

# Vacatur of Rules Under the Administrative Procedure Act

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*Many lower federal courts hold that section 706(2) of the Administrative Procedure Act, 5 U.S.C. § 706(2), instructs courts reviewing agency regulations to vacate regulations that are unlawful as defined by that provision. Vacatur as the courts understand it is distinct from injunctions against enforcement proceedings and declaratory judgments. Unlike remedies that operate with respect to parties and parties' rights, vacatur operates on regulations as such, depriving them of legal force. That feature makes vacatur an inherently universal or nationwide remedy. Lower courts issued orders purporting to vacate rules in two prominent recent cases, *Health Freedom Defense Fund v. Biden*, the mask mandate case, and *United States v. Texas*, an immigration enforcement policy case that was recently argued before the Supreme Court.*

*This Essay argues that the remedy of vacatur of rules as now understood, and the reading according to which 5 U.S.C. § 706(2) calls for vacatur, were not well known when the APA was adopted and at the time of the case in which the Supreme Court approved pre-enforcement review of regulations, *Abbott Laboratories, Inc. v. Gardner*. The drafters of the APA, leading scholars in the 1950s and 1960s, and counsel and the Justices in *Abbott Laboratories* were not familiar with a pre-enforcement remedy of vacatur distinct from injunctions and declaratory judgments.*

## Introduction

Two recent cases, one of which was argued before the Supreme Court in its 2022 Term, raise the question of whether section 706(2) of the Administrative Procedure Act (APA)<sup>1</sup> directs courts to give a remedy of vacatur when they find that an agency rule is unlawful. In *Health Freedom Defense Fund Inc. v. Biden*,<sup>2</sup> and the *United States v. Texas*<sup>3</sup> litigation, the district courts issued orders purporting to vacate the rule under review. They did so pursuant to circuit precedent that, they believed, holds that section 706(2) of the APA calls for that remedy.

Vacatur of rules, as these district courts understood it, is a universal remedy distinct from universal injunctions. Vacatur operates on the legal status of a rule, causing the rule to lose binding force. Injunctions, including universal injunctions against enforcement, operate on the defendant by imposing a new

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1. 5 U.S.C. § 706(2) (2018).

2. No. 8-21-cv-1693, 2022 WL 1134138, at \*1176 (M.D. Fla. Apr. 18, 2022).

3. See *Texas v. United States*, No. 6:21-CV-00016 (S.D. Tex. June 10, 2022), cert. granted before judgment, No. 22-58, 2022 WL 2841804 (U.S. July 21, 2022). In the *United States v. Texas* litigation, Texas and Louisiana were plaintiffs in the district court and the United States was the defendant. The United States is petitioner in the Supreme Court.

duty. Thus, unlike injunctive relief, vacatur is inherently universal. An injunction can be limited to the defendant's actions concerning the plaintiff, and its preclusive effect can be limited to the relations between the parties. Vacatur, by contrast, eliminates a rule's binding force altogether.

This Essay presents historical evidence showing that vacatur of rules as today understood, and specifically the thesis that section 706(2) and its earlier versions call for a remedy like vacatur, was unknown when the APA was adopted and for at least two decades afterwards. In important sources from the 1940s, 1950s, and 1960s, the concept of vacatur—a non-statutory remedy that acts on a rule's legal status and that is different from injunctive and declaratory relief—is absent. Also absent is the claim that section 706(2) calls for a remedy of that kind with the words “set aside.”<sup>4</sup> This absence is notable. The issue of vacatur would have arguably arisen if historical lawyers, judges, and scholars accepted the theory of vacatur that the district courts in *Health Freedom Defense Fund* and the *United States v. Texas* litigation embraced. As evidence, I discuss the committee reports on the APA, a leading treatise from 1958, an influential book from 1965, and the foundational case about pre-enforcement review of regulations, *Abbott Laboratories v. Gardner*.<sup>5</sup> In none of these authorities is a remedy equivalent to vacatur of rules discussed, even though a remedy distinct from injunctive and declaratory relief would have been significant had it been known.

This historical evidence does not by itself show that courts are wrong to embrace vacatur under section 706(2). Vacatur of rules might be a justifiable innovation, either under an innovative reading of that provision or as an addition to the remedies found in unwritten federal equity. Courts that adopt vacatur today, however, point to section 706(2), not to another source of a vacatur remedy. Those courts do not address the possibility that their understanding of that provision differs from the understanding that prevailed from 1946 until at least the late 1960s. As far as I have been able to determine, today's courts are unaware that vacatur of rules as they understand it is a relatively recent innovation. Rather, they assume that in vacating rules, as distinct from giving injunctive and declaratory relief, they are following a practice rooted in section 706(2) that dates to 1946. That assumption is incorrect. The practice of vacatur should therefore be reevaluated in light of the understandings of the APA that prevailed through that statute's first two decades.

To that end, the Essay proceeds in three parts. Part I describes the understanding of vacatur under section 706(2) that is currently common in the lower courts.<sup>6</sup> The district courts in *Health Freedom Defense Fund* and *United*

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4. See 5 U.S.C. § 706(2) (2018) (providing that reviewing courts shall “hold unlawful and set aside agency action, findings, and conclusions found” to satisfy at least one of the criteria set out in 5 U.S.C. § 706(2)(A)-(F)).

5. 387 U.S. 136 (1967).

6. This Essay concerns vacatur of rules in cases like *Health Freedom Defense Fund* and the *United States v. Texas* case, which were not brought as special statutory review proceedings. See 5 U.S.C. § 703 (2018) (distinguishing between “special statutory review proceeding[s]” and other “applicable

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*States v. Texas* case embraced this understanding. Part II presents evidence showing that vacatur of rules was not a known administrative-law remedy, and that section 10(e) of the APA, now 5 U.S.C. § 706, was not thought to call for it, when the APA was adopted and in its first two decades.

