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Remand Without Vacatur and the Ab Initio Invalidity of Unlawful Regulations in Administrative Law

John Harrison*

An important administrative law doctrine developed by the lower federal courts called remand without vacatur rests on a mistaken premise. Courts that embrace the doctrine maintain that when they find that a federal agency regulation is unlawful, they have discretion to remand the regulation without vacating it. The remand gives the regulatory agency an opportunity to correct the flaws that render the regulation unlawful. When a regulation is remanded but not vacated, the courts assume the regulation binds regulated parties despite its illegality. Unlawful regulations, however, are in general void ab initio, just as unconstitutional statutory rules are void ab initio. No affirmative judicial act is required to cause an unlawful regulation to become non-binding. In that respect, agency regulations are unlike lower-court decrees, which are binding when issued, even if erroneous. Reviewing courts, therefore, do not have the option of allowing unlawful regulations to remain in effect, because unlawful regulations never go into effect. This article uncovers the implicit and undefended assumption of ab initio validity of unlawful regulations on which remand without vacatur rests, shows that the assumption is, in general, unsound, and lays out some of the implications of that conclusion.

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INTRODUCTION

Lower federal courts have developed a doctrine under which they can conclude that a federal agency regulation is unlawful but

nevertheless can instruct the regulated parties that they are legally bound to comply with the regulation. Under this doctrine, called remand without vacatur, courts assume that unlawful regulations are binding until displaced by a court, much as a lower court's judgment is binding until displaced, even if the judgment was erroneous. When a reviewing court confronts an unlawful but nevertheless binding regulation, the doctrine holds the court has two options. First, the court can deprive the regulation of its binding force by vacating it. Second, the court can decide not to vacate the regulation and direct the agency to conduct further proceedings to correct the defects that made the regulation unlawful. The latter option, called remand without vacatur, gives the doctrine its name. Courts that embrace the doctrine assume that an unlawful regulation that has not been vacated binds regulated parties while the agency conducts further proceedings. Most of the federal courts of appeals, including the D.C. Circuit, have embraced this practice.¹ The Supreme Court has neither endorsed nor rejected the doctrine.

Agency regulations, however, are, in general, invalid when adopted if they are contrary to law, the way unconstitutional statutes are invalid when adopted. As the Supreme Court recently noted, unconstitutional statutory provisions are "never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment)."² The invalidity of statutes and regulations is brought about by the law and recognized by the courts in the process of deciding cases. In that respect, statutes and regulations are different from judicial decrees. Judicial decrees are binding until displaced, even when they are entered erroneously.³ The analogy between agency regulations and lower-court decrees, on which the doctrine of remand without vacatur rests, is mistaken.⁴

1. See *infra* p. 108 and note 25 and preceding text (noting that most of the courts of appeal employ remand without vacatur).

2. *Collins v. Yellen*, 142 S. Ct. 1761, 1788–89 (2021).

3. See *infra* note 43 (observing that judicial decrees are binding when issued even if based on error and liable to reversal or vacatur).

4. The Supreme Court recently recognized that strictly speaking, judicial review of agencies is distinct from appellate review of one court by another, observing that "Article III courts do not traditionally hear direct appeals from Article II executive agencies." Garland

Judges and commentators have debated the soundness of remand without vacatur.⁵ So far, all participants have shared the premise that unlawful regulations are binding until displaced. The disputed issue has been whether courts have discretion to give a remedy that displaces an unlawful regulation or whether they are required to give that remedy. This article shows that the premise of *ab initio* validity is incorrect. When a court finds that a regulation is unlawful, the court should conclude that the regulation never had the force of law and should decide the case on that basis. Courts should not tell parties that they are obliged to comply with unlawful regulations.

Part I of this article describes the doctrine of remand without vacatur as it is understood by courts and commentators. Part II probes the current understanding. That understanding rests on the unexamined and undefended premise that regulations are binding when issued, whether lawful or not, and remain binding until displaced. Part II also examines the concept of remand underlying the doctrine of remand without vacatur and develops an improved understanding of remand that reflects the differences between agencies and lower courts.

Part III shows that regulations of private conduct that are contrary to law are in general inoperative when adopted. That section first shows that the features that make a regulation unlawful under section 706 of the Administrative Procedure Act (APA) entail *ab initio* invalidity. The article then turns to a familiar mode of judicial review, which the APA specifically contemplates: review in proceedings to impose sanctions on regulated parties for past violations of regulation. In proceedings to impose sanctions, the regulated party may defend on the grounds that the regulation is unlawful. The availability of that defense reflects the assumption that unlawful regulations are non-binding before any litigation about them. Part III also explains that although the Supreme Court has not addressed remand without vacatur, it has held that regulations that are not authorized by statute or that are not

v. Ming Dai, 142 S. Ct. 1669, 1678 (2021) (citations omitted). Rather, “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.* (citations omitted).

5. See *infra* sections II.A.2–3 (describing arguments for and against remand without vacatur).

adopted through statutorily required procedures do not have the force of law.

Part III then discusses regulatory statutes that provide for pre-enforcement review of regulations and make that mode exclusive, barring judicial review in enforcement proceedings. The Clean Air Act is an important example of a statute with such a bar, and remand without vacatur emerged in substantial measure under that Act. The article shows that barring review in enforcement proceedings does not imply that unlawful regulations are binding. Turning to the Clean Air Act's provision governing the lawfulness of regulations, the article shows that regulations that the Act characterizes as unlawful are void *ab initio*, with an explicit exception for minor procedural errors. If the Clean Air Act is nevertheless read to make unlawful regulations binding pending judicial review, it should be read to require reviewing courts to displace unlawful regulations. The Act does not embrace remand without vacatur.

Part IV discusses some of the implications of this article's analysis. When they review regulations of conduct, courts should recognize that unlawful regulations are void and give relief appropriate to the form of proceeding for review involved. They should not state that regulated parties are bound to comply with unlawful regulations.

After drawing that implication, Part IV extends the analysis in two directions. That Part points out that agencies perform a wide variety of functions other than regulation of private conduct. Applying the analogy between agencies and lower courts can obscure important differences among agency functions. Next, Part IV considers the implications of *ab initio* invalidity for the current debate about universal relief against the government. Recognizing *ab initio* invalidity clarifies that debate in important respects, shows that two arguments in favor of universal relief are unsound, and raises issues concerning vacatur as a form of universal relief that have not yet been addressed.

I. THE ORTHODOX UNDERSTANDING OF REMAND WITHOUT VACATUR AND THE DOCTRINE'S WIDESPREAD ADOPTION BY COURTS OF APPEALS

This Part describes the doctrine of remand without vacatur as it is understood by judges and commentators. According to the

orthodox account, remand without vacatur is a remedy available to reviewing courts when they find that the agency action under review is unlawful. In 2014, Stephanie J. Tatham prepared an Administrative Conference of the United States (ACUS) report, the title of which reflects the accepted understanding: *The Unusual Remedy of Remand Without Vacatur*.⁶ The ACUS report, like much commentary, was influenced by the leading academic work on the subject: Professor Ronald Levin's 2003 article, "*Vacation*" at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*.⁷ Professor Levin's article also characterizes remand without vacatur as a remedy in its title.

Describing remand without vacatur as a remedy implies that it is a judicial action taken in response to a wrong. Remedies change the legal situation. Injunctions, for example, create a new obligation for the defendant. The ACUS report's second sentence explains that "[t]he legal landscape has changed dramatically since the mid-twentieth century, when 'reviewing courts routinely vacated agency actions that they found to have been rendered unlawfully.'"⁸ In similar fashion, Professor Levin posits a case in which a reviewing court has concluded "that an agency did act unlawfully. What remedial options does the court have at that point?"⁹

Both the ACUS report and Professor Levin contrast remand without vacatur with the more common practice of vacatur and remand. The usual judicial response to unlawful agency actions is to vacate them, the ACUS report and the ABA resolution it quotes say. Professor Levin answers the question he poses about the courts' remedial options by responding that "the . . . normal course of action" is that "the court declares the action void and sends it back to the agency for further consideration."¹⁰ Declaring the agency action void and sending it back to the agency is remand with vacatur. Remand without vacatur is different.

6. STEPHANIE J. TATHAM, ADMIN. CONF. OF THE U.S., *THE UNUSUAL REMEDY OF REMAND WITHOUT VACATUR* (2014).

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

8. TATHAM, *supra* note 6, at Executive Summary (unnumbered page) (quoting American Bar Association, Resolution 107B, Sections of Administrative Law and Regulatory Practice and Business Law, Report to the House of Delegates 1 (1997)).

9. Levin, *supra* note 7, at 294.

10. *Id.*

The difference is that remand without vacatur, as the ACUS report puts it, “permits the action to remain in place.”¹¹ Professor Levin uses the same words. The first example of remand without vacatur that he discusses is a Ninth Circuit case, *Idaho Farm Bureau Federation v. Babbitt*.¹² Secretary of the Interior Babbitt, through the Fish and Wildlife Service, had added the Bruneau Hot Springs Snail to the list of endangered species under the Endangered Species Act. Taking a member of an endangered species is a crime, so putting the snail on the list had important consequences. In *Idaho Farm Bureau*, Professor Levin explains, the court of appeals found that the Fish and Wildlife Service had issued the rule “illegally” and “ordered that the regulation be returned to the agency, so that the proper procedures could be followed” while adding “that the regulation could remain in place during this period of further consideration.”¹³

A recent application of the doctrine of remand without vacatur is a 2021 Fifth Circuit case. *Texas Association of Manufacturers v. U.S. Consumer Product Safety Commission*¹⁴ was a petition for review of a Consumer Product Safety Commission (CPSC) regulation limiting the use of chemicals called phthalates in children’s toys and child care articles.¹⁵ The court of appeals concluded that in adopting the regulation the CPSC had committed two errors.¹⁶ But rather than regarding the regulation as therefore invalid, the court found that the “remaining question” was “what remedy is appropriate.”¹⁷ Petitioners had requested the remedy of vacatur, by which they apparently meant a judicial order causing the regulation to become inoperative.¹⁸ The court then found that it faced a standard

11. “Judicial remand of an agency decision that permits the action to remain in place is known as remand without vacatur.” TATHAM, *supra* note 6, at Executive Summary (unnumbered page).

12. Levin, *supra* note 7, at 294 (discussing *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995)).

13. *Id.* at 295.

14. *Tex. Ass’n of Mfrs. v. U.S. Consumer Prod. Safety Comm’n*, 989 F.3d 368 (5th Cir. 2021).

15. *See id.* at 372 (describing the regulation).

16. *See id.* at 383 (finding that the final rule was not a logical outgrowth of the rule described in the notice); *id.* at 387–88 (finding that the statute required that the agency consider costs and that the agency failed to do so).

17. *Id.* at 389.

18. *Id.* (noting that petitioners requested vacatur). The court did not define vacatur and apparently assumed that vacatur is a judicial order causing an agency action that is

situation in which remand without vacatur may be appropriate. The agency's failure to conduct the rulemaking process according to law did not necessarily mean that the substance of the regulation was impermissible; the court found there was a "serious possibility" that the CPSC could adopt the same regulation after giving proper notice and considering costs.¹⁹

Under those circumstances, the Fifth Circuit, like other courts that embrace remand without vacatur, exercises remedial discretion and decides whether to vacate the rule and remand the matter to the agency or to leave the rule in place while the agency conducts further proceedings.²⁰ In relying on the "serious possibility" that the rule could be supported through proper proceedings, the Fifth Circuit followed a D.C. Circuit case that is routinely cited as to the factors to be considered in deciding whether to vacate or to remand without vacatur: *Allied-Signal, Inc. v. N.R.C.*²¹ Under *Allied-Signal*, courts deciding whether to vacate along with remanding balance relevant factors in exercising their remedial discretion. The principal factors that the case identified are the likelihood that the agency will make the same choice when it conducts rulemaking properly on remand and the disruptive effects of vacatur.²²

Remand without vacatur has been adopted by many courts of appeals and is well established in the leading federal administrative law tribunal: the D.C. Circuit. Besides the D.C. and Fifth Circuits, the First, Third, Eighth, Ninth, Tenth, and Federal Circuits have all adopted the doctrine.²³ Remand without vacatur is such a familiar feature of administrative law and has been for so long that the American Bar Association adopted a resolution making recommendations about it in 1997.²⁴ Several scholars in

legally binding to lose its binding force. *Id.* The court did not consider the possibility that finding that the regulation was adopted unlawfully entailed the conclusion that the regulation had never been legally operative. *Id.*

19. *Id.* at 389 (finding a "serious possibility that the agency will be able to substantiate its decision given an opportunity to do so.").

20. *Id.* (explaining that under Fifth Circuit precedents, vacatur is rarely the appropriate remedy and pointing to relevant factors in deciding whether to vacate).

21. *Id.* (citing *Allied-Signal, Inc. v. N.R.C.*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)).

22. See *Allied-Signal, Inc. v. N.R.C.*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (citing *International Union, UMW v. FMSHA*, 920 F.2d 960, 966–67 (D.C. Cir. 1990)).

23. TATHAM, *supra* note 6, at 27.

24. *Id.* at 10 (describing 1997 ABA Resolution).

addition to Professor Levin, and Ms. Tatham have written about the practice.²⁵

As far as I have been able to determine, however, no court or commentator has noticed that remand without vacatur rests on the debatable assumption that agencies can act with binding force even when they act unlawfully. The article now turns to that assumption.

II. THE ASSUMPTIONS UNDERLYING REMAND WITHOUT VACATUR

This Part identifies the unstated premise on which remand without vacatur rests: that agency actions that purport to bind private people are binding until displaced even if unlawful. As that assumption and the terminology of vacatur and remand reflect, courts that embrace the doctrine analogize the relationship between agencies and reviewing courts to the relationship between lower courts and appellate courts. Agency regulations are assumed to be binding until displaced, even if unlawful, just as lower-court orders are binding until displaced, even if they rest on legal error. I then turn to the assumption that courts can remand to agencies the way they remand to lower courts. That assumption is incorrect, and this Part explains what the courts mean when they say they are remanding to an agency.

A. The Assumption That Unlawful Regulations Are Binding When Adopted

Courts that embrace remand without vacatur, judges that object to the doctrine, and commentators that describe, support, and criticize the practice, share an assumption that they do not make explicit or defend. They assume that agency action that purports to bind private people, such as agency regulation of private conduct that is backed by sanctions as to private rights, is legally operative until displaced by a court, even if the agency action is unlawful. That assumption is built into the standard conceptualization of remand without vacatur as a remedy. The assumption underlies the factors courts consider in deciding whether to vacate. It underlies scholars' analysis and assessments of the doctrine. The assumption appears in correspondence some of the Justices exchanged when

25. *Infra* Section II.A.3 (discussing scholarly commentary on remand without vacatur).

deciding *Bowen v. Georgetown University Hospital Center*,²⁶ which addressed agencies' authority to act retroactively.

That assumption is an unstated and undefended premise of remand without vacatur. The premise runs through cases and commentary on remand without vacatur, so this treatment will be very selective.

1. Cases That Employ Remand Without Vacatur

Three cases illustrate the assumption that underlies the doctrine and the courts' understanding of remand without vacatur as a remedy. The first, from 2008, shows that the practical stakes can be very high. The next two were decided much earlier in the development of the doctrine and so are especially instructive as to the thinking on which the doctrine rests. One of the early cases explicitly likens the relationship between agencies and reviewing courts to the relationship between lower courts and appellate courts. All three reflect the unstated assumption that unlawful regulations are binding and the assumption that courts have discretion to decide whether to vacate in choosing a remedy.

North Carolina v. EPA,²⁷ from 2008, involved a major Clean Air Act regulation: the Clean Air Interstate Rule.²⁸ On petition for review of the regulations, the D.C. Circuit found "more than several fatal flaws in the rule," so that "very little 'will survive[] remand in anything approaching recognizable form.'"²⁹ The court initially concluded that the appropriate remedy was to vacate the rule and remand it to the agency.³⁰ EPA then petitioned for rehearing. The agency argued that "the rule would prevent an estimated 13,000 deaths per year by 2010 and 17,000 premature deaths per year by 2015."³¹ In response, the panel granted

26. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988).

27. *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), *modified*, *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008).

28. *See North Carolina*, 531 F.3d. at 903–05 (D.C. Cir. 2008) (describing the Clean Air Interstate Rule).

29. *Id.* at 901, 929.

30. *Id.* at 930.

31. Respondent EPA's Petition for Rehearing or Rehearing En Banc at 10–11, *North Carolina v. EPA*, No. 05-1244 (D.C. Cir. filed Sept. 24, 2008).

rehearing and changed its disposition of the case to remand without vacatur.³²

EPA's rehearing petition and the panel's response in *North Carolina v. EPA* reflect the assumption that unlawful regulations are binding until displaced. More than several fatal flaws made the regulation unlawful, the court had found. EPA's projections of the deaths that would be averted if the court did not vacate the regulation rested on the assumption that regulated parties would comply absent vacatur, which in turn rested on the assumption that they would be bound to do so. Regulated parties are bound only if regulations impose new legal duties when promulgated and continue to impose those duties until displaced by a court.

