring in the judgment) (“The pre-enforcement review process established by the [Hobbs] Act avoids the delays and uncertainty that otherwise would result from multiple pre-enforcement proceedings being filed and decided over time in multiple district courts and courts of appeals.”).

²⁸⁴ See 28 U.S.C. § 2342 (“The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of [specified agency orders].”); 28 U.S.C. § 2349(a) (“The court of appeals in which the record on review is filed, on the filing, . . . has exclusive jurisdiction to make and enter . . . a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.”); 33 U.S.C. § 1369(b)(1)–(2) (specifying timing and place of review, but not specifying that relief should extend to nonparties); CERCLA, 42 U.S.C. § 9613(a) (2018) (specifying exclusive review in D.C. Circuit within 90 days of any regulation promulgated, but not specifying that relief should extend to nonparties); 42 U.S.C. § 7607(b)(1) (providing complex provisions for review of covered rules, but not specifying that relief should extend to nonparties); *id.* § 7607(d)(9) (authorizing a court to “reverse” an agency action but not specifying that the reversal should affect nonparties); see also Toxic Substances Control Act, 15 U.S.C. § 2618(c) (2018) (setting forth standards for judicial review but not specifying that relief should extend to nonparties); Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(f) (2018) (authoring venue and specifying timing of a petition “challenging the validity” of a “standard” but not specifying that relief should extend to

neling statutes have long been interpreted as authorizing the reviewing court to universally vacate invalid regulations,²⁸⁵ and to stay regulations on a wholesale basis pending judicial review.²⁸⁶ Conversely, had Congress been concerned about the courts' universal vacatur of regulations under the APA, it would have specified in these statutes that "set aside" or similar relief should be limited to the plaintiffs. But none of these statutes does that.

The long-simmering debate over the propriety of remand *without* vacatur also supports reading the APA to allow universal vacatur. "Remand without vacatur" occurs when a court finds a rule defective but then leaves the rule in place until the agency cures the defects with the rule.²⁸⁷ The legitimacy of remand without vacatur has been debated,²⁸⁸ but what matters here are the premises of that debate. The

nonparties). *See generally PDR Network*, 139 S. Ct. at 2059–60 (Kavanaugh, J., concurring in judgment) (collecting examples of statutes that "authorize facial, pre-enforcement judicial review and expressly preclude judicial review in subsequent enforcement actions," as well as statutes that "authorize facial, pre-enforcement judicial review, but are silent on the question whether a party may argue against the agency's legal interpretation in subsequent enforcement proceedings").

²⁸⁵ *See, e.g., Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 1155 (10th Cir. 2016) (vacating safety standard under Consumer Product Safety Act, 15 U.S.C. §§ 2051–2089 (2018)); *Associated Indus. of N.Y. State, Inc. v. U.S. Dep't of Labor*, 487 F.2d 342, 354 (2d Cir. 1973) (vacating requirement for workplace lavatories under Occupational Safety and Health Act).

²⁸⁶ *See, e.g., Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 421 (8th Cir. 1996) (staying FCC rule), *aff'd mem.* 519 U.S. 978 (1996); *Nat'l Nutritional Foods Ass'n v. FDA*, 504 F.2d 761, 785 (2d Cir. 1974) (ordering that regulations be stayed "in their entirety . . . until six months after our judgment becomes final or June 30, 1975, whichever is later"); *Associated Indus. of N.Y. State*, 487 F.2d at 347 (noting that enforcement of standard had been stayed pending appeal and that the stay was continued). For a decision staying a regulation as to a subset of regulated entities because it was invalid *as applied to them*, see *Carlin Commc'ns, Inc. v. FCC*, 787 F.2d 846, 848 (2d Cir. 1986) (staying FCC order as to dial-a-porn service providers on the New York Telephone Company system).

²⁸⁷ Levin, *supra* note 98, at 298–99 (noting the concern that "a relatively minor error in the agency's reasoning, or a procedural error concerning a single issue, can lead to nullification of a rule that underpins a major regulatory program," sometimes "years after" promulgation and when "regulated interests have already made extensive commitments in reliance on it").

²⁸⁸ *See, e.g., Milk Train, Inc. v. Veneman*, 310 F.3d 747, 755–56 (D.C. Cir. 2002) (remanding regulations without vacating them); *id.* at 756 (Sentelle, J., dissenting) ("In my view, [o]nce a reviewing court determines that the agency has not adequately explained its decision, the [APA] requires the court—in the absence of any contrary statute—to vacate the agency's action." (quoting *Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (Randolph, J., concurring))); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) (interpreting "the clear language of § 706 and the weight of authority interpreting the imperative nature of 'shall'" as an "unequivocal[]" statement by Congress that courts "must compel agency action unlawfully withheld or unreasonably delayed"); *see also* Levin, *supra* note 98, at 377 ("[R]emand without vacation may legitimately be applied, consistently with the APA, in a broadly discretionary fashion."); Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 SETON HALL L. REV. 108, 109,

whole reason lower courts developed the practice of remand without vacatur was to ameliorate the (sometimes drastic) consequences caused by *universal* vacatur of a rule.²⁸⁹ If it was thought that defective rules could *only* be vacated *non-universally*—that is, that they could *only* be vacated in a party-specific way—then there would have been little need to counteract those drastic consequences by crafting the “unusual remedy” of remand without vacatur.²⁹⁰ The assumption that universal vacatur is, at a minimum, *authorized* by the APA is a basic proposition shared by *both* sides of the debate over remand without vacatur; the disagreement between the two sides has been entirely over the question whether universal vacatur is *required* by the APA.²⁹¹ Yet it is to that logically antecedent question—is universal vacatur even authorized?—that the debate has now, oddly, regressed.

