TO VACATE OR NOT TO VACATE: SOME (STILL) UNANSWERED QUESTIONS IN THE APA VACATUR DEBATE

HON. KATHRYN KIMBALL MIZELLE*

INTRODUCTION

Section 706(2) of the Administrative Procedure Act provides that federal courts reviewing agency action "shall" "hold unlawful and *set aside* agency action . . . found to be . . . not in accordance with law."[1] For decades, federal courts have understood this provision to authorize vacatur of unlawful agency rules or regulation.[2] In my own Court, the meaning of "set aside" became relevant in *Health Freedom Defense Fund v. Biden* (you might also know it as the "mask mandate" case).[3] There, the plaintiff brought a challenge to a CDC rule requiring the wearing of masks on all public transportation and asked that the rule be "declared unlawful and set aside."[4] Of course, the appropriate remedy for an APA violation was not a question of first impression before me. As a district judge, my discretion in fashioning relief was constrained by Eleventh Circuit precedent, which describes "vacatur . . . [a]s the ordinary APA remedy."[5] That conclusion is widespread among the circuit courts of appeals, and most pointedly in the D.C. Circuit.[6] But notwithstanding the age of the APA and relevant circuit precedent, the Supreme Court has never

---

* District Judge, United States District Court for the Middle District of Florida. This speech was originally delivered at Harvard Law School on April 19, 2023, roughly two months before the Supreme Court decided *United States v. Texas*, Slip Op. 22-58 (June 23, 2023).

[1] 5 U.S.C. § 706(2)(A) (emphasis added).

[2] *See* Cream Wipt Food Prods. Co. v. Fed. Sec. Adm'r, 187 F.2d 789, 790 (3d Cir. 1951) ("Section 10(e) of the Administrative Procedure Act affirmatively provides for vacation of agency action which is unsupported by 'substantial evidence' and adds that 'in making the foregoing determinations the court shall review the whole record . . . .'"); Wirtz v. Baldor Elec. Co., 337 F.2d 518, 534–35 (D.C. Cir. 1963) (holding, under section 10(e)(B) of the APA, that "if one or more of the plaintiffs-appellees is or are found to have standing to sue, the District Court should enjoin the effectiveness of the Secretary's determination with respect to the entire industry").

[3] *See* Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1176 (M.D. Fla. 2022) (Mizelle, J.).

[4] *Id.* Amended Complaint at 29, Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144 (M.D. Fla. 2022) (No. 8:21-cv-1693), (Doc. 39); Plaintiff's Motion for Summary Judgment, Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144 (M.D. Fla. 2022) (No. 8:21-cv-1693) (Doc. 48 at 21).

[5] Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs, 781 F.3d 1271, 1290 (11th Cir. 2015) (omission in original).

[6] Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("We have made clear that 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." (quoting Harmon v. Thornburgh, 878 F.2d 484, 495 n. 21 (D.C. Cir. 1989) (alterations and quotation marks omitted)); Data Mktg. P'ship, LP v. U.S. Dep't of Lab., 45 F.4th 846, 859 (5th Cir. 2022) ("The default rule is that vacatur is the appropriate remedy."); Sierra Club v. U.S. Env't Prot. Agency, 60 F.4th 1008, 1021 (6th Cir. 2023) ("Reviewing courts certainly have the power to vacate an agency action they find unlawful."); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 511 (9th Cir. 2018) (holding that vacatur is the usual remedy against unlawful regulations), *rev'd on other grounds* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

directly ruled on the legality of vacatur under § 706(2) and the issue has become one of spirited debate.

For example, in *United States v. Texas*, which squarely raised a question about the meaning of "set aside" in § 706, the Justices displayed their divergent views at oral argument in November 2022.[7] The Chief Justice, for example, characterized the United States's position that the APA does not authorize vacatur as "fairly radical and inconsistent with" decades of D.C. Circuit precedent.[8] He even joked that the D.C. Circuit affirms decisions awarding vacatur "five times before breakfast."[9] Justice Kavanaugh referred to the Solicitor General's argument as "extreme" and "astonishing" and to the idea that the APA does not authorize vacatur as a "radical rewrite . . . of . . . standard administrative law practice," thoughtfully applied by decades of respected judges.[10] Conversely, Justice Gorsuch quipped that "some of us didn't have the benefit of sitting on . . . the D.C. Circuit [and] five times before breakfast entering these orders. . . . I stare at the language and . . . I hear [the United States'] argument."[11] And Justice Kagan noted that not all Justices belong to the "D.C. Circuit cartel" supporting vacatur.[12]

Although Professor Mila Sohoni and Professor John Harrison have each authored articles focused on the meaning of "set aside" in § 706,[13] until recently most scholars have made only cursory references to vacatur as part of articles focused on nationwide injunctions.[14] Indeed, before the Supreme Court granted certiorari in *United States v. Texas*, the meaning of "set aside" in § 706(2) was treated as a footnote to the larger controversy surrounding nationwide injunctions. The core question in that debate is whether the "judicial Power" to decide "Cases" and "Controversies" limits the ability of courts to purport to bind or award relief to non-parties when not necessary to provide full relief to plaintiffs.[15] Justice Thomas has opined that these so-called "universal injunctions are legally and historically dubious" as a matter of the traditional equitable powers of courts, at least as inherited at the time of the Founding.[16] He has also noted that granting such relief creates practical problems: "preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch."[17] Justice Gorsuch has publicly joined in

[7] *See* Texas v. United States, 606 F. Supp. 3d 437 (S.D. Tex. June 10, 2022), *cert. granted before judgment*, 143 S. Ct. 51 (2022).
[8] Transcript of Oral Argument at 35, United States v. Texas, No. 22-58 (U.S. Nov. 29, 2022).
[9] *Id*.
[10] *Id.* at 54–56.
[11] *Id.* at 47.
[12] *Id.* at 66.
[13] Mila Sohoni, The Power to Vacate a Rule, 88 GEO. WASH. L. REV. 1121, 1122 (2020); John Harrison, Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies, 37 YALE J. ON REG. BULL. 37 (2020) [hereinafter "Harrison, Section 706 Does Not Call for Universal Remedies"].
[14] *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 438 n.121 (2017); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1100 (2018); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2123 n.167 (2017); Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 35 (2019); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 72–77 (2019); Milan D. Smith, Jr., *Only Where Justified: Toward Limits and Explanatory Requirements for Nationwide Injunctions*, 95 NOTRE DAME L. REV. 2013, 2029–31 (2020).
[15] U.S. CONST. art. III, § 2, cl. 1.
[16] Trump v. Hawaii, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring).
[17] *Id.* at 2425.

those concerns.[18] The war over nationwide injunctions—although neither side has yet secured a surrender from the other—has garnered much academic and litigation attention, and the views espoused by Justices Thomas and Gorsuch appear to be gaining traction.

It is against this backdrop (and the sometimes unstated assumption that nationwide injunctions are unconstitutional) that I offer a few thoughts about the APA vacatur debate that warrant exploration and that, thus far, have largely been neglected. And because I doubt that the Supreme Court will reach the meaning of "set aside" in *United States v. Texas*, there remains time for academic development and parties to present robust arguments addressing these issues.[19] First, has the Supreme Court or the other branches already liquidated the meaning of "set aside" in § 706(2) to mean vacatur? Relatedly, did Congress create or recognize a new "form" of an APA action, and if so, what remedy attaches to that action? Finally, if the APA authorizes vacatur, is vacatur constitutional under Article III?

The first part of this speech provides a background of the debate about the meaning of "set aside" in § 706 as it operates against agency action that would be considered a rule or regulation. Next, I explore why vacatur is relatively common today and why we are debating the legality of vacatur now, even though it has been common practice for decades. Finally, I pose and unpack the above questions.

I. BACKGROUND

A. The Administrative Procedure Act

The Administrative Procedure Act was enacted in 1946.[20] Five years later, the Third Circuit held that § 706—which includes the "set aside" language—"affirmatively provides" for vacatur.[21] And in 1963, the D.C. Circuit in *Wirtz v. Baldor Electric Co.* held that, upon remand and consistent with § 706(2), "the District Court should set aside" the Secretary of Labor's minimum-wage determination.[22] *Wirtz* clarified that vacatur operated "with respect to the entire [electrical motors and generators] industry," not only the plaintiff before the court.[23]

Much later, in *National Mining Association v. U.S. Army Corps of Engineers*, D.C. Circuit Judge Stephen Williams—in an opinion joined by Judge Silberman and Judge Sentelle—affirmed the nationwide vacatur of a regulation promulgated by the U.S. Army Corps of Engineers.[24] In coming to this conclusion, the court cited the "set aside" language in the APA's scope of review

[18] *See* Dep't of Homeland Sec. v. New York, 140 S.Ct. 599, 600 (2020) (Gorsuch, J., concurring).