North Carolina v. EPA clarifies two important details of the doctrine. First, the case shows that non-vacatur is not confined to errors of reasoning. The court found that the regulation was partly contrary to the statute.³³ Second, the case shows that non-vacatur does not simply postpone the question of ab initio invalidity pending further agency proceedings. Had that issue remained open, the court would not have been able to assume that regulated parties would comply with the regulations because the court would not have decided whether they had that obligation.³⁴

When the D.C. Circuit decided *North Carolina v. EPA*, remand without vacatur was a well-established feature of that court's doctrine. That the opinion does not defend the assumptions on which it rests is, therefore, unsurprising. Those assumptions were also implicit and undefended when the doctrine was being developed, mainly in Clean Air Act cases in the 1970s.

32. *North Carolina*, 550 F.3d at 1178 (D.C. Cir. 2008) (modifying disposition).

33. See, e.g., *North Carolina*, 531 F.3d at 906–08 (D.C. Cir. 2008) (finding that EPA's emission trading program did not satisfy the statute's requirement that emissions in each upwind state be reduced).

34. The doctrine may allow a court that ultimately vacates a regulation after remand to do so retroactively so that the regulation is then treated as if it had never gone into effect. The Eighth Circuit assumed that option was available, and found that an earlier D.C. Circuit decision had retroactively vacated a regulation, in *United States v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380, 384–85 (8th Cir. 1992) (finding that *Shell Oil Company v. EPA*, 950 F.2d 741 (D.C. Cir. 1991) had retroactively vacated the regulation under which the defendants were prosecuted for conduct that took place after the regulation was adopted and before the D.C. Circuit vacated it). The Eighth Circuit's opinion seems to assume that retroactivity of vacatur is a matter of remedial discretion and is not automatic.

The D.C. Circuit's first use of remand without vacatur under that statute came in *Kennecott Copper Corp. v. EPA*.³⁵ The case was on petition for review of an EPA regulation adopted through the notice-and-comment process.³⁶ The court agreed with the petitioners that EPA's statement of basis and purpose for the regulation was inadequate.³⁷ Having found a failure in the agency's decision-making process, the court devised the procedure now called remand without vacatur. "In the interest of justice, *cf.* 28 U.S.C. § 2106, and in aid of the judicial function . . . the record is remanded for the Administrator to supply an implementing statement that will enlighten the court as to the basis" for the regulation.³⁸ The court contemplated "that this remand will not halt or delay the on-going proceedings for state adoption of implementation plans to meet and maintain the national standards."³⁹ In a footnote, the court clarified its assumptions about the legal situation and the effect of its order. "The [standards] remain in effect pending amplification of basis on remand and further review by this court."⁴⁰

The D.C. Circuit did not explain why a regulation adopted through a flawed process was binding rather than void ab initio.⁴¹ Judge Leventhal referred to 28 U.S.C. § 2106 and thus the relations between lower and appellate courts.⁴² But he did not undertake to

35. *Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.C. Cir. 1972) (reviewing standards for sulfur dioxide emissions).

36. *Id.* at 849–50 (describing informal rulemaking under the Clean Air Act).

37. The court's conclusion about the adequacy of the agency's explanation probably would have been different under today's Supreme Court doctrine. The D.C. Circuit in *Kennecott Copper* found that the explanation satisfied the APA's minimum requirements, *id.* at 850 (footnote omitted), but under the circumstances, more was needed, *id.* After *Kennecott Copper*, the Supreme Court held that the courts might not add to the procedural requirements of the APA. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

38. *Kennecott*, 462 F.2d at 850.

39. *Id.* at 851.

40. *Id.* at 851 n.21.

41. The court contemplated that the standards might yet be found invalid. "Following remand proceedings petitioner may supplement its petition to review without filing a new petition to review." *Id.* Petitioner's argument in supplementing its petition for review would be that the new explanation was still inadequate. Combined, the court's statements thus indicate that the regulation had become binding upon promulgation but would become invalid if the court found the new explanation insufficient.

42. Section 2106 provides that the "Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order

explain why EPA regulations resembled judicial decrees with respect to *ab initio* validity. Court orders are binding when issued, even if they rest on error, and remain binding until displaced by the issuing court or an appellate tribunal.⁴³ Judge Leventhal drew an analogy between lower courts and agencies, and between court-court relations and court-agency relations, without seeking to justify the analogy. The terminology of remand and vacatur, like the substantive assumption concerning *ab initio* validity, reflects the analogy. The D.C. Circuit in *Kennecott Copper*, and later courts and commentators, have simply taken for granted that the analogy is sound.⁴⁴

Finally, the 1980 case in which the Ninth Circuit embraced remand without vacatur under the Clean Air Act provides another early illustration of the unstated assumptions on which the doctrine rests. In *Western Oil & Gas Ass'n v. United States Environmental Protection Agency*,⁴⁵ that court of appeals treated remand without vacatur as a remedial option. The choice between vacatur and non-vacatur is meaningful only if an unlawful regulation is binding unless vacated. The court's opinion also strongly suggests that the judges did not even think about the possibility that an unlawful regulation might be void *ab initio*.

of a court lawfully brought before it for review." 28 U.S.C. § 2106. Section 2106 also authorizes an appellate court to "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." *Id.*

43. An important example of that principle is the status of erroneously issued injunctions. An injunction issued by an equity court with jurisdiction, pursuant to proper procedure, "must be obeyed" by the parties enjoined, "however erroneous the action of the court may be." *Walker v. City of Birmingham*, 388 U.S. 307, 314 (1967) (quoting *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922)). The lawfulness of an injunction is to be decided by "the court of first instance," and "until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." *Id.*

44. *Kennecott Copper* involved a form of proceeding that very likely facilitates the analogy between court-agency relations and court-court relations. As the caption indicates, *Kennecott*, 462 F.2d at 846, the case was a petition for review, a proceeding brought directly in a court of appeals, see F. R. APP. P. 15-20 (governing petitions for review), and hence similar to an appeal from a district court, see *id.* Rules 3-12.1 (governing appeals from district courts). Perhaps reflecting that similarity, the court in *Kennecott Copper* used terminology that, strictly speaking, was appropriate for review of a lower court, not an agency. The opinion begins, "[i]n this appeal." The third paragraph begins, "[t]his appeal." *Id.* at 847. The court was deciding a petition for review, not an appeal.

45. *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803 (9th Cir. 1980).

Western Oil & Gas came to the Ninth Circuit on petition to review Clean Air Act regulations that the EPA had issued without notice and comment, relying on the APA's "good cause" exception to that requirement.⁴⁶ The court found that EPA had not satisfied the APA's requirements for dispensing with notice and comment.⁴⁷ The court then faced what it called "the most difficult issue of all — what the remedy should be."⁴⁸ The answer was that "guided by authorities that recognize that a reviewing court has discretion to shape an equitable remedy, we leave the challenged designations in effect."⁴⁹ Stating that the regulations would be left in effect assumed that they had gone into effect when promulgated, even though the agency had not satisfied the APA. Describing the question as one of remedy also assumed that invalidity would be brought about by the court rather than having already resulted from the regulation's unlawful mode of promulgation.

Judge Sneed's opinion for the court shows that he assumed that conclusion without having reasoned to it. After framing the question as one of remedy, the court began its answer by quoting a then-recent Supreme Court case about an agency's failure to comply with APA procedures in adopting a regulation, *Chrysler Corp. v. Brown*.⁵⁰ "Certainly regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in [the APA]."⁵¹ Had Judge Sneed been thinking about the possibility of ab initio invalidity, he would have wondered whether the Supreme

46. EPA, acting without notice and comment, had designated certain parts of California as areas in which federal air quality standards had not been attained, a step with important consequences under the Act. *Id.* at 804–06 (describing EPA's designation, its significance under the statute, and the agency's reliance on the "good cause" exception to the notice and comment requirement).

47. *Id.* at 812.

48. *Id.*

49. *Id.* at 813. The court cited one Supreme Court case, *Ford Motor Co. v. NLRB*, 305 U.S. 364 (1939), and four recent court of appeals decisions, including *Sharon Steel Corp. v. EPA*, 597 F.2d 377 (3d Cir. 1979). *W. Oil & Gas*, 633 F.2d at 813. *Ford Motor Co.* bears little resemblance to the Clean Air Act cases. In *Ford Motor Co.*, the Supreme Court concluded that a court of appeals could remand to restore the NLRB's authority to act on the matter, which the agency had lost when petitions for enforcement and review were filed. *See infra* section II.B (discussing remand in *Ford Motor Co.*). The question of whether the NLRB order remained in effect did not arise in *Ford Motor Co.* because NLRB orders were enforced through proceedings in the courts of appeals like the proceeding reviewed in that case.

50. *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

51. *W. Oil & Gas*, 633 F.2d at 812 (quoting *Chrysler*, 441 U.S. at 313).

Court meant that improperly promulgated regulations never acquire the force of law, or are to be deprived of that force by a reviewing court.⁵²

The possibility that improperly promulgated regulations never become part of the body of governing law appears not to have occurred to the Ninth Circuit in *Western Oil & Gas* or to the courts on which it relied in embracing remand without vacatur. As far as I have been able to determine, no judge has examined that possibility and explicitly rejected it.

2. Judge Randolph's Rejection of Remand Without Vacatur and Subsequent Debate on the D.C. Circuit

After the D.C. Circuit had been remanding without vacating for years, one of its judges argued that the practice was contrary to the APA. In dissent in *Checkosky v. SEC*,⁵³ Judge A. Raymond Randolph maintained that the APA requires vacatur of unlawful agency action. Judge Randolph did not argue that unlawful agency actions are void ab initio, which would imply that the question whether to vacate them does not arise. Rather, he assumed that vacatur is a remedy that makes agency action void. His position was that vacatur is mandatory, not optional. Judge Randolph's argument has since become the focus of academic debate.⁵⁴

Checkosky illustrates the wide range of agency acts and modes of judicial review to which courts have found remand without vacatur to be relevant. The case came before the D.C. Circuit on petition for review of an SEC order that had punished David Checkosky.⁵⁵ Checkosky, a partner with the accounting firm of

52. After quoting *Chrysler Corp. v. Brown*, the Ninth Circuit explained that "[o]rdinarily a failure to comply with the APA requirements of prior notice and comment would invalidate such designations." *Id.* at 813. To a reader who has the possibility of ab initio invalidity in mind, that statement also suggests that the regulations never became binding: the failure took place when the regulations were promulgated, not later when they were reviewed. Judge Sneed's failure to address the issue strongly suggests that he had not thought about it.

53. *Checkosky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994).

54. Professor Levin, for example, also assumes that agency actions are binding until displaced but disagrees with Judge Randolph, arguing that the APA gives courts discretion to decide whether to vacate. See *infra* section II.A.3 (describing Professor Levin's argument).

55. See *Checkosky*, 23 F.3d at 452 (setting out caption as petition for review). SEC orders like the order in *Checkosky* are directly reviewable in the courts of appeals under 15 U.S.C. § 78y.

Coopers & Lybrand, had certified financial statements of his client, Savin Corporation, that the Commission found to have been inaccurate.⁵⁶ After a formal adjudication, the agency sanctioned Checkosky by suspending him from practicing before it for two years.⁵⁷

In the D.C. Circuit, the crucial issue concerned the state of mind requirement that the SEC had applied. The SEC's regulations did not identify a mental state that was necessary for a violation to occur.⁵⁸ The rules thus might be interpreted to require recklessness or negligence or to impose strict liability without regard to scienter. The SEC found that Checkosky had in fact been reckless and stated that bad faith or willful misconduct was not required.⁵⁹ The agency did not, however, identify the mental state "both necessary and sufficient to constitute a violation."⁶⁰

Each of the three judges on the panel reached a different conclusion. Judge Randolph found that the SEC had applied a negligence standard and that the agency's decision to do so was inadequately explained and hence unlawful.⁶¹ He concluded that the SEC's order should be vacated and the matter remanded to the agency.⁶² Judge Reynolds found that the agency had applied a negligence standard and had done so lawfully.⁶³ He would have affirmed.⁶⁴ Judge Silberman could not tell what standard the

56. *Checkosky*, 23 F.3d at 454–55 (Silberman, J.) (describing SEC proceedings); In re David J. Checkosky and Norman A. Aldrich, 50 SEC 1180, 1180–81 (1992) (describing Checkosky's conduct and the Commission's findings).

57. *See id.* at 1181 (imposing two-year suspension on Checkosky). Checkosky was punished, not with fine or imprisonment, but by loss of a government benefit—the privilege of practicing before the Commission. *See* 17 C.F.R. § 201.2(e)(1)(ii) (providing that the Commission may deny "the privilege of appearing or practicing before it" as a sanction for unethical or improper professional conduct).

58. *See id.* (describing grounds for sanctions but not addressing state of mind).

59. *Checkosky*, 23 F.3d at 455 (Silberman, J.) (quoting SEC's conclusion that Checkosky had been reckless), *id.* at 458 (quoting SEC's statement that "bad faith or willful misconduct is not a prerequisite for the imposition of sanctions" for violating the agency's rules of practice).

60. *Id.* at 458.

61. *Id.* at 480 (Randolph, J.) (stating that Commission applied a negligence standard); *id.* at 481–87 (Randolph, J.) (concluding that the SEC's decision to apply a negligence standard was "arbitrary and capricious").

62. *Id.* at 487.

63. *Id.* at 493–95 (upholding the SEC's application of a negligence standard) (Reynolds, J.).

64. *Id.* at 493.

agency had used.⁶⁵ He proposed a remand without vacatur so that the SEC could state more clearly what it had done.⁶⁶ Judge Silberman explained that his proposed disposition was not a conventional remand without vacatur, but he relied on cases endorsing that disposition.⁶⁷ With two votes to remand and only one vote to vacate, the result was a remand without vacatur.⁶⁸

Judge Randolph maintained that prior panels of his court had erred in embracing remand without vacatur. He rested that conclusion on section 706 of the APA, which sets out the criteria reviewing courts are to apply.⁶⁹ When agency action is unlawful under 706, Judge Randolph argued, “the Administrative Procedure Act requires the court—in the absence of any contrary statute—to vacate the agency’s action.”⁷⁰ The APA, he maintained, speaks “in the clearest possible terms. Section 706(2)(A) provides that a ‘reviewing court’ faced with an arbitrary and capricious agency decision ‘shall’ – **not may** – ‘hold unlawful and set aside’ the agency action.”⁷¹ The APA says “set aside,” and “[s]etting aside means vacating; no other meaning is apparent.”⁷²

Judge Randolph was aware of D.C. Circuit cases approving remand without vacatur. “But none of those decisions, not one, faced the question whether § 706(2)(A) permitted such a disposition.”⁷³ Those cases therefore were “‘inconsequential for precedential purposes.’”⁷⁴ Courts do not set precedent as to questions that lurk in the record but are not ruled on.⁷⁵

65. *Id.* at 458 (Silberman, J.) (describing SEC’s opinion as ambiguous because it does not specify a “state of mind both necessary and sufficient to constitute a violation”).

66. *Id.* at 462 (calling for a remand so that the SEC could set out its view and make judicial review possible).

67. *Id.* at 462–65 (discussing difference between remanding so that the court can conduct judicial review and remanding after concluding that the agency has erred).

68. *Id.* at 454 (stating disposition of the case per curiam).

69. See 5 U.S.C. § 706(2)(A) (providing that reviewing court shall “hold unlawful and set aside” agency action that fails any of the tests it sets out).

70. *Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (Randolph, J.) (footnote omitted).

71. *Id.* Judge Randolph then cited the statute under which *Checkosky* came before the court. *Id.* (citing 15 U.S.C. § 78y(a)(3) (providing that “[o]n the filing of the petition [for review], the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.”)).

72. *Id.*

73. *Id.* at 492.

74. *Id.* (quoting *Grant v. Shalala*, 989 F.2d 1332, 1341 (3d Cir. 1993)).

75. *Id.* (citations omitted).

Despite Judge Randolph's objections to remand without vacatur, the D.C. Circuit has never considered the doctrine's soundness in an en banc proceeding. In 2002, Judge Sentelle endorsed Judge Randolph's view about remand without vacatur in a dissenting opinion.⁷⁶ In 2005, Judges Randolph and Sentelle formed a panel majority that initially rejected the doctrine under the Clean Air Act, but on petition for rehearing the panel withdrew its earlier opinion.⁷⁷ Despite their rejection of the doctrine, Judges

76. See *Milk Train, Inc. v. Veneman*, 310 F.3d 747 (D.C. Cir. 2002). *Milk Train* involved a Department of Agriculture subsidy program for milk producers. *Id.* at 749–50. The plaintiffs, suing in district court, claimed that the formula for subsidy payments that the Secretary had adopted by regulation favored other beneficiaries at their expense. *Id.* at 750–51. As to one of the plaintiffs' objections, the majority found that "as the administrative record now stands," the court could not "determine whether the Secretary's interpretation of the regulations was inconsistent with the plain language" of the act providing for the subsidy payments. *Id.* at 755. The majority instructed the district court to remand without vacatur, so the Secretary could provide a better explanation or a new allocation of funds. *Id.* at 756.