Part III describes a feature of administrative law's historical development that helps explain the eclipse of the understanding of pre-enforcement remedies found in *Abbott Laboratories*. In *Abbott Laboratories*, the Court did not regard vacatur as a possible remedy in pre-enforcement review of regulations. The pre-enforcement remedies the Court discussed were injunctions and declarations. By facilitating pre-enforcement review, however, *Abbott Laboratories* shifted the focus of judges, lawyers, and scholars to pre-enforcement proceedings and away from other forms of judicial review. The shift in focus from proceedings in which vacatur is inapposite to a form of proceeding in which vacatur *seems* appropriate facilitated the assumption that vacatur is a remedy called for in all cases by section 706(2). Thus, by accident, *Abbott Laboratories* helped obscure the assumption about remedies on which it rested.

### I. Lower Courts' Practice of Vacatur Under 5 U.S.C. § 706(2)

Lower federal courts have developed a practice of issuing an order that vacates, or sets aside, an agency rule that a district court has found to be unlawful. The practice has arisen in district court cases for pre-enforcement review of rules that are not special statutory review proceedings. Vacatur of a rule deprives the rule of legal force, just as vacatur of a lower court's judgment by an appellate court deprives the lower court's order of legal force.

The courts ground that practice in 5 U.S.C. § 706(2), which states that reviewing courts shall "hold unlawful and set aside agency action, findings, and conclusions found" to satisfy descriptions set out in section 706(2)(A)-(F), such as being "contrary to constitutional right, power, privilege, or immunity."<sup>7</sup>

The question of whether the APA calls for vacatur of unlawful rules is central to the current debate over universal remedies against the government. Although much of that debate has concerned so-called universal injunctions, a decree of vacatur is not a universal injunction. An injunction is a directive to the defendant. In pre-enforcement review, a standard form of relief is an injunction directing the defendant not to bring enforcement proceedings. Vacatur, by

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form[s] of legal action" for review). Remedies in special statutory review proceedings are governed by the relevant statute, in addition to generic APA principles. I do not address whether any of the statutes providing for special review proceedings authorizes reviewing courts to deprive rules of their binding force. I also do not address whether a court reviewing an agency adjudication is authorized to eliminate the binding force of the agency's decision as to the parties before the court. As to vacatur of rules, the historical evidence I present supports the conclusion that section 706(2) of the APA does not create a remedy of vacatur of rules that would be available in special statutory review proceedings.

7. 5 U.S.C. § 706 (2018). Section 706(2)(B) refers to unconstitutional agency action, findings, or conclusions.

contrast, is understood to operate on the legal status of the regulation itself, with the same legal effect as rescission by the agency.

The difference between vacatur and injunctions matters with respect to the debate over universal remedies. Injunctions against enforcement can be limited to forbidding enforcement only against the plaintiff, or can forbid enforcement against anyone, party or not. Injunctions can be, but are not inherently, universal. Vacatur is intrinsically universal, because it affects the regulation itself.<sup>8</sup> If section 706(2) directs courts to vacate unlawful rules, then universal relief is at least the statutory default remedy in pre-enforcement review of regulations.<sup>9</sup>

Two current cases exemplify the practice of vacatur under section 706(2). *United States v. Texas* began as a suit by Texas and Louisiana against the federal government in federal district court. The case was not a special statutory review proceeding. The plaintiffs complained of adverse effects from a Department of Homeland Security (DHS) enforcement policy, embodied in a memorandum issued by Secretary Alejandro Mayorkas.<sup>10</sup> The district court found that the policy was final agency action under the APA, that it conflicted with statutory mandates, was arbitrary and capricious, and should have been adopted through the notice and comment process but was not.<sup>11</sup>

Having found the DHS memorandum to be unlawful agency action, the court found that the appropriate remedy was to vacate the memorandum and remand to the agency. That result, the court reasoned, was called for by section 706(2) of the APA:

A federal court “shall . . . hold unlawful and set aside agency action” that is unlawful. 5 U.S.C. § 706(2). “Agency action” includes “the whole or part of an agency rule.” 5 U.S.C. § 551(4), (13). Thus, the APA contemplates wholesale vacatur of entire rules.<sup>12</sup>

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8. The leading scholarship supporting the claim that the APA calls for vacatur of rules is Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121 (2020).

9. Declaratory judgments are inherently specific to parties. The Declaratory Judgment Act authorizes federal courts to “declare the rights and other legal relations of any interested party seeking such declaration.” 28 U.S.C. § 2201 (2018). Courts often formulate declaratory judgments as abstract statements about the content of the law, such as the statement that a regulation is invalid, rather than as statements about the legal relations of parties, such as the statement that the plaintiff has no duty to comply with the regulation. The binding force of abstract statements about the law depends on principles of precedent and preclusion. A district court declaratory judgment stating that a regulation is invalid has no precedential effect and binds only the parties, and so does not have universal effect the way a universal injunction does.

10. See Application for a Stay of the Judgment Entered by the United States District Court for the Southern District of Texas, app., at 50a-53a, *United States v. Texas*, No. 22-58 (U.S. 2022) (reproducing pages 13-16 of the district court opinion).

11. *Id.* at 76a (reproducing page 39 of the district court opinion) (finding final agency action); *id.* at 107a (reproducing page 70 of the district court opinion) (finding that the memorandum is contrary to the applicable statute); *id.* at 114a (reproducing page 77 of the district court opinion) (finding that the memorandum is arbitrary and capricious because inadequately reasoned); *id.* at 120a (reproducing page 83 of the district court opinion) (finding that the memorandum should have been adopted through notice and comment but was not).

12. *Id.* at 128a (reproducing page 91 of the district court opinion).

