

Is Vacatur Unconstitutional?

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After *Trump v. CASA*, the power to “vacate” or “set aside” agency action—a power (seemingly) authorized by section 706 of the Administrative Procedure Act—remains one of the only viable routes to a nationwide remedy. Yet it has gone unnoticed that, unlike a traditional injunction, vacatur is a strange beast of law. Rather than settling rights between parties like normal Article III relief, vacatur purports to act upon the rule itself, striking it from existence. Many have debated whether this practice is warranted by history, but few have asked—is it even constitutional?

This Article answers no. Properly understood, vacatur is a non-judicial power. Therefore, allowing the judiciary to vacate agency action raises a non-delegation problem, one which we believe is constitutionally fatal. To understand why, this Article offers a recapitulation of the debates surrounding the history of vacatur, touching upon early judicial practice and the APA’s predecessor, the Walter–Logan Bill. Then, we will defend our understanding of vacatur as a non-judicial power and show why alternative conceptions are less persuasive. Last, we will analyze its propriety under the non-delegation case law and offer a few solutions to vacatur’s constitutional defects.

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I. INTRODUCTION

Universal remedies are “hot,” generating debate in courts, scholarly and popular journals, and Congress.¹ And little surprise, given that they have emerged at the same time as other legal developments have given district court judges significant power to block government action, a power eagerly seized upon by litigants.² One such hotly debated remedy—if it is, in fact, a remedy at all—is section 706 of the Administrative Procedure Act, colloquially known as “vacatur.”

As applied by courts today, vacatur is the judicial nullification of an agency rule: rather than acting upon the rule’s *enforcement*, it acts upon the rule itself. This makes it conceptually different than a standard injunction, but also a stronger medicine, since its operation is necessarily universal whereas injunctions may be party-specific. Moreover, vacatur does not stem from the courts’ inherent equity powers, but is rather a creation of statute: it traces its pedigree either to section 706’s instruction that reviewing courts shall “hold unlawful and set aside [defective] agency actions,”³ or to various authorities that predate the APA.⁴

After the Court’s ruling in *Trump v. CASA, Inc.*, vacatur has taken an outsized role in the universal remedies debate. That is because, whereas nationwide injunctions are now off the table, the Court explicitly kept open other avenues, like section 706, to universal relief.⁵ Going forward, vacatur will pick up much of the slack left in the wake of the universal injunction’s demise.⁶ One can therefore expect increased scholarly and judicial attention to the questions that surround vacatur.⁷

¹ Samuel L. Bray, *The Truth of The Truth of Erasure*, YALE J. ON REG. NOTICE & COMMENT (Nov. 7, 2024), <https://www.yalejreg.com/nc/the-truth-of-the-truth-of-erasure-by-samuel-l-bray/>.

² See, e.g., Samuel L. Bray, *The Purpose of the Preliminary Injunction*, 78 VAND. L. REV. 4, 6 (2025) (“For the preliminary injunction, the present moment is one of political salience and doctrinal decadence.”).

³ 5 U.S.C. § 702.

⁴ See *infra* Part II.

⁵ *Trump v. CASA*, 606 U.S. 831, 841 n. 10 (2025).

⁶ See, e.g., Benjamin M. Barczewski, “*Set Aside*” and *Vacatur* under the *Administrative Procedure Act*, CONGRESSIONAL RESEARCH SERVICE LEGAL SIDEBAR (Sep. 2, 2025) (“[I]n light of *CASA*, litigants’ interest in securing a remedy that approximates the effects of a nationwide injunction may grow.”), <https://www.congress.gov/crs-product/LSB11357>.

⁷ See, e.g., Fred Halbhuber, *A Remedy Inherited: State Law, Universal Vacatur, and the Meaning of “Set Aside”*, STAN. L. REV. ONLINE 121, 135 (2025) (“In the wake of *Trump v. CASA, Inc.*, the debate over universal vacatur under the APA § 706(2) has never been more important.”); Mila Sohoni, *In CASA You Missed It*, 78 STAN. L. REV. ____ (forthcoming 2026); Jeffrey Lubbers, *Universal Injunctions Are Severely Limited, But What About Universal Vacatur?*, YALE J. ON REG. NOTICE & COMMENT (Jul. 5, 2025), <https://www.yalejreg.com/nc/universal-injunctions-are-severely-limited-but-what-about-universal-vacatur-by-jeffrey-lubbers/>; Christopher J. Walker, *What Trump v.*

Most of the vacatur debate has focused on historical provenance—that is, does the APA permit vacatur?—and not on its constitutionality.⁸ Some have argued that the Constitution requires vacatur, but another rejects this argument as “thin gruel.”⁹ Another posits that perhaps Congress could authorize vacatur, but admits that the question has not been thoroughly addressed.¹⁰ One federal judge has called on scholars to tackle this question directly, and here we attempt to answer her call.¹¹

To begin to answer the question of vacatur’s constitutionality, it is necessary first to decide whether the APA or other pre-APA authorities permit vacatur. This question is not only antecedent to the question of constitutionality, but its investigation helps to reveal the nature of vacatur. Part I reviews the historical practices and the scholarly debate and concludes that the weight of historical evidence seems not to support pre-APA vacatur, and that there are compelling reasons to think that vacatur was not written into the APA’s remedial scheme. That said, we admit that the question is not clearly answered by the Act’s history or text. We proceed, then, to the question of constitutionality. That question turns on another antecedent one—what sort of creature vacatur is. That is the subject of Part II. Whether vacatur is a legislative, judicial, or executive power, or a combination of these, is essential to the analysis. We conclude, contrary to other scholars, that it is a legislative power, and we defend that position from several anticipated criticisms. Legislative power statutorily assigned to the branch of government that wields the judicial power raises a non-delegation issue, which is the subject of Part III. We analyze the question under three different frameworks: as an analogy to the legislative veto rejected by *INS v. Chadha*,¹² as a power ancillary to the exercise of an Article III function, and as an intelligible principle. We conclude that vacatur

CASA Means for the Future of Universal Relief in Administrative Law, YALE J. ON REG. NOTICE & COMMENT (Jun. 29, 2025), <https://www.yalejreg.com/nc/what-trump-v-casa-means-for-the-future-of-universal-relief-in-administrative-law/>.

⁸ See *infra* note 13.

⁹ Compare Gaiser, et al., *infra* note 13, with Bray, *The Truth of the Truth of Erasure*, *supra* note 13.

¹⁰ See *Does The Administrative Procedure Act Provide for Universal Vacatur*, FEDERALIST SOCIETY TELEFORUM, Feb. 17, 2023, <https://fedsoc.org/events/does-the-administrative-procedure-act-provide-for-universal-vacatur> (remarks by Professor John C. Harrison in response to questioning by Judge Steven J. Menashi).

¹¹ Mizelle, *supra* note 11; see also *Skyworks, Ltd. v. Centers for Disease Control & Prevention*, 542 F. Supp. 3d 719 (N.D. Ohio 2021) (raising but not answering the question).

¹² 462 U.S. 919 (1983).

fails to pass constitutional muster under each of these frameworks. Reform, therefore, is in order and that is the subject of Part IV.

II. DOES THE APA AUTHORIZE VACATUR?

Before we resolve vacatur's nature and whether it violates the separation of powers, a preliminary inquiry is in order: does the Administrative Procedure Act even *authorize* vacatur? We need not discuss in full detail the myriad complexities surrounding this question; they have been well-explored elsewhere.¹³ Nonetheless, getting an overview of the pre-APA practice on vacatur will reveal insights that inform its broader constitutionality. First, history demonstrates that the Court was deeply leery of national remedial schemes well into the mid-twentieth century. Scholarship is torn on whether there are any bona fide pre-APA examples of vacatur and nationwide injunction; and where examples indisputably exist, they start off few and far between.

¹³ An incomplete list of sources debating universal vacatur includes: *Gorss Motels, Inc. v. Fed. Commc'ns Comm'n*, 20 F.4th 87, 99 (2d Cir. 2021) (Menashi, J., dissenting); T. Elliot Gaiser, Marthura Sirdaran, & Nicholas Cordova, *The Truth of Erasure: Universal Remedies for Universal Agency Actions*, U. CHI. L. REV. ONLINE 1 (2024); Mila Sohoni, *The Past and Future of Universal Vacatur*, 133 YALE L.J. 2304 (2024); Aditya Bamzai, *The Path of Administrative Law Remedies*, 98 NOTRE DAME L. REV. 2037 (2023) [hereinafter *The Path of Administrative Law*]; William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 169-70 (2023); John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REG. BULL. 119 (2023); Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997 (2023); Hon. Kathryn Kimball Mizelle, *To Vacate or Not to Vacate: Some (Still) Unanswered Questions in the Apa Vacatur Debate*, 2023 HARV. J.L. & PUB. POL'Y PER CURIAM 38 (2023); Mila Sohoni, *The Power to Vacate A Rule*, 88 GEO. WASH. L. REV. 1121 (2020) [hereinafter *The Power to Vacate*]; Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017) [hereinafter *Multiple Chancellors*]; John Harrison, *Agency Action, Agency Failure to Act, and Universal Relief in Corner Post v. Board of Governors of the Federal Reserve System*, YALE J. ON REG. NOTICE & COMMENT (Mar. 25, 2024), <https://www.yalejreg.com/nc/agency-action-agency-failure-to-act-and-universal-relief-in-corner-post-v-board-of-governors-of-the-federal-reserve-system-by-john-harrison/> [hereinafter *Agency Failure to Act*]; Emily Bremer, *We Have Been Looking in The Wrong Place for the Meaning of "Set Aside" Under the APA*, YALE J. ON REG. NOTICE & COMMENT (April 1, 2024), <https://www.yalejreg.com/nc/we-have-been-looking-in-the-wrong-place-for-the-meaning-of-set-aside-under-the-apa/>; Jonathan H. Adler, *On Universal Vacatur, The Supreme Court, and the D.C. Circuit*, YALE J. ON REG. NOTICE & COMMENT (Mar. 1, 2023), <https://www.yalejreg.com/nc/on-universal-vacatur-the-supreme-court-and-the-d-c-circuit-by-jonathan-h-adler/>; Eli Nachmany, *Vacatur as Complete Relief*, 2025 CATO SUP. CT. REV. 77 (2025); Jameson M. Payne & GianCarlo Canaparo, *Vacatur: Is It Historical? Constitutional?*, YALE J. ON REG. NOTICE & COMMENT (Jul. 15, 2025), <https://www.yalejreg.com/nc/vacatur-is-it-historical-constitutional-part-i-by-jameson-m-payne-giancarlo-canaparo/>; Jameson M. Payne, *Vacatur as Redressability: Towards a New History of Universal Relief*, JOTWELL (Nov. 6, 2025), <https://adlaw.jotwell.com/vacatur-as-redressability-towards-a-new-history-of-universal-relief/>; Mila Sohoni, *In CASA You Missed It*, *supra* note 7.

This reflects long-standing principles on the scope of Article III justiciability, and an inheritance of remedial restraint from English equity practice.¹⁴

Second, the history reveals uncertainty as to what “set aside” means in the APA.¹⁵ In light of these ambiguities, construction may be required, and we believe that constitutional avoidance should militate decisively against reading vacatur into law.

A. THE EARLY HISTORY

In the early twentieth century, rulemaking of the prospective and general sort we are today accustomed to was rarely practiced. Rather, most agency action was decided on the basis of a case-by-case adjudication.¹⁶ It is in this context that “set aside” first makes its appearance as an administrative term of art—and indeed, the phrase here is natural. Even in actions of broad scope such as ratemakings, the agency made an *order* rather than a *rule*, and therefore a court sitting in review was taking the administrative record as it would a lower court’s decision.¹⁷ It “set aside” the agency’s action in the same way an appellate court might set aside a trial court’s judgment.¹⁸

As agency prerogatives increased with the New Deal and rulemaking became a more accepted practice, the line between adjudicating and legislating became blurred. Therefore, we

¹⁴ See generally Bray, *Multiple Chancellors*, *supra* note 11.

¹⁵ Some of this uncertainty arises from the confused interplay of sections 703 and 706, but that is outside this Article’s scope and has been dealt with elsewhere. See, e.g., Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, *supra* note 11, at 123–26; Sohoni, *The Power to Vacate*, *supra* note 11, at 1162–73; Levin, *supra* note 11, at 2009–2012.

¹⁶ “Before the 1960s agencies acted mainly through case-by-case adjudications.” Samuel Bray, *Multiple Chancellors*, *supra* note 11, at 438 n. 121 (quoting Reuel E. Schiller, *Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1145 (2001)). “Much of the work of Progressive-era agencies was done through reports and recommendations or through adjudication, rather than through adoption of rules.” Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 GEO. MASON L. REV. 683, 691(2021).

¹⁷ Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 258 (2017) (“The APA instructs federal courts to ‘hold unlawful and set aside’ arbitrary or unlawful agency action. When the APA was enacted in 1946, that instruction reflected a consensus that judicial review of agency action should be modeled on appellate review of trial court judgments Just as a district court judgment infected with error should be should be invalidated and returned for reconsideration, so too with agency action.”); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 940 (2011). But this analogy is not entirely apt, as we will show below. See *infra* Section III.B.

¹⁸ This is not, however, to say that the power exercised during ratemaking was strictly quasi-judicial. Rather, the system of ratemaking was “dual in nature” and often exercised both legislative and judicial functions during the same hearing. See Emily S. Bremer, *Presidential Adjudication*, 110 VA. L. REV. 1749, 1770 (2024); and *infra* Section III.B.

may be inclined to think that the logic of “set aside” that applied to adjudications became extended to rules, having the effect of nullifying them *in toto*.¹⁹ But as the early history demonstrates, this was not the case. Rather, courts held to the law of equitable remedies and judgments of the time, which meant acting against the *enforcement* of a rule against a particular *party*, but not against the rule itself.

As Aditya Bamzai shows, the earliest examples of “set aside” in schemes for judicial review of agency action unequivocally refer to suits in equity. The earliest example of such a scheme, the Hepburn Act, is equated in the congressional record with the remedial powers of equity.²⁰ Likewise, the language of “set aside” was incorporated into a litany of organic statutes for newly constituted agencies. In the case of the Interstate Commerce Act, scholars of the time characterized its review provision as a “plenary suit in equity.”²¹ Likewise, cases such as *United States v. Los Angeles & Salt Lake Railroad Co.* and *Columbia Broadcasting System v. United States* characterize a “set aside” action under the Urgent Deficiencies Act as an “equitable remedy” and a “plenary suit in equity” respectively.²² Therefore, the result of setting aside a rule was seemingly governed by the background principles governing equitable remedies. But what exactly were those principles?

The black-letter law of judgments in the early-twentieth century forbade broad-sweeping remedies like universal vacatur. Because of the doctrine of “mutuality of estoppel,” parties could not be “bound in a subsequent proceeding by a judgment, unless the adverse party now seeking to secure the benefit of the former adjudication would have been prejudiced by it if it had been determined the other way.”²³ And although a party could bring a representative suit on behalf of other parties—a derivative of the common-law “bill of peace”—the fundamental principle

¹⁹ A court “setting aside” an agency judgment may be thought to have issue-preclusive effect, but this is unclear at best. Early cases where a court “vacates,” “nullifies,” or “annuls” an agency adjudication are often attended by a party-specific injunction; therefore it is not clear that such an annulment is intended to bind other courts, or the agency with respect to third parties. *See, e.g., Proctor & Gamble Co. v. ICC*, 225 U.S. 282, 288 (1912) (complainant prays that the ICC order “be set aside and annulled, and that the defendant railway companies, and each of them, be enjoined from collecting or attempting to collect any demurrage charges... upon complainant.”). *See also infra* note 35 and accompanying text.