Judge Sentelle dissented. He concluded that the Secretary's allocation of subsidies was inconsistent with the statute. *Id.* at 757 (Sentelle, J., dissenting). Judge Sentelle then endorsed Judge Randolph's position in *Checkosky*. The APA, he argued, requires vacatur of unlawful regulations, not just remand. *Id.* (stating that when an agency has not adequately explained its decision, the APA requires the court to vacate the agency's action (quoting *Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (Randolph, J.)).

77. See *Honeywell Int'l, Inc. v. EPA*, 374 F.3d 1363, 1364–65 (D.C. Cir. 2005). Under the Clean Air Act, EPA approves substitutes for ozone-depleting chemicals. *See id.* (describing the regulation of ozone-depleting chemicals). Honeywell, a manufacturer of one substitute, challenged the agency's decision to approve others. *Id.* In the panel's initial disposition of the case, Judges Sentelle and Randolph found that EPA had impermissibly relied on economic factors in giving its approval. *Id.* at 1371 (Sentelle, J., for the court). Judge Sentelle, joined by Judge Randolph, concluded that "the only permissible remedy under the [Clean Air Act] is to vacate the rule." *Id.* at 1371. As Judge Sentelle explained, the Clean Air Act's special judicial review provision explicitly displaces parts of the APA, including Section 706, which sets out the criteria reviewing courts are to apply. *Id.* at 1373 (quoting 42 U.S.C. § 7607(d)(1) (codifying the Clean Air Act), which explicitly displaces the APA's provisions for notice and comment rulemaking and Section 706, which governs judicial review). The Clean Air Act, Judge Sentelle explained, "provides that 'the court may reverse any . . . action found to be . . . in excess of statutory jurisdiction, authority or limitation, or short of statutory right.'" *Id.* (quoting 42 U.S.C. § 7607(d)(1)). The word "reverse" suggested vacatur. 364 F.3d at 1381 (citing dictionaries). Because the court's "only source of authority to order a remedy for EPA's unlawful action" was that provision of the Clean Air Act, its power was limited "to 'reversing,' and hence vacating, the offending portions of EPA's rule below." *Id.* Judge Sentelle acknowledged the practice of remand without vacatur but found that no earlier case had analyzed the actual language of the Clean Air Act. *Id.*

Judge Rogers agreed that EPA had erred, but dissented, arguing that the remedy should be "remand, not vacatur." *Id.* at 1379. Earlier cases endorsing remand without vacatur were

Randolph and Sentelle accepted the premise that vacatur is a remedy for unlawful agency action, which is binding until displaced even though contrary to law.

3. Scholars' Discussion of Remand Without Vacatur

Like the courts, scholars have taken for granted that agency action that purports to bind private people is legally effective even if unlawful. Following that logic, scholars treat remand without vacatur as a remedy. They have addressed the doctrine's soundness in the terms Judge Randolph set in *Checkosky*, asking whether reviewing courts have the remedial discretion to decide not to vacate agency action that they have found to be unlawful.

Professor Levin's influential article is an example. He undertook to respond to "Judge Randolph's literal reading of section 706."⁷⁸ Professor Levin maintains that the APA allows the courts to exercise the remedial discretion that Judge Randolph

binding, she thought, and the Clean Air Act's use of "reverse" made no difference on this point. *Id.* at 1380-81.

On petition for rehearing, the panel explained that, on reconsideration, it had found it "unnecessary to decide" whether the Clean Air Act requires vacatur of erroneous EPA actions. *Honeywell Int'l Inc. v. EPA*, 393 F.3d 1315, 1316 (D.C. Cir. 2005) (per curiam). Judges Randolph and Sentelle concluded that if the Act gave the court discretion whether to vacate, they would exercise that discretion to vacate the regulation. *Id.* The panel withdrew the portion of Judge Sentelle's opinion finding that the Clean Air Act requires vacatur. *Id.* Judge Rogers agreed with that withdrawal, but dissented on the disposition, believing that remand without vacatur was the proper outcome. *Id.*

Judge Sentelle's initial opinion for the panel, and Judge Randolph's concurring opinion, followed the latter judge's view in *Checkosky*. Both agreed that a finding of agency error required vacatur; neither considered the possibility that unlawful agency action is void ab initio. Judge Sentelle, joined by Judge Randolph, concluded that "the only permissible remedy under the [Clean Air Act] is to vacate the rule." 374 F.3d. at 1371.

Judge Randolph, in an opinion concurring in the panel's initial decision that was joined by Judge Sentelle, argued that vacating unlawful agency action "should always be the preferred course." *Id.* at 1375. His discussion of the practical issues involved shows that he assumed that, absent an affirmative judicial act of vacatur, unlawful agency actions are legally operative. Judge Randolph maintained that any time a court vacates and remands, a "safety valve," is available. *Id.* Once the court has decided that the agency's action was unlawful, the agency and affected private parties can move to stay the court's mandate. *Id.* That way of proceeding is better than remand without vacatur, because "in deciding whether to allow unlawful agency action to remain in place during the remand (by way of a stay), the court will act with its eyes open[.]" *Id.* If the court stays its order, the agency action will "remain in place" only if it was valid to begin with.

78. Levin, *supra* note 7, at 309.

claims they lack.⁷⁹ He discusses the equitable discretion of reviewing courts before and under the APA in depth.⁸⁰ Professor Levin also analogizes review of agency decisions to appellate review of lower courts, citing the range of options available to an appellate court under 28 U.S.C. § 2106.⁸¹ As his use of the analogy with lower-court decrees indicates, Professor Levin assumes that regulations are binding even if unlawful until displaced by a judicial remedy. He does not seek to justify that assumption.

Stephanie Tatham's thorough study of the doctrine for the Administrative Conference also accepts the assumption on which the courts operate: regulations are binding even if unlawful, and vacatur is a remedy that changes the legal situation by causing an unlawful regulation to lose its binding force.⁸²

Professor Richard Pierce has advanced two arguments in favor of the doctrine. Both rest on the assumption that unlawful agency action is binding until displaced. First, Professor Pierce supports remand without vacatur as a solution to ossification of the regulatory process that results from too-intense judicial scrutiny of agency reasoning.⁸³ By remanding without vacating, a court can retain the benefits of good regulations while requiring that agencies play the notice-and-comment game according to the judiciary's demanding rules.⁸⁴ That benefit follows only if unlawful regulations are binding *ab initio*.

Second, Professor Pierce embraces remand without vacatur as a judicial cure for another self-inflicted wound: the Supreme

79. See *id.* at 341 (stating that the "'set aside' remedy of section 706 of the APA is functionally similar to an injunction," as to which federal courts have equitable discretion).

80. *Id.* at 315–44 (discussing remands and remedial discretion).

81. "Congress has given appellate courts essentially open-ended discretion to fashion appropriate remedies when they review the decisions of lower courts." *Id.* at 312 (footnote quoting 28 U.S.C. § 2106 omitted).

82. See TATHAM, *supra* note 6 (describing the ACUS study).

83. See Richard J. Pierce Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995) (arguing that the regulatory process has become ossified and criticizing the courts for producing that result). According to Professor Pierce, "[t]o have any realistic chance of upholding a major rule on judicial review," an agency's explanation of the rule "must discuss in detail each of scores of policy disputes, data disputes, and alternatives to the rule adopted by the agency." *Id.* at 65. A gap "with respect to any issue can provide the predicate for judicial rejection of the rule on the basis that the agency violated its duty to engage in reasoned decisionmaking." *Id.*

84. Professor Pierce lists "the remedy of remand without vacation," *id.* at 75, among the "major potentially deossifying doctrinal changes" that he endorses, *id.* at 71.

Court's conclusion in *Bowen v. Georgetown University Hospital*⁸⁵ that Congress generally does not authorize agencies to act retrospectively.⁸⁶ The presumption against power to act retroactively, he argues, makes agencies reluctant to regulate. They fear that their reasoning will fail judicial review, their regulations will be vacated, and they will be unable to undo that vacatur by acting retroactively with better reasoning.⁸⁷ *Georgetown University Hospital*, he infers, led the D.C. Circuit to prefer remand without vacatur.⁸⁸ Knowing that rules can remain in effect while errors in reasoning are corrected, agencies will not be reluctant to regulate.⁸⁹ Professor Pierce assumes that unlawful regulations bind private parties until displaced. If unlawful regulations are inoperative ab initio, a new, lawful regulation would have to act retrospectively to fill the gap that opened because the older regulation was never binding.

Other scholars have also accepted the premise that unlawful regulations are binding when issued. Dean Daniel B. Rodriguez agrees that the option of remand without vacatur is available, but argues against its widespread use.⁹⁰ As to the courts' legal authority to remand without vacating, Dean Rodriguez agrees with Professor Levin.⁹¹ Sharing Professor Pierce's concerns about unduly intense judicial scrutiny, Dean Rodriguez fears that the safety valve of non-vacatur will encourage intrusive scrutiny by enabling courts to

85. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988).

86. The case involved a 1984 regulation concerning Medicare reimbursement, adopted to replace a 1981 regulation reducing reimbursement that the D.C. Circuit had found unlawful, that retroactively recouped reimbursements paid under the higher rates the agency had sought to reduce in 1981. *Id.* at 206–07 (describing the sequence of regulations). The Court reasoned that “[r]etroactivity is not favored in the law,” *id.* at 208, and that therefore statutory grants of legislative rulemaking authority should not be understood “to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” *Id.* (citation omitted). Finding nothing in the Medicare Act to overcome that presumption, the Court concluded that “the Secretary has no authority to promulgate retroactive cost-limit rules.” *Id.* at 215.

87. Pierce, *supra* note 83, at 77 (describing ossifying effects of *Georgetown University Hospital*).

88. *Id.*

89. *Id.* at 78 (explaining agencies' incentives in light of remand without vacatur).

90. Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. STATE. L. J. 599 (2004).

91. *Id.* at 625–28 (agreeing that courts have discretion whether to vacate under section 706 of the APA). Built into the argument about section 706 is the assumption that it contemplates a remedy whereby the court causes a previously binding agency action to lose its binding force.

avoid its more extreme consequences.⁹² Like Professor Levin and other participants in the debate, he assumes that when a court remands without vacating “the agency decision stands” while the agency reconsiders.⁹³

In 2005, now-Professor Kristina Daugirdas assessed the D.C. Circuit’s use of the doctrine in a student Note.⁹⁴ She reviewed that court’s remand without vacatur cases for the first ten years after *Allied-Signal*.⁹⁵ Professor Daugirdas makes recommendations for the better administration of the doctrine, but she explicitly does not address the doctrine’s lawfulness, and so works from the assumption that the practice is permissible.⁹⁶

4. Remand Without Vacatur in the Supreme Court

The Supreme Court has not addressed the soundness of remand without vacatur. The Court denied certiorari in a case in which a party questioned the practice.⁹⁷ The petition and the government’s brief in opposition discussed the issue in terms of judicial vacatur of unlawful agency action and did not ask whether unlawful action is void ab initio.⁹⁸

Denials of certiorari are usually not very informative. Professor Levin found in the Thurgood Marshall Papers correspondence among the Justices concerning *Georgetown University Hospital* that

92. *Id.* at 601 (expressing the concern that remand without vacatur “facilitates the use of more aggressive judicial scrutiny”).

93. *Id.* at 600.

94. Kristina Daugirdas, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278 (2005).

95. *Id.* at 281 (describing the D.C. Circuit cases reviewed).

96. *Id.* at 280 n.8 (explaining that the Note does not enter into the debate about the legality of remand without vacatur).

Another commentator, Brian Prestes, has endorsed Judge Randolph’s position in *Checkosky* without asking whether unlawful regulations are void ab initio. Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 SETON HALL L. REV. 108 (2001).

97. See *Council Tree Commc’ns, Inc. v. FCC*, 619 F.3d 235 (3d Cir. 2010), *cert. denied*, 563 U.S. 903 (2011).

98. The question presented by the petition for certiorari was “Whether a reviewing court has the discretion under section 706 of the APA to decline to set aside, or provide any remedy for, unlawful agency action?” Petition for Writ of Certiorari, *Council Tree Commc’ns v. FCC*, 563 U.S. 903 (2011) (No. 10-834), at i. The brief in opposition for the federal parties, in the question presented, stated that “as a remedy” for violations of the notice and comment requirements of the APA, the court below had “vacated both rules” involved in the case. Brief for the Federal Respondents in Opposition, *Council Tree Commc’ns v. FCC*, 563 U.S. 903 (2011) (No. 10-834), at I.

is more informative on this issue. That correspondence indicates that some of the Justices in 1988 understood remand without vacatur in the same way that Judges Silberman and Randolph did in *Checkosky*. In a draft of his opinion for the Court, Justice Kennedy wrote that although agencies generally could not act retrospectively, “courts may exercise their equitable discretion to remand to the agency or to stay invalidation of the challenged regulation pending curative rulemaking.”⁹⁹

Justice Scalia asked Justice Kennedy to delete that passage, taking a position similar to Judge Randolph’s in *Checkosky*. Noting, like Judge Randolph, that section 706 provides that reviewing courts “‘shall . . . hold unlawful and set aside’” unlawful agency action, Justice Scalia wrote, “I think we would be buying grief to suggest that a court may exercise its equitable discretion to disregard this provision by leaving a regulation ‘not in accordance with law’ in effect.”¹⁰⁰ Justices Stevens and Blackmun raised similar concerns, and the language addressing remand without vacatur was deleted.¹⁰¹ Like Judge Randolph in *Checkosky*, Justice Scalia appears not to have considered the possibility that unlawful agency action is void ab initio.

B. Remand in the Court-Agency Relationship

Courts that embrace remand without vacatur assume that they can remand a case to an agency the way they can remand to a lower court. That assumption is unsound, and remand to agencies often differs from remand to lower courts. A better understanding of remand without vacatur therefore requires a better understanding of remand to an agency.

In court-court relations, “remand” is used to describe a judicial act that is often irrelevant in court-agency relations. As between courts, remand restores to the lower tribunal the authority over the case that the lower court loses when a notice of appeal is filed. In general, in federal court a notice of appeal deprives the lower court of authority to act on the case with respect to issues in the appeal.

99. Levin, *supra* note 7, at 351 (quoting Justice Kennedy’s draft opinion).

100. *Id.* at 352 (quoting Scalia letter to Kennedy) (emphasis added by Justice Scalia).

101. *Id.*

Filing an appeal has “jurisdictional significance,” because the appeal moves decisional authority to the appellate court.¹⁰²

An appeal changes the locus of decisional authority from one court to another because of the rules about the respective jurisdiction of courts. Those rules are designed to ensure that only one court will make decisions at any one time.¹⁰³ By contrast, the filing of a lawsuit against a party generally does not change the party’s ability to take legally binding steps, such as entering into a contract. If the plaintiff wants to bar the defendant from taking some step, the plaintiff must seek preliminary relief from the court.¹⁰⁴

In this respect, suits for judicial review of agency action are like suits against private parties, not like appeals.¹⁰⁵ Absent preliminary relief, a government construction project may continue even though suit has been filed to enjoin the project.¹⁰⁶ Similarly, absent preliminary relief, the government may bring proceedings to enforce a regulation, even though suit has been filed to enjoin enforcement.¹⁰⁷ And just as the filing of a suit for pre-enforcement review of a regulation does not itself bar enforcement, neither does that filing keep the agency involved from changing the regulation. For example, the Department of the Interior was free to undertake a new rulemaking while *Idaho Farm Bureau* was pending.¹⁰⁸

102. “The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).

103. A notice of appeal divests the district court of decisional authority because “a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously.” *Id.*

104. *See, e.g., L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 634 F.2d 1197 (9th Cir. 1980) (reversing preliminary injunction ordering the NFL to allow the Oakland Raiders to relocate to Los Angeles).

105. *See Garland v. Ming Dai*, 141 S. Ct. 1669, 1678 (2021) (explaining that courts do not exercise appellate jurisdiction over agencies).

106. *See, e.g., TVA v. Hill*, 437 U.S. 153, 157–58 (1978) (describing injunction that temporarily stayed completion of the Tellico Dam).

107. *See, e.g., Ex parte Young*, 209 U.S. 123, 132 (1908) (reviewing a lower court order that preliminarily restrained the institution of enforcement proceedings against the plaintiffs below by Attorney General Young of Minnesota).

108. *See supra* note 7 (discussing *Idaho Farm Bureau* as an example of remand without vacatur).