[19] As the Texas Solicitor General conceded to Justice Alito and Justice Sotomayor at oral argument, the Court does not need to address the meaning of "set aside" under § 706(2). *See* Transcript of Oral Argument at 120, United States v. Texas, No. 22-58 (U.S. Nov. 29, 2022).

[20] *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

[21] Cream Wipt Food Prods. Co. v. Fed. Sec. Adm'r, 187 F.2d 789, 790 (3d Cir. 1951).

[22] Wirtz v. Baldor Electric Co., 337 F.2d 518, 522 (D.C. Cir. 1963).

[23] *Id.* at 534–35.

[24] *See* 145 F.3d 1399, 1409–10 (D.C. Cir. 1998).

provision.[25] Some circuits have gone even further. For instance, the Ninth Circuit held that nationwide vacatur is actually "compelled by the text" of § 706(2).[26]

More recently, however, respected jurists have begun to question the legality of vacatur. For instance, Chief Judge Sutton of the Sixth Circuit argues that § 706(2) does not authorize vacatur, explaining that "[u]se of the 'setting aside' language does not seem to tell us one way or another whether to nullify illegal administrative action or not to enforce it in the case with the named litigants."[27] And as referenced earlier, Justice Gorsuch seems poised to agree that "set aside" says nothing about a remedy and everything about a "rule of decision."[28]

B. Arguments Against Vacatur

Professor John Harrison is the leading scholar arguing that vacatur was not contemplated by the APA as originally enacted. Harrison argues that § 706(2) does not authorize universal relief because § 706 is not a remedial provision at all.[29] He theorizes that the term "set aside" merely directs courts to disregard invalid agency action when resolving cases.[30]

Harrison observes that the term "set aside" can bear distinct meanings in federal law. It could refer to an appellate court reversing and vacating the judgment of a lower court.[31] Or it could refer to a court deeming that a regulation is invalid and thus should be disregarded as a rule governing the dispute before the court.[32] Under this latter sense of "set aside," a court merely recognizes that the unlawful regulation does not bind the parties in the case.[33] Applying this theory to the APA, Harrison contends that § 706(2) authorizes courts to only disregard, or "set aside," an agency regulation as to the case at hand.[34] Harrison notes that § 706 governs the "scope of review," which in his view undercuts any argument that it concerns available remedies to the plaintiff.[35] Instead, Harrison turns to § 703's list of "forms" of the proceeding to illuminate the types of remedies that are available in an APA suit.[36] This theory about the meaning of "set aside" has been referred to as a "rule of decision" interpretation of the provision, and is the position recently pressed by the Solicitor General in *United States v. Texas*.[37]

In March 2023, the *Yale Journal on Regulation* published another article by Professor Harrison about vacatur.[38] In this subsequent article, Harrison argues that vacatur of regulations was neither contemplated by the Congress that enacted the APA nor by scholars and courts

[25] *Id.* at 1410 (citing 5 U.S.C. § 706(2)(C)).
[26] Earth Island Inst. v. Ruthenbeck, 490 F.3d 687, 699 (9th Cir. 2007), *aff'd in part, rev'd in part sub nom.* Summers v. Earth Island Inst., 555 U.S. 488 (2009).
[27] Arizona v. Biden, 31 F.4th 469, 484 (6th Cir. 2022) (Sutton, J., concurring).
[28] Transcript of Oral Argument at 48, United States v. Texas, No. 22-58 (U.S. Nov. 29, 2022).
[29] Harrison, *Section 706 Does Not Call for Universal Remedies*, *supra* note 13, at 42.
[30] *Id.*
[31] *Id.* at 40, 42–45.
[32] *Id.* at 43.
[33] *Id.*
[34] *Id.* at 45.
[35] *Id.* at 42, 45.
[36] *Id.*
[37] Brief of Petitioner at 40–44, United States v. Texas, No. 22-58 (U.S. Sept. 12, 2022).
[38] John Harrison, Vacatur of Rules Under the Administrative Procedure Act, 40 YALE J. ON REG. BULL. 119 (2023) [hereinafter "Harrison, Vacatur of Rules under the APA"].

during the 1940s, 50s, and 60s.[39] Harrison discusses legislative history,[40] Professor Kenneth Culp Davis's 1958 Administrative Law Treatise,[41] Professor Louis Jaffe's 1965 Book on Judicial Review of Agencies,[42] and the Supreme Court's decision in *Abbott Laboratories v. Gardner*.[43] He notes that these sources state that the APA contemplates several remedies for unlawful regulations, including injunctions and declaratory judgments, but notably, none discuss the possibility of vacatur.[44]

Similarly, Chief Judge Sutton argues that Congress probably did not authorize vacatur through the "unremarkable" "set aside" language in § 706(2).[45] On Judge Sutton's read of the history, before the APA courts had a "bedrock practice" of making only "case-by-case judgments" and awarding remedies limited to the parties.[46] Because courts "presume that statutes conform to longstanding remedial principles,"[47] and because "it is far from clear that Congress intended to make such a sweeping change" by enacting § 706, Judge Sutton rejects vacatur.[48]

Vacatur is also in tension with the Supreme Court's 1940 decision in *Perkins v. Lukens Steel Co*.[49] Although *Perkins* reversed a nationwide injunction due to a standing problem, the Court said that its decision was meant to resolve "whether a Federal court, upon complaint of individual iron and steel manufacturers, may restrain the Secretary and officials . . . from carrying out an administrative wage determination by the Secretary, not merely as applied to parties before the Court, but as to all other manufacturers in [an] entire nation-wide industry."[50]

The Supreme Court chastised the lower court by characterizing its remedy as extending "beyond any controversy that might have existed between the complaining companies and the Government officials."[51] The Court faulted the overbroad injunction, concluding that "[a]ll 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."[52] When the Supreme Court dismissed the suit, it noted that the plaintiffs could not "vindicate any general interest which the public may have,"[53] and emphasized that its decision

---

[39] *See id.* at 123–31.

[40] *Id.* at 123–26.

[41] *Id.* at 127–28 (citing KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE (1958)).

[42] *Id.* at 128–29 (citing LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (abr. student ed. 1965)).

[43] *See id.* (citing Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136, 149 (1967)).

[44] *See id.* Harrison does not address discussions about vacatur in other early sources. *See, e.g.*, Cream Wipt Food Prods. Co. v. Fed. Sec. Adm'r, 187 F.2d 789, 790 (3d Cir. 1951) ("Section 10(e) of the Administrative Procedure Act affirmatively provides for vacation of agency action which is unsupported by 'substantial evidence' and adds that 'in making the foregoing determinations the court shall review the whole record . . . .'"). Nor does Harrison's piece address analogous remedies that seem consistent with vacatur, such as the judicial power to delay the effective date of a rule under 5 U.S.C. § 705.

[45] Arizona v. Biden, 31 F.4th 469, 484 (6th Cir. 2022) (Sutton, J., concurring) (citing 5 U.S.C. § 706(2)).

[46] *Id.*

[47] *Id.* (citing Nken v. Holder, 556 U.S. 418, 433 (2009); Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982)).

[48] *Id.*

[49] *See* 310 U.S. 113 (1940).

[50] *Id.* at 117.

[51] *Id.* at 123.

[52] *Id.*

[53] *Id.* at 125.

was not grounded in "mere formality," but upon "reasons deeply rooted in the constitutional divisions of authority in our system of Government."[54]

Finally, opponents of vacatur note that even if the Supreme Court holds that vacatur is unlawful, many of the D.C. Circuit's decisions will still have a universal effect due to special statutory review provisions or default venue provisions. Sometimes, litigants are required to challenge agency regulations in the D.C. Circuit by congressional design.[55] In other cases, plaintiffs at least have the option of challenging a regulation in the D.C. Circuit because venue almost always lies there.[56] Because of these realities, the D.C. Circuit's decisions may still have a nationwide effect given their precedential value, even if vacatur qua vacatur under § 706(2) is unlawful. Professor Jonathan Adler recently highlighted this phenomenon.[57] Thus, if "the D.C. Circuit upholds a challenge to an agency action and vacates or 'sets aside' the agency action, as a practical matter it has been set aside or vacated for the nation as a whole."[58] In this sense, whether the regulation or rule is disregarded as not binding to the plaintiff or the rule is itself nullified, the implication for the agency and for non-parties is the same.