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As that passage shows, the court assumed that section 706(2) calls for a remedy that vacates a regulation in the sense of undoing its effect altogether, and treated setting aside as meaning, or including, vacatur in that sense.

The district court understood that vacatur is inherently universal: when a regulation is wholly deprived of legal effect, it binds no one.<sup>13</sup> The court regarded vacatur as distinct from an injunction and denied injunctive relief. “If vacatur is sufficient to address the injury, it is improper to also issue an injunction.”<sup>14</sup> Vacatur is also distinct from declaratory relief, which the court also denied.<sup>15</sup>

Separately, in *Health Freedom Defense Fund* (arising from mask mandates), the district court found that the mandate at issue was contrary to the applicable statute and to the APA.<sup>16</sup> The section of the opinion concerning the remedy is headed “The Mask Mandate Is Vacated for Violating the APA.”<sup>17</sup> Like the district court in the *United States v. Texas* litigation, the district court in *Health Freedom Defense Fund* relied on section 706 and cases holding that it calls for vacatur. “The APA requires that courts ‘hold unlawful and set aside agency action’ that violates the APA or exceeds the agency’s authority. 5 U.S.C. § 706. ‘Indeed, vacatur . . . is the ordinary APA remedy.’”<sup>18</sup>

## II. Vacatur of Rules Under the APA in the 1940s, 1950s, and 1960s

This section shows that vacatur of rules, whether pursuant to section 10(e) of the APA as originally adopted (now section 706) or to some other source of law applicable generally in review of administrative decisions, was unknown to the drafters of the APA in 1946. Vacatur as understood today was equally unrecognized by leading administrative law scholars in the 1950s and 1960s, as well as by counsel and the Justices in *Abbott Laboratories*. Vacatur of rules is absent in discussions of the APA’s system of remedies, in discussions of section 10(e) of the APA, and in the application of the system of remedies in *Abbott Laboratories*.

### A. Congressional Understandings When the APA Was Adopted

The congressional committee reports on the APA show that the Act’s drafters did not anticipate a remedy of vacatur of regulations in cases like *Health*

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13. *Id.* at 129a (reproducing page 92 of the district court opinion) (“Next, the scope of relief. When a federal court vacates a rule, relief is not limited to prohibiting the rule’s application to the named plaintiffs. . . . Courts across the country interpret the APA the same way.” (citation omitted)).

14. *Id.* at 131a (reproducing page 94 of the district court opinion).

15. *Id.* at 133a (reproducing page 96 of the district court opinion).

16. *Health Freedom Defense Fund v. Biden*, No. 8-21-cv-1693, 2022 WL 1134138, at \*1176 (M.D. Fla. Apr. 18, 2022).

17. *Id.*

18. *Id.* (quoting *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng’rs*, 781 F.3d 1271, 1290 (11th Cir. 2015)).

*Freedom Defense Fund* and the *United States v. Texas* litigation.<sup>19</sup> They did not think a remedy of vacatur was already available in cases of that kind, and they did not think that they were proposing to create a vacatur remedy through section 10(e).

Section 10(b) of the APA, now 5 U.S.C. § 703, divided proceedings for judicial review into special statutory review proceedings and other forms of proceeding.<sup>20</sup> Using terminology that was common in 1946 and remains in use today, the House committee report explained that section 10(b) codified a pre-existing system that recognized those two broad categories:

The first sentence of this section is an express statutory recognition and adoption of the so-called common-law actions as being appropriate and authorized means of judicial review, operative whenever special statutory forms of judicial review are either lacking or insufficient.<sup>21</sup>

The recognized forms of proceeding other than special statutory review in 1946, also often called non-statutory suits, included declaratory and injunctive proceedings, suits for damages, and the prerogative writs such as habeas corpus and mandamus. Vacatur of rules was not one of those recognized forms of proceeding.<sup>22</sup>

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19. Those cases were not brought as special statutory review proceedings. As noted above, this Essay does not address the availability of a remedy like vacatur in proceedings of that kind. Whether that kind of remedy is available in a statutory review proceeding depends on the statute at issue.

20. “The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction.” Administrative Procedure Act, Pub. L. No. 79-404, § 10(b), 60 Stat. 237, 243-44 (1946) (codified as amended at 5 U.S.C. § 703 (2018)).

21. H.R. REP. NO. 79-1980, at 42 (1946). Identical language appears in the report of the Senate Judiciary Committee. S. REP. NO. 79-752, at 26 (1945).

22. Writing in 1946, Professor James Hart catalogued proceedings for judicial review. In addition to statutory review, he listed the following affirmative remedies: suits against officers for damages or on contracts, injunctive proceedings, suits for the writs of quo warranto, mandamus, certiorari, habeas corpus, and prohibition, and suits for declaratory judgments. JAMES HART, AN INTRODUCTION TO ADMINISTRATIVE LAW WITH SELECTED CASES 438 (1946). In 1928, Professor Ernst Freund gave a classic discussion of administrative remedies. ERNST FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY (1928). Freund distinguished between common-law remedies, *id.* at 234 (heading a chapter “The Common Law System of Remedies”) and statutory remedies, *id.* at 270 (heading a chapter “Statutory Remedies”). In his “brief outline” of common-law remedies (which he explained included equity in that terminology), *id.* at 227, Freund included defenses to enforcement proceedings, *id.* at 234, actions for damages or to recover property, *id.* at 235, injunctions, *id.* at 237, and the prerogative writs of mandamus, certiorari, quo warranto, prohibition, and habeas corpus, *id.* at 239-40. Freund did not list vacatur. (Hart’s list included declaratory relief and Freund’s did not because the federal Declaratory Judgment Act was adopted in 1934, after Freund wrote but before Hart did so.) The terms “common law” and “non-statutory” can be confusing. They are used in contrast with special statutory review proceedings. Because they are not special statutory review proceedings, suits for injunction are common-law in this sense, although they are equitable proceedings, and actions for declaratory judgments are common law and non-statutory proceedings, even though they are founded in the Declaratory Judgment Act. The term “remedies” can also be confusing, because it is often used to include the court’s acceptance of a defense in a judicial enforcement proceeding, in which the court gives no affirmative remedy.