The Department did not lose authority the way a lower court loses authority when a notice of appeal is filed.¹⁰⁹

In similar fashion, the filing of a petition for review in a special statutory review proceeding does not automatically deprive the agency involved of regulatory power. Under the Clean Air Act, for example, filing a petition for review does not stay the agency's enforcement authority nor affect its regulatory authority.¹¹⁰

Some statutes do bar the agency from taking further action while a petition for review is pending. The National Labor Relations Act (NLRA), for example, provides that when a petition for review of a National Labor Relations Board (NLRB) order is filed in a court of appeals, the court has jurisdiction of the proceedings.¹¹¹ In *Ford Motor Co. v. NLRB*,¹¹² the Supreme Court concluded that once a petition had been filed, the court's jurisdiction was exclusive and the Board could take no further action on the matter.¹¹³ The NLRA thus placed the agency in the position lower courts occupy.

In *Ford Motor Co.*, the NLRB wished to reconsider the order under review, and asked the court of appeals to permit it to do so.¹¹⁴ The Act did not explicitly provide for remand to the agency under those circumstances. The Supreme Court found that the court of appeals had authority to give an equitable remedy returning the matter to the Board and restoring the Board's authority to act.

109. The Endangered Species Act confers regulatory powers on the Secretary of the Interior and does not provide that those powers are affected by the filing of lawsuits against the Secretary. See 16 U.S.C. § 1533 (setting out the Secretary's regulatory powers and duties). The Act's authorization of suits against the Secretary similarly does not provide that the filing of a suit affects the Secretary's regulatory powers. 16 U.S.C. § 1549(g) (providing for citizen suits).

110. The judicial review provision of the Clean Air Act provides for petitions for review of EPA regulations, which are not stayed pending judicial review. See 42 U.S.C. § 3607(b) (providing for judicial review with no stay pending review). Nor does that provision limit the agency's authority to modify regulations while judicial review is pending.

111. 29 U.S.C. § 160(e).

112. *Ford Motor Co. v. NLRB*, 305 U.S. 364 (1939).

113. *Id.* at 368 (explaining that, under the statute, the NLRB's authority to "modify or set aside" its order "ended with the filing in court of the transcript of record").

114. *Id.* at 366–67 (describing NLRB's request that the case be dismissed without prejudice so that the agency could set aside its earlier order and conduct new proceedings).

The Court referred to that act as a remand, and likened remands to the agency to remands by an appellate court to a trial court.¹¹⁵

Professor Levin points to *Ford Motor Co.* as a leading case for the principle that courts of appeals that directly review agency action have equitable authority similar to that of federal district courts in ordinary civil cases.¹¹⁶ That case, however, does not enunciate a broad principle about remand to agencies. *Ford Motor Co.* shows that under some circumstances, the pendency of judicial review deprives an agency of authority, so the agency is in a position like that of a lower court in that respect. But the pendency of judicial review does not automatically inhibit the agency. When the agency is free to act pending judicial review, the orders that courts call remand to the agency do not have the effect of remand to a lower court. Remands to agencies do not restore the agency's lost decisional authority when that authority never lapsed.

When courts refer to remand to an agency, they thus frequently are not referring to a step that restores decisional authority and must mean something else. In applications of the doctrine of remand without vacatur, the meaning of remand depends on whether the court has decided to vacate the agency's act. If the court vacates, the statement that the matter is remanded is a way of saying that the agency should proceed with the knowledge of the vacatur order. Whether the agency has any obligation to take any further steps depends on the applicable statute. If the statute requires that the agency issue a regulation, and the regulation it issued has been disapproved, then the statute will require the agency to begin again.¹¹⁷ But if issuing a regulation is optional, the agency may decide to do nothing in response to the court's

115. The Court pointed out that under "familiar appellate practice," courts of appeals often "remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied." *Id.* at 373. A similar step was permissible under the NLRA. "The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with that of the equitable principles governing judicial action." *Id.* (footnote omitted).

116. Levin, *supra* note 7, at 319–320 (discussing the equitable authority of reviewing courts under *Ford Motor Co.*).

117. Some Clean Air Act regulations, for example, are affirmatively mandated. *See, e.g.*, 42 U.S.C. § 3607(d)(10) (referring to statutory deadlines for issuing regulations).

statement that the regulation is remanded. That statement by itself has no legal consequences.

When the court declines to vacate and remands, by contrast, the statement that the matter is remanded does have legal consequences. Remand means that the agency has an obligation to conduct further proceedings that will attempt to repair the defect that made the regulation unlawful.¹¹⁸ If the agency had no such obligation, unlawful regulations would continue to bind private parties indefinitely.¹¹⁹ Remand without vacatur is designed to give the agency an opportunity to do its job correctly, an opportunity the agency must use.¹²⁰

III. THE AB INITIO INVALIDITY OF UNLAWFUL REGULATIONS OF PRIVATE CONDUCT

This Part sets out the article's primary criticism of the doctrine of remand without vacatur. Agency regulations of private conduct, that are enforced by sanctions directed against private rights (not by withdrawal of government benefits), and that are unlawful as set out in section 706 of the APA, are, in general, void ab initio.¹²¹ Regulations that Section 706 describes as unlawful never have binding force on the private parties they purport to regulate. The question whether to vacate them does not arise.¹²²

118. See, e.g., *Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389–90 (5th Cir. 2021) (remanding without vacating and setting out the steps the agency is to take on remand).

119. See *id.* at 390 (retaining jurisdiction pending agency action on remand).

120. The related concepts of vacatur and non-vacatur also have complexities that the analogy to court-court relations obscures. See *infra* Section 4(a)(2) (discussing different meanings of vacatur and pointing out that the courts do not have a well-established account of vacatur).

121. See 5 U.S.C. § 706 (stating that courts are to hold unlawful agency actions that have specified features such as unconstitutionality).

122. Regulations of private conduct that are enforced by withdrawal of government benefits pose distinct questions. *Checkosky* provides an example. The SEC's rules for accountants are enforced by withdrawal of permission to file with the Commission, which the Commission's regulations describe as a privilege. See *supra* note 57 (describing SEC regulations). Clean Air Act regulations, by contrast, are enforced with imprisonment, criminal fines, and civil penalties, see 42 U.S.C. § 7413(b), (c) (providing for civil and criminal enforcement), which operate on private legal interests that are not government benefits in the sense that practicing before the SEC is. I will often refer to regulations of private conduct enforced by sanctions directed against private rights simply as regulations of private conduct.

The article's claim about *ab initio* invalidity is stated as a generalization because the question of the *ab initio* status of regulations is ultimately a question about the statutes that authorize agencies to issue them. Courts that embrace remand without vacatur fail to see this point. Misled by the analogy between agencies and the judiciary, those courts are unaware that their conclusions rest on assumptions about the powers of agencies, not about judicial remedies. Regulatory power comes from statute. The article's generalization is that statutory grants and limits on agency power, and statutory procedures for the exercise of power, set out necessary conditions for the *ab initio* validity of purported exercises of those powers. Specific statutes could set up a different scheme. In general, however, there is a strong presumption that fulfilling the substantive and procedural requirements found in empowering statutes is a necessary condition for the *ab initio* validity of a regulation.

This Part begins by examining the grounds of unlawfulness set out in Section 706 and showing why unlawful regulations are void *ab initio*. I then explain that a familiar form of judicial review – review in enforcement proceedings in which the government seeks a sanction for a past violation of a regulation – operates on the assumption that unlawful regulations are never legally binding. Because proceedings for sanctions involve prior conduct, the question before the court is whether the regulation was binding when that conduct occurred, not whether the court should cause the regulation to lose binding force prospectively. Third, I discuss a case in which the Supreme Court addressed the requirements a regulation must meet in order to be legally binding.¹²³ Unsurprisingly, the Court found that regulations have binding force only if their substance is consistent with the authorizing statute and they were adopted through prescribed procedures.

After defending the general principle that regulations described as unlawful by section 706(2) are void *ab initio*, this Part turns to the Clean Air Act. That statute is worthy of attention for several reasons. It is of great practical importance, and the doctrine of remand without vacatur was developed mainly in Clean Air Act cases and continues to be applied under the Act.¹²⁴ The Act also has

123. See *infra* Section III.A.3 (discussing *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979)).

124. See, e.g., *supra* Section II.A.1 (discussing the Act and cases under it).

features that might be thought to support remand without vacatur. It bars judicial review in enforcement proceedings and uses terminology suggesting that reviewing courts cause previously binding regulations to lose their binding force.¹²⁵ Despite those indicators, the most persuasive reading of the Act is that regulations that are substantively or procedurally inconsistent with it are void when issued, except for an express qualification as to specified procedural flaws. If the Act is read to make unlawful regulations binding until displaced, it requires reviewing courts to displace them. Either way, the Act does not support remand without vacatur.

A. Why Unlawful Regulations Are Void Ab Initio

This article uses the conception of unlawful regulations found in section 706 of the APA. Section 706 instructs reviewing courts to “hold unlawful and set aside” agency “action, findings, and conclusions” that satisfy descriptions in section 706(2)(A)-(D).¹²⁶ Unlawful regulations so defined are void ab initio, are assumed to be void ab initio by the practice of judicial review in enforcement proceedings, and have been described by the Supreme Court as lacking the force of law.

1. The APA and the Principal of Ab Initio Invalidity of Unlawful Regulations

Regulations of private conduct that fall into any of the categories described as unlawful under section 706(2)(A)-(D) are void ab initio. Section 558 of the APA confirms that conclusion.

a. Section 706. Section 706 of the APA has figured in the debate over remand without vacatur so far, but that provision’s full significance has not been appreciated. Judge Randolph argues that section 706 forbids the practice of remand without vacatur, while Professor Levin disagrees. Both assume, however, that unlawful regulations are binding, and attribute that assumption to that

125. See *infra* Section III.B.2 (describing the Act).

126. Section 706(2)(A)-(D) are relevant here because they deal with legal defects. Section 706(2)(E) and (F) deal with defects in agency fact-finding.

provision.¹²⁷ That assumption is not consistent with section 706, because regulations that it categorizes as unlawful are void ab initio. That conclusion follows from the bodies of law to which section 706 points in subsections 706(2)(A) through 706(2)(D), including the Constitution, and is confirmed by the APA itself.

(1) *Section 706(2)(B)*. The category of unlawful regulations that are most clearly also invalid ab initio is found in section 706(2)(B), which tells reviewing courts to hold unlawful agency action, findings, or conclusions that are “contrary to constitutional right, power, privilege, or immunity.”¹²⁸

Unconstitutional regulations are not legally binding. Unless Congress can give an agency more law-making power than the legislature itself has, unconstitutional regulations are “never really part of the body of governing law,” because “the Constitution automatically displaces” conflicting regulations “from the moment” of their enactment.¹²⁹

Section 706(2)(B) does not use the word “unconstitutional,” but employs more specific language. That language underlines the point that purported exercises of agency authority to create binding rules are legal nullities when inconsistent with the Constitution. “Immunity” implies ab initio invalidity because immunity is the legal relation in which one person’s legal position is not subject to change by the unilateral act of another.¹³⁰ “Power” does likewise. When one person’s position is immunity, another’s position is lack

127. Judge Randolph’s view appears in *Checkosky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994); Professor Levin’s appears in his article, Levin, *supra* note 7, at 377 (arguing that section 706 gives courts the power to annul regulations and discretion whether to exercise that power).

128. 5 U.S.C. § 706(2)(B).

129. *Collins v. Yellen*, 141 S. Ct. 1761, 1788–89 (2021) (describing the status of unconstitutional statutory provisions).

130. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16, 55 (1913) (explaining that “an immunity is one’s freedom from the legal power or ‘control’ of another as regards some legal relation”). Hohfeld identified eight jural relations: right, duty, privilege, no-right, power, liability, immunity, and disability. *Id.* at 30 (setting out table of jural correlatives and opposites). Those concepts and their technical usage were familiar to sophisticated lawyers when the APA was adopted. See, e.g., FED. R. CIV. P. 58 advisory committee notes (1937) (explaining that “[t]he existence or non-existence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared” in a declaratory judgment).

of power.¹³¹ Rules about power and immunity operate through validity and invalidity. A purported exercise of a power directed to someone who is immune to that exercise is a legal nullity, and never has binding legal effect.¹³²

When a court reviews a regulation that is unlawful for the reason given in section 706(2)(B), the court does not have the option of leaving the regulation in effect during a remand. The binding force of unconstitutional regulations is not a matter for a reviewing court to decide, any more than it is a matter for Congress to decide. With respect to that member of the list in section 706(2), the assumption on which remand without vacatur rests is undoubtedly incorrect.

(2) *Section 706(2)(C)*. 706(2)(C) describes as “unlawful” agency action, findings, and conclusions that are “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”¹³³ Regulations that are in excess of statutory jurisdiction, authority, or limitations are not legally binding when issued.¹³⁴ That principle derives from the Constitution. Agencies have only the regulatory authority that Congress gives them.¹³⁵ For that

131. See Hohfeld, *supra* note 130, at 30 (setting out table of opposites and correlatives showing that one person’s immunity correlates with another’s disability, which is the opposite of power).

132. As Hart and Sacks explained, “the characteristic sanction of an empowering arrangement is the *sanction of nullity*.” HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 134 (William N. Eskridge, Jr. & Phillip P. Frickey, eds., 1994). They went on to point out that “[t]he sanction of nullity is pervasive in the whole theory of American public law,” and described the courts’ power of judicial review as the power “to treat as null an otherwise relevant statute which they believe to be beyond the power of the legislature.” *Id.* at 154.

133. 5 U.S.C. § 706(2)(C).

134. Section 706(2)(C)’s reference to agency action “short of statutory right” does not have to do with the validity of purported exercises of regulatory power. An agency regulation can be short of statutory right if the agency fails to regulate as it is required to. Improper agency inaction is unlawful under section 706(1), which directs reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). Failure to regulate as required, however, is not invalid, because validity and invalidity are features of purported exercises of power, not of inaction.

135. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (“The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by government departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.”). Professor Thomas Merrill has shown how fundamental that principle is. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004). As

reason, an agency cannot bind private parties even temporarily, pending judicial invalidation, without congressional authorization. Regulations are valid until vacated only if they are valid to begin with, and validity must rest on statutory authority.

The phraseology of section 706(2)(C) confirms that it assumes the invalidity of regulations that meet its description. The clause uses concepts associated with power and lack of power and the consequences of power and lack of power, which are validity and invalidity. Jurisdiction is regularly used to refer to a government institution's authority to act with legally binding effect.¹³⁶ Even judicial decrees and judgments are not binding collaterally when the issuing court lacks jurisdiction.¹³⁷ When Congress attempts to legislate in excess of its constitutional jurisdiction or authority by going beyond its enumerated powers, the result is a legal nullity.¹³⁸ In similar fashion, when Congress attempts to legislate in excess of constitutional limitation by adopting a statutory rule that is inconsistent with an affirmative limitation like the First Amendment, the result is a legal nullity.¹³⁹

The doctrine of remand without vacatur assumes that regulations are binding when adopted whether or not they are within the grants and limits of regulatory power set out in the statute on which the agency relies. That claim could be salvaged, but only on the basis of another claim about agency statutory authority that is outlandish.

The principle that agencies may act with legal force, even temporarily, only if Congress authorizes them to do so, derives

Professor Merrill shows, "executive and judicial officers have no inherent authority to act with the force of law, but must trace any such authority to some provision of enacted law." *Id.* at 2101.

136. See, e.g., RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(A) (AM. L. INST. 2017) (defining a state's jurisdiction to prescribe as its authority to make its law applicable); *id.* at § 401(b) (defining jurisdiction to adjudicate as a state's authority to apply law through its courts or administrative tribunals).

137. See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 1 (AM. L. INST. 1969) (setting out "requisites of a valid judgment" and stating that a court has "authority to render judgment" when it has jurisdiction over the subject matter and over the defendant).

138. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (holding that a criminal prohibition that was not within Congress's enumerated powers was void and could not support a criminal conviction).

139. See, e.g., *United States v. Eichman*, 496 U.S. 310 (1990) (holding that the Flag Protection Act of 1989 was inconsistent with the First Amendment and void and could not support a criminal conviction).

from the Constitution. That principle must be respected. The standard way to read statutes in light of that principle is to assume that when an agency goes beyond its explicit grants of power, or acts contrary to an express limitation, the agency has exceeded its authority and its regulation is unauthorized and invalid. Remand without vacatur, however, rests on the assumption that regulations that go beyond express grants, or that violate limitations, are nevertheless binding when adopted. Such regulations are assumed to be voidable by the courts, but to be binding until a court acts.

Even a voidable regulation, however, must rest on a statutory grant of power in order to be binding until made void. Remand without vacatur thus attributes a two-tier structure to statutes that authorize regulation. One tier is a grant of power, which is constitutionally necessary. Regulations in excess of that grant are void *ab initio*, as the Constitution requires. The other tier states conditions that make regulations voidable. Congress could legislate that way, but remand without vacatur rests on the claim that Congress has done so implicitly in every regulatory statute. That claim is implausible, absent some strong evidence concerning the statute in question.