C. Arguments For Vacatur

On the other side of the debate, scholars—such as Professor Mila Sohoni and Professor Ronald Levin—argue that § 706(2) authorizes vacatur in the light of the text, structure, and history of the APA, and in the light of caselaw preceding the APA's enactment.[59] Additionally, in *United States v. Texas*, Texas and Florida (as an amicus curiae) advance arguments grounded in text, precedent, and the canons of construction.[60]

These advocates would say that the best evidence of the meaning of § 706(2) is the text of the APA itself. The APA defines "agency action" to include "the whole or a part of an agency rule."[61] Thus, when § 706 says, "The reviewing court shall . . . hold unlawful and set aside *agency action*,"[62] § 706 is also saying, "[t]he reviewing court shall . . . hold unlawful and set aside ['the whole or part of an agency rule'] . . . found to be . . . not in accordance with law."[63] In other words, § 706(2) instructs courts to "set aside" the regulation itself.

---

[54] *Id.* at 132.

[55] *See* Jonathan Adler, *Notice and Comment: On Universal Vacatur, the Supreme Court, and the D.C. Circuit*, YALE J. ON REG. (Mar. 1, 2023), https://www.yalejreg.com/nc/on-universal-vacatur-the-supreme-court-and-the-d-c-circuit-by-jonathan-h-adler/ (citing 42 U.S.C. § 7607).

[56] *Id.*

[57] *Id.* ("[O]nce the D.C. Circuit has held that an agency action is unlawful, every other would-be challenger may rely upon the precedent in a challenge of their own, and those challenges will also occur in the D.C. Circuit.")

[58] *Id.*

[59] Sohoni, *supra* note 13, at 1139, 1151–54, 1171; Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997 (2023). At the time that the speech was delivered, Professor Levin's article was forthcoming. References and citations throughout have since been updated to reflect the article's publication.

[60] *See* Brief of Respondents at 40–42, United States v. Texas, No. 22-58 (U.S. Oct. 18, 2022); Brief of Florida as Amicus Curiae at 15–20, United States v. Texas, No. 22-58 (U.S. Oct. 25, 2022).

[61] 5 U.S.C. § 551(13); *see also* CALEB NELSON, STATUTORY INTERPRETATION 555 (2011) [hereinafter "NELSON, STATUTORY INTERPRETATION"] ("There is little controversy about definitional sections in statutes. Courts and scholars alike agree that legislatures have broad power to prescribe, by statute, how particular terms in the same statute should be understood.").

[62] 5 U.S.C. § 706(2)(A).

[63] 5 U.S.C. §§ 551(13), 706(2) (emphasis added).

That reasoning alone, of course, is circular. It begs the question what "set aside" means, as one can disregard the "whole or part of an agency rule" in the way that Professor Harrison suggests. In response, Texas points to Black's Law Dictionary from the 1930s, which defined "set aside" as "to cancel, annul, or revoke."[64]

Texas argues that this reading also comports with the presumption against superfluity,[65] which attempts to give effect to "every word and every provision" of a statute.[66] Texas argues that, under Harrison's and the United States' position, "set aside" becomes synonymous with "hold unlawful" and therefore redundant.[67] According to Texas, the addition of "set aside" makes sense only as an authorization for a distinct remedy, namely, vacatur.[68]

Texas also notes that other sections of the APA grant courts the power to alter the status of the agency rule itself.[69] Section 705 authorizes courts 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."[70] Because "agency action" includes "the whole or a part of an agency rule,"[71] under § 705, when a case is pending, the reviewing court "may issue all necessary and appropriate process to postpone the effective date of" "the whole or a part of an agency rule."[72] The phrase "postpone the effective date of" refers to a preliminary remedy that courts may issue against the rule itself. This is different, of course, from a preliminary injunction against an executive officer from enforcing a statute, which does not alter the effective date of a statute or do anything to the statute. Instead, a preliminary injunction prohibits executive officers from enforcing the statute only against the parties before the Court.[73]

Professor Harrison objects that § 706 cannot speak to remedies because it speaks to the "Scope of Review" and is not a remedial provision.[74] Professor Sohoni responds that the provision refers to remedies in both subsection (1) and subsection (2).[75] Read together, § 706(1) and § 706(2) authorize "[t]he reviewing court" to "(1) compel agency action unlawfully withheld or unreasonably delayed; *and* (2) hold unlawful and set aside agency action . . ."[76] The power to "compel" an action is an equitable remedy long recognized at common law.[77] And although "the

---

[64] Brief of Respondents at 40, United States v. Texas, No. 22-58 (U.S. Oct. 18, 2022) (quoting BLACK'S LAW DICTIONARY 1612 (3d ed. 1933)).

[65] Brief of Respondents at 41, United States v. Texas, No. 22-58 (U.S. Oct. 18, 2022).

[66] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012); *see also* Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 669 (2007) (holding that courts should not read statutes in a manner that makes part of the statute "makes part of it redundant").

[67] Brief of Respondents at 41, United States v. Texas, No. 22-58 (U.S. Oct. 18, 2022).

[68] *Id*.

[69] *Id.* at 40.

[70] 5 U.S.C. § 705.

[71] 5 U.S.C. § 551(13).

[72] 5 U.S.C. § 705.

[73] *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 986–87 (2018).

[74] Harrison, *Section 706 Does Not Call for Universal Remedies*, *supra* note 13, at 37 ("The APA addresses remedies, not in section 706, but in section 703.").

[75] Sohoni, *supra* note 13, at 1163 n.222.

[76] 5 U.S.C. § 706(1)–(2) (emphasis added).

[77] *See, e.g.*, Hepburn & Dundas' Heirs v. Dunlop & Co., 14 U.S. 179, 199–201 (1816); Morgan's Heirs v. Morgan, 15 U.S. 290, 294 (1817); Mississippi & M.R. Co. v. Cromwell, 91 U.S. 643, 645–46 (1875); Kennedy v. Hazelton, 128 U.S. 667, 671 (1888).

title of a statute or section can aid in resolving an ambiguity in the legislation's text,"[78] the title of a provision cannot undermine the unambiguous directive of a statute.[79] The fact that § 706(1) unambiguously grants remedial power, Sohoni argues, suggests § 706(2) also grants remedial power.[80]

Sohoni buttresses her reading by referencing the 1941 Report of the Attorney General's Committee on Administrative Procedure.[81] The Attorney General's Committee was formed in 1939 to study the possibility of a federal statute that would standardize administrative law procedure.[82] Professor Paul Verkuil refers to the members of the Committee as the "founding fathers" of the APA,[83] as it included then-Solicitor General and later-Supreme Court Justice Robert Jackson, other judges, scholars, and DOJ officials.[84] Although the attack on Pearl Harbor and World War II delayed the enactment of administrative reform, the 1941 Report became the centerpiece of the Senate committee hearings when Congress was considering the Administrative Procedure Act in 1946.[85]

Sohoni argues that the 1941 Report suggests that "set aside" referenced vacatur, even in the 1940s.[86] She highlights instances where the Committee opined that sometimes "judicial review of administrative regulations" can involve review of "the validity of a regulation as a whole."[87] The Committee also said that, "[a] judgment adverse to a regulation results in setting it aside."[88] However, the Report never explicitly references vacatur of regulations.[89] And in an article in the Notre Dame Law Review, Professor Aditya Bamzai provides an alternative way to read these passages.[90] Bamzai concludes that the 1941 Report was probably referencing facial challenges to regulations—which is when a court holds that "a regulation [is] invalid in all of its applications"—even though the court ultimately "sets aside" the regulation as to the plaintiffs alone, and not universally.[91]

---

[78] I.N.S. v. Nat'l Ctr. for Immigrants' Rts., Inc., 502 U.S. 183, 189 (1991).

[79] *See* SCALIA & GARNER, *supra* note 66 ("[A] title or heading should never be allowed to override the plain words of a text.").

[80] *Cf.* Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961) ("[A] word is known by the company it keeps."); Third Nat. Bank in Nashville v. Impac Ltd., 432 U.S. 312, 322–23 (1977); Beecham v. United States, 511 U.S. 368, 371 (1994); Dolan v. U.S. Postal Serv., 546 U.S. 481, 486–87 (2006).

[81] Sohoni, *supra* note 13, at 1153–54, 1171–72.