Finally, that some agencies have engaged in nonacquiescence²⁹² is a red herring here.²⁹³ Nonacquiescence is about *adjudications*, not

151 (2001) (“[R]emanding without vacating arbitrary or insufficiently reasoned agency action is unlawful.”); Rodriguez, *supra* note 24, at 601 (“[R]emand without vacatur should be disfavored precisely because it facilitates the use of more aggressive judicial scrutiny of agencies’ reasoning process.”). The propriety of remand without vacatur remains unsettled by the Court. See HICKMAN & PIERCE, *supra* note 46, § 11.9, at 1235 (explaining that in Council Tree Investors, Inc. v. FCC, 563 U.S. 903 (2011), the Court denied certiorari on the question whether remand without vacatur was permissible under the APA); Bagley, *supra* note 47, at 262 (“The Court . . . has never passed on the validity of the D.C. Circuit’s practice of remand without vacatur, despite opportunities to do so.”).

²⁸⁹ See, e.g., Rodway v. U.S. Dep’t of Agric., 514 F.2d 809, 817 (D.C. Cir. 1975) (employing remand without vacatur of food-stamp allotment regulations because of “the critical importance of the allotment regulations to the functioning of the entire food stamp system, on which over ten million American families are now dependent to supplement their food budgets”); ACUS Report, *supra* note 45, at 76,272; Bagley, *supra* note 47, at 308 (noting that remand without vacatur “has grown organically as a response to the courts’ lived experience of adjudicating cases in which the defects in an agency rule, though real, were not so serious as to warrant the disruption that vacating can entail”).

²⁹⁰ See, e.g., STEPHANIE J. TATHAM, ADMIN. CONFERENCE OF THE U.S., THE UNUSUAL REMEDY OF REMAND WITHOUT VACATUR (2014) (discussing the use of the “unusual remedy” of remand without vacatur).

²⁹¹ See sources cited *supra* note 288.

²⁹² “Nonacquiescence” refers to a federal agency’s refusal to abide by an adverse decision of a federal court of appeals as the agency conducts proceedings in subsequent cases. See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 & n.1 (1989) (“What is at stake in the nonacquiescence context is the effect such adverse decisions have on the agency’s subsequent internal proceedings in other cases.”).

²⁹³ *Contra* Reply Brief for Appellant at 26, City of Chicago v. Barr, 961 F.3d 882 (7th Cir. 2020) (No. 18-2885), 2018 WL 6605982 (“[A]ttributing automatic nationwide effect to a judgment that sets aside an agency action . . . would have the effect of eliminating the possibility of consideration of the validity of agency action by multiple courts by ending the well-recognized right of an administrative agency to decline to acquiesce in a single court’s ruling on a nationwide basis.”); Federal Defendants’ Opposition to Plaintiffs’ Motions for a Nationwide Prelimi-

about *rules*.²⁹⁴ An agency engaging in nonacquiescence is not asserting a prerogative to continue to *enforce a rule* that a court of appeals had held unlawful and set aside against other parties.²⁹⁵ It is asserting a prerogative to *conduct subsequent agency adjudications* under its own policy even after a reviewing court disapproves of its application of that policy in a separate case.²⁹⁶

This difference—between nonacquiescence concerning a string of adjudications and nonacquiescence concerning the setting aside of a rule—is conceptually critical. When a court reviews and sets aside the result of an agency *adjudication*—say, a social security disability claim—that decision certainly may *implicate* an agency’s generally applied policy for conducting adjudications, but all that is formally being set aside by the reviewing court is the final agency action at issue in the case.²⁹⁷ Each such adjudication is its own distinct agency action.

nary Injunction at 18, *Am. Farm Bureau Fed’n v. EPA*, No. 3:15-CV-00165, 2018 WL 6411404 (S.D. Tex. Sept. 12, 2018), 2018 WL 1061799 (referring to “the longstanding doctrine of ‘intercircuit nonacquiescence’” under which “federal agencies may ordinarily decline to follow the case law of a court of appeals that has ruled against its administrative action outside of that circuit”); Bagley-Bray Brief, *supra* note 15, at 16 n.6 (asserting the existence of a longstanding practice by the federal government of “continuing to apply rules that a court of appeals has deemed invalid”).

²⁹⁴ See Estreicher & Revesz, *supra* note 292, at 688 n.35 (“Nonacquiescence typically occurs when the agency makes policy through administrative adjudication.”); *id.* at 747 n.317 (declining to endorse the conclusion that “the nonacquiescence standards that apply in adjudication would necessarily apply in rulemaking as well” because the article “is concerned primarily with adjudicatory decisions”).

²⁹⁵ See, e.g., *id.* at 694 (discussing the Social Security Administration’s nonacquiescence policy); *id.* at 707 (discussing the National Labor Relations Board’s nonacquiescence policy). The agencies surveyed by Professors Estreicher and Revesz did not quarrel with the notion that once a rule was “set aside,” it could not thereafter be applied in subsequent cases. To the contrary, the surveyed agencies told the authors that they would give decisions setting aside generally applicable rules *nationally binding effect*. See *id.* at 716 n.196. The FCC, for example, said that it did not consider “a rule or regulation valid in other circuits when one court of appeals has invalidated a rule or regulation of general applicability.” *Id.* Likewise, the FTC wrote that a judgment setting aside an FTC rule “applies to the operation of the rule in every circuit, not only in the circuit in which vacation of the rule took place.” *Id.*

²⁹⁶ *Id.* at 681 n.1 (“What is at stake in the nonacquiescence context is the effect such adverse decisions have on the agency’s subsequent internal proceedings in other cases.”).