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The text of section 10(b), along with the committee reports' commentary, support the conclusion that the APA's drafters did not think that vacatur, as distinct from injunctive or declaratory relief, was an existing non-statutory form of proceeding or remedy. Section 10(b) gave as examples two forms of proceeding especially suited to pre-enforcement review – “actions for declaratory judgments or writs of prohibitory or mandatory injunction”<sup>23</sup> – but did not mention vacatur. In similar fashion, the committee reports discussed declaratory relief as a useful form of pre-enforcement review. “Declaratory judgment procedure, for example, may be operative before statutory forms of review are available and may be utilized to determine the validity or application of any agency action.”<sup>24</sup> In a declaratory proceeding, according to the House report, “the court must determine the validity or application of a rule or order, render a judicial declaration of rights, and so bind an agency upon the case stated and in the absence of a reversal.”<sup>25</sup> Although vacatur is intrinsically a pre-enforcement remedy, the reports do not mention it. Had the drafters believed that the system of non-statutory proceedings they were codifying included vacatur, in addition to injunctions and declaratory judgments, they had both good reason to mention it and a place to put it in their discussion. They did not do so.

The reports' discussion of declaratory judgments in expounding section 10(b) also counts against the possibility that section 10(e) of the APA added vacatur as a new remedy, through the words “set aside.” If section 10(e) took that step, vacatur was very much like declaratory relief. Both were relatively novel statutory creations well suited to pre-enforcement review. If the drafters thought they were creating another remedy of that kind in section 10(e), it is odd that they made no mention of it explicitly. In discussing section 10(b), the drafters mentioned a statutory pre-enforcement remedy created in 1934—but said nothing about the statutory pre-enforcement remedy that the statute they had drafted purportedly added to the system of federal administrative law remedies. Once again, the drafters had both reason to mention the allegedly new remedy of vacatur and a place to put it. But the remedy of vacatur does not appear.

The treatment of section 10(e) in the reports supports the inference that the Act's drafters did not think they had added a new remedy of vacatur. Rather than pointing out that “set aside” created a new remedy, the reports did not quote those words, let alone gloss them. The brief, italicized, summary that begins the reports' treatment of section 10(e) closely paraphrases the provision without including “set aside.” That summary states that reviewing courts are to “*hold unlawful any action, findings or conclusions*” that meet the descriptions found in

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23. Administrative Procedure Act, Pub. L. No. 79-404, § 10(b), 60 Stat. 237, 243 (1946) (now codified as 5 U.S.C. § 703 (2018)).

24. H.R. REP. NO. 79-1980, at 42 (1946). The Senate report contains almost-identical language: “The declaratory judgment procedure, for example, may be operative before statutory forms of review are available; and in a proper case it may be utilized to determine the validity or application of agency action.” S. REP. NO. 79-752, at 28 (1946).

25. H.R. REP. NO. 79-1980, at 42 (1946). The Senate report does not have a similar sentence.

section 10(e), such as those that are “*contrary to the Constitution.*”<sup>26</sup> The words “set aside” were in section 10(e) as they are now in section 706, but apparently did not bear enough weight to appear in a paraphrase. If section 10(e) was designed to add a new remedy of vacatur to the common-law remedies referred to in section 10(b), and did so with the words “set aside,” those words were crucial. But the report leaves them out in its summary.

Despite the lower courts’ current reading of section 706(2), the drafters of the APA would not have seen section 10(e) as an appropriate location in which to introduce a new administrative-law remedy. As they saw it, that provision addressed a different and fundamental issue. Titled “Scope of review,” as is section 706, section 10(e) governed the extent to which courts decide questions de novo, as opposed to deferring to agencies.<sup>27</sup> After the italicized introduction, the body of the report’s discussion begins: “This section provides that questions of law are for courts rather than agencies to decide in the last analysis and it also lists the several categories of questions of law.”<sup>28</sup> The principle that courts decide questions of law for themselves is distinct from the remedies courts give.<sup>29</sup>

26. H.R. REP. NO. 79-1980, at 44 (1946); S. REP. NO. 79-752, at 27 (using identical language).

27. See Administrative Procedure Act, Pub. L. No. 79-404, § 10(e), 60 Stat. 237, 243 (1946) (bearing the heading “Scope of review”); 5 U.S.C. § 706 (2018) (bearing the heading “Scope of review”).