[82] *See* Letter from Homer Cummings, Att'y Gen. of the U.S., to Franklin D. Roosevelt, President of the U.S. (Dec. 14, 1938) *reprinted in* FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 251–52 (1941) [hereinafter "The 1941 Report"]; Letter from Franklin D. Roosevelt, President of the U.S., to Homer Cummings, Att'y Gen. of the U.S. (Feb. 16, 1939) *reprinted in* The 1941 Report at 252; Order No. 3125, Office of the Att'y Gen. (Feb. 23, 1939) *reprinted in* The 1941 Report at 252–53.

[83] Paul R. Verkuil, The Administrative Procedure Act at 75: Observations and Reflections, 28 GEO. MASON L. REV. 533, 533–34 (2021).

[84] Jeremy Rabkin, *The Origins of the APA: Misremembered and Forgotten Views*, 28 GEO. MASON L. REV. 547, 550–51 & n.9 (2021).

[85] *See* Verkuil, *supra* note 83, at 534.

[86] Sohoni, *supra* note 13, at 1171.

[87] *Id.* at 1153–54 (quoting The 1941 Report, *supra* note 79, at 115–16).

[88] The 1941 Report, *supra* note 82, at 117.

[89] *See* The 1941 Report, *supra* note 82, *passim*.

[90] *See* Aditya Bamzai, *The Path of Administrative Law Remedies*, 98 NOTRE DAME L. REV. 2037, 2057–58 (2023). At the time that the speech was delivered, Professor Bamzai's article was forthcoming. References and citations throughout have since been updated to reflect the article's publication.

[91] *Id.* at 2058.

Finally, Sohoni cites several pre-APA cases[92]—most notably the Supreme Court's 1942 decision in *CBS v. United States*.[93] Prior to the APA, several statutes authorized courts to "set aside" various agency actions, and these statutes date back at least until 1906.[94] Two of these statutes—the Urgent Deficiencies Act of 1913 and the Communications Act of 1934—were at issue in *CBS*. The Urgent Deficiencies Act authorized federal courts to "set aside" orders of the Interstate Commerce Commission.[95] And the Communications Act of 1934 said, "[t]he provisions of the [Urgent Deficiencies Act], relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the [Federal Communications] Commission under this Act . . . ."[96]

The plaintiffs—NBC and CBS—sued to "set aside" a regulation promulgated by the FCC.[97] In response, the United States and the FCC moved to dismiss the suit for lack of subject-matter jurisdiction.[98] Although the district court granted the government's motion to dismiss, the court also ordered a stay delaying the enforcement of the regulations during the plaintiffs' pending appeal.[99] This stay prohibited enforcement of the regulations against anyone, not simply against CBS and NBC. The district court required the FCC to "withhold enforcement in *all cases* until the issues could be once and for all determined."[100] On appeal, the Supreme Court held that the district court had subject-matter jurisdiction, and the Supreme Court then continued the district court's nationwide stay.[101] Later nationwide stays also prohibited the FCC's regulation from becoming effective until the Supreme Court ultimately ruled for the FCC on the merits in 1943.[102]

The upshot of *CBS v. United States* is that the Supreme Court ordered the continuance of a nationwide stay against a regulation while the plaintiffs were suing under statutes authorizing federal courts to "set aside" agency regulations. Although the Plaintiffs sued for an injunction,[103]

---

[92] Sohoni, *supra* note 13, at 1142–54.

[93] *See* 316 U.S. 407 (1942).

[94] *See, e.g.*, Hepburn Act, ch. 3591, §§ 4–5, 34 Stat. 584, 589, 592 (1906); Act of June 18, 1910, §§ 1, 3, 36 Stat. 539, 542–43 (1910); Urgent Deficiencies Act of 1913, 38 Stat. 208, 219–20 (1913); Longshoremen's and Harbor Workers' Act, ch. 509, §21, 44 Stat. 1424, 1436 (1927); Communications Act of 1934, Pub. L. No. 73-416, §§ 402, 408, 48 Stat. 1064, 1093, 1096 (1934); Railroad Retirement Act of 1934, §10(b), 48 Stat. 1283, 1288 (1934); Act of Aug. 24, 1937, Pub. L. No. 75-352, § 3, 50 Stat. 751, 752 (1937) (repealed 1976); Railroad Retirement Act of 1937, § 11, 50 Stat. 307, 315 (1937); Bituminous Coal Act, ch. 127, § 6(b), 50 Stat. 72, 85 (1937); Fair Labor Standards Act, ch. 676, § 10(a), 52 Stat. 1060, 1065–66 (1938); Emergency Price Control Act of 1942, Pub. L. No. 77-421, § 204(a)–(b), 56 Stat. 23, 31–32 (1942) (repealed 1947).

[95] Urgent Deficiencies Act of 1913, Pub. L. No. 63-32, 38 Stat. 208, 219 (1913).

[96] Communications Act of 1934, Pub. L. No. 73-416, § 402(a), 48 Stat. 1064, 1093 (1934).

[97] Nat'l Broad. Co. v. United States, 44 F. Supp. 688, 690 (S.D.N.Y.), *rev'd sub nom.* Columbia Broad. Sys. v. United States, 316 U.S. 407 (1942), *and rev'd*, 316 U.S. 447 (1942).

[98] *Id.*

[99] *Id.* at 696–97.

[100] *Id.* (emphasis added); *see also* Sohoni, *supra* note 13, 1149–50 (discussing additional sources about the nationwide stay).

[101] Columbia Broad. Sys. v. United States, 316 U.S. 407, 421–22, 425 (1942).

[102] Nat'l Broad. Co. v. United States, 319 U.S. 190, 196 (1943) ("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.").

[103] Columbia Broad. Sys., 316 U.S at 408.

the "stay" granted by the district court delayed "enforcement [of the rule] in *all* cases,"[104] which is different than injunctions recognized by traditional equity. The "stay" in this case resembled another preliminary remedy authorized four years later in the APA: § 705—which permits reviewing courts to "issue all necessary and appropriate process to postpone the effective date of" agency rules "pending conclusion of the review proceedings."[105] Sohoni concludes that in the 1940s, the term "set aside" authorized courts to stay the effective date of regulations; it did not merely authorize courts to temporarily enjoin enforcement of regulations against the parties before the Court.[106]

II. WHY THE VACATUR DEBATE EMERGED DECADES AFTER CONGRESS ENACTED THE ADMINISTRATIVE PROCEDURE ACT

So why is the legality of vacatur suddenly in question? The D.C. Circuit has vacated regulations for decades and in hundreds of cases with virtually no objection until the latter half of the 2010s.[107] One might also wonder why vacatur is relatively common today, even though it was uncommon when the APA was first enacted.[108] Finally, if the APA authorized vacatur, why was vacatur not discussed more fully at the time that the APA was enacted? I share three possible explanations.

A. *Vacatur is More Common Because of the Supreme Court's Decision in* Association of Data Processing Service Organizations Inc. v. Camp[109]

In 1970, the Supreme Court decided *Association of Data Processing Service Organizations, Inc. v. Camp*.[110] As Professor Caleb Nelson documented in a 2019 article, administrative law scholars view this decision—commonly referred to as *ADPSO*—as a "watershed" case.[111] Professor Gary Lawson called *ADPSO* an "Earth-Shattering Kaboom."[112] *ADPSO* is significant

---

[104] Nat'l Broad. Co. v. United States, 44 F. Supp. 688, 697–98 (S.D.N.Y.), *rev'd sub nom.* Columbia Broad. Sys. v. United States, 316 U.S. 407 (1942), *and rev'd*, 316 U.S. 447 (1942).

[105] 5 U.S.C. § 705.

[106] *See* Sohoni, *supra* note 13, at 1151 ("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.").

[107] Transcript of Oral Argument at 36–38, United States v. Texas (No. 22-58) (statement of General Prelogar), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/22-58_4fc4.pdf [https://perma.cc/HF7C-2HYY]; Memorandum from the Off. of the Att'y Gen. on Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions to Heads of Civ. Litigating Components, U.S. Att'ys 4 (Sept. 13, 2018) [hereinafter "Att'y Gen. Memorandum on Nationwide Injunctions"], https://www.justice.gov/opa/pressrelease/file/1093881/download [https://perma.cc/A4C9-V4NU].

[108] *See* William Baude & Daniel Epps, *Marching Orders*, DIVIDED ARGUMENT, at 46:30–47:14 (Feb. 11, 2023) (accessed on Spotify) ("I think everybody agrees that when the APA was enacted, like nationwide vacatur of rules was not a common thing."), transcript available at https://www.dividedargument.com/episodes/marching-orders/transcript [https://perma.cc/D75N-59LX].