²⁰ Bamzai, *The Path of Administrative Law Remedies*, *supra* note 11, at 2046, 2047 nn. 45–46.

²¹ *Id.* at 2047.

²² *United States v. Los Angeles & Salt Lake R. Co.*, 273 U.S. 299, 315 (1927); *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 415 (1942).

²³ Bamzai, *The Path of Administrative Law*, *supra* note 11, at 2052

remained unchanged.²⁴ A remedy could not pronounce on “general questions of legality,” and “a party can obtain an injunction solely to protect its own injuries.”²⁵ Incorporating this equitable background into the “set aside” remedy, strong evidence is required to rebut the presumption that relief cannot span beyond resolving individual parties’ rights.

Mila Sohoni and others have raised key pieces of evidence that contradict this narrative. They claim that, far from being an invention of post-APA jurisprudence, vacatur finds firm precedent in the practice of the early-twentieth century. The cases they cite cannot simply be dismissed out of hand; but upon careful inspection, these too comport with the general prohibition on non-party relief. Let us take them individually and see why they do not support the existence of a pre-APA vacatur remedy.²⁶

The first such case is *United States v. Baltimore & Ohio Railroad Co.*²⁷ There, the Court “vacated, set aside, and annulled” an ICC rule requiring railroads to use a reverse gear on steam locomotives.²⁸ This ruling extended not only to the twenty plaintiff rail companies, but to “substantially all the other railroads.”²⁹ Disagreeing with Justice Gorusch’s understanding of the remedy as merely “restrain[ing] enforcement” of the order, Professor Sohoni characterizes this as a vacatur, pointing to the Court’s declaring the order “vacated, set aside, and annulled.”³⁰ However, this view has its problems. For one, the decision does not settle whether to “vacate” and “annul”

²⁴ But note that “a bill of peace was not used to resolve a question of legal interpretation for the entire realm. It was not enough that many people were interested in or affected by the outcome. It was instead a kind of proto-class action. The group was small and cohesive; in present terms, we might say its interest was common.” Samuel L. Bray, *Multiple Chancellors*, *supra* note 11, at 426. For more on the development of “representative suits,” see Bamzai, *The Path of Administrative Law*, *supra* note 11, at 2044–55; Bray, *Multiple Chancellors*, *supra* note 11, at 431.

²⁵ Bamzai, *The Path of Administrative Law*, *supra* note 11, at 2056–57.

²⁶ Throughout this Article, we will sometimes refer to vacatur as a “remedy.” As will soon be clear, we agree with scholars like Emily Bremer who have argued that “vacatur under the APA is not a remedy” but rather “an appellate determination.” Emily Bremer, *We Have Been Looking in the Wrong Place for the Meaning of “Set Aside” Under the APA*, YALE J. ON REG. NOTICE & COMMENT (April 1, 2024), <https://www.yalejreg.com/nc/we-have-been-looking-in-the-wrong-place-for-the-meaning-of-set-aside-under-the-apa>. Nonetheless, because the court today uses vacatur as a universal remedy separate from injunctive relief, we use this phrasing to reflect the modern understanding.

²⁷ 293 U.S. 454 (1935).

²⁸ See *id.*, Statement as to Jurisdiction on Appeal at 4 (“A final decree was entered permanently annulling, enjoining, and setting aside the [ICC’s] order.”); Sohoni, *Power to Vacate*, *supra* note 11, at 1148 n. 138.

²⁹ *Baltimore*, *id.*, at 458.

³⁰ Sohoni, *The Past and Future of Universal Vacatur*, *supra* note 11, at 2331 (quoting *United States v. Texas*, 599 U.S. 670, 701 (2023) (Gorsuch, J., concurring)).

the order was understood as reaching beyond the parties at suit. If the scope of the remedy reached non-parties, then the implication could be that the Court was indeed striking the order *in toto*, much like a modern vacatur. But as the trial court record explains, “[t]he 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.”³¹ Therefore, *Baltimore* was brought in a representative capacity, and it appears that the real remedy, an injunction, reached only the representees. This is in fact suggested by the opinion, where it says the suit represents “*substantially* all the other railroads,” but not *actually* every other railroad.³² It was more a class action than a third-party suit. Therefore, the decision does not disambiguate whether “to vacate” here meant to strike entirely, or merely to refuse to take cognizance of the order in settling the parties’ rights. Whether this case should be characterized as a proto-nationwide injunction is up for debate, but the fact that it affected a large class of parties does not mean the Court vacated the ICC’s rule.

Another case adduced as evidence of pre-APA vacatur is *The Assigned Car Cases*.³³ Setting aside the weight to be afforded an overturned lower-court decision, this case too falls victim to the *Baltimore* issue: a remedy for a suit in representative capacity is not a third-party remedy. Professor Sohoni agrees that this is a “representative suit,” but would nonetheless maintain that the lower court’s decreeing the order “set aside, annulled, and suspended” proves that the court intended a vacatur.³⁴ But here again, the court’s decision does not necessarily reach that far. That it phrased its remedy in broad strokes means only that the represented class was large, but it does not prove the court understood “setting aside” a rule as vacating it. Rather, it could mean simply that it did not take cognizance of the rule. And even had it meant it as vacatur, this still does not establish the scope of the remedy; a successful facial challenge to an order does not *per se* entail non-party relief.³⁵

³¹ Sohoni, *The Power to Vacate*, *supra* note 11, at 1148 n. 134 (quoting Transcript of Record at 4–5, *Balt. & Ohio R.R. v. United States*, 5 F. Supp. 929 (N.D. Ohio 1933)).

³² *Supra* note 29 (emphasis added).

³³ 274 U.S. 564 (1927)

³⁴ Sohoni, *The Past and Future of Universal Vacatur*, *supra* note 11, at 2332 n. 143.

³⁵ The DOJ’s Litigation Guidelines rightly note that, even if review is conceived as a challenge upon the rule *in rem*, this does not mean that the scope of relief is universal. *See* Sohoni, *The Power to Vacate*, *supra* note 11, at 1164 n. 223 (quoting Memorandum from the Office of the Att’y Gen. to the Heads of Civil Litigating Components U.S.

The last purported instance of a pre-APA vacatur is *Columbia Broadcasting System v. United States*, where the complainant prayed to “declare invalid and set aside” the Federal Communications Commission’s rule regulating contracts between broadcasting stations and broadcasting networks.³⁶ However, as Professor Bamzai notes about *Columbia Broadcasting*, the case does not “establish[] the scope of the remedy sought—party-specific or universal,” and the decision’s own language clarifies that “the ‘set aside’ language had the meaning of a suit in equity.”³⁷ Indeed, the Court understood itself as being bound by the traditional principles governing non-party relief: “a court judgment adjudicating the rights of individuals... is binding only on the parties to the particular proceeding.”³⁸

One case that might provide limited evidence in favor of our understanding is where District Courts issue *conflicting* judgments on the same agency action. This did happen—rarely. For example, in *Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co.*, the Commission’s order was challenged both in Colorado, where it was remanded back to the Commission, and in Nebraska the order was partially vacated.³⁹ Unfortunately no decisive inference can be drawn, since both cases went to the Court on direct appeal and were resolved. It is telling however that consolidation or venue transfer was not required, even though judgment in one court should have had preclusive effect in other courts.⁴⁰

B. THE MEANING OF “VOID”

As we have now seen, a large part of the debate over early practice hinges on what exactly it means to hold a rule “void.” There are two main schools of thought on how this language should be understood. The first is that the court is applying a rule of decision: to treat a rule as void means “to disregard any binding force the action may purport to have and decide the case on the law as

Attorneys, *Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* 7 (Sept. 13, 2018), <https://www.justice.gov/opa/press-release/file/1093881/download> [<https://perma.cc/VE7K-6LWB>] (“[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.”).

³⁶ Sohoni, *The Past and Future of Universal Vacatur*, *supra* note 11, at 2333 n.149 (quoting *Nat’l Broad. Co. v. United States*, 44 F. Supp. 688, 690 (S.D.N.Y. 1942)).

³⁷ Bamzai, *The Path of Administrative Law*, *supra* note 11, at 2051–51.

³⁸ *Columbia Broadcasting System v. United States*, 316 U.S. 407, 418 (1942).

³⁹ *Denver & R.G.W. R. Co. v. Union Pacific R. Co.*, 351 U.S. 321, 326 (1956).

⁴⁰ *See also Kansas City Southern Ry. Co. v. United States*, 282 U.S. 760, 763–64 (1931) (ruling that a suit under the Urgent Deficiencies Act did not deprive other courts of jurisdiction over suits attacking the same order).

it otherwise appears.”⁴¹ On this reading, the rule is not “expunged” from existence, and a rule being voided does not preclude a future court from changing its mind and using it as a basis for adjudication. Vacatur then is not a remedy at all; it is a finding of unlawfulness, upon which the court applies its actual remedy, such as injunctive or declaratory relief.

The second understanding is that a void rule is of absolutely no effect: it would be the judicial equivalent of writing “voided” upon the rule in the Federal Register.⁴² It has no currency anywhere, and binds all parties who would seek to use it. But which one is the sense intended by the early courts?

Those in favor of pre-APA vacatur might analogize review of agency rulemaking to a court sitting in appeal of a lower-court judgment. Indeed, when a court “sets aside” or “reverses” a lower court’s decision, the record of that judgment “becomes mere waste paper” and neither party “can receive assistance from the former adjudication.”⁴³ And to be sure, review of agency action was modeled off of appellate review.⁴⁴ Therefore it is not entirely out of the question that when courts set aside agency rulemakings, they understood them to be “void” in the sense of *in toto* nullification. This is a possibility we will return to later.⁴⁵

The second possibility—that a court uses “void” to mean “without cognizance,” but not vacatur—is also found in early practice. This sense of the term stems from the English practice surrounding common-law writs and equitable relief. For instance, the early caselaw on injunctions often calls the object of suit “void” when contrary to law, but we are aware of no one who would contend that injunctions could act directly upon legal instruments—much less with the effect of non-mutual estoppel—at this time.⁴⁶

⁴¹ John Harrison, *Agency Failure to Act*, *supra* note 11.

⁴² See Sohoni, *The Power to Vacate*, *supra* note 11, at 1169 (“The conventional thinking on that issue has been that invalid rules are set aside universally, thereby leaving no rule in place to enforce.”).

⁴³ A.C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 481 (2nd ed. 1874).

⁴⁴ *Supra* note 17.

⁴⁵ See *infra* Part III.B.

⁴⁶ See generally, e.g., 1 J. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS § 496, *et seq.* (4th ed. 1905) (variously describing unconstitutional laws, illegally levied taxes, and mortgages as “void”). Some equitable proceedings acting *in rem* can preclude further litigation. See, e.g., Samuel L. Bray, *Preventative Adjudication*, 77 U. CHI. L. REV. 1275, 1315 (2010) (describing the equitable roots of a suit to quiet title). But we are aware of no attempts to conceive of vacatur in terms of these actions. Indeed, the conceptual difficulties would be manifold.

Another example comes from the practice surrounding the writ of scire facias, which could in fact strike letters patent from existence entirely—much like vacatur purports to do.⁴⁷ When parties proceeded via normal litigation rather than via prerogative writ, “[c]ourts spoke of a patent being void,” but “that decision bound only the parties to the case” and they were free to “bring further suits after losing an infringement action.”⁴⁸ Thus it seems that in the majority of examples in English practice, a court finding an act “void” means nothing more than refusing to take judicial cognizance of it in a particular case.

In at least some contexts, the American practice retained the English convention that to hold an act “void” or “annulled” did not entail vacatur. The first notable American description of a law as void comes from James Otis, who in the *Writs of Assistance Case* argued—citing Coke’s canonical statement in *Dr. Bonham’s Case*—that an Act of Parliament “against common right and reason” is “void.”⁴⁹ And yet, in a later pamphlet reiterating the same logic, Otis affirmed that “only [Parliament] can repeal their own acts.”⁵⁰ Courts could hold a law unenforceable as contrary to reason, but they could not repeal it. The next prominent example is the canonical statement in *Marbury v. Madison* that legislation “repugnant to the constitution, is void.”⁵¹ But as Jonathan Mitchell notes, *Marbury* did not have the effect of striking section thirteen of the Judiciary Act of 1789, and mandamus petitions were occasionally filed before the Court even thereafter.⁵²

In response to an even earlier controversy, *Hayburn’s Case*, Madison reports that the Circuit Court for the District of Pennsylvania had held the Invalid Pensions Act of 1792 to be

⁴⁷ James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex Parte Young*, 72 STAN. L. REV. 1269, 1304 (2020) (“[T]he writ of scire facias... [could] cancel the patent and operate for the benefit of the public at large.”); Christopher Beauchamp, *Repealing Patents*, 72 VAND. L. REV. 647, 657 (“[A] suit for scire facias repealed the grant outright.”); Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 VA. L. REV. 1673, 1684 (quoting EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; CONCERNING THE JURISDICTION OF THE COURTS 88 (London, W. Clarke & Sons 1817) (describing the Chancery’s power to “cancell the kings letters patents under the great seal” and “damm[] the inolment thereof, by drawing strikes through it.”). For more on this writ in relation to vacatur, see *infra* Section III.C.

⁴⁸ Beauchamp, *id.*

⁴⁹ Raoul Berger, *Doctor Bonham’s Case: Statutory Construction or Constitutional Theory?*, 117 U. PENN. L. REV. 521, 521 nn. 1–3 and accompanying text (citing Paxton’s Case, Quin. 51 (Mass. Super. Ct. 1761)).

⁵⁰ *Id.* at 524 n. 25 (quoting BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 179 (1967)).

⁵¹ 5 U.S. (1 Cranch) 137, 177 (1803).

⁵² See *infra* note 130.

“unconstitutional & void.”⁵³ And yet, when the circuit for North Carolina—surely aware of Pennsylvania’s earlier decision—wrote to report their own opinion on the Act, they gave no indication whatsoever of being bound by its brethren court’s decision.⁵⁴ In fact, the case came up to the Supreme Court in the posture of a mandamus petition, because the circuit in Pennsylvania had refused to entertain Hayburn’s claim altogether. Rather than rendering any affirmative remedy, the law was “voided” because the circuit had *refused* to act.⁵⁵ Madison therefore could not have meant the term in any manner other than as a rule of decision, which in this case informed abstention rather than a remedy.

This convention was adopted in state practice as well. For example in *Pierce v. Pierce*, the Supreme Court of Indiana explained the effect of overruling a decision that had deemed a law “unconstitutional and void”:

This court has no power to repeal or “abolish” statutes. If it shall hold an act of the legislature unconstitutional, while its decision remains, the act must be regarded as invalid. But if it shall afterward come to the conclusion that its former ruling was erroneous, and overrule it, the statute must be regarded for all purposes as having been constitutional and in force from the beginning, and the rights of parties must be determined accordingly.⁵⁶

Therefore, characterizing the law as “void” carried no implication that it had been repealed by judicial fiat—rather the opposite. It was not merely a matter of annulling the statute then reinstating it upon a reversal of precedent; the statute always existed—and with *retroactive* legal effect—for the duration of its being “void.” Take another case, *State v. O’Neil*.⁵⁷ There, the majority reaffirmed the principle of *Pierce*, and the concurrence said that “[a]n unconstitutional statute is absolutely void,” but then immediately clarified that “a statute may be vitalized or

⁵³2 U.S. (2 Dall.) 409; Letter of James Madison to Henry Lee (Apr. 15, 1792), accessed at <https://rotunda.upress.virginia.edu/founders/JSMN-01-14-02-0259>.

⁵⁴*Hayburn’s Case*, 2 U.S. at 412–13.

⁵⁵*Id.* at 411.