In the two-tier structure required for remand without vacatur to be permissible, every statute that authorizes regulation includes an initial, empowering tier that is not set out in the text. An empowering tier is required by the Constitution, but under remand without vacatur, the provisions explicitly conferring and limiting regulatory power cannot be the source of that power because they produce only voidability. The source of power must be elsewhere in the statute and must be implicit.

Two possible forms of implicit grants of power show how implausible is the suggestion that Congress grants power silently. First, whenever Congress empowers an agency to regulate, it might implicitly empower the agency to adopt any regulation that the Constitution enables Congress to authorize. Regulations that Congress has power to authorize but that go beyond the stated terms of the statute then would be trimmed back by the courts. That reading of statutes granting regulatory authority cannot be taken

seriously.¹⁴⁰ It implies, for example, that the Fish and Wildlife Service has the authority to regulate drug safety, until a court tells it not to.

Second, Congress might implicitly give regulatory authority that does not extend to the constitutional limit but is not as restricted as the regulatory authority Congress gives explicitly. Congress might implicitly authorize the Food and Drug Administration (FDA) to adopt regulations that have something to do with food and drug safety, even if those regulations exceed the agency's explicit grants of authority. Regulations in excess of the implicit grants of power would be void ab initio, as regulations in excess of granted power must be. Regulations within the implicit grants and beyond the explicit grants would be binding until displaced. With that two-tier structure, voidable regulations would have the statutory authorization they need.

That arrangement cannot be attributed to Congress, absent very strong evidence that a statute has two tiers of that kind. The decision to take the two-tier approach, and the decision about the scope of the grant of power to adopt voidable regulations, are both important enough that Congress would give some indication that it had taken them. The reach and limits of agency regulatory power are matters of intense congressional concern, of intense interest to regulated parties and regulatory beneficiaries, and frequently of careful drafting to implement hard-fought compromises.¹⁴¹ If remand without vacatur is correct, all that careful drafting concerns grounds of voidability. Whether to invalidate a voidable regulation is in the courts' discretion.¹⁴² When regulated parties win an explicit limit on regulatory power, they have won only a ticket in a lawsuit

140. The Court expects "Congress to speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance."'" Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., No. 21A23, slip op. at 6 (U.S. Aug. 26, 2021) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000))).

141. The 1990 amendments to the Clean Air Act, for example, were the product of "one of the longest—and hardest fought—legislative battles in recent congressional history." Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENV'T L. 1721, 1721 (1991). In the years leading up to the amendments, "thousands of hours were spent developing, debating, and blocking legislative proposals," and "millions of dollars were spent on lobbying by interest groups." *Id.*

142. The doctrine of remand without vacatur finds the principles governing judicial vacatur in the courts' equitable discretion. See Levin, *supra* note 7, at 317–26 (discussing the history of equitable discretion in administrative law remedies).

lottery, and Congress has not even decided on the odds that the ticket will pay off. The courts will determine whether to enforce the statutory limit on grounds the judges choose.¹⁴³ The grounds on which a regulation would be void *ab initio* are nowhere expressed, and no one focuses on them in the legislative process. No rational legislature would work that way. Explicit statutory limits on regulatory authority produce invalidity *ab initio*.

Proponents of remand without vacatur do not make the unlikely claims of agency regulatory power just described. That is not because they point to some other source of authority, but because they do not recognize their assumption of *ab initio* validity. Reliance on section 706 of the APA in support of remand without vacatur reflects a failure to recognize that assumption.¹⁴⁴ The question whether Congress has given the FDA regulatory authority that exceeds the agency's stated regulatory authority, for example, is a question about the statutes that empower that agency. It is not a question about section 706, which does not confer regulatory power.

(3) *Section 706(2)(A)*. Section 706(2)(A) describes as unlawful agency action, findings, and conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁴⁵ Regulations meeting that description are invalid when adopted. Their invalidity does not wait for a judicial determination of unlawfulness and a decision to relieve regulated parties of the obligation to comply.

The concept of arbitrary and capricious agency action as the courts have come to understand it has two components, one of which is especially important for the doctrine of remand without vacatur. As the Supreme Court has recently noted, agency decisions are arbitrary and capricious if they are not "reasonable and reasonably explained."¹⁴⁶ The contrast between the

143. On this point, the principle that Congress does not hide elephants in mouseholes is a good turn of phrase that reflects the realities of legislation. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes.").

144. See *supra* Sections II(A)(2)–(3) (discussing focus of proponents and opponents of remand without vacatur on section 706).

145. 5 U.S.C. § 706(2)(A).

146. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2571 (2019). A classic formulation of the arbitrary and capricious standard requires that reviewing courts decide whether the

reasonableness of the decision and of the explanation shows that the standard applies both to the substance of the decision and to the agency's reasoning.

The status of substantively unreasonable regulations is clear. As between *ab initio* invalidity and *ab initio* validity subject to judicial displacement, Congress's rejection of unreasonable regulations calls for the former. Unreasonable regulations are undesirable when adopted. They do not start off as sound policy and then become bad choices when a court finds them to be arbitrary and capricious. The requirement of substantively rational policy choices calls for *ab initio* invalidity when that requirement is not satisfied.¹⁴⁷

Regulations that are arbitrary and capricious because they are not reasonably explained raise different issues. An agency decision that was based on flawed reasoning might be substantively sound. That possibility suggests that perhaps Congress empowers agencies to adopt regulations that are initially binding, although they lack a sound rationale, and that remain in force until a court finally determines that the agency cannot find a persuasive explanation. Such an arrangement, however, cannot be reconciled with the reason Congress empowers agencies: expertise.¹⁴⁸ Unless the agency has applied that expertise rationally, Congress's predicate for the grant of power is not satisfied. The connection between expertise and the agency's reasoning indicates that Congress ties the power to regulate to the reason for giving an agency that power. Congress enables agencies to act with the force of law only when they satisfy the justification for giving them that power.

agency's "decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Whether the agency's judgment clearly erred is a question about the content of the judgment, and hence objective. After explaining the arbitrary and capricious standard as it applies to the substance of the agency's decision, the Court in *Overton Park* turned to the question whether the agency "followed the necessary procedural requirements." *Id.* at 417.

147. The same reasoning applies to regulations that are abuses of discretion. An abuse of discretion is a clearly unreasonable decision. *See, e.g., Rabkin v. Oregon Health Sci. Univ.*, 350 F.3d 967, 977 (9th Cir. 2003) (explaining that an abuse of discretion is a plain error). If unreasonable regulations should be invalid at any point, they should be invalid *ab initio*, and not only after the abuse of discretion has been detected. Abuses of discretion are mistakes when made.

148. *See Chevron USA Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (pointing to agency expertise as a reason Congress commits policy choices to agencies and not courts).

(4) *Section 706(2)(D)*. Section 706(2)(D) classifies as unlawful regulations that are adopted “without observance of procedure required by law.”¹⁴⁹ Several considerations show that agency authority to regulate is authority to regulate through the process Congress has set out and not otherwise. First, the Constitution itself includes the principle that granted powers must be exercised through a specified process. To be legally binding, purported exercises of federal legislative power must be the product of the law-making process set out in Article I, Section 7 of the Constitution.¹⁵⁰ In the administrative part of government, significant government power can be exercised only by individuals appointed to offices of the United States through the procedures set out in the Appointments Clause.¹⁵¹

The general principle that valid enactments can be adopted only by the specified law-making procedure reflects considerations that Congress has good reason to embrace, and therefore is readily attributed to Congress’s statutes. Procedures governing law-making processes are often adopted in the service of substantive interests, and so are implemented the way provisions governing the substance of power are. The National Environmental Policy Act (NEPA) is an example. NEPA requires that agency reasoning as to all decisions take environmental factors into account, in the interest of environmental quality goals.¹⁵² Because of the close connection between substance and procedure, the assumption that Congress ties regulatory authority to compliance with its procedure is justified.

Next, statutory grants of regulatory authority include, and must include, some principles governing procedure, failure to comply with which leads to *ab initio* invalidity. For example, a

149. 5 U.S.C. § 706(2)(D).

150. *See INS v. Chadha*, 462 U.S. 919 (1983) (holding a one-house legislative veto to be legally ineffective because in order to affect private legal interests Congress must use the legislative process with bicameralism and presentment to the President).

151. *See United States v. Arthrex*, 141 S. Ct. 1970 (2021) (holding that Administrative Patent Judges were not appointed as required by the Appointments Clause and could not exercise power); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (holding that only officers appointed pursuant to the Appointments Clause may exercise significant government power under federal statutes). The Appointments Clause specifies a procedural requirement in that it concerns the way in which power is exercised, not the content of government action.

152. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) (explaining that NEPA pursues substantive goals through procedures that require agencies to consider environmental consequences of agency decisions).

statute authorizing regulation must identify the agency that is to regulate, and regulation by that agency is a necessary condition of validity. A purported drug safety regulation issued by the Archivist of the United States would not be binding. Because some failures to comply with statutory procedure lead to *ab initio* invalidity, remand without vacatur once again assumes a two-tier structure concerning procedure: A drug safety regulation adopted by the Archivist would be void *ab initio*, but a regulation that the FDA adopted without following statutory procedures would be binding but voidable. If statutes governing procedure had that two-tier structure, it would be explicit.

With respect to procedure, the inference that Congress would indicate a departure from *ab initio* invalidity explicitly can draw on an example in which it has done so. In the Regulatory Flexibility Act (RFA), Congress has imposed procedural requirements, compliance with which is explicitly *not* a necessary condition of the regulation's *ab initio* effectiveness.¹⁵³ Rather, courts are empowered to decide whether a regulation issued without the appropriate procedure should be suspended pending further agency proceedings.¹⁵⁴ The RFA thus does enable agencies to issue regulations that do not fully comply with the law but that nevertheless are legally effective until a court directs that they not be. It is an exception to the general rule and is identifiable as such.¹⁵⁵

153. See 5 U.S.C. §§ 601-12 (codifying the RFA). The RFA requires that when agencies promulgate a regulation through the notice and comment process, they analyze the regulation's effect on small entities (which are defined by the Act, 5 U.S.C. § 601(6) (defining small entity)) and include that analysis in the final rule. 5 U.S.C. §§ 601, 605, 606, 608 & 610 (specifying process for considering the impact of regulation on small entities).

154. This provision of the RFA deals with judicial review: 5 U.S.C. § 611. It includes a special time limit for bringing challenges to regulations based on non-compliance with the Act. *Id.* § 611(1)(3) (specifying time limits). That section authorizes reviewing courts to "order the agency to take corrective action consistent with this chapter and chapter 7 [of title 5], including, but not limited to – (A) remanding the rule to the agency, and (B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest." *Id.* § 611(1)(4).

155. Section 706 recognizes that agency error may be harmless. It concludes: "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. If procedural error in adopting a regulation, as opposed to in an adjudication, can be harmless, harmless error principles limit *ab initio* invalidity. But harmless error principles do not support remand without vacatur because harmless error leads to *ab initio* validity, not voidability.

b. Section 558. Section 558 of the APA rests on the assumption that regulations are binding only if authorized by law. It provides: “A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.”¹⁵⁶ By using “authorization,” section 558 indicates that it states a criterion for the validity of agency action that purports to be legally binding.¹⁵⁷ The point in time to which section 558 refers confirms that reading. Section 558 governs the imposition of sanctions and the issuance of rules and orders, events that take place when the agency acts, not later when a court reviews that action. Consistent with its focus on agency action when that action takes place, section 558 is not formulated as a directive to courts conducting judicial review. Courts, of course, apply it, as they apply all relevant law, but it is not primarily addressed to them.

The word “jurisdiction” in section 558 is also noteworthy. Remand without vacatur rests on an analogy between agencies and courts. Judicial decrees are generally binding until overturned, even if they rest on error. But decrees are binding only if made within the court’s jurisdiction, and jurisdictional defects are a proper grounds of collateral attack.¹⁵⁸ When the APA’s drafters wanted to refer to the limits on an agency’s ability to act with binding force, they reached for a word that stated the limits even of the judiciary’s ability to bind parties.

2. Review of Regulations in Enforcement Proceedings

Another fundamental feature of administrative law, acknowledged in the text of the APA, reflects the principle that unlawful regulations are void ab initio. When the government sues a private person to impose a sanction for failure to comply with a regulation, the court is to conduct judicial review. The APA provides: “Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.”¹⁵⁹ Courts that conduct judicial review decide

156. 5 U.S.C. § 558(b).

157. See *supra* Section III(A)(1) (showing that the power to issue regulations that are binding when adopted depends on congressional authorization).

158. See *supra* note 137 (discussing the principle that courts must have jurisdiction in order to issue a judgment that will be binding in later proceedings).

159. 5 U.S.C. § 703.

whether the agency action before them is unlawful under Section 706.¹⁶⁰ In a proceeding to impose a sanction based on an alleged violation of a regulation, the function of judicial review is to determine whether the regulation was valid at the time of the defendant's conduct. If unlawful regulations were binding until displaced, judicial review would be of no use in a proceeding based on prior events. Courts in suits for sanctions under a regulation are deciding whether the regulation was valid in the past, not whether to make it invalid in the future.¹⁶¹

Although enforcement-stage review is generally available, courts that embrace remand without vacatur very likely base their thinking on the now-common litigation form of pre-enforcement review.¹⁶² In pre-enforcement review, which the Court endorsed in *Abbott Laboratories v. Gardner*,¹⁶³ regulated parties sue before they have violated the regulation in question. They seek prospective relief in the form of injunctions against the institution of enforcement proceedings as to future conduct and declarations that govern their future conduct.¹⁶⁴ In that litigation context, courts may think that they are being asked for a prospective remedy that causes a regulation that was valid when adopted to become invalid as to future conduct.

As the Justices understood in *Abbott Laboratories*, however, pre-enforcement review enables regulated parties to raise the same arguments that they would raise in an enforcement proceeding. One factor counting in favor of pre-enforcement review in the

160. Section 706 is addressed to reviewing courts: "The reviewing court shall . . . hold unlawful and set aside agency actions, findings, and conclusions found to" have the features the provision lists. 5 U.S.C. § 706.

161. The consequences of ab initio invalidity can be seen when the courts find in an enforcement proceeding that a criminal statute is unconstitutional. Under those circumstances, the defendant is guilty of no crime, because the defendant's conduct was not illegal when it took place. See, e.g., *United States v. Davis*, 139 S. Ct 2319, 2323–24 (2019) (affirming that an unconstitutionally vague statute is "no law at all" and cannot support a criminal conviction). Judicial findings of unconstitutionality are in a sense retroactive, because they apply to events that took place before the Court's decision, but after the Constitution nullified statutory rules that are inconsistent with it. See *Harper v. Virginia Dep't of Tax'n*, 509 U.S. 86, 94 (1993) (holdings of unconstitutionality have retrospective effect).

162. For example, *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995), which Professor Levin uses as a paradigmatic instance of remand without vacatur, *supra* note 12, was a suit for pre-enforcement review.

163. *Abbott Lab'ys v. Gardner*, 387 U.S. 136 (1967).

164. *Id.*

Court's reasoning was that without it, regulated parties would have to violate the regulation and raise their objections to it as defenses, running the risk of penalties if the regulation proved to be valid.¹⁶⁵ That reasoning assumed that a legal defect gives rise to a defense, which in turn assumes that the defect made the regulation inoperative at the time of the conduct being sanctioned. Justice Fortas, in dissent, argued that the "mechanism for judicial review" of the kind of agency action at stake was "well understood."¹⁶⁶ Judicial review was "confined to enforcement actions instituted by the Attorney General," and the courts should decide on the validity of FDA regulations only in that kind of proceeding.¹⁶⁷

Pre-enforcement review allows regulated parties to raise the arguments they would raise in proceedings for sanctions. In proceedings for sanctions based on prior conduct, regulated parties argue that the regulation at issue is unlawful and therefore was not binding when their conduct took place. Nothing in *Abbott Laboratories* suggests that any of the Justices thought that a pre-enforcement court could give a remedy of prospective invalidation that would be useless in an enforcement proceeding. They understood pre-enforcement review to be useful because it would give regulated parties certainty about what the law already was. The Justices did not suggest that pre-enforcement review enabled regulated parties to obtain a favorable change in the law through invalidation of a previously binding regulation.

Scholars have long recognized that enforcement proceedings, in which defendants claim that unlawful regulations are invalid ab initio, are a standard form of judicial review. As a leading administrative law treatise notes, *Abbott Laboratories* was an important innovation, because before that case, review of regulations mainly took place in enforcement proceedings.¹⁶⁸ Professor David Currie stressed the usual availability of

165. *Id.* at 153–54 (describing the dilemma faced by regulated parties).

166. *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 178 (1966) (Fortas, J., concurring in *Gardner v. Toilet Goods Ass'n* and dissenting in *Abbott Laboratories*).