[109] 397 U.S. 150 (1970).

[110] *Id.*

[111] Caleb Nelson, *"Standing" and Remedial Rights in Administrative Law*, 105 VA. L. REV. 703, 708 (2019) [hereinafter "Nelson, *Standing and Remedial Rights*"] (quoting JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 1281 (7th ed. 2014)) (citing STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 816 (8th ed. 2017); GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 1087 (8th ed. 2019)).

[112] LAWSON, *supra* note 111, at 1087.

because it fundamentally changed the way that courts construe the APA, and *ADPSO* created more opportunities for plaintiffs to challenge unlawful agency action.

Before the APA, litigants could challenge unlawful agency action in two limited circumstances. First, if an agency's action violated a "legal right" held by the plaintiff, the plaintiff could sue for an injunction against an agency official.[113] But a would-be plaintiff could not sue merely because they were "harmed by the official's unlawful behavior."[114] Professor Nelson cites the example of *Alabama Power Co. v. Ickes*[115] to illustrate this point:

> [I]n *Alabama Power* [], a utility company sought to enjoin the Federal Emergency Administrator of Public Works from providing loans and grants that would help municipalities build their own electric plants in the region that the company served. The company alleged both that the Administrator lacked authority to provide these subsidies and that the Administrator's unlawful behavior would harm and might even ruin the company (because the company would lose business to the new plants). But according to the Supreme Court, even if the loans and grants were indeed unauthorized, they did not violate any "legal or equitable right" belonging to the company.[116]

Because the agency's actions did not violate the utility company's equitable or legal rights, the company could not sue for relief.[117]

Alternatively, Congress occasionally authorized private litigants to challenge unlawful agency action through "special statutory review provisions."[118] If Congress enacted such a provision, litigants could obtain judicial review regardless of whether the agency action violated the plaintiff's legal rights.[119] For example, the Communications Act of 1934 (the statute at issue in *CBS v. United States*[120]) included a special statutory review provision.[121]

As Professor Nelson notes, most administrative law scholars agree "that rather than expanding judicial review . . . the APA was simply meant to codify existing doctrines and to accommodate the variety of forms of review that were already in use."[122] That is, the APA codified the pre-existing understanding that plaintiffs could obtain judicial review in two limited circumstances: either (1) the unlawful agency action violated the plaintiff's "legal rights," or (2)

---

[113] Nelson, *Standing and Remedial Rights*, *supra* note 111, at 712–20.

[114] *Id.* at 717 n.54 (citing Stark v. Wickard, 321 U.S. 288, 290 (1944); Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940); Tenn. Elec. Power Co. v. TVA, 306 U.S. 118, 137–38 (1939); R.R. Co. v. Ellerman, 105 U.S. 166, 174 (1882)); *see also* Gudgel v. Iverson, 87 F. Supp. 834, 841 (W.D. Ky. 1949).

[115] 302 U.S. 464 (1938).

[116] Nelson, *Standing and Remedial Rights*, *supra* note 111, at 718–19 (quoting 302 U.S. at 475).

[117] Alabama Power, 302 U.S. at 479.

[118] Nelson, *Standing and Remedial Rights*, *supra* note 111, at 721–25.

[119] *Id.* at 721–22 (citing Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940)).

[120] 316 U.S. 407, 408 (1942).

[121] *See* Nelson, *Standing and Remedial Rights*, *supra* note 111, at 721–22.

[122] *Id.* at 727 n.98 (citing STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 816–17 (8th ed. 2017) ("This provision is best understood as codifying the bases for standing that had been developed by the courts at the time the APA was enacted."); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1150 (2009) ("The widely accepted view of the history is that [§ 10(a)] was a declaration of existing law.")); *see also* S. Rep. No. 79-752, app. B, at 229 (1945); DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 95–96 (1947).

the unlawful agency action was subject to judicial review through a special statutory review provision.[123]

Most scholars agree that *ADPSO* fundamentally changed this understanding of the APA.[124] Today, *ADPSO* stands for the proposition that a plaintiff may sue for a remedy under the APA if (1) the plaintiff suffers an injury-in-fact due to the agency's unlawful action, and if (2) the plaintiff is at least "'arguably' within the zone of interests to be protected or regulated by the statute or constitutional provision that the agency was violating."[125] Plaintiffs are no longer required to prove that the agency violated one of the plaintiffs' "legal rights" before they can sue.[126] To be sure, Professor Nelson rejects this reading of *ADPSO* and argues that later courts misinterpreted *ADPSO*'s holding.[127] But even Professor Nelson agrees that later Supreme Court decisions assumed that *ADPSO* stood for the proposition that a plaintiff can sue for relief so long as (1) the plaintiff suffers an injury in fact and (2) is "arguably" within the zone of interest to be protected by the statute or constitutional provision in question.[128]

Regardless of the proper interpretation of *ADPSO*, the point remains that modern interpretations of its holding have dramatically expanded opportunities for plaintiffs to challenge unlawful agency action today relative to those that existed in the 1940s, 50s, and 60s.

B. Vacatur is More Common Because Pre-Enforcement Challenges are More Common

Vacatur is also more common today because *Abbott Laboratories v. Gardner*[129] expanded opportunities for pre-enforcement challenges against agency regulations. Before *Abbott Labs*, pre-enforcement challenges were rare. In most cases, litigants could only challenge the validity of a regulation as a defense to an agency's enforcement action.[130]

The Supreme Court shifted course in *Abbott Labs*. The Court held that a pre-enforcement challenge is ripe for review if the issues of the case are fit for a judicial determination, and if there would be hardship to the parties in the absence of judicial review.[131] Justice Fortas—in a decision joined by the Chief Justice and Justice Clark—dissented.[132] Fortas characterized the Court's decision as granting a "general hunting license" to litigants, and he feared that the decision "arm[ed] each of the federal district judges in this Nation with power to enjoin enforcement of

---

[123] Nelson, *Standing and Remedial Rights*, *supra* note 111, at 727.

[124] *See, e.g.*, MASHAW, *supra* note 111, at 1281; BREYER, *supra* note 111, at 816; LAWSON, *supra* note 111, at 1087.

[125] Nelson, *Standing and Remedial Rights*, *supra* note 111, at 777–83.

[126] *See, e.g.*, Air New Zealand Ltd. v. C.A.B., 726 F.2d 832, 836 n. 3 (D.C. Cir. 1984) (Scalia, J.) (adopting this reading of *ADPSO*).

[127] *See* Nelson, *Standing and Remedial Rights*, *supra* note 111, at 803.

[128] *Id.* at 780–83 (citing Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221 (1986); Clarke v. Securities Industry Ass'n, 479 U.S. 388 (1987)).

[129] Abbott Labs, 387 U.S. 136 (1967).

[130] Toilet Goods Ass'n v. Gardner, 387 U.S. 167, 189–90 (1967) (Fortas, J., dissenting); Marla E. Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers*, 68 N.D. L. REV. 1, 19–23 (1992).

[131] Abbott Labs, 387 U.S. at 149.

[132] Toilet Goods, 387 U.S. at 174–201 (Fortas, J., dissenting). Please note that although Justice Fortas's dissent bears the name of a companion case to *Abbott Labs*, Justice Fortas clarified that the dissent applied to *Abbott Labs* also. *Id.* at 174–75 ("Mr. Justice FORTAS, with whom THE CHIEF JUSTICE and Mr. Justice CLARK join, concurring in No. 336, and dissenting in Nos. 39 and 438 . . . I am, however, compelled to dissent from the decisions of the Court in No. 39, *Abbott Laboratories v. Gardner*, 387 U.S. 136, and No. 438, *Gardner v. Toilet Goods Assn.*, 387 U.S. 167.").

regulations and actions under the federal law."[133] He feared that the Court had "opened Pandora's box. Federal injunctions will now threaten programs of vast importance to the public welfare."[134]

In other words, *Abbott Labs* dramatically expanded opportunities for such pre-enforcement challenges to agency rules and programs.