²⁹⁷ See, e.g., *Baeder v. Heckler*, 768 F.2d 547, 553 (3d Cir. 1985) (“We do not believe, however, that *in the context of Baeder’s claim for disability benefits*, the district court had the authority to issue an injunction aimed at controlling the Secretary’s behavior in every disability case in the country.” (emphasis added)). It is possible for a similar dynamic to develop when a court reviews a string of rulemakings; a decision setting aside a given rule may have implications for subsequent rulemakings that implicate the same statutory language as the initial rule. An agency may then “nonacquiesce” in the court’s construction of that statutory language in conducting subsequent rulemakings, while at the same time abiding by the decision that set aside the initial rule. See Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1760–61 (2012) (describing as “nonac-

The matter is entirely different when a rule is set aside. When a *rule* is under review, there is only one distinct agency action for the court to review—the rule. If that *rule* is set aside, an agency that carried on as if the rule still existed would not be “refusing to acquiesce”; it would be disobeying the mandate of the court that set aside the rule.²⁹⁸ That is why agencies do not engage in this form of “nonacquiescence,” and also why reading the APA to allow universal vacatur of rules is not in any tension with the kinds of nonacquiescence in which agencies have engaged.

D. *Structural Considerations*

Is there any constitutional *obstacle* to reading the APA to allow universal vacatur? There is a simple case that the answer is an obvious “no.” Congress has the power to delegate authority, including rulemaking authority, to federal agencies,²⁹⁹ the power to specify how its delegates will wield delegated authority,³⁰⁰ and the power to specify how courts will check those delegates, including by specifying the remedies that will be available in those courts.³⁰¹ Conversely, agencies have only the power to wield delegated power subject to the procedural and judicial checks that Congress has specified. Congress’s greater power to delegate authority to the executive branch and to structure the timing and availability of judicial review³⁰² includes the lesser power to specify how exercises of delegated power by agencies should be checked by courts—including by allowing the remedy of universal vacatur. There is no Article III *standing* problem with so understanding the APA.³⁰³ A case or controversy exists between two adverse par-

quiescence” EPA’s “occasional irreverence toward precedent” in promulgating a *series* of air toxic emissions rules, but not identifying any instance in which EPA had asserted the right to enforce a vacated rule).

²⁹⁸ See Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 691 n.15 (2018) (“Note the distinction between (a) an agency’s noncompliance with a court order that actually binds that agency and (b) an agency’s refusal, in taking action *not* subject to a court order, to acquiesce in the view of the law taken by the courts that *could* issue an order affecting that action *if* a plaintiff were to sue. The former behavior is subject to a contempt finding. The latter behavior—known as ‘nonacquiescence’—has substantial claims to being legitimate and is practiced regularly by several federal agencies . . .”). I am grateful to Professor Parrillo for his comments on this discussion of nonacquiescence.

²⁹⁹ *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

³⁰⁰ See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 51 (1950).

³⁰¹ See *Yakus v. United States*, 321 U.S. 414, 440–42 (1944).

³⁰² See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 513 (1868).

³⁰³ The universal vacatur of an unlawful rule has the same functional effect as a permanent injunction decreeing that the defendant officer shall not enforce an unlawful rule against anyone.

ties, and the judgment sought is in no sense advisory. That the *effect* of the judgment is to set aside a rule universally does not create a *standing* problem.

To this simple argument, DOJ and various observers have made an equally simple rejoinder: that a single district court judge—a judge whose opinions carry no precedential force—should not have the power to invalidate a federal regulation universally, nationwide. As Attorney General Barr has put it, a district court judge should not be able to stop the executive branch “with the stroke of the pen,” for “[n]o official in the United States government can exercise that kind of nationwide power, with the sole exception of the President.”³⁰⁴

This rejoinder has some obvious intuitive appeal, but how much water does it hold? Agencies, after all, exercise nationwide power. And Congress crafted the APA’s remedial scheme to enlist federal courts to *check* those agencies. Nothing in the Constitution remotely *obligates* Congress to limit the judicial power of lower federal courts so that they may only set aside rules on a plaintiff-by-plaintiff basis.³⁰⁵

Universal vacatur therefore resembles an injunction against future violations of the law—“the simplest use of the injunction.” DOUGLAS LAYCOCK & RICHARD L. HASEN, *MODERN AMERICAN REMEDIES* 275 (Rachel E. Barkow et al. eds., 5th ed. 2019). Standing is no bar to a plaintiff obtaining such an injunction, even though it protects nonparties who would otherwise be harmed by the defendant’s illegal acts. Think, too, of non-mutual issue preclusion: Plaintiff 1 does not have *standing* to obtain relief for Plaintiff 2, but the judgment obtained by Plaintiff 1 may nonetheless preclude Defendant in Plaintiff 2’s suit against Defendant. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331–33 (1979). Although *United States v. Mendoza*, 464 U.S. 154 (1984), rejected non-mutual issue preclusion against the federal government, it did so on policy grounds, and obviously not on Article III standing grounds; a holding on Article III standing grounds would have knocked out non-mutual issue preclusion across the board, not just in suits against the federal government. *Id.* at 555. Note, finally, that a lower district court may invalidate an agency action on a nationwide basis by awarding relief to a nationwide class. *See Califano v. Yamasaki*, 442 U.S. 682, 682 (1979). The standing analysis as to a certified class is identical to the standing analysis for a non-representative plaintiff. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996) (“That a suit may be a class action . . . adds nothing to the question of standing . . .” (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976))). Thus, *standing* is not what makes the difference between broader and narrower relief. If nationwide relief may constitutionally be given to a single plaintiff suing for a nationwide class—as essentially everyone accepts—then it follows that standing poses no constitutional obstacle to either nationwide injunctive relief or universal vacatur. I am grateful to Chris Egleson for his thoughts on the last point.