⁵⁶46 IND. 86, 95–96 (1874). See also Melville B. Nimmer, *A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875*, 65 COLUM. L. REV. 1394, 1412 and accompanying footnote (quoting 39 OPS. ATT’Y. GEN. 22–23 (1937)).

⁵⁷147 Iowa 513 (1910).

resuscitated by a decision overruling prior ones holding to the contrary, and this occurs although there be no reenactment by the Legislature.”⁵⁸

This distinction between a void enactment and an expunged one was adopted into federal practice as well. Much like in the aforementioned English practice, “the accepted limitations of the doctrine of *res judicata*” precluded a judgment deeming a patent void from operating upon “a stranger to the record.”⁵⁹ Elsewhere, when the Court explicitly detailed the nature of its jurisdiction, it reaffirms the principle that the judicial power acts against the enforcement of law, but not against laws *in rem*. For example in *Knoxville v. Knoxville Water Co.*, the Court sat in review of a suit whose purpose was “to arrest the operation of a law on the ground that it is void and of no effect.”⁶⁰ Notice the Court’s language: the effect of finding the law “void” would be to “arrest the operation” thereof, but not to strike it or ‘vacate’ it in the modern sense. The judiciary’s power extended only to the matter of enforcement against specific parties. This sense is reaffirmed when the Court says it has the power of “refusing to enforce legislation,” but nowhere says anything about striking the law from the books.⁶¹ Another case, *McChord v. Louisville & Nashville R. Co.*, states that when an agency “pass[es] an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void... it will be time enough for equity to interfere, and by injunction prevent the execution of such ordinance.”⁶² Again, the finding of voidness is a preliminary to the actual remedy, which here was an injunction “prevent[ing] the execution” of the law. Calling a law “void” carries no implication about the nature of the remedy to be administered, much less that it be one of universal sweep.⁶³

⁵⁸ *Id.* at 515, 529.

⁵⁹ *Radio Corp. v. Radio Engineering Laboratories, Inc.*, 293 U.S. 1, 7 (1934). *See also* *Butterworth v. United States*, 112 U.S. 50, 63 (1884) (“[A] suit in equity... may adjudge and declare either of the patents void in whole or in part... [but] of course, without prejudice to the rights of any person, except the parties to the suit.”) (citing REV. STAT. § 4893 (U.S. 1884)).

⁶⁰ *Knoxville v. Knoxville Water Co.*, 212 U.S. 1, 8 (1909).

⁶¹ *Id.*

⁶² *McChord v. Louisville & Nashville R. Co.*, 183 U.S. 483, 496 (1902) (citing *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 482 (1896)).

⁶³ In at least one case, the Court indicates that universal remedies would in fact violate due process if the rule or ordinance to be voided presents a vested right. *See New Orleans Waterworks Co., id.*, at 480 (“A decree declaring the ordinances in question void would have no effect in law upon the rights of the beneficiaries named in the ordinances, for, in the absence of the parties interested and without their having an opportunity to be heard, the court would be without jurisdiction to make an adjudication affecting them.”).

The Court also conceived of its set aside powers in terms of enforcement in *Proctor & Gamble Co. v. ICC*.⁶⁴ There, the question was whether the Commission’s dismissal of a complaint constituted an “order” under the statute providing for suits to “enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.”⁶⁵ Answering no, the Court interpreted “set aside, annul, or suspend” as simply the mirror opposite of the ability to enforce a Commission order:

[T]he first subdivision provides for the enforcement of orders—that is, the compelling of the doing or abstaining from doing of acts embraced by a previous affirmative command of the Commission—and the second... provides for the contingency of a complaint made to the court by one seeking to prevent the enforcement of orders of the Commission... [i]n other words, by the cooperation of the two paragraphs, authority is given, on the one hand, to enforce compliance with the orders of the Commission, if lawful, and on the other hand, power is conferred to stay the enforcement of an illegal order.⁶⁶

Equating the power to “set aside, annul, or suspend” with the power to “prevent the enforcement of orders” and “stay the enforcement of an illegal order,” the *Proctor* Court seemed to conceive of its powers as a simple extension of equity. It may act to *enforce* an order or not; what it may not do is strike its operation *in rem*, thus binding the whole world.

In summary, the cases cited in support of pre-APA vacatur are ambiguous, because they fail to clarify the relationship between a finding of voidness and the scope of remedy to be applied. However, in the majority of uses, it appears that locutions such as “void,” “annulled,” or “set aside” did not displace the traditional principles governing equity. Rather, these were findings preliminary to the actual remedy, which dealt with enforcement and was party-specific.

⁶⁴ 225 U.S. 282 (1912)

⁶⁵ *Id.* at 293.

⁶⁶ *Id.* at 293–94. It appears that proceedings under the Federal Trade Commission Act of 1914 were envisioned in similar terms, providing for proactive suits to enforce an order, and defensive suits to prevent enforcement of the order. *See Merrill, supra* note 3, at 969 (“An affirmative finding would result in a cease and desist order, which could be enforced through an action by the Commission for an injunction in federal court; alternatively, a party against whom the order was directed could bring an action to have the order set aside.”).

C. THE DECLARATORY JUDGMENT ACT AND WALTER–LOGAN BILL

Another source of dispute about vacatur’s origin is two mid-century pieces of legislation: the Declaratory Judgment Act, and the unsuccessful Walter–Logan Bill. The first, passed in 1934, provided that in “cases of actual controversy,” a court may “declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed.”⁶⁷ The second, a precursor to the Administrative Procedure Act that was vetoed by President Roosevelt in 1940, provided that the precursor to the D.C. Circuit had the power to “render a declaratory judgment holding [a] rule legal and valid or holding it contrary to law and invalid.”⁶⁸ More importantly, it spells out the effect of such a judgment: “[i]f the rule is held contrary to law and invalid, the rule thereafter shall not have any force or effect.”⁶⁹

In Professor Sohoni’s thorough account of the early history surrounding declaratory judgments and the Walter–Logan Bill, she reads these bills as ratifying a well-accepted understanding of vacatur—that is, as a nullification of rules *in toto*. However, we read the history to cut *against* this understanding. Declaratory judgments did no more than settle the legal relations of the parties at case, and when the Walter–Logan Bill attempted to expand the remedial scope of judgments, much trepidation ensued. In fact, the Administrative Procedure Act was in many ways an outright rejection of the mechanisms proposed by Walter–Logan; therefore it would be a strange thing indeed if it retained one of its most controversial features.

First, notice the particular language of the Walter–Logan Bill: “if the rule is held contrary to law and invalid, the rule thereafter shall not have any force or effect.”⁷⁰ On its face alone, this implies that a rule’s being deprived of force or effect is not a *necessary* consequence of its being held contrary to law—otherwise the language would be superfluous. The testimony of Chester Lane before the House Judiciary Committee supports this understanding, for he points to this precise language as allowing a court to “wipe the rule off the books,” rather than the provision allowing the court to hold a rule unlawful.⁷¹ Indeed, if our reading of the early caselaw is correct, holding a rule “annulled,” “invalid,” or “set aside” did not remove it of further legal effect, but

⁶⁷48 STAT. 955

⁶⁸ Walter-Logan Bill, H.R. 6324, 76TH CONG. § 3 (1940)

⁶⁹ *Id.*

⁷⁰ *Supra* note 68.

⁷¹ Sohoni, *The Past and Future of Universal Vacatur*, *supra* note 11, at 2349.

merely informed a party-specific remedy. The plain meaning of the first clause seems to adopt this understanding, which is why the second clause explaining the effect of such a ruling was needed.

Second, the controversial nature of the Walter–Logan Bill makes no sense if it were merely adopting an accepted practice of *in toto* vacatur vis-a-vis declaratory judgment. For example, the Acting Secretary of the Interior Harry Slattery complained that the Bill would “confer upon the [D.C. Circuit] a veto power over administrative regulations” and that “a defeat for the government would invalidate the rule once and for all.”⁷² Stephen Gibbons, the Acting Secretary of the Treasury, lamented that “a decision of the [D.C. Circuit] holding a rule invalid would be absolutely binding upon the Government.”⁷³ These objections cannot be squared with the fact that the Declaratory Judgment Act was passed six years earlier, which under Professor Sohoni’s reckoning should have already given the federal courts a “veto power” of “absolutely binding” effect upon administrative rules.⁷⁴ Indeed, being even worse than the Walter–Logan Bill, the Declaratory Judgment Act would have had the effect of giving *every* circuit court a bite at the apple in invalidating rules. This was evidently not the understanding of how declaratory judgments operated. Therefore these objections must be understood instead as pertaining to the Bill’s unique language, which specifies that the court’s holding a rule unlawful results in its “not hav[ing] force or effect.”⁷⁵

The most suggestive contemporary evidence is given by O.R. McGuire, who had a key hand in writing the Walter–Logan Bill’s predecessor, the American Bar Association’s Administrative Law Bill. During his testimony, McGuire responded to the complaint that while the D.C. Circuit’s review would be “binding on the administrative agencies, they would not be binding on other individuals in other courts.” His response was to confirm the longstanding requirement that judgments affect both parties to have preclusive effect. “[A] judgment of the courts is never binding beyond the territorial jurisdiction of such courts and particularly upon individuals which were not parties to the proceedings resulting in such judgment.”⁷⁶ This strongly

⁷² *Id.* at 2348, 2350 (citing 84 CONG. REC. 9487 (1939)).

⁷³ *Id.* at 2350 (citing 84 CONG. REC. 5688 (1939)).

⁷⁴ *See id.* at 2350 (arguing that “existing law already allowed actions for declaratory judgments” which could be used to “remove any force and effect from a rule.”).

⁷⁵ *Supra* note 68.

⁷⁶ 76 Cong. Rec. 9489 (1939). *See also* Jameson M. Payne & GianCarlo Canaparo, *Vacatur: Is It Historical? Constitutional?*, *supra* note 11.

suggests that the Bill’s judicial review provision could not bind other jurisdictions, unlike what vacatur does today.

Our understanding of the Walter–Logan Bill’s unique effect also appears confirmed by Professors Blachly and Oatman’s contemporary treatise, *Federal Regulatory Action and Control*.⁷⁷ In discussing the section that provides for review of agency action in the precursor to the D.C. Circuit, they note that the provision seems “almost meaningless” unless it “simultaneously withdraw[s] such power from other courts.”⁷⁸ This comment may seem strange, since it suggests that courts cannot exercise concurrent jurisdiction over agency control. But in fact, it makes perfect sense: because the effect of such review was *in toto* nullification, Professors Blachly and Oatman assumed that such a review could only be vested in a court of *exclusive* jurisdiction. This follows a well-known exception to the mutuality of estoppel: as Professor Bamzai notes, “where the matter adjudicated is by a court of peculiar and exclusive jurisdiction, and the same matter comes incidentally before another court, the sentence in the former is conclusive upon the latter, as to the matter directly decided, not only between the same parties, but against strangers.”⁷⁹ It seems therefore to have been taken as granted that courts could not issue universal remedies to bind other courts, unless in compliance with the recognized exceptions. That this was the Professors’ understanding is confirmed later on in the discussion:

In case this court declares a rule or regulation to be legal and valid, the determination has no finality and may be entirely nullified by any other federal court having jurisdiction. In fact it is more than doubtful, for reasons already given, whether the determination of the Court of Appeals for the District of Columbia in such an advisory opinion or declaratory judgment is *res judicata*. *Even a determination that a rule is invalid may be rendered*

⁷⁷ FREDERICK F. BLACHLY & MIRIAM E. OATMAN, *FEDERAL REGULATORY ACTION AND CONTROL* (1940).

⁷⁸ *Id.* at 200 (“It seems at first sight almost meaningless to bestow upon one court the power to pass upon the validity or invalidity of rules and regulations, without simultaneously withdrawing such power from other courts.”)

⁷⁹ Bamzai, *The Path of Administrative Law*, *supra* note 11, at 2053 (quoting *Rhoades v. Selin*, 20 F. Cas. 631, 634 (C.C.E.D. Pa. 1827)).

*inoperative by the simultaneous or earlier or later decision made in connection with an actual case or controversy, that the same rule is valid.*⁸⁰

In light of Section 3’s criticism by scholars and the administration, the absence of its controversial language from the Administrative Procedure Act is no coincidence. The APA was designed as a moderate alternative to the Walter–Logan Bill’s more substantial overhaul of administrative procedure. As Joseph Postell explains, “once it became clear that Roosevelt would not accept a measure like Walter–Logan, Congress was forced to consider a compromise measure that could survive the threat of a presidential veto. That compromise measure became the Administrative Procedure Act of 1946 (APA).”⁸¹ It therefore strains credulity to believe that the APA would drop aspects of Walter–Logan deemed too cumbersome—such as strict separation between the prosecutorial and adjudicatory departments within agencies—but would *extremify* a judicial-review provision that was roundly derided by the administration. More probable is that the APA did no more than “codify existing doctrines and [] accommodate the variety of forms of review that were already in use,” which did away with Walter–Logan’s more expansive form of review.⁸²

Moreover, the language of commentators in the wake of the Bill’s veto does not undermine our understanding of declaratory judgment. For instance, Professor Sohoni cites Louis Jaffe for the proposition that the Bill was unnecessary, since the Declaratory Judgment Act already offered “procedure for reviewing in one form or another the validity and impact of rules.”⁸³ However, Jaffe is not here saying that “reviewing the validity of rules” has the effect of *vacating* a rule.⁸⁴ This is made obvious by the fact that he mentions, among other avenues of review, that “a person

⁸⁰ BLACHLY & OATMAN, *supra* note 77, at 202. This passage might be read to suggest that a judgment invalidating a rule *in toto* could be permissible if it were in an Article III case or controversy; but we read the thrust of the discussion to be that this is only permissible if the Circuit is given exclusive jurisdiction.

⁸¹ JOSEPH POSTELL, *BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE’S CHALLENGE TO CONSTITUTIONAL GOVERNMENT* 236 (2017).

⁸² Caleb Nelson, “*Standing*” and Remedial Rights in Administrative Law, 105 VA. L. REV., 703, 727 (2019).

⁸³ Sohoni, *The Past and Future of Universal Vacatur*, *supra* note 11, at 2351 (citing Louis L. Jaffe, *The Report of the Attorney General’s Committee on Administrative Procedure*, 8 U. CHI. L. REV. 401, 437 (1941)).

⁸⁴ It is also revealing that mention of anything resembling vacatur is absent from Professor Jaffe’s 1965 treatise on administrative law. See John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REG. BULL. 119, 128 (2023) (noting that “[v]acatur and setting aside as a remedy under section 706(2) are missing from [Jaffe’s] extensive treatment of remedial proceedings and remedies” and that “Professor Jaffe almost certainly was not familiar with a non-statutory remedy of vacatur that was distinct from injunctions and declarations.”).

could raise the issue of validity in enforcement proceedings.”⁸⁵ It would be strange to contend that the effect of a successful challenge at enforcement is vacatur, and we are aware of no one who takes this position.⁸⁶ And though Jaffe takes issue with enforcement challenges, it is merely because “it requires risking a penalty to test the rule,” and not because it fails to invalidate a rule *in toto*.⁸⁷ The overarching concern of respondents to the Walter–Logan Bill was not whether remedies of universal effect were already available, but whether there were streamlined mechanisms for challenging rules without the cumbersome formalities of equity.⁸⁸

Third, the text and direct precedents surrounding the Declaratory Judgment Act confirm our understanding that it is not a prototypical form of vacatur. A declaratory judgment settles the “rights and other legal relations of any interested party,”⁸⁹ which is exactly the effect of any other Article III judgment. As John Harrison explains,

Declaratory judgments... cannot be said to invalidate statutory rules... [because] [t]he Act provides that a court may declare the rights or other legal relations of parties. The legal relations of parties, like the right to performance under a contract, are specific to the parties. The invalidity of a statutory provision is general, and so not the proper subject of a declaratory judgment.⁹⁰

⁸⁵ Sohoni, *The Past and Future of Universal Vacatur*, *supra* note 11, at 2351.