C. Scholars Began Questioning Vacatur Because of the Rise of Nationwide Injunctions

ADPSO and *Abbott Labs* partially explain why vacatur was relatively uncommon when the APA was first enacted. But these decisions have operated as controlling precedent for roughly half-a-century. So why is vacatur suddenly in question?[135]

One reason, in my view, is the rise of nationwide preliminary injunctions, which are often issued in APA challenges or in constitutional challenges. According to a 2018 memorandum from the Department of Justice, "[i]t took more than 200 years for the first 22 nationwide injunctions to be issued," but "recently, courts issued 22 [nationwide injunctions] in just over one year."[136] The pattern emerged as follows: a plaintiff challenges an executive action and immediately seeks, often securing, a preliminary injunction that halts the program or regulation for the next several years and remains in place until the Supreme Court elects to review the case.[137] In the interim, a top Executive Branch priority is waylaid by a single district court judge based on only a preliminary merits review undertaken in an expedited manner. This criticism is a well-founded practical problem with nationwide preliminary injunctions, and I've expressed my concern about them before.[138] As a result, the Trump Administration began arguing that nationwide injunctions, and vacatur under the APA, are unlawful and inconsistent with the Constitution, federal law, historical practice, and judicial precedent.[139] The Biden Administration has maintained the same position.[140]

As scholars began questioning the legality of nationwide injunctions, proponents of nationwide relief responded by citing vacatur under § 706 as an example of lawful, universal relief.[141] Opponents of nationwide injunctions then questioned whether § 706 authorized vacatur.[142] Before Professor Harrison's article, scholars made passing references to § 706 and vacatur in papers focused on nationwide injunctions.[143]

---

[133] *Id.* at 183.

[134] *Id.* at 176.

[135] The D.C. Circuit has awarded vacatur for decades, *see supra* note 107, and only one circuit has questioned the legality of vacatur. CASA de Maryland, Inc. v. Trump, 971 F.3d 220, 259 (4th Cir. 2020) (Wilkinson, J., majority) (joined by Niemeyer, J.), *reh'g en banc granted*, 981 F.3d 311 (4th Cir. 2020). However, that circuit's opinion was vacated and is no longer controlling precedent. *Id.*

[136] Att'y Gen. Memorandum on Nationwide Injunctions, 4.

[137] *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891 (2020); Dep't of Com. v. New York, 139 S. Ct. 2551 (2019).

[138] Health Freedom Def. Fund, Inc. v. Biden, 572 F. Supp. 3d 1257, 1265–67 (M.D. Fla. 2021) (Mizelle, J.).

[139] *Supra* note 136.

[140] *Supra* note 107, at 57.

[141] *See, e.g.*, Frost, *supra* note 14, at 1100 ("The APA appears to authorize nationwide injunctions in cases challenging federal agency action."); Siddique, *supra* note 14, at 2123 n.167.

[142] *See, e.g.*, Bray, *supra* note 14, at 438 n.121; Morley, *supra* note 14, at 35.

[143] *Id.*

III. UNANSWERED QUESTIONS WE OUGHT TO CONSIDER

That leads to the crescendo of this speech. Notwithstanding the current scholarship on vacatur and the litigation position of the Department of Justice in a host of varied APA cases, there are several questions that remain unanswered, likely because they have not been raised by courts. I break them into two sets: The first relates to the statutory interpretation debate of "set aside;" the second to the constitutional implications of the former.

A. Statutory Interpretation Questions

1. Is Vacatur a Liquidated Remedy?

First, has "set aside" been liquidated to mean vacatur?

"[O]n rare occasion," a statutory provision might be "truly ambiguous" and "susceptible to multiple, equally correct legal meanings."[144] Since the founding era, it has been well-established that courts have authority to liquidate these ambiguous provisions, meaning that courts may resolve ambiguity by adopting a reasonable interpretation of the provision.[145] In later cases, when a court is confronted with the "ambiguous" provision again, the court should adhere to its prior precedent so long as that precedent "occupies the space left by the indeterminacy of the underlying rules of decision."[146]

So the question is whether "set aside" in § 706 is sufficiently ambiguous—given the history, structure, and text of the APA—to have already been liquidated to mean vacatur.

A couple things on this question. First, the Supreme Court has never directly addressed whether § 706 authorizes vacatur, although it has affirmed lower courts awarding vacatur, and its decisions frequently assume that vacatur is a valid remedy.[147] Recently, the Supreme Court stayed an EPA rule pending its decision, which ultimately invalidated the entire rule, and it did so without questioning the propriety of either that interim or final remedy.[148] The Court has also recognized that vacatur is distinct and a "less drastic remedy" than an injunction.[149] One might argue that, given the D.C. Circuit's special role in administrative law, it has liquidated the meaning. A fair response is that, without a direct holding by the Supreme Court on the issue, § 706(2) has not been liquidated to provide for complete vacatur and no amount of uniformity among the lower courts or acquiescence by the Supreme Court in affirming judgments purporting

---

[144] Gamble v. United States, 139 S. Ct. 1960, 1987 (2019) (Thomas, J., concurring).

[145] Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 13 n.35 (2001) [hereinafter "Nelson, *Stare Decisis*"].

[146] *Id.* at 84.

[147] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 486 (2001); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 161 (2000); Allentown Mack Sales & Serv., Inc. v. N.L.R.B., 522 U.S. 359, 374 (1998); Bd. of Governors of Fed. Rsrv. Sys. v. Dimension Fin. Corp., 474 U.S. 361, 365 (1986); Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 841–42 (1984).

[148] West Virginia v. E.P.A., 142 S. Ct. 2587, 2604 (2022) ("The same day that EPA promulgated the rule, dozens of parties (including 27 States) petitioned for review in the D. C. Circuit. After that court declined to enter a stay of the rule, the challengers sought the same relief from this Court. We granted a stay, preventing the rule from taking effect.") (citing West Virginia v. E.P.A., 577 U.S. 1126 (2016)).

[149] *See* Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165–66 (2010) ("If a less drastic remedy (such as partial or complete vacatur of APHIS's deregulation decision) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted.")

to vacate regulations constitutes liquidation by the judiciary. Of course, in the absence of precedent, the first task of liquidation—if the Supreme Court decides the vacatur question—is to determine the correct legal meaning of the APA.

The lack of explicit judicial liquidation by the Supreme Court leads me to my second inquiry on liquidation. Has the phrase been liquidated by the other branches? In a 2019 article, Professor William Baude posits that liquidation sometimes occurred at the founding through executive or legislative practice instead of through a judicial decision.[150] Although Baude's article focuses on liquidation in the constitutional context, it might be applicable to statutory liquidation too. James Madison seemingly thought that liquidation applied to statutes, as he states in Federalist Paper 37 that "[*a*]*ll new laws*, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[151]

Baude posits three requirements for liquidation to occur in the constitutional context. First, he notes that there had to be "a textual indeterminacy."[152] "Clear provisions could not be liquidated, because practice could 'expound' the Constitution but could not 'alter' it."[153] Next, "there had to be a course of deliberate practice" and those "repeated decisions" must have "reflected constitutional reasoning."[154] And lastly, "that course of practice had to result in a constitutional settlement."[155] According to Baude, that settlement must include "acquiescence by the dissenting side, and 'the public sanction'—a real or imputed popular ratification."[156]

If applicable to statutes, has "set aside" been liquidated to mean vacatur in a way that meets these elements? As to the first point of textual indeterminacy, that debate turns on how wide a lane one permits for ambiguity (similar in some regards to a *Chevron* step one argument).[157] I do not attempt to nail down here the parameters for that kind of analysis. As to the second point of "deliberate practice" through "repeated decisions," courts of appeals have regularly vacated unlawful regulations and the executive branch, to my knowledge, never officially took the position that vacatur—as distinct from nationwide injunctive relief—was unlawful until 2018.[158]

---

[150] William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 8–13, 21–35 (2019).

[151] The Federalist No. 37 (James Madison), https://guides.loc.gov/federalist-papers/text-31-40#s-lg-box-wrapper-25493391 [https://perma.cc/ZEB9-YKGY] (emphasis added).

[152] Baude, *Constitutional Liquidation*, *supra* note 150, at 1.

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *See id.* at 66–68 (drawing the same analogy to *Chevron*).

[158] Att'y Gen. Memorandum on Nationwide Injunctions, 4; *see also* Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1408–09 (D.C. Cir. 1998) ("The agencies challenge the district court's issuance of a nationwide injunction ordering 'that the so-called *Tulloch* rule is declared invalid and set aside, and henceforth is not to be applied or enforced by the Corps of Engineers or the Environmental Protection Agency.' The agencies make two arguments: first, that the plaintiffs are not entitled to an injunction because they presented no record evidence, and the district court made no explicit findings, as to the elements necessary for injunctive relief; and second, that even if the plaintiffs were entitled to an injunction the district court erred by granting nationwide relief to plaintiffs and non-parties alike. As for the first argument, we note at the outset that district courts enjoy broad discretion in awarding injunctive relief. . . . The agencies' argument about the breadth of the injunction fares no better. We have made clear that '[w]hen 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.'") (citations omitted).