³⁰⁴ Barr, *supra* note 20.

³⁰⁵ DOJ has suggested that universal vacatur, like the universal injunction, does not comport with traditional equity practice and thus exceeds the Article III power. *See supra* text accompanying notes 94–96. As I have elsewhere argued, universal injunctions are consistent with the traditions of equity and do not exceed the Article III power. *See Sohoni, supra* note 14. In any event, Congress can adjust the equitable powers of federal courts by statute. *See Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 329 (1999) (noting that this Court “leaves any substantial expansion of past [equity] practice to Congress”). Here, Congress has spoken: the APA empowers courts to “set aside” rules and to “issue all necessary and appro-

If Congress were inclined tomorrow to lay venue for all facial, pre-enforcement challenges to all federal rules in a federal district court “sitting on an island in the Pacific”³⁰⁶ (or, more realistically, in the District of Columbia), and then to make that district court’s adverse decisions conclusive nationwide on the executive branch and reviewable only by the Supreme Court, it could do just that. In the event, of course, Congress has not opted for such a regime. Instead, it has enacted provisions that allow federal rules to be attacked in district or circuit courts scattered across the country.³⁰⁷ Congress can do that as well.³⁰⁸ Congress’s choice to expand the possible venues for generic APA suits—which it accomplished in 1962 by making a brief amendment to 28 U.S.C. § 1391, in order to make life easier for plaintiffs³⁰⁹—says nothing about the kinds of interim or final relief that courts in the allowed venues may afford; the latter are matters addressed by 5 U.S.C. § 705 and § 706, which Congress has left unchanged since 1946. Even as a simple matter of statutory construction, venue provisions and remedies provisions cannot be equated.³¹⁰ Much less can the two be forced into lockstep as a matter of constitutional law.

In the absence of any solid constitutional obstacle, the (perhaps inevitable) argumentative reflex will be to fall back to the notion that at least some constitutional *doubt* must exist that would counsel construing the APA’s language to avoid authorizing universal vacatur ab-

appropriate process to postpone the[ir] effective date . . . or to preserve status or rights” pending judicial review. 5 U.S.C. §§ 705–706 (2018).

³⁰⁶ Charlie Savage, *Jeff Sessions Dismisses Hawaii as ‘an Island in the Pacific,’* N.Y. TIMES (Apr. 20, 2017), <https://www.nytimes.com/2017/04/20/us/politics/jeff-sessions-judge-hawaii-pacific-island.html> [<https://perma.cc/ZU2N-4VXK>] (quoting Interview by CNN KFILE with Jeff Sessions, U.S. Att’y Gen.: “I really am amazed that a judge sitting on an island in the Pacific can issue an order that stops the president of the United States from what appears to be clearly his statutory and constitutional power”).

³⁰⁷ See, e.g., 5 U.S.C. § 703; 28 U.S.C. § 1391(e)(1) (2018); *id.* §§ 2341–2351.

³⁰⁸ Cf. Sunstein, *supra* note 93, at 1678 (“[I]f Congress wants agencies to interpret ambiguous statutes, it can grant them that authority If Congress wants to deny agencies interpretive authority and require an independent judicial role, it can do that as well.” (footnote omitted)).

³⁰⁹ Mandamus and Venue Act of 1962, Pub. L. No. 87-748, 76 Stat. 744 (codified as amended at 28 U.S.C. § 1391(e)); see Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and “Nonstatutory” Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 310 (1967).

³¹⁰ See, e.g., *Abbott Labs. v. Gardner*, 387 U.S. 136, 144 (1967) (noting that a purpose of the special review provision of FDCA “was to provide broader venue to litigants challenging” specific kinds of agency determinations and that the provision “does not manifest a congressional purpose to eliminate judicial review of other kinds of agency action”); see *supra* text accompanying notes 227–34.

sent a clear statutory statement.³¹¹ Indeed, that is essentially the position that DOJ takes.³¹² But that argument will not work either. Consider again the channeling statutes that provide for facial, pre-enforcement challenges to rules in select courts. As noted, these statutes have long been interpreted to allow for universal vacatur.³¹³ If a statute (on DOJ's logic) must contain a "clear statement" in order to authorize universal vacatur, then these channeling statutes pose a problem, for they *lack* that clear statement, just as the APA lacks it.³¹⁴ If there were a constitutional doubt that would forbid a federal court from setting aside a rule "for everyone" absent a clear statement, then that doubt would equally beleaguer these channeling statutes. Yet decades of courts and observers have failed to detect any such constitutional dubiety with (or need for a clear statement in) these channeling schemes. The reason is because no such constitutional doubt (or clear statement requirement) exists.³¹⁵

Finally, there are issues of policy to be considered—issues that are not strictly speaking "constitutional" or "structural" in character, but that relate to important systemic values that (we may assume) Congress would rationally wish to protect. This suite of concerns—securing percolation, preventing forum shopping, keeping district

³¹¹ See, e.g., *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). See generally Mila Sohoni, *The Problem with "Coercion Aversion": Novel Questions and the Avoidance Canon*, 32 YALE J. ON REG. ONLINE, no.2, 2015, at 1 (explaining "classical" and "modern" variants of the constitutional avoidance doctrine).