⁸⁶ *C.f.* Bamzai, *The Path of Administrative Law*, *supra* note 11, at 2058 (noting a similar problem with reading the 1941 Attorney General’s Report on Administrative Procedure as evidence of universal relief).

⁸⁷ *Id.*

⁸⁸ *Id.* at 2324 (“Reformers saw the declaratory judgment as a way to cut through needless traps for the unwary and to promote practical, efficient, and merits-focused judicial review.”); *see also* POSTELL, *supra* note 81, at 240–41 (noting that “the principal purpose of the [APA] is to allow persons who are aggrieved as a result of acts of governmental agencies to appeal to the courts.”) (quoting Senate Proceedings, exchange between Sen. Pat McCarran and Sen. Kenneth McKellar, March 12, 1946).

This may also explain why Vom Baur’s 1942 treatise treats set aside as a form of proceeding “where an injunction is not desired.” Emily Bremer, *Pre-APA Vacatur: One Data Point*, YALE J. ON REG. NOTICE & COMMENT (Mar. 23, 2023) (citing 2 F. TROWBRIDGE VOM BAUR, FEDERAL ADMINISTRATIVE LAW 865 (1942)), <https://www.yalejreg.com/nc/pre-apa-vacatur-one-data-point/>. This is not suggesting the *effect* of this form of proceeding is different from an injunction; rather it simply does away with the byzantine formalities requisite to attaining a traditional injunction.

⁸⁹ *Supra* note 67.

⁹⁰ John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56, 82 n. 130 (2014).

Likewise, as the court declared in *Doran v. Salem Inn*, “neither declaratory nor injunctive relief can directly interfere with the enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs.”⁹¹ In short, neither the history leading up to the Declaratory Judgment Act, nor the debates surrounding it and the Walter–Logan Bill, provide evidence of a pre-APA practice of vacatur.

D. MANDATORY INJUNCTIONS TO VACATE

One final question that must be resolved is to what extent a court can issue a mandatory injunction requiring an agency to take action. Theoretically, a court could compel an agency to rescind its own rule via injunction, rather than directly vacating the rule. This would have the effect of a vacatur while abiding by the forms of equitable relief, which would pose a substantial challenge to the anti-vacatur interpretation of twentieth-century caselaw.⁹² However, the limited precedents on this question militate against allowing vacatur in the guise of a mandatory injunction, which would anyways conflict with the broader principles of equity.⁹³

A common instance where a court might issue a mandatory injunction against an agency is for a procedural defect, like when it has failed to disclose the evidentiary basis for its rulemaking. This has the effect of requiring an agency to take an action that spans beyond the injury of a single plaintiff. This precise remedy was ordered in two early cases, *A.E. Staley Manufacturing Co. v. Secretary of Agriculture*, and *Twin City Milk Producers Ass’n v. McNutt*.⁹⁴ These cases respectively ordered the agency in question to “disclose the basis of its order” and “disclose the basis of his action.”⁹⁵ In cases like these, it has been argued that “a plaintiff-specific remedy would be inadequate,” because the claim pertains not to the substance of the action, but rather to “the

⁹¹ *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); Bray & Baude, *Proper Parties, Proper Relief*, *supra* note 11, at 165 n. 107.

⁹² See Kathryn Kimball Mizelle, *To Vacate or Not to Vacate: Some (Still) Unanswered Questions in the APA Vacatur Debate*, 2023 HARV. J.L. & PUB. POL’Y. PER CURIAM 1, 20 (2023) (noting that the approach of “order[ing] an executive officer to rescind a regulation... [would] on first glance, comport more with traditional notions of injunctions.”).

⁹³ See HIGH, *supra* note 46, at § 2 (“[C]ourts of equity rarely interfere to command the doing of a positive act, [when] the same result is obtained by framing the injunction in an indirect form and prohibiting the defendant from doing the reverse of what he is desired to do.”).

⁹⁴ 120 F.2d 258 (7th Cir. 1941); 123 F.2d 396 (8th Cir. 1941).

⁹⁵ *A.E. Staley*, 120 F.2d at 261; *McNutt*, 123 F.2d at 398.

plaintiff's (and the public's) entitlement to non-arbitrary decision making and/or their right to participate in the rulemaking process.”⁹⁶

It is indeed true that an equitable remedy might compel an agency to take action that incidentally affects all similarly situated parties. This concept of “indivisible relief” is a staple of traditional equity.⁹⁷ However, asserting that vacatur necessarily follows from this type of mandatory injunction is to mistake two different remedies at play: a proactive remedy requiring an agency to do what it is bound to do by law, and a plaintiff-protective injunction which requires an agency to abstain from action. Though they are often granted together, the two are entirely separate, and their sweep is different. A clear example of where these two types of relief do not correspond is in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*.⁹⁸ There, the plaintiff actually *benefited* from the presence of the regulation, but asserted that it was not stringent enough. An injunction of the regulation as applied to the plaintiff was both impossible and undesirable: the plaintiff was not regulated but merely adversely affected, and the removal of the regulation would have injured the plaintiff. This led Justice Kavanaugh to conclude that the only possible remedy in the case was a vacatur, followed by subsequent rulemaking. However, as John Harrison conclusively shows, a mandatory injunction could have been used instead of vacatur, and employing vacatur in these cases is not only unnecessary but in fact rife with conceptual difficulty.⁹⁹ In this case, the scope of the proactive remedy—requiring the agency to do further rulemaking, which incidentally affects all parties—does not speak to the scope, or even possibility, of a plaintiff-protective injunction. Therefore, in the case that an adversely affected party *does* seek an injunction, it does not follow that a court must vacate the rule against all parties

⁹⁶ Sohoni, *The Past and Future of Universal Vacatur*, *supra* note 11, at 2341 (quoting *Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 72 (D.D.C. 2019), *rev'd on other grounds sub nom. Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020)).

⁹⁷ See Bamzai, *The Path of Administrative Law*, *supra* note 11, at 2040 (“ [Where] the tailoring of relief to the parties before the court... might not be possible such as where injunctive relief is “indivisible”—a court has the authority to issue an injunction with the collateral or ancillary consequences of benefiting nonparties.”); Samuel L. Bray, *The Purpose of the Preliminary Injunction*, 78 Vand. L. Rev. ___, 67 n. 319 (2025) (“It is of course true that sometimes the relief appropriate for the plaintiff will have effects on other people who are not parties.”).

⁹⁸ 144 S. Ct. 2440 (2024).

⁹⁹ See generally Harrison, *Agency Failure to Act*, *supra* note 11. The problem with viewing agency under-regulation as an “action” subject to being “set aside” has led to the convoluted remedy of vacating the rule, then staying that vacatur to maintain the parties’ rights *status quo ante*, then ordering subsequent rulemaking. The same effect could simply be achieved without any vacatur at all, namely via a mandatory injunction. *See id.*

to compel subsequent rulemaking. Rather, it may issue a party-specific prohibitory injunction, followed by a mandatory injunction of universal effect.¹⁰⁰ Repeal via vacatur is not necessary to remedy procedural violations.

A more extreme example of mandatory injunction is when the court outright orders an agency to rescind its action. This, in effect, is vacatur without vacatur. As a general principle, the early practice denied this possibility: parties could not request remedies that compel agency action, like mandamus or mandatory injunctions, to get what was in effect a writ of error.¹⁰¹ There are instances where such relief was contemplated, but they are passing rare. The earliest such example of which we are aware is *Hooker v. Knapp*, where the complainant prayed that “the individual defendants and the Commission be required by mandatory injunction to set aside and annul the... order.”¹⁰² However, one should hesitate to read too far into this case: it was ultimately dismissed for want of jurisdiction, and the issue of proper relief was never raised nor decided. Additionally, the complaint arose from the Commission reducing the appellants’ rate to a lower schedule, but not to the extent requested. Much like *Corner Post*, the remedy prayed for was to engage in *further* rulemaking; revoking the original order was simply a formality incidental to the rate reduction. Hence, even had the case reached the merits, it would have not demonstrated a true vacatur, but something more like a mandatory injunction or mandamus-type relief. Other lower-court cases where a similar relief was prayed for were quasi-judicial in nature and therefore inapposite.¹⁰³

¹⁰⁰ Presumably, this injunction would require the agency to not enforce the rule against regulatees whom the adversely affected party deals with. If the contention is that universal injunction is required because the party is injured by downstream effects from the entire industry, then the case is arguably not even within the ambit of Article III anymore. See, e.g., *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (Noting that standing requires a party to assert “immediate[] danger of sustaining some direct injury,” and not merely “that he suffers in some indefinite way in common with people generally.”).

¹⁰¹ See Note, *Judicial Review of Negative Orders by the Interstate Commerce Commission*, 34 COLUM. L. REV. 908, 915 nn. 38–42 and accompanying text.

¹⁰² *Hooker v. Knapp*, 225 U.S. 302 (1912)

¹⁰³ Two early lower-court decisions have prayers for relief that are phrased in a similar manner. See *Whitfield v. Hoage*, 71 F.2d 690 (D.D.C. 1934) (appeal from a decree dismissing a complaint for “mandatory injunction to set aside or modify a compensation order made by the deputy commissioner of the United States Employees’ Compensation Commission”); *Reilly v. Millis*, 144 F.2d 259 (D.C. Cir. 1944) (“[Plaintiffs] ask for a mandatory injunction to set aside and expunge from the records of the National Labor Relations Board a Direction of Election and certification of the collective bargaining representatives of their group). The nature of both of these cases—a compensation order and a collective-bargaining certification—are quasi-judicial in nature.

Almost thirty years later, Congress passed the Food, Drug, and Cosmetic Act of 1938.¹⁰⁴ The scheme for judicial review contained therein deserves particular notice: it provided not only that the Circuit courts could “set [] aside” rule “in whole or in part, temporarily or permanently,” but furthermore that “if the Secretary refuses to issue, amend or repeal a regulation” the court could “order [him] to take action, with respect to such regulation, in accordance with law.”¹⁰⁵ What is notable about the phrasing of this Act is that the court was empowered to direct a Secretary to repeal his regulations *above and beyond* the power to “set aside” a rule. The implication then seems to be that Congress did not equate setting aside a rule with the power to repeal its existence on the agency’s behalf. And what is more, we can be sure that this judicial-review provision was not routine, for it was singled out by Professor Uhler for reproach in his 1942 *Review of Administrative Acts*.¹⁰⁶ “Provisions of this type,” he writes, “seem to run so definitely counter to heretofore accepted notions of division of labor in the departments of government that the flagrant imposition of administrative functions upon federal courts can scarcely be expected to stand the test of constitutionality.”¹⁰⁷ At the time of writing, he considered it “very doubtful” that such a provision could be considered “representative of the American administrative system.”¹⁰⁸ The characterization of mandatory injunctions upon agencies as novel and dubious a mere four years prior to the APA’s passage should counsel strongly against reading it into the text.

In sum, the weight of historical evidence does not support a pre-APA practice of vacatur, nor does it warrant reading it into the APA’s remedial scheme. Rather, vacatur-type proceedings were derided where attempts to introduce them were made, and actions that appear to vacate were in fact kept within the traditional confines of equity.

III. CONCEPTUALIZING VACATUR

As we have thus seen, the Administrative Procedure Act seems to have not contemplated modern vacatur; it is ambiguous at best on the matter. The statute therefore requires construction.

¹⁰⁴ 48 STAT. L. 1040 (1938).

¹⁰⁵ 21 U.S.C. § 371(f).

¹⁰⁶ ARMIN UHLER, REVIEW OF ADMINISTRATIVE ACTS (1942).

¹⁰⁷ *Id.* at 92.

¹⁰⁸ *Id.*

But as Professor Bray points out, canons of construction come in “dueling” pairs, and “there is always a principle on each side” of a statutory question.¹⁰⁹ One might treat vacatur as a “liquidated remedy” under the APA, thus resolving the ambiguity in its favor.¹¹⁰ But one might also refer to the principles governing injunctions, and heed the court’s presumption “that statutes conform to longstanding remedial principles.”¹¹¹ In light of these interpretive oppositions, what principle ought to resolve the ambiguity that is central to modern administrative remedies?

We propose that the problem is much simpler. The very power of vacatur—giving the courts the power to act not on parties, but on law itself—poses a serious non-delegation problem. Traditionally, the Article III “judicial power” has been understood as the power to “resolve not questions and issues but Cases or Controversies.”¹¹² This language relegates the court’s power “to the traditional role of the Anglo-American courts.”¹¹³ To the extent that vacatur goes beyond adjudicating the rights of parties and into the realm of affecting the text of law, it is exercising a legislative power. Perhaps this delegation is permissible, and we do indeed venture an answer as to whether vacatur survives the tests for legislative delegation to courts. But the court should not read a constitutional bramble into the APA where it is unnecessary. Respecting the well-known canon of constitutional avoidance, it should evade the question altogether.¹¹⁴

But before we proceed to the question of non-delegation, we must be clear on what this creature of law, vacatur, is. Like a chameleon, vacatur might take on a variety of aspects—legislative, judicial, executive (more than one? all of the above?)—depending on how it is

¹⁰⁹ Bray, *Multiple Chancellors*, *supra* note 11, at 444–45.

¹¹⁰ See Mizelle, *supra* note 11, at 14–16.

¹¹¹ *Arizona v. Biden*, 31 F.4th 469, 484 (6th Cir. 2022) (Sutton, C.J., concurring) (citing *Nken v. Holder*, 556 U.S. 418, 433 (2009); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982)).

¹¹² *Id.* at 421 (citing *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 132 (2011)).

¹¹³ *Winn*, *id.* (citing *Summers v. Earth Island Institute*, 555 U.S. 488, 492 (2009)).

¹¹⁴ Constitutional avoidance is especially well-analyzed when laws raise potential separation-of-powers claims. See generally, e.g., Cass R. Sunstein, *Nondelegation Canon*, 67 U. CHI. L. REV. 315 (2000); John F. Manning, *The Nondelegation Doctrine As A Canon of Avoidance*, 2000 SUP. CT. REV. 223 (2000). For an understanding of the major questions doctrine in this context, see e.g. Louis Capozzi, *In Defense of the Major Questions Doctrine*, 100 NOTRE DAME L. REV. 509 (2024); Michael D. Ramsey, *An Originalist Defense of the Major Questions Doctrine*, 76 ADMIN L. REV. 817 (2024).

conceptualized.¹¹⁵ Its nature will inform how it should be analyzed under the court’s non-delegation precedent. It is therefore imperative that it be pinned down firmly.

In what proceeds, we will make the affirmative case for vacatur being a “non-exclusive” legislative function.¹¹⁶ Just like rulemaking itself, vacatur partakes of a legislative character, but may in some instances be assigned to a different branch. Which branches it can or cannot be assigned to will depend on the nature of the function and the character of the branch. We will argue that it can be shared with the executive, but not the judiciary. More importantly, we show why two alternate conceptions of vacatur are inadequate: first that vacatur acts like an appellate review of a lower-court judgment and is therefore adjudicatory; and second that rules are purely executive and that vacatur therefore acts like a prerogative writ.

A. VACATUR IS A NON-JUDICIAL FUNCTION

The first matter that must be considered is what type of power vacatur should be understood as. If it is judicial in nature, then it is far less likely to be constitutionally suspect.¹¹⁷ A better understanding, however, is that vacatur is fundamentally a legislative function. We will defend the understanding that the legislative power is the power to adopt (and rescind) binding rules for the direction of society, particularly those of a prospective and general nature. And since administrative rules are typically legislative or “quasi-legislative,”¹¹⁸ so too must be the power to

¹¹⁵ *C.f.* *Bowsher v. Synar*, 478 U. S. 714, 749 (1986) (Stevens, J., concurring in judgment) (“[O]ur cases demonstrate [that] a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned.”).