28. H.R. REP. NO. 79-1980, at 44 (1946); S. REP. NO. 79-752, at 28 (1945) (using identical language).

29. In earlier work, I contrasted section 706 of the APA (originally section 10(e)) with section 703 (originally section 10(b)), arguing that the latter deals with remedies while the former does not. See John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. ON REGUL. BULL. 37 (2020). In response to my statement that “section 706 does not address remedies,” *id.* at 37, Professors Ronald Levin and Mila Sohoni point to section 706(1), which provides that reviewing courts shall “compel agency action unlawfully withheld or unreasonably delayed,” 5 U.S.C. § 706(1) (2018). Ronald M. Levin & Mila Sohoni, *Universal Remedies, Section 706, and the APA*, YALE J. ON REGUL. NOTICE & COMMENT (July 19, 2020), <https://www.yalejreg.com/nc/universal-remedies-section-706-and-the-apa-by-ronald-m-levin-mila-sohoni/> [<https://perma.cc/5DJV-XL5N>]. They write, “Subsection (1) states that a reviewing court shall ‘compel agency action unlawfully withheld or unreasonably delayed.’ Obviously, the latter part of that phrase states review criteria, and the former half identifies the remedy that the court must grant if those criteria are satisfied.” *Id.* Section 706, they state, “then goes on to pair that affirmative remedial power with a complementary remedy: the negative power to ‘hold unlawful and set aside’ the agency actions specified in subsection (2).” *Id.* However, Section 706(1) (originally section 10(e)(A)) does not indicate that section 706(2) calls for a remedy, does not show that section 706 adds to the law of remedies, and does not suggest that the drafters of the APA would have thought that section 10(e) was a proper location for an addition to the law of remedies. If sections 706(1) and (2) are parallel in that they both address remedies, neither adds a remedy. Rather, both point to existing remedial principles. Section 706(1) tells courts to compel agency action. Compelling agency action is not a remedy, but rather a generic reference to specific remedies that perform that function. Section 703 refers to the primary remedy that compels agency action when it refers to “writs of prohibitory or mandatory injunction,” 5 U.S.C. § 703 (2018). If section 706(2) refers to remedies with “hold unlawful and set aside,” it calls for the appropriate remedy, including prohibitory injunctions against enforcement proceedings and declaratory judgments as referred to by 5 U.S.C. § 703 (2018). Section 706(2) does not add a new remedy of setting aside any more than section 706(1) adds a new remedy of compelling action. The two clauses are not parallel, however. The drafters of the APA had a reason to mention remedies in section 706(1) that does not apply to section 706(2). Section 706(1) makes clear that agency inaction is reviewable, and that courts need not accept an agency’s decision not to act. Stating that courts give affirmative remedies for inaction confirms that principle. That courts give affirmative remedies for unlawful action, however, was familiar enough to need no repetition. Moreover, the correct judicial response to unlawful action is not easily summarized by directing that affirmative remedies be given, because sometimes the correct judicial response to unlawful agency action is judicial inaction, not an affirmative remedy. When a plaintiff sues seeking judicial

*B. Professor Kenneth Culp Davis's 1958 Administrative Law Treatise*

In 1958, Professor Kenneth Culp Davis published the first edition of a treatise that would become a leading reference in administrative law.<sup>30</sup> Chapter 23 is titled “Federal Forms of Proceedings for Review.”<sup>31</sup> It discusses a number of forms of proceeding, including statutory remedies, injunctions, declaratory judgments, habeas corpus, and mandatory relief, as well as resisting enforcement as a form of review.<sup>32</sup> Chapter 23 does not discuss proceedings for vacatur, under section 10(e) or otherwise, or the remedy of vacatur. The absence of a vacatur remedy in 1958 implies that a non-statutory remedy of that kind did not predate the APA and that that statute did not create a new remedy of vacatur.

In addition to listing and discussing various forms of review, Professor Davis summarized the consequences of the APA for administrative law remedies. “The effect of the APA on forms of proceedings in the federal courts is in general very slight.”<sup>33</sup> Adding vacatur—under the name of “setting aside”—to existing pre-enforcement remedies like injunctions and declaratory judgments would not have been a slight effect.

Professor Davis’s more detailed analysis of proceedings and remedies confirms that he did not think that section 10(e) had added vacatur through the term “set aside.” As his listing of statutory remedies along with non-statutory remedies like injunctions and declaratory judgments shows, Professor Davis followed the standard classification that is embedded in section 703 (then section 10(b)) and that the committee reports on the APA drew on. That classification distinguishes between special statutory review proceedings and other forms of proceeding, with the latter called “common law” and “non-statutory.” As to statutory review, he stated that the APA “makes no change; any special statutory review proceeding may be used under the APA in exactly the same manner in which it was used before the APA.”<sup>34</sup> Professor Davis assumed that section 10(e) did not add a new remedy to all special statutory review proceedings.

Professor Davis realized that “non-statutory review” meant “review not under a special review statute,” not “review not based on any statute.” “The nonstatutory forms of proceedings for review of administrative action are injunction, declaratory judgment, habeas corpus, mandamus, and prohibition.”<sup>35</sup> Declaratory judgments are a product of statute, but not of a special review statute,

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enforcement of an unlawful regulation, the court holds for the defendant and takes no affirmative step. The court sets the regulation aside in the sense of disregarding its purported binding force in deciding the case. Section 706(2) does not refer to remedies, and section 706 as a whole does not add to the law of remedies.

30. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE (1958).

31. *Id.* at 295.

32. See *id.* (listing section headings of chapter).

33. *Id.* at 296.

34. *Id.* at 297.

35. *Id.* at 307. Professor Davis understood that some forms of proceeding were defined by the remedy sought, such as forms of proceeding for injunctions, declaratory judgments, and mandamus, and so would have classified vacatur as a form of proceeding and also as a remedy.

and therefore are non-statutory in the relevant sense. In that sense, a remedy of vacatur under section 10(e) of the APA or otherwise would have been non-statutory. It would have been available in district-court cases under the APA and 28 U.S.C. § 1331. Vacatur was not on Professor Davis's list of non-statutory remedies, but injunctions and declaratory judgments were.

*C. Professor Louis Jaffe's 1965 Book on Judicial Review of Agencies*

In 1965, another leading scholar of administrative law, Professor Louis Jaffe, published an influential book titled *Judicial Control of Administrative Action*.<sup>36</sup> As the title suggests, Professor Jaffe was concerned with the ways in which courts oversee administrative agencies. Vacatur and setting aside as a remedy under section 706(2) are missing from his extensive treatment of remedial proceedings and remedies.