³¹² See *Litigation Guidelines*, *supra* note 5, at 7 ("[E]ven where the rule itself is the subject of legal challenge, the text of section 706 does not specify whether the rule, if found invalid, should be set aside *on its face* or *as applied to the challenger*. In the absence of a clear statement in the APA that it displaces traditional rules of equity, courts should adopt the latter reading of the 'set aside' language."); United States Public Charge Reply Brief, *supra* note 35, at 13–14 ("At a minimum . . . respondents' expansive reading of Section 705 [to authorize universal stays of rules] would raise serious constitutional doubts and so should be rejected on that basis too.").

³¹³ See cases cited *supra* note 285.

³¹⁴ See sources cited *supra* note 284.

³¹⁵ If there is any constitutional problem with such channeling statutes, it flows not from the scenario in which a court vacates the rule universally, but from the opposite scenario: what happens if the reviewing court *upholds* the rule, or if no challenge to the rule is brought in the period specified by the channeling statute? In these latter two scenarios, the potential constitutional problem comes from the fact that some channeling statutes purport to limit later courts from assessing procedural or substantive objections to the regulation. See, e.g., *Clean Water Act*, 33 U.S.C. § 1369(b)(2) (2018); *Clean Air Act*, 42 U.S.C. § 7607(b)(2) (2018). A subsequent enforcement suit may then be brought against those who were not parties to, and may have had no reason to even know about, let alone participate in, a speedy and immediate challenge to a rule—a scenario that raises due process concerns. In the post-APA era, the Court has studiously evaded deciding whether such total preclusions of review may be enforced as to later-in-time litigants. See, e.g., *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007); *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978).

court judgments from extending “beyond the court’s jurisdiction” so as to negate the practical effect of contrary decisions reached by other federal courts of equal dignity—has been well-canvassed in the debate over the nationwide injunction, and their relevance for this parallel debate over the APA’s meaning will be obvious. A regime of plaintiff-by-plaintiff vacatur in challenges to rules would help to secure percolation and may prevent some forum shopping.³¹⁶ It would also help to ensure litigation symmetry between the federal government and private litigants—if rules can only be enjoined or set aside as to the parties, then a single loss for the government would not “wipe out” its earlier victories in other districts or circuits.³¹⁷

But once we cross into this domain of “constitutionally adjacent” structural and systemic values, we must also include in the accounting the countervailing values *protected* by universal vacatur—values that Congress may also rationally want to shield. These values include, among other things, avoiding wasteful, repetitive litigation,³¹⁸ securing uniformity in federal law, avoiding the distributive inequity of a regime in which only litigants with the wherewithal to sue can secure relief against unlawful federal agency action, preventing the entrenchment of potentially unlawful rules by their piecemeal implementation, and placing brakes upon illegal regulatory action that causes abrupt, avulsive legal change and that may produce irreversible consequences for those subject to it. Ensuring percolation, reducing forum shopping, and raising the odds that the executive branch will be able to continue to enforce rules until the Supreme Court decides on whether they are valid: these are surely good things.³¹⁹ But they are not the *only* good things. They are desiderata to be balanced against other desiderata.

³¹⁶ Cf. Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J.F. 242, 248–49 (2017) (explaining why and how forum shopping would persist notwithstanding elimination of the nationwide injunction).

³¹⁷ Unless, that is, that loss were in a nationwide class action. See, e.g., *Sullivan v. Zebley*, 493 U.S. 521, 541 (1990) (affirming a Third Circuit decision granting relief to a nationwide class action in a case involving regulations earlier deemed valid or held enforceable by *four* other circuits).

³¹⁸ Speaking of the Hobbs Act, Justice Kavanaugh noted that it would be “wholly impractical—and a huge waste of resources—to expect and require every potentially affected party to bring pre-enforcement . . . challenges against every agency order that might possibly affect them in the future.” *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2061 (2019) (Kavanaugh, J., concurring in the judgment). DOJ’s reading of the APA would likewise encourage the bringing of many more repetitive suits by plaintiffs seeking to obtain identical relief.

³¹⁹ *But see* William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11 (2017) (“If we were talking about laboratory cultures or seedlings, the concept of issues ‘percolating’ in the courts of appeals for many years before they are really ready to be

Precisely where to strike that balance may reasonably be debated. But it would be a long leap to say that one particular constellation of these values is so compelling that it should be treated as a dispositive consideration for how a court construes the meaning of the APA today.

In sum, reading the APA to allow universal vacatur does not threaten to cross, let alone run afoul of, any constitutional tripwire, and the policy considerations are Congress's to weigh. Because of the sheer breadth of Congressional latitude on issues of administrative procedure and judicial review, the key legal issue really is merely and only the matter of statutory interpretation addressed above: does the APA authorize courts to set aside rules universally? If the treatment of the statute above is persuasive, then that analysis should be the end of the matter; the constitutionality of such a statute is simple.

* * *

Courts have long proceeded on the understanding that the APA at the very least *allows* universal vacatur in certain challenges to agency rules.³²⁰ DOJ now claims that the APA does not permit this form of relief.³²¹ The foregoing discussion has gamely engaged with the various strands of that argument. This Part has argued that a relatively clear answer exists to the question whether the APA authorizes universal vacatur: it does.³²² That is a choice that presumably should “command judicial respect.”³²³ In this case, however, one cannot

decided by the Supreme Court might make some sense. But it makes very little sense in the legal world in which we live.”).

³²⁰ See sources cited *supra* notes 1–2; 44–47; 270–72.

³²¹ See, e.g., Litigation Guidelines, *supra* note 5.