¹¹⁶ This Article’s understanding of separation of powers in terms of exclusive and non-exclusive functions is taken largely from Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735 (2022). See also Philip Hamburger, *Nondelegation Blues*, 92 GEO. WASH. L. REV. 1083 (2023)

¹¹⁷ Though even if vacatur is a judicial power, it may still be unconstitutional. Article III limits the reach of the judicial power to “Cases” and “Controversies.” See U.S. CONST. art. III, § 2, cl. 1. Despite being traditionally understood as a restriction on standing, the case-or-controversy requirement also touches upon the nature of the relief that can be properly granted. See, e.g., *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (“the power of a court [is] to decide and pronounce a judgment and carry it into effect *between persons and parties who bring a case before it for decision.*”) (emphasis added); *Flast v. Cohen*, 392 U.S. 83, 94–95 (1968) (“Embodied in the words ‘cases’ and ‘controversies’ are two complementary but somewhat different limitations... in part those words define the role assigned to the Judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.”);

¹¹⁸ We recognize that the concept of “quasi-” powers has been subject to ardent criticism. See *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2216 (2020) (Thomas, J., concurring in part and dissenting in part) (“The Constitution does not permit the creation of officers exercising “quasi-legislative” and “quasi-judicial powers” in “quasi-legislative” and “quasi-judicial agencies.” No such powers or agencies exist.”); *FTC v. Ruberoid*

rescind them *tout court*. Vacatur then must be analyzed as a delegation of legislative power to the judiciary.

The framers and their intellectual predecessors roundly support this understanding of legislative power. As Hamilton puts it in *Federalist 75*, “[t]he essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of the society.”¹¹⁹ In so doing he echoes the definitions put forth by Locke and Blackstone, who respectively define the power as the “right to direct how the Force of the Commonwealth shall be employ'd for preserving the Community and the Members of it” and the ability to “prescribe the rule of civil action.”¹²⁰ The formulation given by Montesquieu clarifies that the power is not merely to enact “temporary or perpetual laws,” but also to “amend[] or abrogate[] those that have been already enacted.”¹²¹ Therefore, insofar as administrative rulemaking seeks to “prescribe rules for the regulation of... society,” and vacatur seeks to “abrogate” said rules, vacatur falls squarely within the classic understanding of the legislative power.¹²²

This is particularly true when these binding rules are of a general and prospective nature. The Constitution itself adopts this understanding of “law” when it restricts both Congress and state legislatures from legislating in a specific and retroactive manner.¹²³ The forward-looking nature of the legislative power is what distinguishes it from adjudication: “it is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a

Co., 343 U.S. 470, 487 (Jackson, J., dissenting) (“The mere retreat to the qualifying ‘quasi’ is implicit with confession that all recognized classifications have broken down, and ‘quasi’ is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.”). We will occasionally use that phrasing for convenience, and because its underlying precedent has not been overturned. What we really mean by “quasi-legislative,” however, is that the power is *non-exclusive*: it falls under the ambit of several branches’ powers. See *infra* nn. 171–178 and accompanying text.

¹¹⁹ *Federalist 75* (Hamilton) in Jacob E. Cooke, ed., *The Federalist* 503, 504 (Wesleyan 1961). See also Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1316 (2003).

¹²⁰ Alexander & Prakash, *id.* at 1311–13.

¹²¹ *Id.* at 1312.

¹²² See also 18 ANNALS OF CONG. 2125 (1808) (statement of Rep. Philip Key that “to suspend or repeal a law is a Legislative act”); *id.* at 2232 (statement of Rep. John Rowan that “to repeal or modify” a statute was a “discretionary power” that could not be delegated); and *INS v. Chadha*, 462 U.S. 919, 954 (1983) (“Amendment and repeal of statutes, no less than enactment, must conform with Art. I.”).

¹²³ See U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”); U.S. CONST. art. I, §10, cl. 1 (“No State shall... pass any Bill of Attainder, [or] ex post facto Law.”).

predetermination of what the law shall be for the regulation of all future cases.”¹²⁴ Moreover, this understanding of a legislative versus judicial exercise of power has been adopted into the APA and subsequent precedent. Section 551 of the APA in part defines a “rule” as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law.”¹²⁵ This is opposed to an “adjudication,” which is the formulation of an “order,” itself defined as “a final disposition... in a matter other than rule making.”¹²⁶ By distinguishing between “rules” of “future effect” and “adjudications,” the APA makes clear that rulemaking was understood to be an exercise of legislative power.

This view is redoubled by the analysis undertaken in Jonathan Mitchell’s seminal article, “The Writ-Of-Erasure Fallacy.”¹²⁷ Reviewing the failed proposals at the constitutional convention to secure a veto-like power within the judicial branch, Mitchell concludes that “[t]he federal courts have no authority to erase a duly enacted law from the statute books.”¹²⁸ Rather, “judicial review is more limited: [i]t permits a court to decline to enforce a statute in a particular case or controversy, and it permits a court to enjoin executive officials from taking steps to enforce a statute.”¹²⁹ This is by no means a radical formulation of the judicial power: it is well-affirmed by historical and contemporary precedent, and has received the approval of at least two Justices.¹³⁰ Citing Mitchell’s article, Justice Thomas, joined by Justice Alito, explained: “the judicial power is, fundamentally, the power to render judgments in individual cases,” which “[i]n the context of a constitutional

¹²⁴ *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 107 (1993) (Scalia, J., concurring) (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION *91 (Boston, Little, Brown & Co. 1868)).

¹²⁵ 5 U.S.C. § 551(4).

¹²⁶ 5 U.S.C. § 551(6)–(7).

¹²⁷ Jonathan F. Mitchell, *The Writ-Of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018).

¹²⁸ *Id.* at 936.

¹²⁹ *Id.*

¹³⁰ *See id.* at 936 n. 5. Even the canonical statement in *Marbury v. Madison* that a law may be declared “void” did not have the effect of striking section 13 of the Judiciary Act of 1789. *See id.* at 965 n. 133. Another intriguing early source that rebuts the writ-of-erasure fallacy comes from Alexis de Tocqueville’s *Democracy in America*. In his discussion of the judicial power, Tocqueville explains that “if anyone invokes in an American court a law which the judge considers contrary to the Constitution, he can refuse to apply it.” Once this happens, “lawsuits multiply, and that law becomes ineffective,” and eventually either “the people change the Constitution or the legislature repeals the law.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 102 (Harper & Row 1966) (1835). This description makes it clear that, in the early nineteenth century, judicial review was conceived as the “refusal to apply a law,” and the statute still existed for the legislature to “repeal” themselves.

challenge [] amounts to little more than the negative power to disregard an unconstitutional enactment.”¹³¹

Mitchell’s article suggests that “the writ-of-erasure mentality need not be avoided when considering judicial review of agency action,” but we find this carve-out unwarranted from the broader analysis.¹³² Insofar as vacatur seeks to expunge a rule rather than decline to enforce it, it is *perforce* exercising a non-judicial power, and therefore raises the possibility of a non-delegation issue.

B. AGENCY ADJUDICATION AND THE APPELLATE-REVIEW MODEL

Thus far, we have made the affirmative case for vacatur being a legislative power, and the case against its being a judicial power. This leaves open the possibility that vacatur is legislative, but *non-exclusively* so, and that it may therefore still be delegable. We will visit this argument soon. But before we do so, we wish to dispel an argument that might be made in service of vacatur’s proponents: namely, that because review of agency action is modeled off of appellate review, vacatur is and was intended to be a *judicial* power.

By way of history, there is little room for denying that special statutory proceedings, and then the APA, were analogized to appellate review of lower-court judgments. As Tom Merrill showed, the Court in the early twentieth century began using the well-known fact–law distinction in determining what standard of review to apply to agency findings.¹³³ This model was formalized by John Dickinson, whose 1927 *Administrative Justice and the Supremacy of the Law* exercised decisive influence on subsequent administrative law, including the decision in *Crowell v. Benson*.¹³⁴ Professor Bremer is right to say that “[p]articipants on both sides of the vacatur debate

¹³¹ *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2219 (2020) (Thomas, J., concurring in part and dissenting in part) (quoting *Murphy v. National Collegiate Athletic Assn.*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring)); *Plaut v. Spendthrift Farm, Inc.*, 514 U. S. 211, 219 (1995)). *See also* *Massachusetts v. Mellon*, 262 U. S. 447, 488 (1923) (“If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding.”).

¹³² Mitchell, *supra* note 127, at 951.

¹³³ Merrill, *supra* note 17, at 942–943.

¹³⁴ *Id.* at 977.

acknowledge and seem to accept” that the drafting of the APA was informed by this appellate-review model.¹³⁵

Some scholarship has taken this analogy to mean that the effect of holding agency action unlawful under the APA is the same as when an appellate court sets aside a lower court’s judgment—namely, *in toto vacatur*.¹³⁶ But we would caution against extending the analogy that far without careful consideration. The appellate-review model pertains fundamentally to the standard of review that the courts give to agency actions, not to the nature of the action itself. As Professor Merrill explains, nineteenth-century review of official action “was uniformly what we would now call *de novo*,” but this was “jettisoned” by the Court in response to the Hepburn Act.¹³⁷ But even as the court began applying appellate-like standards of review, the underlying action was an original proceeding in equity, and not a review proceeding.¹³⁸ After the Hepburn Act made Interstate Commerce Commission orders self-executing, litigation to set aside an order proceeded via “bill of equity,” which was “understood to be an original action.”¹³⁹ As we noted earlier in this Article, other statutory-review proceedings, like under the Urgent Deficiencies Act, were likewise understood as bills in equity.¹⁴⁰ Decades later in the Senate hearings over the Walter–Logan Bill, the FCC’s former General Counsel, William Dempsey, testified that *FCC v. Pottsville Broadcasting Co.*—a case that he had written the brief for—declared that while review of agency action “may be denominated an ‘appeal’ in the statute, in all legal aspects the proceeding in the court is an original proceeding.”¹⁴¹

¹³⁵ Bremer, *supra* note 1.

¹³⁶ See Sohoni, *The Power to Vacate*, *supra* note 11, at 1133–34; Bremer, *supra* note 11.

¹³⁷ Merrill, *supra* note 17, at 951–53.

¹³⁸ *Contra* Sohoni, *The Power to Vacate*, *supra* note 11, at 1166 n. 234 (citing *Hameetman v. City of Chicago*, 776 F.2d 636, 640 (7th Cir. 1985)) (“[A] generic APA suit filed in a district court resembles an equity suit but is actually a review proceeding rather than an original proceeding.”).

¹³⁹ Merrill, *supra* note 17, at 959.

¹⁴⁰ See *supra* nn. 20–22 and accompanying text.

¹⁴¹ *Hearings Before a Subcommittee of the Committee on the Judiciary on S. 674, S. 675, and S. 918* (1941), at 1168. The *Pottsville* case dealt more generally with the so-called “administrative” or “supervisory” jurisdiction granted to the courts by some statutes. The complications wrought by this non-judicial function are outside the scope of the Article, but *vacatur* might be thought to relate to this supervisory jurisdiction. See also 84 CONG. REC. 5688 (1939) (letter of Stephen Gibbons) (“[T]he [D.C. Circuit] has the status both of a constitutional and of a legislative court and [] the Congress may impose nonjudicial functions upon it. However... [the] Supreme Court would have no constitutional power to review a declaratory judgment of the [D.C. Circuit] holding an administrative rule invalid since this would involve an administrative proceeding and not a case or controversy.”).

Although adopting the language of appellate review, review of agency action was dictated by the principles governing equitable relief and judgments more broadly, like mutuality of estoppel and party-specific relief. And as Professor Harrison cautions, if the appellate-review model were taken any further than furnishing standards of review, one would run very quickly into conceptual problems, like for instance in reviewing agency *inaction*.¹⁴²

In any case, the fact that review of agency action was modeled on judicial review does not make vacatur a judicial power for *constitutional* purposes, just as Article I courts do not reside in Article III despite being patterned thereon. As Justice Scalia noted in *Mistretta v. United States*, statutory law may “divide up the Government any way it wishes... for nonconstitutional purposes,” but the Court “must [] decide for itself” the nature of the power being exercised and by what office “for purposes of separation of powers analysis.”¹⁴³ And far from simply assuming that agencies exercise judicial power, the Court has long recognized that some agency powers are legislative in nature, even though they may take the form of an adjudicatory proceeding.

The example most relevant to pre-APA practice is ratemaking. It is common to refer to these proceedings as “quasi-judicial” in nature, but this is not entirely accurate.¹⁴⁴ The Court has long recognized that “prescribing rates for the future is an act legislative, and not judicial, in kind,” and that the character of a proceeding is determined by “the nature of the act” rather than “what inquiries may have been made as a preliminary to the legislative act.”¹⁴⁵ Although ratemaking has “has a quality resembling that of a judicial proceeding,” and is therefore “frequently described as a proceeding of a *quasi*-judicial character,” the resultant order is in fact a “legislative action.”¹⁴⁶ Therefore, “when the final act is legislative, the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case.”¹⁴⁷ For constitutional purposes, then, the power of rulemaking is—and has long been

¹⁴² See Harrison, *Agency Failure to Act*, *supra* note 11 (noting that “[a]nalogizing judicial review of agencies to appellate review of lower courts is not always apposite.”); see also Bray, *The Truth of The Truth of Erasure*, *supra* note 11 (citing to Harrison for instances where the appellate-review model “runs out.”).

¹⁴³ *Mistretta v. United States*, 488 U.S. 361, 423 (1989) (Scalia, J., dissenting).

¹⁴⁴ See Bremer, *supra* note 18, at 1770.

¹⁴⁵ *Louisville & Nashville R. Co. v. Garrett*, 231 U.S. 298, 305 (1913); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 227 (1908).

¹⁴⁶ *Morgan v. United States*, 298 U.S. 468, 479–80 (1936).

¹⁴⁷ *Prentis*, 211 U.S. at 227.

recognized to be—a legislative power, notwithstanding the adjudication-like form of agency proceedings.

In short, the appellate-review analogy does not describe the nature nor power of proceedings to set aside rules. They were always understood to be original proceedings in equity, and the power against which they acted—in the case of a rule or ratemaking—was legislative, not judicial.

C. DELEGATION FORMALISM AND ADMINISTRATIVE WRITS

Another obvious objection that might be raised is that rules are not “Laws” (in the Article I sense), and so the court’s limited ability to act directly upon laws would not extend to rules. This objection dovetails with what Adrian Vermeule and Eric Posner deemed the “naïve” view of delegation. Under their reckoning, “the authority that the president exercises pursuant to a statutory grant is executive authority in the core sense.”¹⁴⁸ Therefore, when an executive official is “performing duties, including rulemaking, pursuant to a statutory mandate,” they are in fact not exercising legislative authority at all.¹⁴⁹ Since rulemaking is not legislative, presumably neither would be the power to expunge rules.

A less extreme but similar understanding of delegation runs through a set of precedents from *Morrison v. Olson* down to *Seila Law v. Consumer Financial Protection Bureau*.¹⁵⁰ These cases undermine the ‘quasi-legislative’ and ‘quasi-judicial’ conception of delegation set out in *Humphrey’s Executor* and substitute it for a formalist understanding. According to this strain of jurisprudence, such “quasi-” powers are merely metaphorical; the agency is in fact exercising an executive power that *appears* like legislation or adjudication.¹⁵¹ These agency actions “take legislative and judicial forms, but they are exercises of—indeed, under our constitutional structure

¹⁴⁸ Eric A. Posner & Adrian Vermeule, *Interring the Non-Delegation Doctrine*, 69 U. CHI. L. REV. 1721, 1725 (2002). See also Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 280 (2021) (“The executive power [at the founding]... was simply the authority to execute the laws—an empty vessel for Congress to fill.”).