And after courts began awarding vacatur under § 706, Congress enacted several statutes that incorporate the APA's judicial review scheme or include "set aside" language.[159] These statutes expressly provide courts with authority to review federal regulation.[160] Congress also amended the APA's judicial review provisions in 1976—twenty-five years after *Cream Wipt*, thirteen years after *Wirtz*, and nine years after *Abbot Laboratories*—without touching § 706 or otherwise indicating that the remedy of vacatur was a misinterpretation of the APA's remedial scheme.[161] Rather, the amendments Congress enacted served to expand the availability of relief to those seeking to challenge agency action by eliminating sovereign immunity as a defense to an APA suit.[162] Although "Congress' acquiescence to a settled judicial interpretation can suggest adoption of that interpretation,"[163] when "Congress has not comprehensively revised a statutory scheme but has made only isolated amendments . . . [i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation."[164] Which of these principles best describes the above congressional action (and inaction) with respect to the APA may be relevant, especially given the sea change vacatur's detractors allege that *Cream Wipt* and its progeny made to the law of administrative remedies. Lastly, there appeared to be no widespread dissenting public opinion until quite recently, but that dissent is becoming loud and strenuous.

To be clear, I am not endorsing the view that the other branches *have* liquidated § 706(2) to authorize vacatur as the appropriate remedy (or that the APA includes a textual indeterminacy that would allow them to do so), but I suggest this avenue as one worth considering in the vacatur debate.

2. What relief attaches to a generic APA claim?

My second question about statutory interpretation concerns what relief attaches to a so-called generic APA claim. Section 703 provides that "the form of proceeding for judicial review" is either a "special statutory review proceeding" or "any applicable form of legal action" and then identifies some examples, like "actions for declaratory judgments or writs of prohibitory or mandatory injunction."[165] Professor Harrison grounds his disagreement with vacatur on the basis that these other "forms" prescribe their attending remedies, so an action for declaratory judgment receives a declaratory judgment or a writ of mandatory injunction, an injunction, and so forth.[166] In his article, Professor Bamzai agrees with that view and explains that each of the § 703 forms

[159] *See, e.g.*, 15 U.S.C. § 1474(b)(3) (expressly incorporating § 706(2)); 28 U.S.C. § 3902 (expressly incorporating § 706(2)); 28 U.S.C. § 2342 (authorizing courts to "set aside" "regulations" promulgated by the Secretary of Transportation, the Federal Maritime Commission, and the Surface Transportation Board); 15 U.S.C. § 8302(c)(3)(B) ("The United States Court of Appeals for the District of Columbia Circuit shall . . . determine to affirm or set aside a rule, regulation, or order of the responding Commission . . . .").

[160] *See id.*

[161] *See* Sohoni, *supra* note 13, at 1175.

[162] Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (amending 5 U.S.C. §§ 702–703); H.R. Rep. No. 94-1656, at 1 (The proposed legislation would amend section 702 of title 5, U.S.C., so as to remove the defense of sovereign immunity as a bar to judicial review of federal administrative action otherwise subject to judicial review.").

[163] AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n, 141 S. Ct. 1341, 1352 (2021).

[164] Alexander v. Sandoval, 532 U.S. 275, 292–93 (2001) (quotations omitted).

[165] 5 U.S.C. § 703.

[166] Harrison, Section 706 Does Not Call for Universal Remedies, supra note 13, at 45–46.

provides for the kind of remedy that would ordinarily attach to it, borrowing from the background principles in which they arose.[167] He also posits that the "form" most prominent in pre-APA administrative challenges was the "bill of equity."[168] According to Bamzai, that form allowed plaintiffs to bring pre-enforcement challenges to enjoin allegedly unlawful administrative action but required that the plaintiff satisfy the requirements of equitable relief, like irreparable harm.[169]

Section 703 did not, then, create the forms. It recognized them as potential vehicles of legal recourse against agency action. That makes sense if the APA simply codified existing administrative law instead of inventing new causes of action and remedies.[170] Indeed, scholars largely agree that that was exactly the point of the APA.[171] Harrison argues that vacatur under § 706(2) was an unknown form in the 1940s, 50s, and 60s, and Bamzai argues that the term "set aside" never meant vacate—either in the APA itself or in special statutory review provisions.[172] In response to Harrison's position, Professor Emily Bremer highlighted a passage in a 1942 treatise about a pre-APA "form" allowing agency orders to be "vacated, annulled and set aside, and decreed to be void and of no effect."[173] The treatise—titled *Federal Administrative Law* by F. Trowbridge vom Baur—expressly states that this form is "[f]or use where an injunction is not desired."[174] Curiously, the treatise does not identify a case using the vacatur form.[175]

Today, courts no longer conceive of administrative law remedies in connection with the forms that pre-existed the APA. Instead, many courts countenance the idea of an "APA claim," of which vacatur is the usual remedy.[176] Of course, litigants conceive of their APA actions in this way and draft their complaints accordingly. For example, in the mask mandate challenge, the Plaintiff's complaint alleged that the Defendants violated the APA by promulgating regulations in excess of statutory authority, failing to provide opportunity for notice and comment, and acting

[167] Bamzai, *supra* note 90, at 2042–43.
[168] *Id.* at 2042–45.
[169] *Id.* at 2045.
[170] *See* Nelson, *Standing and Remedial Rights*, *supra* note 111, at 712–25; Bamzai, *supra* note 90, at 2044.
[171] Nelson, *Standing and Remedial Rights*, *supra* note 111, at 726–27.
[172] Harrison, *Vacatur of Rules Under the APA*, *supra* note 38, at 134; Bamzai, *supra* note 90, at 2045–51.
[173] Emily Bremer, *Pre-APA Vacatur: One Data Point*, YALE J. ON REG. NOTICE & COMMENT (Mar. 23, 2023), https://www.yalejreg.com/nc/pre-apa-vacatur-one-data-point/ (citing 2 F. TROWBRIDGE VOM BAUR, FEDERAL ADMINISTRATIVE LAW 865 (1942)).
[174] 2 F. TROWBRIDGE VOM BAUR, FEDERAL ADMINISTRATIVE LAW 865 n.56 (1942).
[175] *See id.*; *see also* Bremer, *supra* note 173 ("Most of the forms in the book are inspired by reported cases. This form doesn't say which case inspires it . . . .").
[176] *See, e.g.*, Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs, 781 F.3d 1271, 1290 (11th Cir. 2015) ("[V]acatur . . . is the ordinary APA remedy.") (quotation omitted); Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("We have made clear that 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.") (quotation omitted); Data Mktg. P'ship, LP v. United States Dep't of Lab., 45 F.4th 846, 859 (5th Cir. 2022) ("The default rule is that vacatur is the appropriate remedy."); Sierra Club v. EPA, 60 F.4th 1008, 1021 (6th Cir. 2023) ("Reviewing courts certainly have the power to vacate an agency action they find unlawful."); Regents of the Univ. of California v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 511 (9th Cir. 2018) (holding that vacatur is the usual remedy against unlawful regulations), *rev'd on other grounds* Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891 (2020).

arbitrarily and capriciously.[177] Instead of bringing a "bill of equity" seeking injunctive relief or some other form of recognized equitable relief, the first three counts of the complaint were labeled APA claims. At the end of the complaint, the Plaintiffs' "prayer for relief" asked that the court "enter a declaratory judgment holding the Mask Mandate as unlawful and/or unconstitutional, and set it aside."[178] And although the Plaintiff sought remedial rights under the Declaratory Judgment Act, it never cited a special statutory review provision or other recognized form to support its request to "set aside" the mandate.[179] Lastly, although the federal government asked that the mandate only be "vacated" as to the members of the Fund who filed a declaration to support associational standing of the organization,[180] it never cited any case that has ever authorized partial vacatur. Moreover, the Plaintiff never asked for an injunction of any kind, preliminary or final.[181] Instead, the entire complaint broadly alleged that the Plaintiff challenged the mask rule "pursuant to 5 U.S.C. § 706(2)" and that the court had remedial authority under § 706 of the APA, which it claimed required vacatur of the entire rule consistent with widespread administrative law practice.[182]

I use the mask mandate case as a template, but I suspect it is not an outlier in the administrative law world. A few other examples of similarly styled pleadings include the complaints in: *United States v. Texas* (the immigration case referenced at the beginning of this speech and before the Supreme Court this term),[183] *New York v. Department of Commerce* (where the plaintiffs alleged that the federal government unlawfully inserted a question about citizenship on the census form),[184] *Florida v. Becerra* (the "no sail" order governing cruise ships during the COVID-19 pandemic),[185] and *Nebraska v. Biden* (one of the student loan forgiveness cases).[186]

It seems clear, then, that if vacatur truly was not a form of proceeding that pre-existed the APA, that practice in the administrative law space has not pigeonholed plaintiffs into picking one of those pre-existing forms.[187] In that case, anyone attempting to understand the original meaning of § 706(2) must determine whether Congress created a new vacatur form via § 706(2), or whether vacatur is a valid form via liquidation. This leads to my formulation of the ultimate interpretive question in the vacatur debate: Is vacatur a new remedy expressly created by § 706(2), a statutorily liquidated remedy provided for in § 706(2), or a pre-existing remedy incorporated into § 706(2)? For vacatur to be a valid remedy, one of the above must be true. If the former, then what remedies attended other established "forms" are less informative as to what this new APA form permits.