³²² To say that courts possess this authority under the APA is not to say either (a) that the APA as written is perfect, *see infra* note 347; or (b) that courts should be handing out universal preliminary injunctions of rules “unthinkingly.” *See Frost, supra* note 15, at 1115. That form of relief is root-and-branch equitable, *see supra* notes 185–87, and therefore discretionary and flexible. *See Levin, supra* note 98. Courts should be circumspect in offering such injunctions. *See AARP v. EEOC*, 292 F. Supp. 3d 238, 242 (D.D.C. 2017) (noting that post-judgment briefing on vacatur determinations is useful because parties rarely brief remedies before judgment); *Frost, supra* note 15, at 1115–18 (laying out procedural tools a court should use to elicit “relevant information about the costs and benefits of the proposed scope of an injunction before issuing it,” and identifying factors for courts to consider in deciding on scope of relief). Once a rule is determined to be invalid on the merits, the APA makes universal vacatur the default remedy, *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998), though remand without vacatur remains an option. *See Levin, supra* note 98; ACUS Report, *supra* note 45.

³²³ DAVIS, *supra* note 99, § 23.09, at 335 (“[A]fter a long period of pulling and hauling, a compromise about scope of review was reached in the [APA]. . . . One might suppose that such an important compromise when embodied in an Act of Congress would command judicial respect.”).

safely rest on the assumption that exclusively “internal” considerations of law and legal meaning will be the only inputs deemed relevant to the matter. The next Part turns to frame a broader array of factors that may bear on the Court’s ultimate resolution of this issue.

III. OLD STATUTES, NEW PROBLEMS, AND THE APA

The federal courts are dual-purpose institutions: they perform both a dispute-resolution function and a law-declaration function.³²⁴ Besides playing these two roles, the Supreme Court wears a third hat as well: it bears responsibility for preserving the institutional legitimacy of Article III courts.³²⁵ In a number of decisions and doctrines dating back to the earliest days of the country, the Court has steered the Article III judiciary clear of various “political thicket[s],”³²⁶ or has beaten sound retreats from areas it used to police. Just last year, a five-to-four decision in *Rucho v. Common Cause*³²⁷ laid down yet another line that federal judges may not cross:³²⁸ claims of partisan gerrymandering are nonjusticiable, the Court held, because they would require “judges to take the extraordinary step of reallocating power and influence between political parties.”³²⁹ As that recent example among many others shows, the Court has long been concerned not only with deciding the individual cases before it correctly, but also forbearing decision in certain domains in order to preserve the Article III judiciary’s overall institutional authority to decide future cases effectively.

Today, the panoply of cases seeking nationwide injunctions presents a new “political thicket” into which the federal courts are being asked to venture. Federal courts issued nationwide universal injunctions during the Bush II and Obama Administrations (and well before then, too),³³⁰ but with the advent of the Trump Administration,

³²⁴ See Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668 (2012).

³²⁵ See Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 499–505 (2018) (explaining that the robust judicial independence and authoritative stature enjoyed by today’s Article III judiciary is “politically constructed and . . . historically contingent”).

³²⁶ *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion).

³²⁷ 139 S. Ct. 2484 (2019).

³²⁸ *Id.* at 2494.

³²⁹ *Id.* at 2502.

³³⁰ See Bray, *supra* note 12, at 437–44 (citing examples dating back to 1963); Frost, *supra* note 14, at 1076–80; Daniel J. Walker, Note, *Administrative Injunctions: Assessing the Propriety of Non-Class Collective Relief*, 90 CORNELL L. REV. 1119, 1122–23 (2005).

the raw number of these injunctions rose sharply.³³¹ The swift increase has spurred powerful observers to complain about “activist” federal judges, judicial bias,³³² and “abuses of judicial power.”³³³ Speeches and opinion columns by two Trump Attorneys General have poured kerosene on the notion that nationwide injunctions are “a danger to our constitutional order.”³³⁴ The head of the DOJ Office of Legal Policy has said that “the rash” of such orders “strikes at the heart of our democratic system” by allowing “unelected district court judges to issue wholesale vetoes on the domestic policy and national security decisions of our elected officials.”³³⁵

This wave of suits—many of which have invoked the APA—is the product, among other things, of changes in the broader legal landscape that have unfolded well after the APA was enacted, including some shifts as recent as 2007. When the APA became the law, “cause

³³¹ Williams, *supra* note 7 (citing the “whopping 20 nationwide injunctions” issued in Trump’s first year in office). As one court noted, it is a separate question “whether any such increase [in universal injunctions over the decades] signals an expanding judicial over-reach or an increasing executive autocracy.” *City of Chicago v. Barr*, 961 F.3d 882, 912–13 (7th Cir. 2020).

³³² Empirical work is beginning to emerge to probe the basis for the bias claim. See Glicksman & Hammond, *supra* note 15, at 1714–15 (“[W]e informally mapped judges’ appointing presidents’ parties to the outcomes of sixty decisions Of the forty district court opinions in which the agencies lost, twenty-eight were written by Democrat-appointed judges, and ten by Republican-appointed judges. For eleven successful challenges in circuit courts, seven panels were majority-Democrat, four were majority-Republican, and one was evenly split. Of the unsuccessful challenges in circuit courts, one was majority-Democrat and one was majority-Republican. This accounting has not been tested by statistical methods and reflects a small number of observations. But we think it notable that it is not solely Democratic appointees who are rejecting Trump administration actions.” (footnotes omitted)).