¹⁴⁹ Posner & Vermeule, *id.* at 1725–26.

¹⁵⁰ 569 U.S. 290 (2013); 140 S. Ct. 2183 (2020).

¹⁵¹ For a review of non-delegation formalism in the caselaw, see Wurman, *supra* note 116, at 748–58. And for an analysis of this precedent with regard to the President’s removal power, see also Bremer, *supra* note 18, at 1805–06.

they must be exercises of—the executive Power.”¹⁵² Unlike in the naïve view, statutory authorizations may still violate the non-delegation doctrine, but only because the authority being exercised is now *truly* legislative or judicial, and not an executive power that seems otherwise.

This view of delegation was given a full-throated exposition by Justice Scalia’s dissent in *Mistretta*. As he explains, “[s]trictly speaking, there is *no* acceptable delegation of legislative power.”¹⁵³ Rather, what a non-delegation challenge actually claims is that “the degree of generality contained in the authorization for exercise of executive or judicial powers in a particular field is so unacceptably high as to amount to a delegation of legislative powers.”¹⁵⁴ That is, any *true* delegation of legislative power is *ipso facto* unconstitutional. Otherwise, the power being “delegated” is no delegation at all, but an exercise of judicial or executive power masquerading as legislative. “A certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action,” and that discretion is therefore not a delegation at all, but rather “ancillary” to the actual power exercised, either executive or judicial.¹⁵⁵

Whether vacatur can be understood as ancillary to the exercise of the judicial power is a question we will revisit later.¹⁵⁶ But remember that vacatur is not the judiciary’s exercising rulemaking authority for itself, like for instance when it “prescribe[s] by rule the manner in which [its] officers shall execute [its] judgments.”¹⁵⁷ Rather, vacatur acts upon the enactment of another branch—namely the executive. Therefore, if vacatur is anything under a formalist model, it would seem to be executive in nature.¹⁵⁸ One might then ask why it matters whether it is understood as executive or legislative: either way it is a non-judicial power, and so by being vested in the

¹⁵² *Seila Law*, 140 S. Ct. at 2198 n. 2 (quoting *Arlington v. FCC*, 569 U. S. 290, 305 n. 4 (2013)).

¹⁵³ *Mistretta*, 488 U.S. at 419 (emphasis in original).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 417. For the application of this understanding with respect to agency adjudication, see *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 908–13 (1991) (Scalia, J., concurring in part and in judgment).

¹⁵⁶ See *infra* Part IV.

¹⁵⁷ *Mistretta*, 488 U.S. at 417 (citing *Wayman v. Southard*, 10 Wheat. 1, 23 U. S. 45 (1825)).

¹⁵⁸ But in cases like *INS v. Chadha*, the court characterized the same exact function as executive or legislative depending on which branch exercised it. See 462 U.S. 919, 952, 953 n.16 (1983); see also Wurman, *supra* note 116, at 751 (“[T]o some Justices in *Chadha*, the act when done by the House was legislative, but the exact same act when done by the Attorney General was executive.”). Therefore in the case of “non-exclusive” functions, one might argue that the power exercised depends not on the character of the enactment, but on who exercises the power. This problem will be addressed below, *infra* Section III.A.

judiciary is a delegation.¹⁵⁹ But we believe there is a subtle difference. Whereas the prohibition against judicial interference with legislative action is well-known,¹⁶⁰ history provides one instance of the court’s acting directly upon executive enactments: the common-law practice of administrative control via extraordinary writs.

Indeed, recent scholarship has argued that writs such as mandamus, certiorari, and scire facias were used in English and American courts to grant non-party relief against executive privileges like land grants and letters patent.¹⁶¹ These writs were used “to decide the legality of government action as a general matter” and could thereby give “nonparty-protective benefits” that “quashed and rendered invalid” executive action.¹⁶² One writ, scire facias, had the explicit effect of repealing the instrument at issue.¹⁶³ Therefore, if rules are understood more like an executive license and less like a legislative function, one might analogize vacatur to a writ like scire facias and rest it upon common-law practice.

Taking the analogy at face value, it runs into several immediate problems. The first is that the writ of scire facias was a remedy in law, not equity.¹⁶⁴ It is difficult to maintain that vacatur, if a remedy at all, is a remedy at law, for the implications of that view would diverge dramatically from current practice.¹⁶⁵ And what is more, the practice of scire facias is actually *consistent* with

¹⁵⁹ Put another way: if the judicial power can only determine an action’s validity for the purpose of resolving parties’ rights, then the nature of the enactment—statutory or not—is irrelevant. This appeared to be the understanding of one of the witnesses in the Walter–Logan Bill hearings. *See supra* note 141 at 1166 (statement of William Dempsey) (“[T]he courts have no power to review acts of any of the executive officers of Government... they may [only] decide if it is required for the decision of any contested case before them whether or not a particular act of... an executive officer is valid or invalid.”).

¹⁶⁰ *See, e.g.,* *McChord v. Louisville & Nashville R. Co.*, 183 U.S. 483, 495 (1902) (“The fixing of rates is essentially legislative in its character, and the general rule is that legislative action cannot be interfered with by injunction.”).

¹⁶¹ *See generally* Pfander & Wentzel, *supra* note 40. We are incredibly thankful to Benjamin Johnson for bringing this interesting body of literature to our attention.

¹⁶² *Id.* at 1275 n. 18, 1282.

¹⁶³ *Supra* note 47 and accompanying text.

¹⁶⁴ Lemley, *supra* note 47, at 1684 n. 44 (citing THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 392 n.2 (5th ed. 1956) (“There seem no grounds for the suggestion... that there is anything 'equitable' about *scire facias*.”)); *see also id.* at 1685 (noting that the Court of Chancery sent *scire facias* proceedings to the King’s Bench for the convening of a jury, which is “consistent with the idea that the jurisdiction of the chancery courts over *scire facias* actions was legal, not equitable.”).

¹⁶⁵ The position that vacatur is a remedy in law has been argued at least once. *See* Gaiser, et al., *supra* note 11, at 11 (“Universal remedies under the APA, however, remain within Article III limits because they are legal, not equitable, remedies.”). *But see* Bray, *The Truth of The Truth of Erasure*, *supra* note 11 (noting that if vacatur were a legal remedy, there would be an “an astonishing change from current practice,” including that “jury trial right in all APA suits for vacatur” would attach, “none of the equitable defenses would apply” in APA suits, “the availability of

the principle that courts may not repeal an executive decree *ex proprio vigore*. Proceedings under scire facias employed the legal fiction that the suit was being brought in the sovereign's own name, since the sovereign issued the patent in the first place. Likewise, "[b]ecause the Crown granted the patent in the first instance, it was thought to have an interest in the proceeding, and so the Attorney General was a party and had to approve the proceeding."¹⁶⁶ Less like a private suit and more like a *qui tam* action, the sovereign was really repealing its own action, rather than the court doing so. The requirement of government leave and the nature of the suit reaffirms that, as a general rule, courts cannot repeal the executive's enactments.

Second, even if vacatur were analogous in *form* to scire facias or another writ, its *scope* is rather different. Whereas the former was used almost exclusively against licenses, privileges, or other executive franchises granted to a single party, vacatur acts upon rules of general effect. Although rulemaking of the modern variety is far more common today, there is in fact an obvious analogy that existed in English practice: royal proclamations. While proclamations in theory could merely direct the King's officials or "admonish his subjects that they keep the laws, and do not offend them," in reality proclamations were at times used to legislate with general and prospective effect.¹⁶⁷ We are aware of no form of proceeding which claimed to be able to nullify royal proclamations *in toto*. Therefore, to the extent that vacatur can be analogized to scire facias at all, its scope would be limited to agency adjudication of particular benefits, rather than general rulemakings.

As for writs other than scire facias, the history is not entirely clear to what extent they diverged from parallel developments in equity. "[M]uch of the government action quashed, compelled, or prohibited by means of the administrative writs was indivisible," and only "occasionally" did the early courts "deploy the administrative writs to provide more comprehensive relief."¹⁶⁸ If administrative writs did no more than provide indivisible relief in indivisible cases—with occasional exceptions—then this does little to show that courts can act

vacatur would wind up sharply limiting the availability of injunctions, since vacatur would provide an adequate remedy at law," and "[t]here would be no ability to modify or dissolve the order using equitable powers.").

¹⁶⁶ Lemley, *supra* note 47, at 1683.

¹⁶⁷ PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 47 (2014). For the broader history of the use and abuse of proclamations, *see id.* at 33–50.

¹⁶⁸ Pfander & Wentzel, *supra* note 47, at 1351.

directly upon laws or decrees. In short, the history of non-party relief via prerogative writs does not seem to warrant vacatur’s incorporation into “the judicial Power” as it existed in the eighteenth century.¹⁶⁹

Third, even proceedings for *in toto* vacatur brought under a prerogative writ may not fully usurp the problem identified by Mitchell. It is conceivable that even these “vacated” orders might be resurrected, such as upon a Rule 60(b)(5) relief from judgment.¹⁷⁰ Though this would not remove their unique character as universal relief, there would remain looming the threat that a future administration might resurrect, and thereby enforce, old rules that were ostensibly “voided.”

But beyond these immediate difficulties, we think that the analogy between vacatur and judicial control over executive powers is inapt, because rulemaking is not strictly executive at all. Rather, we believe that rulemaking, and delegation more broadly, is best understood in terms of exclusive and non-exclusive powers. As Justice Gorsuch explained in his dissent in *Gundy v. United States*, “[w]hile the Constitution vests all federal legislative power in Congress alone, Congress’s legislative authority sometimes overlaps with authority the Constitution separately vests in another branch.”¹⁷¹ Or, as Justice Thomas put it, “[c]ertain functions may be performed by two or more branches without either exceeding its enumerated powers under the Constitution.”¹⁷² Unlike the formalist model, this understanding does not require the exercise of a function, like rulemaking, to partake of only one power.¹⁷³

¹⁶⁹ U.S. CONST. art. III, § 1, cl 1. As a general matter, the outer limits on Congress’ ability to expand remedies beyond those available in 1789 are unclear. See Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1321 n. 141 (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937); Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1014 n.80 (2015); and Mila Sohoni, *Equity and the Sovereign*, 97 NOTRE DAME L. REV. 2019, 2048 (2022)). But the express representations of the Federalists that equity would be “bound down by strict rules and precedents” in accordance with a “regular system” implies that equity jurisdiction is not a *carte blanche* to extend the judicial power ceaselessly. See Federalist 78, 83 (Hamilton); see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring) (“[W]hether the authority comes from a statute or the Constitution, district courts’ authority to provide equitable relief is meaningfully constrained. This authority must comply with longstanding principles of equity that predate this country’s founding.”).

¹⁷⁰ See FED. R. CIV. P. 60(b) (providing that “the court may relieve a party or its legal representative from a final judgment, order, or proceeding... [when] it is based on an earlier judgment that has been reversed or vacated.”). See also Mitchell, *supra* note 127, at 939 n. 21 (citing *Agostini v. Felton*, 521 U.S. 203 (1997)).

¹⁷¹ *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting). See also Hamburger, *supra* note 116, at 1143–48.

¹⁷² *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 69 (2015) (Thomas, J., concurring)

¹⁷³ See Wurman, *supra* note 116, at 736–37 (describing the formalist position that “any governmental power exercised in our system must be either legislative or executive or judicial: the premises of the system do not allow

What is more, this position appears more consistent with the original understanding than a purely formalist theory. For example, the prototypical case of a non-delegation challenge, *Wayman v. Southard*, states that “Congress may certainly delegate to others powers which the legislature may rightfully exercise itself.”¹⁷⁴ The Court explicitly calls the provision under review a “delegation of legislative power,” and affirms that “[w]hereas] the legislature makes, the executive executes, and the judiciary construes the law... the maker of the law may commit something to the discretion of the other departments.”¹⁷⁵ Indeed, the distinction for *Wayman* was not between legislative and executive powers, but between “powers which are strictly and exclusively legislative”—those which “must be entirely regulated by the legislature itself”—and powers of “less interest” whose “details” the other branches may “fill up.”¹⁷⁶ This account tracks closely to the concept “exclusive” and “non-exclusive” powers. Other early statements, like Madison’s *Report of 1800* and the debates surrounding the creation of the Comptroller General, seem compatible with our reading of non-delegation.¹⁷⁷ Professor Wurman’s broad survey of early non-delegation practice concludes that “[e]arly and modern practice... is [] arguably with an ‘important subjects’ theory of nondelegation.”¹⁷⁸

In light of this understanding, we do not read the dicta in *Seila Law* to be in necessary contradiction to our reading of non-exclusive powers. Although Chief Justice Roberts, author of the controlling majority in *Seila Law*, cites Justice Scalia’s formalist dicta from *Arlington v. FCC*, Roberts took a more pragmatic approach in his own opinion in *Arlington*.¹⁷⁹ This might signal that

for the conclusion that a power could be something other than one of these three (or that it could be two of them at the same time.)” (quoting Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1390 (1994)).

¹⁷⁴ *Wayman v. Southard*, 23 U.S. 1, 43 (1825).

¹⁷⁵ *Id.* at 46.

¹⁷⁶ *Id.* at 42–43. See also Ilan Wurman, *Non-Delegation at the Founding*, 130 YALE L. REV. 1490, 1534 (2021) (“[*Wayman*] assumed there was a difference between exclusive legislative power that Congress could not delegate and nonexclusive legislative power that Congress could either exercise or delegate.”).

¹⁷⁷ Madison’s warning that the “whole power” of legislation may not be “transferred” and that “a delegation of power in this latitude” is impermissible seems to imply that some delegation is permissible if it is of less latitude than the provision that was being discussed. See JAMES MADISON, *The Report of 1800*, in 17 THE PAPERS OF JAMES MADISON 303, 324 (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991) (emphasis added). For the debate around the Comptroller General, see Wurman, *supra* note 116, at 768–74.

¹⁷⁸ Wurman, *supra* note 176, at 1555.

¹⁷⁹ *Supra* note 152. But see *Arlington*, 569 U.S. at 312–13 (Roberts, C.J., dissenting) (“Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with

Roberts has warmed up to delegation formalism, but a better reading of *Seila Law* is that the case has to do with the character of *officials*, rather than the *power* they wield. *Humphrey's Executor* muddied the waters by tying the nature of an office to the character of the power that it wields: a Commission with “quasi-legislative” or “quasi-judicial” power was no longer understood as being fully within the executive branch, but was rather an adjunct to the other branches.¹⁸⁰ But there is of course no *necessary* connection between the power exercised by an office and which department it resides in for constitutional purposes. An official might exercise considerable non-exclusive functions, but would still be entirely within Article II for removal purposes.¹⁸¹ Therefore, *Seila Law* should best be understood as trying to cabin the awkward departmental line-drawing done in *Humphrey's Executor*, without necessarily viewing adjudicatory or rulemaking functions as being purely executive.

Referring back to the canonical formulation of legislating—“to prescribe rules for the regulation of society”—there is little room left to doubt that rulemaking and its mirror, vacatur, fall under the legislative umbrella.¹⁸² The implications of this have been little-explored, but could signal a serious constitutional infirmity in our current system of administrative remedies. The remainder of this Article will assess how well vacatur fares under the caselaw governing delegations of legislative power to the judiciary, then propose solutions for reform.

IV. VACATUR IS AN IMPERMISSIBLE DELEGATION

Now that we have properly conceptualized vacatur as a legislative function, it remains to be seen whether it stands or falls as a permissible delegation. Not all authorizations of legislative discretion are unconstitutional: as Justice Scalia rightly points out, the Court has “almost never felt

those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules.”)