---

[177] Health Freedom Def. Fund v. Biden, No. 8:21-cv-1693, (Dec. 13, 2021) (Mizelle, J.) Am. Compl. (Doc. 39) at ¶¶ 58–81, available at https://storage.courtlistener.com/recap/gov.uscourts.flmd.391798/gov.uscourts.flmd.391798.39.0.pdf [https://perma.cc/49FS-GL9J].

[178] *Id.* at 20, 24–25.

[179] *Id.* ¶ 21.

[180] Health Freedom Def. Fund v. Biden, No. 8:21-cv-1693, (Dec. 13, 2021) (Mizelle, J.) Def.'s Reply in Supp. of Mot. for Summ. J. (Doc. 50) at 25.

[181] Health Freedom Def. Fund v. Biden, No. 8:21-cv-1693, (Dec. 13, 2021) (Mizelle, J.) Am. Compl. (Doc. 39) at 31.

[182] *Id.* ¶¶ 5, 21.

[183] Am. Compl., Texas v. United States, No. 6:21-cv-16 (S.D. Tex. Oct. 22, 2021) (Tipton, J.), (Doc. 109).

[184] Second Am. Compl., New York v. Dep't of Com., No. 1:18-cv-2921 (S.D.N.Y. July 25, 2018) (Furman, J.) (Doc. 214).

[185] Compl., Florida v. Becerra, No. 8:21-cv-839 (M.D. Fla. Apr. 8, 2021) (Merryday, J.) (Doc. 1).

[186] Compl., Nebraska v. Biden, No. 4:22-cv-1040 (E.D. Mo. Sept. 29, 2022) (Autrey, J.) (Doc. 1).

[187] *See supra* note 19 and accompanying text.

That concludes my statutory interpretation questions and leads directly into my constitutional questions.

B. Is Vacatur Constitutional Under Article III?

Turning now to my constitutional concerns, if § 706 authorizes vacatur, courts must consider whether vacatur is constitutional under the limits of the judicial power provided in Article III.[188] To answer that question, scholarship on the history and traditions of relief vis-a-vis regulations would be useful.

To start this inquiry, it would be helpful to distinguish between how courts and litigants conceive of vacatur and universal injunctions. Vacatur is distinct from injunctive relief in several key respects. Because courts do not have power to remove federal statutes from the statute books,[189] when a plaintiff is seeking relief from an unconstitutional statute, the plaintiff usually seeks an injunction against the executive officer who enforces the statute.[190] Regarding nationwide injunctions, the debated question is whether Article III authorizes district courts to prohibit executive officials from enforcing an unconstitutional statute against anyone, or whether Article III authorizes courts to prohibit officials from enforcing the unconstitutional statute only against the parties before the court.[191] An injunction, thus, does not operate against the statute itself nor is Congress a party to the lawsuit.

Vacatur is different. As Jonathan Mitchell explains, "the [APA] establishes a unique form of judicial review that differs from judicial review of statutes."[192] According to Mitchell, vacatur "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."[193] In a theoretical sense, when a court "vacates" a regulation, the court *does* strike the regulation from the Code of Federal Regulation.[194] And, ordinarily, the agency that both promulgated the rule and enforces the rule is a party before the court.

---

[188] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2425 n.2 (2018) (Thomas, J., concurring) (noting that "if Congress someday enacted a statute that clearly and expressly authorized universal injunctions, courts would need to consider whether that statute complies with the limits that Article III places on the authority of federal courts."); Transcript of Oral Argument at 61, United States v. Texas (No. 22-58) (statement of Barrett, J.), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/22-58_4fc4.pdf [https://perma.cc/HF7C-2HYY] ("Why isn't it a matter of Article III jurisdiction? Why do you concede that it would be acceptable if Congress specifically authorizes it?").

[189] *See generally* Mitchell, *supra* note 73.

[190] *See, e.g.*, Ex parte Young, 209 U.S. 123, 161 (1908) ("It would seem to be clear that the attorney general, under his power existing at common law, and by virtue of these various statutes, had a general duty imposed upon him, which includes the right and the power to enforce the statutes of the state, including, of course, the act in question, if it were constitutional. His power by virtue of his office sufficiently connected him with the duty of enforcement to make him *a proper party* to a suit of the nature of the one now before the United States circuit court.") (emphasis added).

[191] *See generally* Bray, *supra* note 14; *see also* CASA de Maryland, Inc. v. Trump, 971 F.3d 220, 262 (4th Cir. 2020) ("And even on the district court's view that CASA had standing to challenge the Rule, the decision to grant a nationwide injunction was still wrong. There is no reason—none—that the district court, if it felt the Rule unlawful, could not have issued a narrower injunction barring the federal government from enforcing the DHS Rule against CASA's members."). However, the opinion was vacated and is no longer controlling precedent. 981 F.3d 311 (4th Cir. 2020).

[192] Mitchell, *supra* note 73, at 950.

[193] *Id.* at 1012.

[194] *Id.* at 1012–13.

Importantly, whether one agrees or disagrees as to the meaning of "set aside" in § 706, many, including the Solicitor General, argue that certain special statutory review provisions contemplate vacatur as the appropriate remedy (and they often use the terminology "set aside" to indicate that).[195] Thus, at some point, it appears inevitable that courts will be asked to confront the question of whether the judicial power of Article III includes the ability to vacate a regulation.

As the starting point to answer this question, federal courts should begin with a review of available remedies in historical equity practice.

One avenue for further research is whether, at the time of the founding, anything like a quasi-legislative, quasi-executive agency existed. If so, what powers did the courts possess to afford relief to a plaintiff against something akin to a rule or regulation? Was there ever an instance where the executive branch wrote the law, enforced it, and was the defendant in a lawsuit challenging that law? And is the writ-of-erasure fallacy premised solely on the impotency of courts to do anything other than declare the rule of decision in a case? Stated differently, does the judicial power operate the same against a rule promulgated by the executive as it does against a statute enacted by Congress?

Relatedly, because Article III courts are required to trace their equitable remedies to the British Court of Chancery in 1789,[196] one relevant question is whether vacatur was conceived of at traditional equity. Did the British Court of Chancery recognize a remedy that operated directly against a rule or regulation? If so, how did early federal courts exercise vacatur-like power when they sat in equity?

Finally, it seems courts order a regulation "vacated" as if that judgment were self-effectuating on the rule. I have, for example, never seen a court direct that the vacated rule be stricken from the Federal Register, which suggests the idea that vacatur must inherently do that without such a directive. But I wonder if that is accurate when viewed in the light of how reversal on appeal works. Take the mask mandate case again. If I am reversed on appeal, does the CDC need to re-promulgate the mask mandate or will it automatically spring back into action as soon as the Eleventh Circuit's opinion issues? If the latter, what effect did the vacatur originally have? And if vacatur as currently conceived turns out to be beyond Article III powers, additional research would be quite informative as to whether a court could properly order an executive officer to rescind a regulation. That orientation would, on first glance, comport more with traditional notions of injunctions that bind only the individual executive officer before the court. And it would clean up some of the disjointedness I just described that inures when lower courts issue judgments setting aside agency regulations.

I make these points to frame questions, not to outline answers.

CONCLUSION

I look forward to observing the vacatur debate as it continues to develop. Thank you.

---

[195] Transcript of Oral Argument at 36–38, United States v. Texas (No. 22-58) (statement of General Prelogar), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/22-58_4fc4.pdf [https://perma.cc/HF7C-2HYY].

[196] Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318–19 (1999); Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939) (holding that federal courts must trace equitable remedies to "the English Court of Chancery at the time of the separation of the two countries").