³³³ Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, Attorney General Sessions Releases Memorandum on Litigation Guidelines for Nationwide Injunctions Cases (Sept. 13, 2018) [hereinafter Sessions Press Release], <https://www.justice.gov/opa/pr/attorney-general-sessions-releases-memorandum-litigation-guidelines-nationwide-injunctions> [https://perma.cc/48A9-7NFA] (“The Constitution does not grant to a single district judge the power to veto executive branch actions with respect to parties not before the court. . . . These abuses of judicial power are contrary to law”); see Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 8:12 AM), <https://twitter.com/realdonaldtrump/status/827867311054974976> [https://perma.cc/T48L-35L4] (“The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!”); Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 22, 2018, 7:21 AM) <https://twitter.com/realdonaldtrump/status/1065581119242940416> [https://perma.cc/PFC8-B6ZR] (“Justice Roberts can say what he wants, but the 9th Circuit is a complete & total disaster. It is out of control, has a horrible reputation, . . . & is used to get an almost guaranteed result.”); Pence, *supra* note 22 (“These injunctions undermine the rule of law and the separation of powers that are central to our nation’s founding, that lie at the very heart of our Constitution. . . . This era of judicial activism must come to an end.”).

³³⁴ Sessions Press Release, *supra* note 333; see Barr, *supra* note 20.

³³⁵ Williams, *supra* note 7.

lawyering” was a far less common phenomenon than it is today.³³⁶ Modern-day congressional polarization and gridlock had not emerged.³³⁷ The era of “presidential administration” lay well beyond the horizon.³³⁸ Perhaps most importantly, until just over a decade ago, state standing was more constrained and state attorneys general were not so politically active and litigious.³³⁹ But, as Professor Grove has explained, the Court’s 2007 decision in *Massachusetts v. Environmental Protection Agency*³⁴⁰ “perhaps unwittingly [] launched a new era of ‘State v. United States’ litigation.”³⁴¹ The subsequent “explosion”³⁴² in suits by states against the executive branch has been a major contributor to the recent surge of sweeping injunctions against the federal government.³⁴³

All of these broader legal and political changes have contributed to the recent uptick in suits seeking sweeping injunctive relief against federal officers. In the subset of those suits implicating the APA, *the original language of the APA is being applied according to its terms*—but it is being applied in a legal landscape, and in a political environment, that is entirely different than the one that existed at the time of the statute’s drafting. The external “world” in which agency action is litigated has transformed, a transformation as remarkable as the strik-

³³⁶ See Davis, *supra* note 25, at 1255 (“Cause lawyering outside the state is now a familiar phenomenon, whether it involves public interest firms or private firms representing clients with ideological goals.”).

³³⁷ See Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2251 (2019) (reviewing RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018)) (“Party polarization has increased dramatically since the 1990s, with the Republican Party growing more conservative and the Democrats moving closer to their progressive base.”).

³³⁸ See Bulman-Pozen, *supra* note 29.

³³⁹ See Grove, *supra* note 28 (manuscript at 2) (describing the “new trend” of litigation by states against the federal government); *id.* (manuscript at 19–20) (explaining why “[m]any state attorneys [general] seem to have found lawsuits against the federal executive to be a winning strategy with voters”).

³⁴⁰ 549 U.S. 497, 505–06 (2007).

³⁴¹ Grove, *supra* note 28 (manuscript at 7–8) (footnote omitted); Tim Arango et al., *Trump Inspires California Lawmakers to Go on Offense*, N.Y. TIMES (Sept. 14, 2019), <https://www.nytimes.com/2019/09/14/us/california-trump-newsom.html> [<https://perma.cc/3X3G-FN6F>] (“Xavier Becerra, California’s attorney general, has filed 59 lawsuits against the Trump Administration, on issues ranging from immigration to health care to environment policy.”).

³⁴² Grove, *supra* note 28 (manuscript at 2).

³⁴³ Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955, 1968–69 (2019) (describing the sharp increase in suits by states against the federal government and noting that “[m]any of these suits sought a national injunction”); Grove, *supra* note 28 (manuscript at 2) (“Although state suits against the federal government began to increase in the 1990s, the explosion has occurred in the past five years” (footnote omitted)).

ing changes that have unfolded in the internal “world” of agency practice.³⁴⁴

One serious consequence of this disjoint has been a rising challenge to the institutional legitimacy of the federal courts. Forces that favor broad, unfettered executive power have derided the federal courts’ recent grants of universal relief as improper judicial activism—a wrongheaded critique that dismisses as irrelevant, and frequently fails even to notice, that in many of those cases relief has been sought and granted under the APA. Yet such is the momentum of that critique that DOJ is now leveraging it as a justification for courts to revise the long-settled understanding of that law’s meaning.

To put matters in a nutshell, in order to secure their own institutional legitimacy, Article III courts are now being asked to impose a self-protective self-restraint by re-interpreting the APA to eliminate the judicial power to vacate and enjoin rules universally. Although such a re-interpretation can find no support in statutory text, precedent, decades of practice and commentary, or constitutional command, it would have one salient point in its favor: such a re-interpretation would at least reduce the incentive to bring sweeping challenges to federal rules, and might thus help to stem the number of the decrees that are drawing the worst fire to federal-court decision-making.

A general account of whether (if ever) courts may properly consider how to protect their *own* legitimacy in deciding cases is beyond the scope of this Article.³⁴⁵ Nor do I propose to answer how courts with their own institutional skin in the game should weigh those legitimacy concerns against the countervailing demands placed by textualism and statutory originalism.³⁴⁶ Instead, with respect to the particular question of universal vacatur, I offer one simple point about institutional competence and another slightly more complex observation about politics.

First, as to institutional competence: the remedial regime of administrative law as it is currently operating is surely imperfect and could be improved,³⁴⁷ but the Court is ill-situated to correct that re-

³⁴⁴ See Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1173 (2014) (“[T]he realities of modern agency practices do not fit well with the theoretical framework established by the APA and judicial decisions.”).

³⁴⁵ For an illuminating assessment of how considerations of legal, moral, and sociological legitimacy interact to shape judicial decision-making, see RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018).