¹⁸⁰ See *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935) (“The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties *as a legislative or as a judicial aid.*”) (emphasis added). See also *Mistretta*, 488 U.S. at 423 (Scalia, J., dissenting) (“We seem to have assumed [in *Humphrey's Executor*], however, that that agency... exercised no governmental power whatever, but merely assisted Congress and the courts in the performance of their functions.”); *c.f. Seila Law*, 140 S. Ct. at 2200 (“[T]he CFPB Director is hardly a mere legislative or judicial aid.”).

¹⁸¹ See also *Mistretta*, *id.* at 422–23.

¹⁸² *Supra* note 119.

qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”¹⁸³ Our precedent reflects this, leaving broad latitude in the type of discretion that may be committed to the executive or judiciary. This state of affairs has received plenty of flack from critics of the administrative state, but it remains the law of the land until the Court resuscitates a more robust concept of non-delegation.

In this climate favorable to delegation, can *vacatur* survive? Despite the permissive caselaw, we think that it still fails. We decide here to sidestep entirely the normative discussion about whether non-delegation *ought* to be more exacting. In that scenario, *vacatur*’s survival would be very precarious. But even so, we believe that the precedent as it exists today is sufficient to doom section 706.

Much like any contentious doctrinal turf, the Court’s non-delegation precedent is hardly unified. Although one test is far and away the most common—the so-called “intelligible principle doctrine”—it is not the only test that has been used to frame a non-delegation challenge. For our purposes, we tackle *vacatur* under three different frameworks, and conclude that it fails under all three: legislative vetos in the spirit of *Chadha*; powers “ancillary to” the exercise of an Article III function; and the intelligible principle test.

A. THE LEGISLATIVE VETO ANALOGY

When understood as a legislative power, the constitutional infirmity *vacatur* poses is similar to the issue raised in *Immigration & Naturalization Services v. Chadha*.¹⁸⁴ There, the Court held that §244(c)(2) of the Immigration and Nationality Act, which allowed either house of Congress to veto the Attorney General’s suspension of deportation proceedings under the Act, was unconstitutional. The reasoning of *Chadha* is somewhat muddled, adopting a stultifying formalist conception of delegated power; but its essential holding is that a one-house veto, because it “alter[s] the legal rights, duties, and relations of persons” and is therefore “legislative in purpose and effect” must satisfy the requirements of bicameralism and presentment.¹⁸⁵ Inasmuch as *vacatur* appears “legislative” under *Chadha*’s definition, and has the same nullifying effect on executive action as a one-house veto, it may well be that vesting such a power in the courts is no more

¹⁸³ *Mistretta*, 488 U.S. at 416.

¹⁸⁴ 462 U.S. 919 (1983).

¹⁸⁵ *Id.* at 952.

constitutional than vesting it in Congress. Let us then inspect the reasoning of *Chadha* carefully and see whether this analogy holds water.

First, it is worth noting precisely what action was being reviewed in *Chadha*. Jagdish Chadha, a citizen of Kenya, had overstayed his student visa and was therefore subject to deportation proceedings. But under §244(a)(1) of the Immigration and Nationality Act, deportation could be suspended when certain conditions were met. The Immigration Judge therefore suspended Chadha’s deportation, and it was this action which was vetoed by the House of Representatives.¹⁸⁶ But in light of the action being vetoed—a deportation proceeding taken against a single individual—it may appear strange for the Court to label the veto as being “legislative in its character and effect.”¹⁸⁷ Indeed, Justice Powell’s concurrence in judgment characterizes the veto as “assum[ing] a judicial function,” and therefore “would not reach the broader question whether legislative vetoes are invalid under the Presentment Clauses.”¹⁸⁸ But the majority seemed to believe that “altering the legal rights, duties, and relations of persons... outside the Legislative Branch” is sufficient to characterize the action as legislative.¹⁸⁹ Because the issue in *Chadha* dealt with a determination of one person’s rights, it would seem to follow *a fortiori* that vacatur, which acts upon rules of general effect, would be “legislative in character and effect” under the ruling’s logic.

What is more, the Court states that the “legislative character” of the one-house veto is “confirmed” by the “character... of the [] action that is supplanted.”¹⁹⁰ Because neither house of

¹⁸⁶ *Id.* at 963–64 (Powell, J., concurring in judgment).

¹⁸⁷ *Id.* at 952.

¹⁸⁸ *Id.* at 960, 967.

¹⁸⁹ The Court further responds to Justice Powell’s contention in a footnote. *See Chadha*, 462 U.S. at 957 n. 22. There it explains that while the decision has a “judicial cast,” the analogy to adjudication is “less than perfect,” because the Attorney General’s decision to suspend Chadha’s deportation did not present an Article III case or controversy. This should not be read to suggest that a decision is adjudicatory merely because it arises in a justiciable case. Rather, a determination falling outside of Article III makes it *per se* a non-adjudicatory determination, but the ultimate test is still whether the action is “legislative in purpose and effect.” *Id.*

Even so, vacatur might still fail under the most permissive reading of this footnote, because vacatur purports to bind *all* parties, even those who would not be able to raise an Article III case or controversy. The relevant standard is the effect of the action, not the form in which it is brought. *Cf. supra* nn. 145147, *infra* nn. 201–205 and accompanying text. For instance, nobody would contend giving the court a *carte blanche* rulemaking power is permissible so long as it is exercised ancillary to an Article III case or controversy. Likewise, an Article III case with non-Article III effect, i.e. vacatur, falls under the footnote’s ambit.

¹⁹⁰ *Chadha*, 462 U.S. at 952.

Congress alone could “effectively require the Attorney General to deport an alien” once he had made the relevant finding under §244(a)(1) without the veto provision, that provision served as a stand-in for “legislation requiring deportation.”¹⁹¹ Now, one might think that this reasoning does not apply to vacatur because the courts, unlike Congress, *can* make case-by-case determinations via the native power of the Article III vesting clause. But one must keep in mind the difference between vacatur and a normal Article III judgment. The latter cannot permanently bind all parties and remove the underlying action of legal effect; even those who permit universal injunctions would presumably have to agree that a later court could reverse its previous decision, thereby resurrecting the enactment’s validity.¹⁹² This is not so with vacatur. Because repealing an act or rule is fundamentally legislative, the power necessarily goes beyond what the courts can do *ex proprio vigore*. So in fact, vacatur does fall under *Chadha*’s reasoning, because neither the courts, nor Congress, can repeal an agency rule by their own force. Therefore, section 706 of the APA acts as a stand-in for legislation to nullify the rule in question, just as §244(c)(2) did in *Chadha*.

One last complication in *Chadha*’s reasoning is the majority’s characterization of the Attorney General’s initial decision to suspend deportation. In a footnote, they respond to the complaint that if Congress’s decision is legislative in nature, then so too must be the Attorney General’s. “Why is the Attorney General exempt from submitting his proposed changes in the law to the full bicameral process?”¹⁹³ The Court offers the standard formalist rejoinder that such executive action only “resemble[s] lawmaking,” but that it is executive power in the final analysis.¹⁹⁴ Because the executive “acts in his presumptively Article II capacity” when making the initial determination, one might naively conclude that the courts act presumptively in their Article

¹⁹¹ *Id.* at 952–54.

¹⁹² *Cf. supra* nn. 56–58 and accompanying text.

¹⁹³ *Chadha*, 462 U.S. at 953 n. 16.

¹⁹⁴ *Id.* The Court’s logic is not very satisfactory, or at least is unclear. It argues that “[t]he bicameral process is not necessary as a check on the Executive’s administration of the laws, because his administrative activity cannot reach beyond the limits of the statute that created it.” But this is of course just as true for the one-house veto; each house’s ability to veto the Attorney General’s action depends precisely upon the statute’s existence, and therefore cannot “reach beyond [its] limits.” One way to make sense of this contradiction is to hinge it on the Attorney General’s being bound by the standard set forth in §244(a)(1), whereas the veto is purely discretionary. In that case, vacatur would be problematic since it is discretionary. Alternatively, the issue might be that congressional action is not judicially reviewable, standard or no, and the Attorney General’s action is. Again, vacatur would be problematic. Any attempt to cohere the footnote’s reasoning results in vacatur’s raising a constitutional objection.

III capacity when they vacate.¹⁹⁵ But the footnote’s reasoning must be looked at closely. The justification for the distinction between the Attorney General’s and Congress’s action looks to be functionalist: executive discretion is “always subject to check by the terms of the legislation that authorized it” and “open to judicial review,” whereas the one-house veto “is not so checked.”¹⁹⁶ The Court then seems to believe that the nature of the decision is partially determined by whether there are sufficient checks against its abuse or not. If this is the case, then vacatur seems rather suspect, since the courts cannot be depended on to independently check their *own* judgments. *Quis custodiet ipsos custodes?* And anyways, section 706 does not furnish any “terms” upon which “the courts... [can] ascertain whether the will of Congress has been obeyed” because vacatur is purely discretionary.¹⁹⁷ However one wishes to make sense of this footnote, it does not undermine the analogy of vacatur to a legislative veto.

Resolving *Chadha*’s obscure formulation of legislative, executive, and judicial functions requires turning to the concept of ancillary powers and the intelligible principle doctrine, which we shall arrive at shortly. But needless to say, vacatur seems suspect, even with *Chadha*’s perplexing caveats. In sum, it is at least arguable that vacatur is to be understood as a legislative veto—given to the courts, rather than Congress—and therefore in violation of Article I.

B. VACATUR AS AN ANCILLARY TO JUDICIAL POWER

Another way of analyzing vacatur as a separation-of-powers claim is through the concept of “ancillary powers.” As Justice Scalia explained in his *Mistretta* dissent, the Court permits certain delegations not because “Congress... can assign its responsibility of making law to someone else,” but rather because “a certain degree of discretion... *inheres* in most executive or judicial action.”¹⁹⁸ He then gives examples of the type of discretion that inheres in judicial action: the Court may be given the power to “adopt rules of procedure” or “prescribe by rule the manner in which their officers shall execute their judgments,” because such acts are “ancillary to their exercise of judicial powers.”¹⁹⁹ Analogous to the formalist framework that we have already

¹⁹⁵ *Id.*, see also *id.* at 951.

¹⁹⁶ *Id.* at 953 n. 16.

¹⁹⁷ *Id.*

¹⁹⁸ *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting).

¹⁹⁹ *Id.*

detailed for executive action, this analysis suggests that delegations must be “ancillary” to the power vested in the judiciary by Article III, viz. rendering judgment—equitable or legal—in a case or controversy.

This is also the logic behind the standard announced in *Hayburn’s Case*, one of the earliest challenges of a delegation to the judicial branch.²⁰⁰ Although the Court ultimately dismissed the mandamus petition in the case, the decision reported some informative letters by the Circuit Courts, some of whom had justices riding circuit. The Circuit Court for the District of North Carolina, which included Justice Iredell, wrote that “courts cannot be warranted... for the exercise of... any power not in its nature judicial, or, if judicial, not provided for upon the terms the Constitution requires.”²⁰¹ Put another way by Chief Justice Jay, riding circuit in the District of New York, “the Legislative... [cannot] constitutionally assign to the Judicial any duties but such as are properly judicial and to be performed in a judicial manner.”²⁰² *Hayburn’s Case* is often read as a narrow ruling on advisory opinions and the revisability of Article III judgments, but its text plainly speaks to broader limits on delegation.²⁰³ Statutes can only empower courts to do what is “in its nature judicial,” “upon the terms the Constitution requires, and “[as] performed in a judicial manner.” In short, the power must be ancillary to the exercise of a legitimate judicial power.

Can vacatur thus be understood as ancillary to the power of rendering Article III judgments? We think no. As *Hayburn’s Case* reminds us, it is not enough for the process to be “performed in a judicial manner,” it must also be judicial in nature. In our discussion above on the appellate-review model, we demonstrated that this principle was adhered to in the infancy of administrative law, when courts held ratemakings to be a “legislative act” even when performed

²⁰⁰ 2 U.S. (2 Dall.) 409 (1792).

²⁰¹ *Id.* at 412–13.

²⁰² *Id.* at 414.

²⁰³ The case is often read to mean that the power to set pensions was non-judicial *because* it was revisable by other branches. But the letters seem to suggest two separate defects: the non-judicial nature of the power, *and* its revisability. See *id.* at 411 (“[T]he business directed by this act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States.”), 414 (“[T]he duties assigned to the circuit courts by this act are not [judicial], and the act itself does not appear to contemplate them as such.”); see also Maeva Marcus & Robert Teir, *Hayburn’s Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 532 n. 31 (1988). One commentator has suggested that the circuits deemed the power non-judicial because it extended beyond mere fact-finding and into the exercise of discretion to set pension rates. See Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 137 (1973). If this is true, then it follows *a fortiori* that the purely discretionary review of rules via vacatur would run afoul of the principle.

in a trial-like procedure.²⁰⁴ Likewise, all of the examples adduced by Justice Scalia—rules of procedure, the manner of executing judgments, and so on—merely specify how the judicial power is to be carried out, but never result in a non-judicial outcome. This is evidenced where Scalia explains that the power to determine aggravating and mitigating factors was permissible only because it was constrained to “pronouncing sentence upon *individual* defendants,” which suggests that delegations cannot allow the Court to render judgments in a generalized, and thus non-judicial, capacity.²⁰⁵ That is all to say that courts may be delegated broad latitude in specifying the form of judgments, but those judgments cannot span beyond the nature of the judicial power.

Because vacatur is only rendered in the context of an Article III case or controversy, it is mistakenly assumed to be ancillary to the judicial power. But as we have seen above, it is not sufficient that the power be exercised in a judicial posture; the power itself must likewise be judicial. If one agrees with our characterization of vacatur as a plainly legislative power, then it moves beyond serving as an ancillary to the judicial power and transmutes it entirely. When the court goes beyond delegations that are incidental to settling legal relations in individual cases, and into changing the law that affects all regulated parties, they go a bridge too far.

C. VACATUR LACKS AN INTELLIGIBLE PRINCIPLE

The last framework that the Court uses to analyze non-delegation challenges is the intelligible principle doctrine. It has long been understood that almost anything under the sun may pass as an “intelligible principle” under twentieth-century caselaw, and four Justices in *Gundy v. United States* expressed a willingness to revisit the test.²⁰⁶ Nonetheless, it is still the governing standard of classic non-delegation claims, and it is a low bar. Can vacatur fall below even such a

²⁰⁴ See *supra* nn. 144–147 and accompanying text.

²⁰⁵ *Mistretta*, 488 U.S. at 418 (emphasis added). *Cf. supra* note 124.

²⁰⁶ See *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (“[T]he Court has stated that a delegation is permissible if Congress has made clear to the delegate the general policy he must pursue and the boundaries of his authority. Those standards, the Court has made clear, are not demanding.”) (internal quotation marks omitted); *id.* at 2140 n. 62 (Gorsuch, J., dissenting) (“[T]he [intelligible principle] test has become so ephemeral and elastic as to lose its meaning.”) (quoting D. Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1231 (1985)). See also Kristin E. Hickman, *Gundy, Nondelegation, and Never-Ending Hope*, REGUL. REV. (Jul. 8, 2019) (“By one reading, SORNA’s section 20913(d) was fortunate to survive at all, and *Gundy* was likely the intelligible principle standard’s last gasp. Four justices declared themselves willing to replace the intelligible principle standard.”), <https://www.theregreview.org/2019/07/08/hickman-nondelegation/>.

lax restriction? We think that it does: section 706 gives *no* principle—much less an intelligible one—to guide courts in whether to vacate not. It constitutes a purely arbitrary exercise of discretion, and therefore violates non-delegation.