Like his predecessors, Jaffe distinguished between “two main sources” of judicial remedies.<sup>37</sup> One was “a group of statutes which establish an agency and incorporate provisions for review of its actions.”<sup>38</sup> The other was a collection of remedies developed “by the combined action of the common law and statutes consolidating, simplifying, or in some other way reforming the common law remedies.”<sup>39</sup> Jaffe then gave a list, similar to Davis's. “These remedies are certiorari, mandamus, prohibition, habeas corpus, quo warranto (the so-called prerogative writs) damage suits, the bill in equity, and defense to enforcement proceedings.”<sup>40</sup> Modern statutes “have added the declaratory judgment procedure.”<sup>41</sup> Professor Jaffe's list tracks the APA provision that is now section 703. It does not include vacatur.

Professor Jaffe almost certainly was not familiar with a non-statutory remedy of vacatur that was distinct from injunctions and declarations. Nor did he think that section 10(e) of the APA had introduced a new remedy of setting aside that is (or includes) vacatur, and that such a remedy is called for in all proceedings for judicial review. He asked, “To what extent has the APA affected the federal system of remedies?”<sup>42</sup> His answer was [p]ossibly a little, although even this is not clear.<sup>43</sup> The little possible change he discussed was not vacatur under section 10(e). It was the possibility that section 10 of the APA, now codified in 5 U.S.C. §§ 701-706, added to the federal question jurisdiction of the district courts.<sup>44</sup> The addition of a new remedy of vacatur in section 10(e) would

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36. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (abr. student ed. 1965).

37. *Id.* at 152.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 153.

42. *Id.* at 164.

43. *Id.*

44. *Id.* at 164-65. When Jaffe wrote, the general federal-question jurisdiction in 28 U.S.C. § 1331 had a jurisdictional amount requirement. *Id.* at 164 (explaining that “if the APA is itself a source of jurisdiction, no jurisdictional amount is needed since no mention is made of such a requirement.”).

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have been a large, not a little, change—substantially larger than eliminating a jurisdictional amount requirement.

### D. Abbott Laboratories

*Abbott Laboratories, Inc. v. Gardner* involved the regulation of drug labels. The Supreme Court found that when an agency regulation demands current and costly compliance, pre-enforcement suits by regulated parties for declaratory and injunctive relief are generally ripe.<sup>45</sup> As cases like *Health Freedom Defense Fund* show, the central application of vacatur under section 706(2) is in pre-enforcement suits by regulated parties. Vacatur is a prospective remedy, which eliminates the binding effect of regulations for the future, and therefore is especially well suited to pre-enforcement review.

Had the parties and the Justices in *Abbott Laboratories* believed that section 706(2) presumptively calls for vacatur of unlawful regulations, vacatur would have figured substantially in the parties' arguments and the Justices' reasoning. The parties and the Justices assumed that relief in pre-enforcement cases takes the form of injunctions and declarations, and did not mention vacatur. Their failure to discuss vacatur of regulations where it would have been relevant shows that they were not familiar with that remedy, under section 706(2) or any source of remedies law applicable in that case.

Abbott Laboratories and other drug companies, petitioners in the Supreme Court, sought declaratory and injunctive relief.<sup>46</sup> If all expert administrative lawyers had believed that the APA calls for vacatur, an ideal pre-enforcement remedy, counsel would have either sought that relief or answered the natural question of why they had not done so.

Petitioners argued that the regulations were reviewable under the Declaratory Judgment Act and the APA.<sup>47</sup> As to the latter, they stated that the regulations were “reviewable under section 10 of the [APA].”<sup>48</sup> They did not point to section 10(e) or any statutory remedy along the lines of vacatur. One explanation is that in a case about pre-enforcement review of a regulation, counsel both knew that section 10(e) called for a pre-enforcement remedy concerning regulations and referred to section 10, but did not address section 10(e)'s bearing on the case. Much more likely is that counsel did not think that any part of section 10 called for a remedy of vacatur of rules.

Counsel for the government also would have discussed vacatur had they thought the APA provided that remedy, but the government's brief did not discuss such a remedy. The Solicitor General argued that regulations generally should be reviewed in enforcement proceedings, and that pre-enforcement

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45. *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 149 (1967).

46. *See* Brief for Petitioners, at 3, *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136 (1967) (stating that petitioners, plaintiffs below, sought declaratory and injunctive relief).

47. *Id.* at 9 (stating that the regulations were reviewable “under the Declaratory Judgment Act and the Administrative Procedure Act”).

48. *Id.* at 10.

review should be rare.<sup>49</sup> Had government counsel thought that section 10(e) called for pre-enforcement review and vacatur of rules, they would have explained why *Abbott Laboratories* nevertheless was not ripe, or would not have resisted pre-enforcement review.

In addressing ripeness, the Solicitor General referred to the Declaratory Judgment Act and 5 U.S.C. § 704, describing the latter as recodifying section 10 of the APA.<sup>50</sup> If section 706 was known to call for pre-enforcement vacatur of rules, to discuss section 704 and not section 706 would have been disingenuous at best. The Solicitor General, who must maintain a reputation for candor with the Court, did not address section 706 because government counsel did not believe that it called for vacatur of rules.

Writing for the Court, Justice Harlan discussed ripeness principles governing injunctions and declaratory judgments.<sup>51</sup> He said nothing about vacatur, which according to cases like *Health Freedom Defense Fund* is the presumptive remedy for unlawful regulations under section 706(2). It is possible that Justice Harlan believed that section 706(2) called for vacatur, but never mentioned a remedy other than declaratory and injunctive relief because the parties, for some reason, had not. More likely, Justice Harlan would have addressed vacatur regardless of what the parties had argued because vacatur would have been crucial to any discussion of pre-enforcement review of regulations. Justice Harlan did not discuss vacatur because he did not think that vacatur was an available remedy in non-statutory pre-enforcement review.