³⁴⁶ See *supra* note 93 (describing the Court’s mixed approach to “APA originalism”).

³⁴⁷ Any number of reforms might be considered. The problem of forum shopping, for ex-

gime singlehandedly. The Court might cudgel the APA's remedial scheme into the shape preferred by DOJ—but, in doing so, the Court would be toying with the source code of administrative law with unpredictable and potentially disruptive consequences. Because the language of the APA is borrowed and cross-referenced across the U.S. Code,³⁴⁸ and because it acts as a gap-filler when other statutes are not explicit about the relief they authorize, a holding that altered the meaning of the remedial provisions of the APA would have ripple effects across public law. In contrast, however bad Congress may be at the job of procedural and remedial reform, Congress can do something that the Court cannot: address and harmonize many different provisions of law at once. A conservative list of the sources of law implicated here would include not just the APA, but also various provisions of Title 28,³⁴⁹ the Federal Rules of Civil Procedure, and many—probably dozens of—other statutes addressing particular substantive domains of law.³⁵⁰ The kind of broad-gauged rationalization of procedural and remedial provisions that needs to be accomplished here is the work of the legislative draftsman; it is not something that can be done with a rifle-shot holding on the APA. There have been successful efforts to make those sorts of across-the-board revisions in the past; it is not impossible that such a task could be undertaken

ample, may be addressed by requiring the convening of a three-judge court for suits seeking universal relief, *see* Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), <https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem/> [<https://perma.cc/5TKN-GPPD>]; by requiring all cases seeking to vacate rules to be brought in a chosen forum, for example the United States District Court for the District of Columbia; by the transfer and consolidation of all challenges to a single rule for adjudication before a single, randomly chosen district court, *see* Adam White, *Congress Should Fix the Nationwide Injunction Problem with a Lottery*, YALE J. REG.: NOTICE & COMMENT (Feb. 11, 2020), <https://www.yalejreg.com/nc/congress-should-fix-the-nationwide-injunction-problem-with-a-lottery/> [<https://perma.cc/TGP3-YDPU>]; or by expanding the coverage of the Hobbs Act to govern more agencies' rulemaking. The latter three reforms, though they would diminish percolation, would also mean the executive branch would not have to risk "running the table" in multiple courts.

³⁴⁸ For example, over three dozen provisions of the U.S. Code specify that judicial review shall proceed in accordance with "section 706 of title 5." *See, e.g.*, 49 U.S.C. § 60119(a)(3) (2018).

³⁴⁹ *See, e.g.*, 28 U.S.C. § 1391(e) (2018); *id.* § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."); *id.* §§ 2341–2351.

³⁵⁰ *See* 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3941 (3d ed. 2012) (noting that "a startling array of specific statutory provisions establish court of appeals jurisdiction to review actions of agencies that range from the major independent regulatory agencies to a large number of executive officials" and declining to attempt to enumerate this "welter" of provisions).

again, perhaps in consultation with the Advisory Committee on Civil Rules and the Administrative Conference of the United States.³⁵¹

Second, as to the politics, it is not obvious that a holding by the Court that the APA authorizes only party-specific vacatur and injunctive relief would do very much to dispel the cloud of criticism from political actors looming over the federal courts today. Even in a world *without* universal vacatur or universal injunctions under the APA, doctrines of state standing and associational standing would remain, as would the fact that individual litigants sometimes seek indivisible relief against high-profile executive branch action (e.g., injunctions against border walls or injunctions against the alteration of census questionnaires). Even in such a world, lower federal courts would be drawn into high-stakes, politically charged cases in which the remedies offered would impose serious restraints upon the executive branch. And even in such a world, the decrees in those cases would consequently draw fire from political actors.

Alternatively, and more optimistically, an unambiguous declaration from the Court that section 706 of the APA *does* authorize universal vacatur (and that section 705 *does* authorize the universal preliminary injunction) would have the benefit of making it clear to the executive branch, Congress, and other interested observers that the remedy that lower federal courts have been offering is, in fact, *not* lawless, as has so often (and so groundlessly) been lately asserted. Such a holding would likewise establish that the ball is in the political branches' court to amend existing law, if they wish to take those powers away. In other words, and perhaps surprisingly, for the Court to *approve* the legality of these universal remedies may do quite as much to check the tide of political criticism of the federal judiciary as *rejecting* it would.

CONCLUSION

The debate over the legality and the legitimacy of the universal injunction is unfolding on multiple fronts and in multiple venues. One of the most potentially disruptive collateral consequences of that debate is how it has suddenly embroiled administrative law. A remedy long offered by the federal courts now sits in the crosshairs. The proposition that a court has the power to enjoin and to vacate a rule universally has been denied; it has even been made out to be some kind

³⁵¹ ACUS recently convened a forum to discuss possible reforms in this area. See *Forum: Nationwide Injunctions and Federal Regulatory Programs*, ADMIN. CONF. U.S., <https://www.acus.gov/nationwide-injunctions-forum> [<https://perma.cc/CRE9-8247>].

of legal or jurisprudential impossibility. But that portrayal ignores both what Congress may do, and what it in fact has done. Reforms to the APA's remedial scheme and the procedural rules governing challenges to agency action may well be desirable, and a close study of that subject should be one of the top items on the agenda of reformers. Yet it must not be forgotten that the entity with both the responsibility and the capacity to undertake that task of procedural and remedial reform is Congress, not the Supreme Court. Until those reforms occur, the courts should continue to read the APA in accordance with its plain terms and the decades of caselaw applying it: if a rule is unlawful, the APA gives the reviewing court the power to vacate that rule universally.