The bar is low, but it does exist. The Court has held that vague terminology like “unduly or unnecessarily complicated,” “unfairly or inequitably,” and “public interest” are sufficient to constitute an intelligible principle.²⁰⁷ But there has to be *some* principle; it cannot be unfettered discretion. In the case of *Panama Refining Co. v. Ryan*, where the law “provided literally no guidance for the exercise of discretion,” the delegation was struck down.²⁰⁸ Recently, in *Jarkesy v. Securities & Exchange Commission*, the Fifth Circuit took the intelligible principle standard to mean that “a total absence of guidance is impermissible under the Constitution.”²⁰⁹ And although the Court in *Gundy* ultimately ducked the question of non-delegation through statutory construction, Justice Kagan noted that “we *would* face a nondelegation question” if the Sex Offender Registration and Notification Act had given “the Attorney General plenary power to determine SORNA’s applicability.”²¹⁰ Standardless legislative discretion violates the requirement of an intelligible principle.

Strictly speaking, section 706 provides that “[t]he reviewing court *shall*... set aside agency action” upon finding a rule unlawful.²¹¹ The imperative phrasing of section 706 has been used to support an anti-vacatur reading, since universal relief was not understood to be a consequence of the APA at its passage.²¹² Mostly, however, section 706 is read instead as a permissive “shall,” allowing courts to vacate purely at their discretion. Some courts, like the D.C. Circuit, have imposed *post hoc* tests for deciding whether to vacate, considering factors like the “seriousness of

²⁰⁷ See *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 474 (2001).

²⁰⁸ 293 U. S. 388 (1935). See *Whitman, id.*

²⁰⁹ 2022 U.S. App. LEXIS 13460 at *25 (5th Cir. 2022).

²¹⁰ *Gundy*, 139 S. Ct. at 2123.

²¹¹ 5 U.S.C. § 706.

²¹² Cf. Samuel Bray, *Does the APA Support National Injunctions?*, REASON: THE VOLOKH CONSPIRACY, <https://reason.com/volokh/2018/05/08/does-the-apa-support-national-injunction/> (“[T]he complete absence of national injunctions in the decades before and after the APA makes it highly unlikely that the text was understood by Congress to authorize or require national injunctions.”). But see John Harrison, *Remand Without Vacatur and the Ab Initio Invalidity of Unlawful Regulations in Administrative Law*, 48 *BYU L. Rev.* 2077, 2093–2099 (2023); Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, *supra* note 11, at 2019–23.

the order’s deficiencies” and the “disruptive consequences” of vacatur.²¹³ But this cannot change the fact that the underlying statute lacks any guidance for when to vacate or not. Self-imposed judicial tests, free to be fashioned and refashioned, cannot remedy a non-delegation challenge.²¹⁴ Therefore, under the intelligible principle standard, vacatur is again unconstitutional.

V. REFORMING UNIVERSAL REMEDIES

A. MANDATORY VACATUR

One way that the courts could resolve vacatur’s constitutional defect is to take seriously the “shall” language of section 706. Instead of letting the courts decide *ad libitum* whether or not to vacate a rule, the APA could be read to make vacatur the mandatory result of a successful challenge. This approach is not without a few merits. It would conceivably remove some of the non-delegation issues with section 706, because vacatur would no longer hinge on the discretion of the judiciary, but would simply be an automatic effect of judgment. Moreover, it is not an entirely novel reading of the APA; the idea of mandatory vacatur has been suggested by some precedent, particularly in the D.C. Circuit.²¹⁵

But we ultimately find this solution to be vastly inferior to the ones we will suggest soon. It is not entirely satisfactory of vacatur’s constitutional problem, because it still has the court issuing non-party relief. The removal of discretion ameliorates, but does not fully remove, the non-delegation issue; and there remains the broader issue of whether certain kinds of universal relief are ever permissible under Article III.²¹⁶ Further, the reading of section 706 as requiring mandatory relief is possible, but not plausible. The practice immediately following the APA’s passage did not suggest a requirement to vacate.²¹⁷ Lastly, requiring mandatory vacatur would keep in place the pandemonium of single-judge district courts tying up federal regulation. It would even make it

²¹³ *Allied-Signal, Inc. v. US Nuclear Regulatory Com'n*, 988 F. 2d 146, 151 (D.C. Cir. 1993).

²¹⁴ *See Whitman*, 531 U.S. at 472 (“[A]n agency [cannot] cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.”).

²¹⁵ *See Sohoni, The Power to Vacate, supra* note 11, at 1177 n. 288; Harrison, *supra* note 212, at 2091–95.

²¹⁶ *See generally Bray, Multiple Chancellors, supra* note 11; Paul J. Larkin, Jr. & GianCarlo Canaparo, *supra* note 11.

²¹⁷ *See Bray, supra* note 212.

worse, since judges could no longer decide to issue a single-party injunction rather than a nationwide vacatur.²¹⁸ The entire scheme would be disruptive and constitutionally suspect.

B. EXCLUSIVE JURISDICTION AND THE HOBBS ACT

If Congress were to involve itself in reforming administrative remedies, a better (though still not ideal) solution than mandatory vacatur would be consolidating universal relief in one court.²¹⁹ This solves both the constitutional issue and the forum-shopping issue. As Aditya Bamzai has noted, a well-known exception to the rule of non-mutual estoppel is when the issue is vested in a court of exclusive jurisdiction.²²⁰ That universal relief might be permissible in a court of exclusive jurisdiction was also suggested by scholars contemporary to the passage of the APA. Professors Blachly and Oatman simply assumed that the Walter–Logan Bill’s provision for judicial review intended to strip all other courts of jurisdiction and vest it in the D.C. Circuit.²²¹ That is because universal relief made sense only if other courts were precluded from deciding the issue themselves. This scheme, therefore, gets around the Article III and non-delegation issue. It is premised in equitable practice that would have been known to the founders; and the remedy would be universal without being legislative. The judgment would act only upon the parties of the case, but other courts would have to respect it because of issue preclusion.²²² Furthermore, it creates a reliable forum for reviewing federal regulation, and would prevent every rule from being vacated nationally by only having to find a single willing district court judge.

Not only is this scheme more practicable, but it has been done before. A similar mechanism of consolidated review already exists for multidistrict litigation—a model that some have proposed

²¹⁸ Judges under this scheme might begin to resort to the clever trick employed in cases like *NACS v. Bd. of Governors of the Fed. Reserve Sys.*, 958 F. Supp. 2d 85 (D.D.C. 2013). There, the court vacated the rule, but then stayed their vacatur to preserve the plaintiffs’ status quo. *See id.* at 115. But this maneuver has been criticized when applied to regulations that are invalid *ab initio*, rather than ones that regulate too little. *See* Harrison, *supra* note 212.

²¹⁹ We are very grateful to Aditya Bamzai for bringing to our attention several cases that informed the analysis of this Section.

²²⁰ Bamzai, *The Path of Administrative Law*, *supra* note 11, at 2053–54.

²²¹ *See supra* nn. 77–80 and accompanying text.

²²² *See* Taylor v. Sturgell, 553 U.S. 880, 895 (2008) (noting that “special statutory scheme[s]” may “expressly foreclose successive litigation by nonlitigants.”).

be applied to nationwide injunctions.²²³ One example is the scheme adopted by the Hobbs Act. The Act gives circuit courts the exclusive jurisdiction to “enjoin, set aside, suspend... or [] determine the validity of” certain agency orders,²²⁴ but has been interpreted to not bar later challenges upon enforcement.²²⁵ This at least minimizes forum-shopping by removing universal remedies from the district courts.²²⁶ It also (in theory) retains a level of percolation and federalism, since a successful challenge in one circuit would not bind other circuits.²²⁷

A more restrictive example is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). CERCLA’s judicial-review section grants the D.C. Circuit exclusive jurisdiction over pre-enforcement review of covered regulations.²²⁸ Although its language does not explicitly provide for universal relief, such a reading would comport with the principle that judgments in courts of exclusive jurisdiction have non-party preclusive effect.²²⁹ Therefore, such a scheme would enable more predictability and less chaos, since only one court would be able to issue universal remedies. This was also the review scheme

²²³ See Adam J. White, *Congress Should Fix the Nationwide Injunction Problem with a Lottery*, YALE J. ON REG. NOTICE & COMMENT (Feb. 11, 2020), <https://www.yalejreg.com/nc/congress-should-fix-the-nationwide-injunction-problem-with-a-lottery>.

²²⁴ 28 U.S.C. § 2342

²²⁵ The Court in *PDR Network*, *infra* note 226, punted on the question of whether the Act bars enforcement challenges. Justice Kavanaugh thought that it did not preclude an enforcement review, *PDR Network*, *infra* note 226, at 2058, but this position has been disputed. See, e.g., Brief of Professor Aditya Bamzai as Amicus Curiae at 24 (arguing that “the term ‘determine the validity of,’ as used in the Hobbs Act, carries the same meaning given to it under the EPCA — as well as the same limitations,” namely precluding review by the district court).

²²⁶ See *PDR Network, LLC v. Carlton Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2063 (2019) (Kavanaugh, J., concurring in judgment) (“[I]f the district court disagrees with the agency’s interpretation in an enforcement action, that ruling does not invalidate the order and has no effect on the agency’s ability to enforce the order against others.”).

²²⁷ We say “in theory,” because the Hobbs Act has been taken by some courts to require non-mutual estoppel. We agree with Judge Menashi that this is the wrong understanding of the Act. See *Gorss Motels, Inc. v. Fed. Comm. Comm’n.*, 20 F.4th 87, 99 (2d Cir. 2021) (Menashi, J., dissenting) (rejecting the basis of the FCC’s repeal of its 2006 Solicited Fax Rule for assuming that “the D.C. Circuit’s decision is binding on all other circuits.”).

²²⁸ See 42 U.S.C. §9613.

²²⁹ Combined with its provision that agency actions “shall not be subject to judicial review in any civil or criminal proceeding for enforcement,” *id.*, interpreting it as non-preclusive would raise serious due process issues. That is because if an enforcement proceeding were brought outside the D.C. Circuit, the defendant would have no opportunity to raise an as-applied challenge, nor could they have brought a pre-enforcement challenge. They would therefore be left without any means of judicial review. See *Chrysler Corp. v. EPA*, 600 F.2d 904, 913 (D.C. Cir. 1979) (noting that preclusive review provisions raise a “substantial due process question.”).

envisioned for the Walter–Logan Bill; although as we have already seen, even that sort of scheme was roundly derided as impracticable and legally dubious.²³⁰

C. REMEDIAL FEDERALISM

Both aforementioned solutions would remedy some of vacatur’s strictly legal issues, but neither deal entirely with its policy issues. The traditional model of parallel review across multiple jurisdictions—call it “remedial federalism”—allows for the sharpening of factual and legal issues via percolation.²³¹ On the other hand, universal remedies lead courts into “rushed, high-stakes, low-information decisions.”²³² Ignoring the Article III issues entirely, one may find it desirable to scrap centralized review, and return to the standard model of court–agency relations that prevailed until the mid-twentieth century.

The APA can be read in precisely this way. As we have said before, anti-vacatur scholars tends to read section 706 as specifying that “questions of law are for courts rather than agencies to decide in the last analysis,” which then informs the actual remedy to be applied.²³³ As Part II of this Article has outlined, we find this reading to be much more plausible than the pro-vacatur interpretation. But even if one is not convinced, construing the ambiguity against both the discretionary- and mandatory-vacatur reading comports best with constitutional avoidance. It would be passing strange to read a statutory ambiguity to *create* a constitutional defect.²³⁴ And this is to say nothing of the policy considerations that bear upon the matter, which themselves are intimately tied up in concerns about the courts’ proper role in our constitutional framework.

It is also doubtful whether vacatur’s status as a “liquidated remedy” is firm enough to rebut the application of constitutional avoidance.²³⁵ The Court has never actually rendered an affirmative

²³⁰ See *supra* Section II.C.

²³¹ See Larkin & Canaparo, *supra* note 11, at 68–72; Bray, *Multiple Chancellors*, *supra* note 11, at 461–462. See also Ronald A. Cass, *Nationwide Injunctions’ Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29 (2019).

²³² Dep’t of Homeland Sec. v. New York, 139 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay).

²³³ Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, *supra* note 11, at 126 (quoting H.R. REP. NO. 79-1980, at 44 (1946)).

²³⁴ See *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 546 (2010) (Breyer, J., dissenting) (“I am not aware of any other instance in which the Court has... *created* a constitutional defect in a statute.”).

²³⁵ See Mizelle, *supra* note 11, at 14–16.

decision on vacatur’s status, neither under the APA nor the constitution.²³⁶ And even then, stare decisis is of little help to vacatur. The Court has laid out several factors for determining a precedent’s strength—quality of reasoning, the rule’s workability, its disruptive effect, and reliance interests—several of which weigh against vacatur.²³⁷ As far as we are aware, Circuit Courts began adopting universal vacatur *sua sponte* around the 1980s, with very little considered reasoning as to whether the APA intended to authorize it or not.²³⁸ Their precedential value on this question is therefore dubious.²³⁹ To its credit, vacatur may be said to be “workable,” because it is now a normal and predictable result of challenges to controversial agency action. But it can very fairly be said to be disruptive, both to the extent that it literally disrupts the normal functioning of the federal government, and because it stops the percolation of lower-court decisions and the more stable development of the law therefrom. Under *Dobbs*’s understanding of “reliance interest”—i.e., “concrete” interests such as those that implicate “property and contract rights”—it can hardly be said that one has a reliance interest in being able to seek universal vacatur.²⁴⁰ This interest is all the weaker since universal remedies by definition go beyond what is needed to vindicate any one individual’s rights: their interest in abating the threat of agency action is already provided for by other means of pre-enforcement review.

VI. CONCLUSION

Having now canvassed vacatur’s entire constitutional career—from its origin in twentieth-century administrative law, up to its conflict with non-delegation caselaw, and into methods for reform—it is in order that we take a step back. We make no claim that this Article is the last word on a deeply complicated issue. Vacatur stands at the intersection of various competing, thorny legal questions; this makes it all the harder to resolve decisively its constitutional status. As a

²³⁶ See *Corner Post*, 144 S. Ct. at 2450 n. 2 (stating that the Court “assume[s] without deciding that vacatur is available under the APA.”).

²³⁷ See *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2265 (2022).

²³⁸ See Sohoni, *The Power to Vacate*, *supra* note 11, at 1174 n. 270 (citing a string of cases that show that courts “proceed[ed] on the understanding that the APA authorizes courts to give universal relief,” the earliest of which is from 1985).

²³⁹ See *Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”). See also *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 183 (1979).

²⁴⁰ *Id.* at 2277.

matter of policy, clashing values between federalism, efficiency, and inter-branch relations are implicated. As a matter of caselaw, no one precedent is directly on point, and there is room for reasonable disagreement over how to draw distinctions and similarities between vacatur and other non-delegation paradigms. And as a matter of originalism, finding a proper historical analogy to vacatur—a modern solution responding to an administrative structure quite foreign to the founders—is exceedingly difficult.

But these problems are not intractable. We believe that policy, history, and precedent weigh preponderantly against vacatur (and universal remedies more broadly). To be sure, there is more fruitful scholarship to be had, answering questions like: what is the relation between vacatur and the so-called “supervisory jurisdiction” of pre-APA courts? What was the early American practice around non-mutual estoppel? How did agency non-acquiescence work when applied to rules, not orders? And so on. But we hope that we have sketched a relatively convincing edifice upon which this work can grow, showing that vacatur stretches the limits of both text and tradition. Therefore, we echo the wise words of Samuel Bray, and say: in a system like ours, there is no room for universal vacatur.²⁴¹

²⁴¹ See Bray, *Multiple Chancellors*, *supra* note 11, at 482.