Especially striking is Justice Fortas's dissent, which was joined by Chief Justice Warren and by Justice Clark, who as Attorney General in 1947 issued the *Attorney General's Manual on the Administrative Procedure Act*.<sup>52</sup> Justice Fortas rejected the majority's conclusion that regulations calling for immediate compliance were usually ripe for review through injunctive and declaratory proceedings.<sup>53</sup> In Justice Fortas's view, the majority had endorsed "threshold or pre-enforcement challenge" to allegedly "erroneous exercises of the agency's

49. Brief for Respondents, at 36, *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136 (1967) (arguing that "it is ordinarily desirable to limit judicial review of administrative rule-making to factually-sharpened instances where legal rights are directly at issue").

50. *Id.* at 38 n.16 (arguing that neither the Declaratory Judgment Act nor 5 U.S.C. § 704 compels review of unripe cases). 5 U.S.C. § 704 is derived from section 10(c) of the APA, not section 10(e). Compare 5 U.S.C. §§ 704, 706 (2018) with Administrative Procedure Act, Pub. L. No. 79-404, §§ 10(c), 10(e), 60 Stat. 237, 243-44 (1946) (showing the derivation of 5 U.S.C. §§ 704 and 706).

51. After concluding that the Food, Drug, and Cosmetic Act did not bar the pre-enforcement relief sought, 387 U.S. at 139-48, Justice Harlan turned to ripeness. The section on ripeness begins: "A further inquiry must, however, be made. The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." *Id.* at 148. Justice Harlan did not discuss the ripeness principles applicable to the remedies of vacatur or setting aside.

52. Justice Fortas's opinion, dissenting as to *Abbott Laboratories*, is published as an opinion in a companion case. *Gardner v. Toilet Goods Ass'n, Inc.*, 387 U.S. 167, 174 (1967) (Fortas, J., concurring, and dissenting as to *Abbott Laboratories*).

53. Justice Fortas also rejected the majority's conclusion that the Food, Drug, and Cosmetic Act did not bar pre-enforcement review. *Id.* at 178-87 (arguing that judicial review of regulations under that statute takes place in enforcement proceedings except as the statute specifically provides).

power.”<sup>54</sup> He maintained that “established principles of jurisprudence, solidly rooted in the constitutional structure of our Government” dictated that courts “should not intervene in the administrative process at this stage” to decide “whether the content of these regulations is within the statutory intentment.”<sup>55</sup> The district courts in *United States v. Texas* and *Health Freedom Defense Fund* assumed that section 706(2) directs courts to give the pre-enforcement remedy of vacatur for regulations that are not within the statutory intentment.<sup>56</sup> If Justice Fortas had been familiar with that reading of the APA, he would have addressed it. He did not.

### **III. *Abbott Laboratories* and the Development of Vacatur of Rules as a Remedy in Addition to Declaratory and Injunctive Relief**

Vacatur of rules, under section 706(2) or as a generally applicable non-statutory remedy, was not familiar when the APA was adopted. As far as I have been able to determine, the understanding of section 706(2) the lower courts now generally embrace developed substantially more recently than the time of the APA’s adoption. I have not undertaken to develop a complete account of the origins of today’s practice. This Part argues that *Abbott Laboratories*<sup>57</sup> was an important step in the process leading to that practice. Paradoxically, the case led to developments in litigation form that helped obscure the understanding of pre-enforcement remedies on which it rested. As this section explains, *Abbott Laboratories* shifted the focus of review of regulations from enforcement proceedings to pre-enforcement review. Pre-enforcement cases resemble appellate review of one court by another in that pre-enforcement plaintiffs seek a prospective remedy that concerns the binding force of an official act. Because of that resemblance, vacatur can seem an appropriate remedy.

In enforcement proceedings, by contrast, the question is whether a regulation was binding when the defendant’s conduct took place, not whether the regulation should be made inoperative in the future. The analogy with judicial appellate proceedings fails in enforcement-stage review, and vacatur is an inapposite remedy. By making pre-enforcement review, rather than enforcement-

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54. *Id.* at 175. Justice Fortas pointed out that the plaintiffs had not raised constitutional questions, had not argued that the agency lacked authority to issue regulations on the subject matter, and had not claimed that the agency’s procedures were “arbitrary or unreasonable.” *Id.* The question was whether the agency’s view of the statute’s meaning was correct.

55. *Id.* at 175-76. In a dissent that rested on general principles, Justice Fortas was not limited by the parties’ arguments, even if Justice Harlan writing for the Court considered vacatur but decided not to discuss that remedy because the parties had not done so.

56. *Texas v. United States*, No. 6:21-CV-00016 (S.D. Tex. June 10, 2022), *cert. granted before judgment*, No. 22-58, 2022 WL 2841804 (U.S. July 21, 2022); *Health Freedom Defense Fund v. Biden*, No. 8-21-cv-1693, 2022 WL 1134138, at \*1176 (M.D. Fla. Apr. 18, 2022).

57. 387 U.S. 136 (1967).

stage review, the prototypical example of judicial review of regulations, *Abbott Laboratories* facilitated the belief that a remedy that would be apposite in pre-enforcement review is a generic remedy under the APA. A shift in focus to proceedings in which vacatur would be a useful remedy facilitates the assumption that reading section 706(2) as calling for vacatur is consistent with the provision's application *whenever* a court reviews an agency action, finding, or conclusion.

After *Abbott Laboratories*, prospective suits challenging agency action that purports to have binding force, such as *Health Freedom Defense Fund*, became a mainstay of judicial review. Unlike many other forms of proceeding for judicial review, suits of that kind have features that make them structurally similar to appellate review of lower courts' judgment. Pre-enforcement review deals with the future effects of agency action that claims binding force. A declaratory judgment stating that a private party has no duty to comply with an invalid regulation enables the private party to plan future conduct on the assumption that the regulation is not binding.<sup>58</sup> An injunction against enforcement has the same effect. Pre-enforcement review focuses mainly on legal challenges, not on factual applications. Pursuant to section 706 of the APA, courts conducting pre-enforcement review decide questions of law for themselves.