167. *Id.* (Justice Fortas also noted limited forms of pre-enforcement review explicitly provided by the statutes. *Id.*)

168. 3 RICHARD J. PIERCE, *THE ADMINISTRATIVE PROCESS* 1683 (5th ed. 2010) (noting that review of regulations was mainly conducted in enforcement proceedings before *Abbott Laboratories*).

enforcement-stage review in criticizing the Clean Air Act's bar on judicial review at that stage, and the Act's requirement that regulated parties instead use the proceeding for pre-enforcement review that the Act provides. The Clean Air Act's system, Currie pointed out, was a deliberate departure from the standard rules about fora for judicial review. "It is common for one charged with violating a regulation to argue in defense that the regulation is invalid."¹⁶⁹ By "invalid," Currie meant not binding when the defendant's conduct occurred.

A few years after Currie's 1977 article, a 1982 recommendation by the Administrative Conference of the United States addressed the problem of barring review in enforcement proceedings. The ACUS report began by observing that judicial review ordinarily is available to defendants. "A person adversely affected by an agency rule may ordinarily obtain judicial review of that rule either [through pre-enforcement review] or by asserting the invalidity of the rule as a defense in a civil or criminal proceeding to apply or enforce the rule (enforcement review)."¹⁷⁰ The report did not suggest that judicial review in enforcement proceedings is more limited than pre-enforcement review, because it can be based only on flaws that produce invalidity; the report assumed that unlawful regulations are invalid and so cannot support sanctions.

That assumption is reflected in one of the Administrative Conference's recommendations: "When Congress decides to limit the availability of judicial review of rules at the enforcement stage, it should ordinarily preclude review only of issues relating to procedures employed in the rulemaking or the adequacy of factual support for the rule in the administrative record."¹⁷¹ Absent a limitation, regulated parties would be able to argue in enforcement proceedings that the regulation was inadequately factually

169. David P. Currie, *Judicial Review Under Federal Pollution Laws*, 62 IOWA L. REV. 1221, 1254 (1977). Allowing review at the time of enforcement, however, has "considerable potential for delay." *Id.* For that reason, Congress provided for expedited pre-enforcement review in the courts of appeals and barred courts from considering the validity of Clean Air Act regulations in enforcement proceedings. *Id.* Currie criticized the "harshness" of barring review in enforcement proceedings and recommended that the ban be "expeditiously repealed." *Id.* at 1258-59.

170. ADMINISTRATIVE CONF. OF THE U.S., RECOMMENDATION 82-7: JUDICIAL REVIEW OF RULES IN ENFORCEMENT PROCEEDINGS 1 (1982) (adopted by the Administrative Conference December 17, 1982).

171. *Id.* at 4-5.

supported. In proceedings for sanctions, defendants assert ab initio invalidity. The ACUS report thus assumed that a regulation that is unlawful because inadequately factually grounded is never binding.

Judicial review in proceedings for sanctions based on past conduct, in which defendants argue that a regulation is unlawful, is a basic form of review. Claims of unlawfulness in that paradigmatic mode of review are claims of ab initio invalidity.

3. The Supreme Court's Understanding of the Status of Unlawful Regulations

The Supreme Court has not explicitly addressed the question whether regulations of private conduct that are unlawful under section 706 of the APA are binding until displaced. In 1979, however, the Court did address the question of whether regulations have the binding force of law when they are not authorized by statute or were not adopted in accordance with applicable procedural requirements. The unsurprising answer was no. In holding that unauthorized regulations and procedurally improper regulations are not binding law, the Court did not even consider the possibility that such regulations have legal force until a court displaces them.

In *Chrysler Corp. v. Brown*,¹⁷² Chrysler Corporation (Chrysler) sued Secretary of Defense Harold Brown. Chrysler sought an injunction against public disclosure by the Secretary of confidential business information Chrysler had supplied to the government.¹⁷³ One of Chrysler's claims was based on the Trade Secrets Act, which bars government officials from disclosing described kinds of business information submitted to the government "to any extent not authorized by law."¹⁷⁴

As a source of legal authorization for disclosure, the government pointed to regulations issued by the Secretary of Labor.¹⁷⁵ Chrysler responded that the regulations were not "law" within the meaning of the Act, arguing that the regulations were

172. *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

173. *Id.* at 285 (describing Chrysler's claim).

174. *Id.* at 294-95 (quoting the Trade Secrets Act, 18 U.S.C. § 1905).

175. *Id.* at 295 (describing the government's argument based on regulations issued by the Office of Federal Contractor Compliance Programs of the Department of Labor).

not authorized by any statute and had not been adopted through the notice and comment process.¹⁷⁶ The Court agreed that the regulations were unlawful for both those reasons, which provided independent grounds for finding that the regulations were not law within the meaning of the Trade Secrets Act.

The Court began with the premise that “properly promulgated, substantive agency regulations have the ‘force and effect of law.’”¹⁷⁷ The Department of Labor regulations could satisfy the Trade Secrets Act, provided that they had the force and effect of law.¹⁷⁸ To satisfy that description, a regulation “must have certain substantive characteristics and be the product of certain procedural requisites.”¹⁷⁹

Two substantive characteristics mattered for the Court in deciding whether the regulations had the force and effect of law. One substantive characteristic involved the regulations’ content. To qualify as law, regulations must “‘affect[] individual rights and obligations.’”¹⁸⁰ The regulations on which Secretary Brown relied had that kind of content.¹⁸¹

The second substantive characteristic was statutory authorization. “The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by government departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.”¹⁸² Having framed that question, the Court found that none of the statutes on which the government relied provided authority to adopt the Department of Labor regulations.¹⁸³ Although the Court did not make the point in *Chrysler Corp.*, lack of statutory authorization is one of the grounds

176. *Id.*

177. *Id.* (quoting *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) and citing other cases to the same effect). The Court in *Batterton* cited a leading administrative law authority, the Attorney General’s Manual on the Administrative Procedure Act, issued shortly after the APA was adopted: “Legislative, or substantive, regulations are ‘issued by an agency pursuant to statutory authority . . . Such rules have the force and effect of law.’” 432 U.S. at 425 n.9 (quoting Attorney General’s Manual on the Administrative Procedure Act 30 n.3 (1946)).

178. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979).

179. *Id.*

180. *Id.* at 302 (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)).

181. *Id.* at 303.

182. *Id.* at 302.

183. *Id.* at 304–13 (rejecting the government’s claim that the regulations rested on statutorily granted authority).

on which courts are to hold agency action unlawful under section 706.¹⁸⁴

To qualify as law, *Chrysler Corp.* reasoned, a regulation must have those two substantive characteristics and must also “be the product of certain procedural requisites.”¹⁸⁵ Applying that standard, the Court found “a procedural defect” in the regulations “which precludes courts from affording them the force and effect of law.”¹⁸⁶ The regulations had not been promulgated with notice and comment.¹⁸⁷ The Secretary of Labor had treated the rules as interpretative, not substantive, and had dispensed with notice and comment.¹⁸⁸ Rules not adopted through the notice and comment process, as substantive rules must be, are not given “the binding effect of law.”¹⁸⁹ That conclusion also accords with section 706, which condemns agency action taken “without observance of procedure required by law.”¹⁹⁰

In deciding whether the rules at issue had the force of law, the Court found that they lacked that force on grounds that obtained when the rules were promulgated. The Court assumed, without saying so explicitly, that the regulations were void ab initio.

The Court did not consider the possibility that the defects on which it relied made the rules voidable, but did not keep them from being binding law until a court decree vacated, set aside, or invalidated them. Perhaps had the Justices considered that possibility, they would then have asked whether *Chrysler Corp.* was a proceeding in which the courts could vacate the rules. Had the Justices believed that the rules were binding until vacated, and that the case before them was not one in which the remedy of vacatur could be given, they would have decided the question of the rules’ binding force the other way. Rather than approaching the case with the assumption of ab initio validity of unlawful regulations, the Justices in *Chrysler Corp.* understood and applied a basic principle

184. 5 U.S.C. § 706(2)(C).

185. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979).

186. *Id.* at 312. That formulation counts against the assumption that unlawful regulations are binding until displaced. The Court said that procedural defects keep the courts from treating regulations as law, not that such defects are grounds on which the courts may cause regulations to lose their status as law.

187. *Id.* at 313–14.

188. *Id.* at 315.

189. *Id.* at 315–16.

190. 5 U.S.C. § 706(2)(D).

of administrative law: regulations that are not authorized by statute, or are not adopted through the required procedure, never become part of the body of governing law.¹⁹¹

B. Statutory Bars on Enforcement-Stage Review and the Clean Air Act

This section discusses a distinctive and important category of statutes and a leading example of the category: the Clean Air Act. Some regulatory statutes explicitly provide for pre-enforcement review and make that the exclusive mode of judicial review by barring enforcement-stage review when the private defendant had access to the pre-enforcement proceeding. That arrangement, which the Supreme Court upheld in *Yakus v. United States*,¹⁹² is controversial.¹⁹³

Statutory bars on enforcement-stage review raise questions concerning the ab initio invalidity of regulations that are unlawful under statutes containing such bars. Bars on enforcement-stage review undercut one argument in support of an ab initio invalidity and might seem to support an inference of ab initio validity. A bar on enforcement-stage review might be thought to reflect a congressional decision that regulated parties should be bound by unlawful regulations until judicial review has been completed.

In addition to having a *Yakus*-type bar on enforcement-stage review, the Clean Air Act empowers reviewing courts to “reverse” unlawful regulations and limits the circumstances under which courts may “invalidate” EPA regulations.¹⁹⁴ That terminology suggests that EPA regulations are to be treated like the judgments of lower courts, which are binding until displaced.

This section discusses *Yakus*, then turns to the Clean Air Act. I first argue that bars on enforcement-stage review do not imply ab

191. The Court in *Chrysler Corp.* did not follow the analogy between regulations and lower-court orders, which are binding until displaced. One reason the Court was not misled by that analogy may have been that Chrysler sued Secretary Brown in district court seeking an injunction, rather than filing a petition for review in a court of appeals. The latter form of proceeding resembles appeal from one court to another more than does the former.

192. 321 U.S. 414 (1944).

193. See, e.g., James R. Conde & Michael S. Greve, *Yakus and the Administrative State*, 42 HARV. J. L. & PUB. POL’Y 808, 812 (2019) (describing *Yakus* as a “milestone” in “the surrender of effective legal constraints on administrative discretion”); Currie, *supra* note 169, at 1258 (stating that “the harshness of such a measure is manifest” with reference to the judicial review limits in the Emergency Price Control Act and the Clean Air Act).

194. See *infra* Section III(B)(2) (setting out the statutory language).

initio validity; that conclusion applies to the Clean Air Act and other statutes that have *Yakus*-type provisions. I then consider specific features of the Clean Air Act. The Act's provisions concerning unlawful regulations imply ab initio invalidity, with an explicit exception. The Act's language that might seem to indicate the contrary does not do so when examined carefully.¹⁹⁵

1. Statutory Bars on Enforcement-Stage Review and *Yakus*

In 1944, the Supreme Court considered the constitutionality of a statutory limitation on enforcement-stage judicial review of regulations under World War II price controls. *Yakus* had been convicted of selling beef at a price above the limit imposed by regulations under the Emergency Price Control Act.¹⁹⁶ At trial, the district court refused to consider *Yakus*'s arguments that the statute and regulations were unconstitutional and that the regulations did not conform to the statute.¹⁹⁷ The Act provided for expedited pre-enforcement review, and created an Emergency Court of Appeals to which all proceedings for review were channeled.¹⁹⁸ The statute further provided that no other court would have "jurisdiction or power to consider the validity of any such regulation, order, or price schedule," or to give relief regarding the Act or any regulation thereunder.¹⁹⁹ *Yakus* had not availed himself of the Act's pre-enforcement review proceeding.²⁰⁰

Relying on statutory text and congressional intent, the Court found that the statute barred judicial review in criminal enforcement proceedings like the case before it.²⁰¹ With that reading of the statute in place, the Court turned to the question of whether the Act deprived *Yakus* of due process contrary to the Fifth Amendment.²⁰² The pre-enforcement review system Congress had

195. The statute provides that regulations are valid despite procedural flaws that the Act describes. See *infra* Section III(B)(2) (discussing 42 U.S.C. § 3607(d)(8)).

196. *Yakus v. United States*, 321 U.S. 414, 418 (1944).

197. *Id.* at 418–19.

198. *Id.* at 428–29 (describing statutory structure for expedited pre-enforcement review).

199. *Id.* at 429 (quoting statute).

200. *Id.* at 418.

201. See *id.* at 430 (finding that the text was broad enough to bar a defense based on invalidity in enforcement proceedings), *id.* at 430–31 (finding that such a bar was "the intention of Congress").

202. *Id.* at 431.

created, the Court found, gave Yakus adequate opportunity to bring his objections before the courts.²⁰³ Yakus had not availed himself of that opportunity, and “a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.”²⁰⁴

The Court pointed out that it was not deciding two questions that were not relevant to Yakus’s situation. It had “no occasion to decide whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face.”²⁰⁵ Yakus had not raised such a defense.²⁰⁶ Also, because Yakus had not sought pre-enforcement review, the Court did not “consider whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure may thus be deprived of the defense that the regulation is invalid.”²⁰⁷ That last qualification is especially worth noting because today pre-enforcement review can take years.²⁰⁸

2. *The Clean Air Act*

This section first describes the Clean Air Act’s system for judicial review, which includes a bar on review in enforcement proceedings. I then argue that the bar itself does not make unlawful regulations binding until displaced. That argument applies generally to statutes that limit enforcement-stage review. I then

203. *Id.* at 433–37 (assessing the adequacy of the pre-enforcement review provided by the Act).

204. *Id.* at 444.

205. *Id.* at 446–47.

206. *Id.* at 447.

207. *Id.*

208. A striking example is *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991). The court found that a regulation under the Resource Conservation and Recovery Act (RCRA) was substantially unlawful and vacated the regulation. *Id.* at 765. The regulation was promulgated in 1980, *id.* at 746, several petitions for review were filed, *id.*, the court deferred briefing in 1982 pending possible settlement discussions, *id.*, and the case was decided in 1991. The court stated that it had not stayed the regulations, “which have remained in effect.” *Id.* at 746. Thus, the court apparently assumed that regulations, which it ultimately found to be unlawful, had gone into effect and had been binding on regulated parties until the regulations were vacated. (A stay keeps a regulation from going into effect whether or not the regulation is otherwise binding, so the issuance of a stay is a sufficient but not necessary condition for the stayed regulation to be functionally non-binding.).

turn to the specifics of the Clean Air Act and show that it contemplates *ab initio* invalidity for unlawful regulations, except for one provision that specifically provides to the contrary. I also argue that if the Clean Air Act is read to make unlawful regulations binding until displaced, courts are required to displace them, and remand without vacatur is not allowed.

a. Judicial review under the Clean Air Act. Review of Clean Air Act regulations is governed by section 307 of the Act.²⁰⁹ When first adopted in 1970, section 307 provided for review of regulations directly in the courts of appeals, barred review in enforcement proceedings, and otherwise incorporated generic APA principles governing rulemaking and judicial review.²¹⁰ In 1977, Congress substantially revised Section 307, creating a distinctive system for rulemaking and judicial review thereof and retaining the restriction on enforcement-stage review.²¹¹

The 1977 amendments introduced two features in addition to the ban on enforcement-stage review that bear on the question of whether the Act contemplates remand without vacatur. First, section 307 uses “may reverse” to describe the step by which a reviewing court gives a successful petitioner relief other than a directive that the agency conduct further proceedings.²¹²

Second, section 307, as amended in 1977, departs from the APA as to rulemaking procedure and judicial review thereof. The notice and comment process under the Clean Air Act is more elaborate than the APA’s.²¹³ And while the Clean Air Act repeats section 706’s

209. Clean Air Amendments of 1970, Pub. L. No. 91-604 § 307, 84 Stat. 1707–08. Section 307 is codified at 42 U.S.C. § 7607. I will refer to the provision as section 307 but cite to the codified version.

210. *See id.* § 12(a), 84 Stat. 1676, 1707–08 (adding § 307 to the Clean Air Act).

211. *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95 § 305, 91 Stat. 685, 772–76 (amending § 307 of the Clean Air Act). Section 307(b) creates the *Yakus*-type bar on enforcement stage review. Section 307(b)(1) provides for pre-enforcement review in the courts of appeals. 42 U.S.C. § 7607(b)(1). Section 307(b)(2) provides: “Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.” 42 U.S.C. § 7607(b)(2).

212. *See* 42 U.S.C. § 7607(d)(9) (providing that the reviewing court “may reverse” regulations that fail the tests set out in that provision).

213. Section 307(d) sets out the Clean Air Act’s distinctive rulemaking process, which, among other features, directs the EPA to maintain a regulatory docket, which is to contain specified information provided by the agency and comments submitted to it. 42 U.S.C. § 7607(d)(2)–(6) (providing for notice and comment for specified Clean Air Act regulations).

provisions regarding judicial review of the substance of EPA rules, it has a distinctive rule governing review of the rulemaking process.²¹⁴ Under section 307(d)(9)(D), regulations fail the Act's procedural test only if they are not pursuant to "procedure required by law," the failure to follow required procedure "was arbitrary or capricious," and two other requirements are met.²¹⁵ One additional requirement limits objections that may be made in judicial review to those objections submitted to the agency during the public comment period.²¹⁶ The other is found in Section 307(d)(8), which provides that

[i]n reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.²¹⁷

b. Bars on enforcement-stage review and ab initio invalidity. This section addresses the general question of whether bars on enforcement-stage judicial review imply that unlawful regulations are binding until displaced. Although an argument in favor of that inference can be constructed, it is not persuasive.²¹⁸ That conclusion applies to the Clean Air Act and other statutes that limit enforcement-stage review.