Appellate review of lower courts' orders shares those features. Appeals determine whether the party bound by a decree will have to comply with it in the future. When an appellate court decides that a lower court's judgment is based on error, the appellate court can relieve parties of their future obligation to comply by acting on the lower court's judgment.<sup>59</sup> Appellate courts decide questions of law *de novo*, while deferring to trial courts on factual issues.<sup>60</sup>

*Abbott Laboratories* facilitated a shift in focus to pre-enforcement review that was, by design, a shift away from enforcement-stage review. The point of pre-enforcement suits is to enable regulated parties to determine their rights and duties without having to violate a regulation and run the risk that in an enforcement proceeding the rule will be upheld and result in sanctions.<sup>61</sup> Because it performs that function, pre-enforcement litigation is especially valuable as a

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58. Declaratory judgments state legal relations that already exist, and do not change parties' rights. In a sense, declarations therefore are retrospective. The declaratory remedy is prospective in that it facilitates planning future conduct, with secure knowledge of existing rights the declaration clarifies.

59. When the appellate court changes the binding force of the lower court's judgment, it simultaneously operates on the parties because judgments do so.

60. As Professor Thomas Merrill has explained, in the early twentieth century Congress and the courts laid the foundations of the modern administrative state on an analogy between judicial review of agencies and appellate review of one court by another. See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011) (describing the understanding of judicial review of agency action, modeled on review by appellate courts of lower court decisions, in which the reviewing court gives deference on questions of fact while deciding questions of law *de novo*).

61. See *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 152-53 (1967) (noting the dilemma of choosing between compliance and running the risk of prosecution from which prospective challenges relieve regulated parties).

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substitute for raising defenses in criminal enforcement proceedings, in which the threatened sanctions can be severe.

In criminal enforcement proceedings, vacatur would not be useful to the defendant. Vacatur operates prospectively, but the question in a criminal prosecution is whether the regulation was binding when the defendant's conduct took place. In a prosecution, the defendant seeks no affirmative remedy, only a determination of prior invalidity. Moreover, in a criminal prosecution under an agency regulation, an analogy between the agency and a lower court is untenable. In a criminal case, the government is unmistakably a party, not another tribunal.

The shift of emphasis from enforcement-stage review to pre-enforcement review was a shift from a form of litigation in which vacatur has no place to a form of proceeding that resembles appellate review of lower courts. In the latter litigation structure, vacatur as today understood would be functionally apposite and may seem inevitable because of the analogy with review of lower courts.

Had Justice Fortas prevailed in *Abbott Laboratories*, treating vacatur as the generic remedy in administrative law would have been much more difficult.<sup>62</sup> Judges would more readily have seen proceedings for judicial review of regulations as lawsuits between parties, and would have been more likely to think in terms of remedies appropriate in lawsuits between parties.<sup>63</sup> Declaratory judgments and injunctions, the remedies the parties sought and the Court approved in *Abbott Laboratories*, would have seemed the more natural remedies when pre-enforcement review was available. To some extent, that case set in motion developments through which the understanding of pre-enforcement remedies the Court employed in it has been neglected.

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62. I have previously pointed to the differences among proceedings for judicial review, and the inapplicability of vacatur to many of them, to support the claim that section 706(2) does not instruct courts to give a remedy of vacating agency action with the words "set aside." See Harrison, *supra* note 29, at 45-46. Section 706(2) applies to all the forms of proceeding contemplated by the APA, see 5 U.S.C. § 703 (2018) (setting out forms of proceeding for judicial review), and therefore must give a directive that can be followed in any of them. Judicial review can take place in criminal enforcement proceedings, *id.*, and when a court in a criminal proceeding to enforce a regulation finds the regulation to be unlawful, the court sets the regulation aside by disregarding it, and gives no affirmative remedy. In response to the argument that vacatur is irrelevant in enforcement proceedings, Professors Levin and Sohoni maintain that "in the enforcement context, the 'agency action' under review is the agency's adjudicative decision applying the rule to the respondent's case. An order that nullifies (yes, 'sets aside') the agency's order that applies the rule to the respondent gives that party all the relief it needs." Levin & Sohoni, *supra* note 29. Their reference to the respondent suggests that they have in mind enforcement proceedings brought before an agency and then reviewed in court. In a criminal prosecution to enforce a regulation, the agency action under review is the regulation, and the remedy of vacatur is not relevant. The defendant asks the court to disregard the regulation in deciding a case about the defendant's earlier conduct, not to deprive the regulation of binding force in the future.

63. The Court recently stated that proceedings for judicial review of agency action are lawsuits against the government, not appellate proceedings. "Article III courts do not traditionally hear direct appeals from Article II executive agencies." *Garland v. Ming Dai*, 141 S. Ct. 1669, 1678 (2021) (citation omitted). Instead, "judicial intervention generally comes, if at all, thanks to some collateral review process Congress has prescribed, initiating a new action in the federal courts." *Id.* (*Ming Dai* began as a statutory review proceeding. See *Ming Dai v. Sessions*, 884 F. 3d 858 (9th Cir. 2018) (deciding a petition for review).)

**Conclusion**

Vacatur of rules under section 706(2) of the APA as understood today is a relatively recent innovation. It was not contemplated when the APA was adopted or for more than two decades thereafter. Whether today's practice can be justified as a legitimate departure from earlier understandings is a question distinct from that of the practice's conformity with those earlier understandings. Proponents of vacatur of rules might defend it as a legitimate adaptation of the APA to changing circumstances, or as a legitimate addition to federal equity. Under either reading, vacatur may still be an applicable form of legal action under 5 U.S.C. § 703. If that is the case, however, the innovation of vacatur should be justified as such. Courts that claim a historically grounded authority to vacate rules are not implementing a directive the APA gave in 1946.