The inference of ab initio validity of unlawful regulations is based on a possible purpose of bars on enforcement-stage review. Statutory rules about the timing and availability of judicial review do not explicitly affect agencies' regulatory power. Rules about judicial review might have implications for rules about regulatory power, however. The argument based on purpose is that Congress bars review in enforcement proceedings because it wants regulated parties to comply with regulations when the regulations' lawfulness is uncertain. A policy of compliance with unlawful

214. Section 307 of the Clean Air Act reproduces sections 706(2)(A)–(C) of the APA, which deals with the substance of regulations.

215. 42 U.S.C. § 7607(d)(9)(D).

216. 42 U.S.C. § 7607(d)(7)(B).

217. 42 U.S.C. § 7607(d)(8).

218. As far as I am aware, no one has argued that bars on enforcement-stage review imply ab initio validity of unlawful regulations; the question of ab initio validity and invalidity has not been much explored. For that reason, rather than responding to an existing argument, I produce an argument and respond to it.

regulations is hard to attribute to the legislature, but non-compliance with doubtful regulations that are in fact lawful and binding might be a problem. Regulated parties might make a risk analysis that leads them to violate a regulation in the face of doubt, and to assert a defense in any later enforcement proceedings. If defenses are not available, neither is that strategy, and the incentive to comply with doubtfully lawful regulations is increased.

Limiting review in enforcement proceedings is an indirect way of encouraging regulated parties to treat doubtfully lawful regulations as lawful and binding. A more direct way to that goal is to provide that all regulations are binding, lawful or not, until a court resolves challenges and deprives unlawful regulations of legal force. If doubts about lawfulness do not entail doubts about validity, regulated parties will have stronger incentives to comply in the face of uncertainty. Voidability, rather than *ab initio* invalidity, thus might serve the purpose of limitations on enforcement-stage review, and Congress's decision to choose the latter might imply that it has also chosen the former.

That argument is dubious, and limits on enforcement-stage review can be explained without positing an accompanying implicit expansion of agency authority. Several difficulties suggest that Congress would not pursue that strategy. First, regulated parties facing uncertainty already have strong incentives to comply. Those incentives are the main reason courts and Congress devised pre-enforcement review, which enables regulated parties to determine their obligations before they act.²¹⁹ Second, making all regulations binding requires compliance not only with lawful regulations that are not clearly so but with unlawful regulations, including those that are clearly so. Third, Congress's power to make unlawful regulations binding is limited, because it cannot confer legal force on unconstitutional regulations.

Another justification for bars on enforcement-stage review is much more reasonable and does not entail any expansion of regulatory power. Statutes that make pre-enforcement review a mandatory substitute for enforcement-stage review put time limits

219. See *supra* note 165 and accompanying text (discussing *Abbott Laboratories'* justification of pre-enforcement review as a solution to the dilemma faced by regulated parties who can resolve uncertainty only by violating a regulation at the risk of sanctions if the regulation is valid).

on pre-enforcement review.²²⁰ Those time limits provide the government with a benefit that is not related to the incentives of regulated parties. If the system works as designed, when the deadline has passed and no petition for review has been filed, the agency knows it will not have to reconsider the regulation because a court has found it unlawful. Especially when Congress seeks to achieve major regulatory goals in a short time, as with the Clean Air Act, it has reason to enable the agency involved to use its limited resources as efficiently as possible, including by moving on from one regulatory project to another.

The reasoning just presented applies to bars on enforcement-stage review in general. The article now turns to features specific to the Clean Air Act.

c. Ab initio invalidity and remand without vacatur under the Clean Air Act. The article now examines the Clean Air Act's provisions regarding judicial review other than its bar on enforcement-stage review, asking whether the Act contemplates remand without vacatur.

To answer that question, I will assess three possible readings of the Act. One provides for *ab initio* invalidity of unlawful regulations, except that the harmless procedural defects referred to in Section 307(d)(9)(D) do not produce invalidity. According to a second reading, the Act does not invalidate regulations it describes as unlawful but requires reviewing courts to do so, with the same exception. According to the third, the Act does not invalidate unlawful regulations and gives reviewing courts discretion whether to do so and thus allows remand without vacatur. Of the three, the most persuasive is the first. Regulations that fail the Act's substantive tests are void *ab initio*. If that is not the case, the second possible reading is the more persuasive, and invalidation by reviewing courts is mandatory. On no plausible reading do courts have discretion to leave in place regulations that are substantively unreasonable, unconstitutional, or contrary to statute.

The question of *ab initio* invalidity is closer under the Clean Air Act than under general APA principles because some features of the Act might be thought to call for a departure from those principles. First, the argument based on the availability of enforcement-stage review is not applicable. Second, section 307

220. See, e.g., *supra* Section III.B.1 (describing time limits in the price control statute at issue in *Yakus*).

provides that reviewing courts “may reverse” regulations that fail three of its criteria.²²¹ The word “reverse” suggests the relationship between courts, and “may” suggests judicial discretion. Third, section 307(d)(9)(D) provides that reviewing courts “may invalidate” regulations for procedural flaws only if the flaws are substantially likely to have affected the regulation’s substance.²²² The word “invalidate” might suggest that the court causes the regulation to become inoperative, and to say that the court “may invalidate” the regulation only under certain circumstances might suggest that when those circumstances arise, the court has discretion.

Despite those features of the Act, the case for remand without vacatur is unsound. This section first shows that *ab initio* invalidity is the most persuasive reading of the Act. I then explain that if unlawful regulations are assumed to be binding until displaced by a reviewing court, displacement is mandatory.

(1) *Ab initio* invalidity. Except as provided in section 307(d)(9)(D), Clean Air Act regulations that fail the tests in section 307(d)(9) are void when issued. That conclusion emerges from the content of sections 307(d)(9)(A)-(C), each viewed in isolation, from the parallelism of those three provisions, and from their combination with section 307(d)(9)(D).

Section 307(d)(9)(B) unquestionably presupposes *ab initio* invalidity. Like section 706(2)(B) of the APA, it refers to agency action “contrary to constitutional right, power, privilege, or immunity.”²²³ Unconstitutional regulations are void *ab initio*. A statute can recognize but cannot alter that result.

Section 307(d)(9)(C) also assumes invalidity of regulations it describes as unlawful.²²⁴ Like section 706(2)(C), it refers to agency action “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”²²⁵ Regulations under the Clean Air Act, like all regulations, are, as a constitutional matter, valid only if authorized by statute.²²⁶ The Act must provide that authorization.

221. 42 U.S.C. § 7607(d)(9).

222. 42 U.S.C. § 7607(d)(9)(D).

223. 42 U.S.C. § 7607(d)(9)(B).

224. That provision assumes *ab initio* invalidity, rather than prescribing it, because that result follows from the provisions of the Act that grant and limit regulatory authority.

225. 42 U.S.C. § 7607(d)(9)(C).

226. See *supra* Section III.B.2 (explaining that regulations must have statutory authorization to be legally binding).

The most natural reading is that the statute's grants and limits of regulatory power are what they seem to be—grants and limits beyond which the agency has no power to act. As discussed above, the alternative is that the Act silently has two tiers of rules about EPA's regulatory authority. One tier implicitly provides authority that is much broader than the explicit tier. Regulations in excess of the broad implicit grant are void *ab initio*, while regulations in excess of the explicit grants are binding but voidable by the courts.²²⁷ The Act gives no hint of the presence of two tiers or the content of the broader grant of power.

Like section 706(2)(A) of the APA, section 307(d)(9)(A) of the Clean Air Act refers to agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²²⁸ The two provisions differ, however, in that section 307(d)(9)(A) deals only with substantively unreasonable regulations. Section 307(d)(9)(D) deals separately with regulations that rest on inadequate reasoning.²²⁹ Unreasonable regulations are contrary to the policy of any reasonable legislature. Congress has no reason to allow regulations of that kind to go into effect, even temporarily.

Taken together, sections 307(d)(9)(A)-(C) support a *noscitur a sociis* inference.²³⁰ Three criteria operate in parallel, all governed by the same directive. One of those criteria—section 307(d)(9)(B), which applies to unconstitutional regulations—undoubtedly assumes *ab initio* invalidity. The other two are easily read to do so. The Act does not give any indication that the apparent parallelism is not real.

The Clean Air Act also supports an *expresio unius* inference because of the contrast between sections 307(d)(9)(A)-(C) and 307(d)(9)(D). Section 307(d)(9)(D) explicitly departs from *ab initio*

227. See *supra* Section III.A.1 (discussing that possibility as to regulatory statutes in general).

228. 42 U.S.C. § 7607(d)(9)(A).

229. Courts often point to section 706(2)(A) as the source of the principle that inadequately explained agency action is unlawful, even if it might be justified by better reasoning. An example is Judge Randolph's conclusion in *Checkosky* that the SEC's decision to apply a negligence standard was arbitrary and capricious because it was inadequately reasoned. *Supra* Section II.A.2.

230. Under the *noscitur a sociis* principle, courts recognize that the components of a list often have features in common. See, e.g., *Neal v. Clark*, 94 U.S. 704, 790 (1878) (explaining the *noscitur a sociis* principle, which looks to the context in which a word is used). Section 307 is self-contained in a way that section 706 is not, so intertextual principles are available in interpreting the Clean Air Act that may not be under the APA.

invalidity for some regulations that rest on flawed reasoning. To be eligible for the exception, such regulations must pass all the other tests in section 307(d)(9), and the court must conclude that its procedural flaws are minor.²³¹ Congress has good reason to allow regulations that meet that description to be binding. Sections 307(d)(9)(A)-(C), by contrast, do not contain any such distinction, and no policy considerations suggest that regulations that fail those tests should be binding. Congress's decision to draw a distinction within section 307(d)(9)(D) between regulations with consequential and those with inconsequential reasoning flaws indicates that it drew no distinction within the other categories of regulation.

Counting against *ab initio* invalidity are possible readings of "may reverse" in section 307(d)(9) and "may invalidate the rule only if" in section 307(d)(8). "Reverse" might indicate that a reviewing court resembles an appellate court and, like an appellate court, can replace one judgment with another. "May" reverse might indicate discretion because it can be read to confer power but no obligation to use the power. In a similar fashion, "invalidate" might indicate that the court causes the rule to become invalid. In "may invalidate the rule only if," the word "may" might indicate that while the court may not invalidate the regulation if the conditions are not met, if they are met, the court has discretion.

Probably most important is "reverse," which appears in Section 307(d)'s primary directive concerning the reviewing court's response to an unlawful regulation. The word "reverse," when used in the context of relations between courts, refers to a jural act of an appellate court that eliminates the binding force of a lower court's decree and substitutes another outcome. Before they are reversed, lower-court judgments are binding, so "reverse" is in tension with the Act's indications that unlawful regulations are invalid *ab initio*. That tension can be resolved if "reverse" has a reasonable meaning that does not equate reversal with changing the status of a regulation from binding to non-binding.

A meaning that reconciles the provisions is available, and the context indicates that the Act uses it. To reverse under the Clean Air Act is to give the pre-enforcement remedies that were familiar when the Act's judicial review system was created in the 1970s:

231. Section 307(d)(9)(D) allows courts to invalidate regulations because of procedural error only upon finding a "substantial likelihood" that the rule would have been significantly different had the error not been made. 42 U.S.C. § 7607(d)(9)(D).

injunctions against the institution of enforcement proceedings and declarations that the regulated party is not bound by the regulation.²³² That meaning is natural because it adapts the concept of reversal from the court-court relation, in which reversal originates, to the court-agency relation, in which the Act uses it.

Injunctive and declaratory relief against the agency are a sound extension of the concept because they perform the same function as reversal of a lower court. When pre-enforcement relief is given, the regulated party can lawfully disregard the regulation, just as a party can lawfully disregard a judgment that has been reversed.²³³

Injunctions and declarations are appropriate to the court-agency relation because of a basic difference between suits for judicial review and appeals from one court to another. As the Court has recently noted, proceedings for review of agency action, including petitions for review, are lawsuits against the government. "Article III courts do not traditionally hear direct appeals from Article II executive agencies."²³⁴ Instead of operating through appellate jurisdiction, "judicial intervention generally comes, if at all, thanks to some collateral review process Congress has prescribed, initiating a new action in the federal courts."²³⁵ Appellate review, by contrast, does not take the form of a new lawsuit against the lower court; it is a further judicial proceeding between the parties.²³⁶ Injunctive and declaratory relief are

232. When the 1977 amendments were adopted, injunctions against enforcement and declarations were the standard relief in pre-enforcement review of regulations. *See, e.g., Abbott Lab'ys, Inc. v. Gardner*, 387 U.S. 136 (1967) (approving pre-enforcement review through a suit for injunctive and declaratory relief).

233. Declaratory and injunctive relief are sufficient but not necessary conditions for a regulated party lawfully to disregard a regulation. The assumption of *ab initio* validity makes those sufficient conditions necessary conditions. Because of *ab initio* invalidity, a regulation's unlawfulness is another sufficient condition for lawfully disregarding it, but absent a judgment, a regulated party may be in doubt about lawfulness. The point of pre-enforcement review is to dispel that doubt.

234. *Garland v. Ming Dai*, 141 S. Ct. 1669, 1678 (2021) (internal citation omitted).

235. *Id.* The Court regarded petitions for review as collateral proceedings; *Ming Dai* originated as a petition for review in the Ninth Circuit. *Ming Dai v. Sessions*, 884 F.3d 858 (9th Cir. 2018) (deciding a petition for review).

236. The difference between an original proceeding against the government and an appellate review of an inferior tribunal has consequences for the Supreme Court's jurisdiction. In *Marbury v. Madison*, 5 U.S. 137 (1803), the Court held that a suit against the Secretary of State was an exercise of original jurisdiction, not appellate jurisdiction, that was not within the original jurisdiction granted by Article III. Appellate jurisdiction, the author

appropriate to the court-agency context because they treat the agency as a party to a dispute, not another judicial tribunal.

Understanding reversal under the Act as giving injunctive and declaratory relief matches the word “reverse” with the Act’s indications that unlawful regulations are, in general, invalid when adopted. Courts enjoin the enforcement of enactments because the enactment is invalid, and the injunctive plaintiff, therefore, would have a good defense in an enforcement proceeding.²³⁷ Declarations conclusively determine the existing legal relations of parties.²³⁸ Those remedies make regulations invalid only in the realistic sense in which a court’s conclusive determination of the law is said to make the law.

Understanding reversal to refer to injunctive and declaratory remedies resolves another question the text poses. The Act provides that the reviewing court “may” reverse, and “may” can imply some discretion. To reverse under section 307 is to provide a party-specific injunctive or declaratory remedy. Courts generally have discretion in administering those remedies.²³⁹ “May reverse” recognizes that the remedies involved are discretionary to some extent. To say that those remedies are discretionary does not mean

of *Marbury* later explained, acts “to correct the errors of an inferior Court.” *Cohens v. Virginia*, 19 U.S. 264, 396 (1821). More recently, the Court found that it could permissibly exercise appellate jurisdiction over the Court of Appeals for the Armed Forces (CAAF) and was not illicitly exercising original jurisdiction in doing so because that body is a court. *Ortiz v. United States*, 138 S. Ct. 2165, 2174 (2018). Justice Alito argued in dissent that the CAAF was not a court, but an executive agency and, therefore, no more subject to appellate jurisdiction than Madison was. *Id.* at 2189–90 (Alito, J., dissenting).

237. See, e.g., *Ex parte Young*, 209 U.S. 123 (1908) (approving injunction against proceedings to enforce an unconstitutional state statute because the plaintiff in equity would have a defense at law based on the invalidity of the statute).

238. For example, the Supreme Court approved the constitutionality of the federal Declaratory Judgment Act in a case in which an insurance company sought a declaration that certain life insurance contracts had lapsed because of prior events. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 237–38 (1937) (describing the plaintiff’s claim that the defendant’s insurance contracts had lapsed because of prior failure to pay premiums). Declaratory plaintiffs, as in *Haworth*, typically seek determinations of their legal relations as those legal relations stand, not a decree creating new legal relations.

239. See, e.g., *Eccles v. People’s Bank of Lakewood Vill.*, 333 U.S. 426, 431 (1948) (stating that a “declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest”) (citations omitted).

that a court is free to decide on any grounds whatsoever. Discretion must be exercised reasonably.²⁴⁰

Any remedial discretion recognized by section 307 is to be exercised in light of Congress's decision to substitute pre-enforcement for enforcement-stage review. Absent that substitution, regulated parties would be able to rely on invalidity, including invalidity resulting from unconstitutionality, as defenses to enforcement. Pre-enforcement courts must exercise their discretion so as to make pre-enforcement review a substitute for enforcement-stage review. It is hard to imagine a case in which a pre-enforcement court has found that a regulation is not legally binding but decides not to implement that holding with some remedy. A court, in those circumstances, does have discretion whether to use injunctive or declaratory relief or some combination of the two and the word "may" recognizes that discretion.

A similar textual issue arises concerning the word "invalidate" in section 307(d)(8), to which section 307(d)(9)(D) refers. Section 307(d)(8) provides that the reviewing court "may invalidate the rule" because of procedural failings only when the failings are consequential.²⁴¹ "Invalidate" might suggest a judicial act that causes a previously binding regulation to lose binding force, and "may" might suggest discretion whether to take that step. On closer examination, section 307(d)(8) does not bear out those suggestions.

"Invalidate" is ambiguous. It can mean to cause to become inoperative, as when a statute invalidates a regulation.²⁴² But it can also mean to recognize pre-existing invalidity and to give an appropriate remedy, as when a court is said to invalidate a statute on constitutional grounds.²⁴³ Attributing the latter sense of

240. *See id.* (noting that discretion must be exercised in the public interest); *Pub. Affs. Ass'n, Inc. v. Rickover*, 369 U.S. 111, 112 (1962) (noting that discretion concerning declaratory relief may not be based on a whim and must reflect the public interest).

241. *See supra* Section III.B.2.b (describing section 307(d)(8)).

242. *See, e.g.,* CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 5 (2021) (explaining that the CRA, which provides a fast-track legislative procedure through which Congress can override regulations by statute, is limited to overriding regulations as a whole and so can be used "only to invalidate a single final rule in its entirety").

243. As Justice Kavanaugh recently explained, "[t]he term 'invalidate' is a common judicial shorthand when the Court holds that a particular provision is unlawful and therefore may not be enforced against a plaintiff." *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2351 (2020) (plurality opinion of Kavanaugh, J.) Judicial invalidation is not repeal. "To

“invalidate” to section 307(d)(8) implements the ab initio invalidity of regulations that have consequential procedural flaws. That ab initio invalidity reflects the congressional policy that a regulation that would have been different had the agency reasoned soundly should not go into effect.

In a similar fashion, “may” in section 307(d)(8) reflects the courts’ discretion with respect to the remedies that are given in pre-enforcement review. In exercising that discretion, courts must implement Congress’s rejection of regulations that rest on consequential procedural flaws. In general, the reviewing court must give some relief as to such regulations. Because section 307(d)(8) provides that the courts may invalidate “only” regulations with procedural flaws, it bars the invalidation of regulations with inconsequential procedural flaws. The Act most likely contemplates that regulations with inconsequential procedural flaws are binding when adopted and that the agency has a reasonable time in which to repair the inconsequential flaws.

(2) *The Clean Air Act on the assumption that unlawful but constitutional regulations are binding until displaced.* As discussed above, the debate over remand without vacatur has largely proceeded on a false premise. Like Judge Randolph in *Checkosky*, judges and commentators have assumed that unlawful regulations are binding and have asked whether a court that finds a regulation to be unlawful has discretion whether to displace it.²⁴⁴ This section makes the assumption that contrary to the argument just presented, the Clean Air Act does not contemplate ab initio invalidity of unlawful regulations but authorizes courts to displace them. I show that on that assumption, courts have no discretion and are obliged to reverse regulations that are unlawful under section 307(d)(9).

be clear, however, when it ‘invalidates’ a law as unconstitutional, the Court of course does not formally repeal the law from the U. S. Code or the Statutes at Large.” *Id.* Invalidation is the recognition of invalidity brought about by the Constitution. “Instead, in Chief Justice Marshall’s words, the Court recognizes that the Constitution is a ‘superior, paramount law,’ and that ‘a legislative act contrary to the constitution is not law’ at all.” *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). “The Court’s authority on this front ‘amounts to little more than the negative power to disregard an unconstitutional enactment.’” *Id.* (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)). Justice Kavanaugh also distinguished a holding of invalidity from “the formal remedy afforded to the plaintiff,” which is “an injunction, declaration, or damages.” *Id.*

244. See *supra* Section II.A.2 (discussing the debate up to this point).

Section 307(d)(9)(B) must be put aside for these purposes because Congress cannot confer binding force on unconstitutional regulations. Section 307(d)(9)(D) has its own explicit approach to procedurally deficient regulations. For that reason, it does not bear on the question of whether Congress implicitly gave courts discretion not to reverse unlawful regulations other than supporting an *expressio unius* inference discussed presently. With those two subparagraphs put aside, the question of remand without vacatur concerns subparagraphs (A) and (C). Do courts have discretion whether to leave in place regulations that are substantively unreasonable or contrary to the Clean Air Act?

North Carolina v. EPA presents the question starkly. The D.C. Circuit concluded that a major Clean Air Act regulation was unlawful in its substance and that little of it would survive.²⁴⁵ When the EPA argued that the regulation had many benefits, the court allowed the regulation to remain in effect until a replacement was adopted.²⁴⁶ As a pure matter of policy, the agency and the court may have been right that the regulation was on balance beneficial, and so better than nothing.

Whether or not the court's result was sound policy, it rested on an unlikely reading of the Act. *North Carolina v. EPA* read the statute as silently giving the courts very broad regulatory discretion, without any explicit congressional standard governing that discretion. Congress is unlikely to have given that policy discretion to the courts, Congress is unlikely to have given that discretion with no guidance, and Congress is unlikely to have done so silently.²⁴⁷ Congress's choice of the agency rather than the courts as the recipient of policy discretion is especially well established with respect to the Clean Air Act. Congress chose the EPA, not judges, to make policy choices under the Act, because the agency, not the courts, combines technical expertise with electoral accountability.²⁴⁸ Had Congress decided to depart so substantially from the ordinary structure of regulation through expert agencies in the Clean Air

245. See *supra* Section II.A.1 (describing *North Carolina v. EPA*).

246. See *id.*

247. See *supra* Section III.A.1.a.2 (discussing the implausibility of an implicit grant of broad policy discretion to the courts).

248. See *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (explaining that agencies, not courts, have expertise and policy-making authority conferred by Congress).

Act, where expertise and ultimate political accountability are so central, the statute would have made that departure explicit. The statute would have provided that courts have discretion whether to displace unlawful regulations and would have supplied principles to guide that discretion. The Act does nothing along those lines. A non-discretionary judicial duty to displace unlawful regulations is much more in keeping with the standard structure in which agencies make policy choices and the courts keep the agency within the law.²⁴⁹

Another indication that the Act does not give the courts this kind of policy-making authority involves fact-finding. Regulatory policy judgments rest on factual conclusions, especially concerning the costs and benefits of regulation.²⁵⁰ Agencies like the EPA are designed to have factual expertise that courts do not.²⁵¹ The Clean Air Act's notice and comment process requires the EPA to take into account comments, often provided by highly expert and sophisticated parties.²⁵² A court deciding whether to modify a regulation by vacating it in part, by contrast, has available neither expertise—which the agency has and the court lacks—nor an administrative record that addresses the modification the court is considering.²⁵³ Nor can a court in those circumstances direct the agency to engage in further fact-finding. Under the doctrine of remand without vacatur, courts decide whether to vacate before any further agency proceedings on remand. If the statute contemplated that courts would engage in fact-finding in deciding

249. See *Dept. of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (explaining that the role of the court is to ensure that agencies have exercised their discretion within the bounds of the law, not to substitute their judgment for the agency's).

250. See Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575, 579 (2015) (describing agency assessments of costs and benefits of regulations).

251. See *Chevron*, 467 U.S. at 865–66 (explaining that Congress gives agencies policy-making authority because of their expertise).

252. See *supra* note 213 and surrounding text (describing the Clean Air Act's distinctive form of notice and comment).

253. This difficulty probably was not apparent to the court in *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (describing the D.C. Circuit's decision in that case to remand without vacating). Although the court relied on the regulation's benefits, it decided not to vacate any part of the rule, and so could rely on the agency's findings concerning the rule's benefits. A court deciding whether to vacate a regulation in part could not always rely on agency fact-finding.

whether to vacate, if would have given them the means to do so.²⁵⁴ Some statutes that provide for direct review in the courts of appeals enable the court to remand for more fact-finding, but the Clean Air Act has no such provision associated with the courts' remedial authority.²⁵⁵

On this point too, section 307(d)(9)(D) supports an *expressio unius* inference. That provision explicitly calls for reviewing courts to make judgments about the seriousness of agency error and provides principles for the courts to apply.²⁵⁶ Sections 307(d)(9)(A) and (C), by contrast, provide no guidance concerning the decision whether to vacate. When Congress decided that courts would not automatically reverse unlawful regulations, it gave them principles to follow. When Congress provided no guiding principles, that is because it did not contemplate any judicial choice that required guidance.

Next, exclusive pre-enforcement review, as under the Clean Air Act, performs its function only if vacatur of unlawful regulations is mandatory (assuming *ab initio* validity). That function is to substitute for enforcement-stage review. Section 703 of the APA, which was in place when the Clean Air Act was adopted, underlines that function. Section 703 provides that judicial review is available in enforcement proceedings "[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law."²⁵⁷ As explained above, enforcement-stage review assumes that unlawful regulations are invalid.²⁵⁸ To be an adequate substitute for a proceeding in which unlawful regulations are treated as non-binding, pre-enforcement review must ensure

254. Under statutes that provide for review of agency action directly in the courts of appeals, the fact-finding role otherwise performed by the district court is performed by the agency, not the court of appeals. See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 953–65 (2011) (describing the emergence of the appellate-review model of judicial review of agencies, with the agency as the primary factfinder, in the Hepburn Act's restructuring of judicial review of the Interstate Commerce Commission in 1906).

255. For a statute that does authorize remand for more fact-finding, see, e.g., 15 U.S.C. § 78y(a) (providing for review of SEC orders in the courts of appeals and authorizing the court to remand to the Commission for further fact-finding under specified circumstances).

256. See *supra* section III.B.2.a (setting out section 307(d)(9)(D)'s standard for assessing procedural error).

257. 5 U.S.C. § 703.

258. See *supra* Section III.A.2 (explaining that enforcement-stage review assumes *ab initio* invalidity of unlawful regulations).

that they will be non-binding in any future enforcement proceeding. Pre-enforcement courts can achieve that goal only if they in effect cause unlawful regulations to become inoperative, so vacatur must be mandatory, not discretionary. A proceeding in which courts have discretion whether to eliminate an unlawful regulation, which they do if remand without vacatur is an option, is not an adequate substitute for a proceeding in which courts are obliged to treat unlawful regulations as non-binding.²⁵⁹ If section 307 of the Clean Air Act is designed to provide the adequate substitute contemplated by section 703 of the APA, and unlawful regulations are not void when adopted, the Clean Air Act requires that reviewing courts give relief with respect to those regulations.

IV. IMPLICATIONS OF THE AB INITIO INVALIDITY OF UNLAWFUL REGULATIONS OF PRIVATE CONDUCT

This Part discusses implications of the argument presented so far. Two consequences concern cases in which the courts currently apply the doctrine. First, in cases involving the regulation of private conduct, courts should recognize ab initio invalidity and decide accordingly. They should not hold that an unlawful regulation is valid and thereby set a precedent to that effect and collaterally bind parties on that issue. Next, courts should recognize the differences among agency activities and the varying relevance of the analogy between agencies and lower courts. I illustrate the second point with a brief discussion of agency operational activities, like construction projects, to which the concepts of validity, invalidity, and vacatur are inapplicable.

The ab initio invalidity of unlawful regulations also has consequences for the current debate over so-called universal relief in suits against the government. I discuss three consequences of recognizing ab initio invalidity. First, that recognition helps show why the possibility of facial invalidity, which when present arises when a regulation is adopted, does not imply that courts can or must bring it about. Second, recognizing ab initio invalidity also helps show that party-specific remedies, like injunctions against

259. Even if relief is mandatory, pre-enforcement review is not a fully adequate substitute for enforcement-stage review, because pre-enforcement review only relieves regulated parties of the duty to comply prospectively, rather than determining that they never had that duty. That limitation follows from the assumption that unlawful regulations are valid until displaced.

enforcement as to the party, are adequate to give relief to parties. No remedy of vacatur, which would operate on the regulation itself, is needed to protect parties. Third, the principle that unlawful regulations are invalid before any judicial remedy helps show that the courts need but lack an account of the remedy of vacatur as applied to regulations.

*A. Cases in Which the Doctrine of Remand Without Vacatur
Is Currently Applied*

This section first addresses cases involving regulations that impose duties on private parties, with which the article has so far mainly been concerned, then turns to cases involving other kinds of agency activity.

1. Cases Involving Regulation of Private Conduct

Most of the courts of appeals currently apply the doctrine of remand without vacatur.²⁶⁰ In doing so, they assume that agency actions that purport to bind private people are genuinely binding until displaced, even if unlawful. That assumption is generally false with respect to agency regulations of private conduct. I now turn to the implications of this article's conclusions for a court of appeals that were to embrace it.²⁶¹

When the regulated party is the defendant, the court should disregard unlawful regulations. Regulated parties are defendants in enforcement suits by the government, and sometimes in suits by other private parties that rely on a regulation.²⁶² In cases of that kind, the principle of *ab initio* invalidity compels the court to treat the unlawful regulation as non-binding.

260. See *supra* note 23 (listing courts of appeals that embrace the doctrine).

261. These observations are most directly relevant to courts that are not bound by earlier cases that have embraced the doctrine, as the courts of appeals sitting en banc are not and as the Supreme Court is not. As Judge Randolph's opinion in *Checkosky*, *supra* note 53, and Judge Sentelle's opinion in *Milk Train*, *supra* note 76, show, judges sitting on court of appeals panels may believe that they are not bound as to issues that their court has never explicitly addressed. *Ab initio* validity of unlawful regulations is such an issue. I will not attempt to determine the binding force in any circuit of cases that applied the doctrine but did not identify and justify that assumption.

262. See, e.g., *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019) (remanding for further proceedings in case between private parties in which the plaintiff relied on an FCC regulation and the defendant challenged the regulation's validity).

Next, if a regulated party is the plaintiff but the plaintiff does not seek pre-enforcement review, unlawful regulations should be disregarded. Habeas corpus provides an example.²⁶³ A petitioner who is detained pursuant to an unlawful regulation should be released. In a suit for damages, either against an officer personally or against the United States under the Federal Tort Claims Act, unlawful regulations should provide no defense.²⁶⁴

A third and central mode of judicial review is the pre-enforcement suit, under a special statutory review proceeding or under federal equity and the Declaratory Judgment Act.²⁶⁵ The ab initio invalidity of unlawful regulations has two major implications for the disposition of pre-enforcement cases. First, a court that finds a regulation unlawful should make clear that the regulated party has no duty to comply. The court should not state that it has not vacated the regulation nor state that the regulation is binding. One unfortunate effect of the doctrine of remand without vacatur is that when a court states that it has decided not to vacate a regulation, the court in effect instructs regulated parties that they are obliged to comply with the unlawful regulation. Not only do judicial statements of that kind misinform parties about their obligations, those statements might constitute holdings that collaterally bind the parties.²⁶⁶ Parties that are not obliged to comply with a regulation should not be told that they are, or preclusively bound

263. See 5 U.S.C. § 703 (listing suits for habeas corpus among the forms of judicial review under the APA).

264. See 28 U.S.C. § 2674 (providing for liability of the United States for torts).

265. Section 703 of the APA contemplates judicial review in “the special statutory review proceeding relevant to the subject matter” and “actions for declaratory judgments or writs of prohibitory or mandatory injunction . . .” 5 U.S.C. § 703. See, e.g., 29 U.S.C. § 655(f) (providing for review in the courts of appeals of Occupational Safety and Health Administration emergency temporary standards); *Abbott Lab’ys Inc. v. Gardner*, 387 U.S. 136 (1967) (approving pre-enforcement review in district court of an FDA regulation in a suit for injunctive and declaratory relief).

266. The preclusive effect of a judgment remanding but not vacating as to the issue of the regulation’s binding force depends on whether the issue of validity was “actually litigated and determined” and is “essential to the judgment.” RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. L. INST. 1980). If the parties were to contest the binding force of unlawful but unvacated regulations and the court were to hold such regulations to be binding, that conclusion probably would have preclusive effect. By contrast, a point the court and the parties took for granted might later be found not to have been actually litigated and determined for purposes of preclusion.

by a holding that they are so obliged.²⁶⁷ Judicial statements by a court of appeals implying that an unlawful regulation is binding might also set a precedent with that content, and thereby affect non-parties. When a court recognizes that an unlawful regulation is therefore invalid, it avoids that outcome too.

A second implication for pre-enforcement suits is that a court that finds a regulation unlawful normally should enter a declaratory judgment providing that the regulated party has no duty to comply.²⁶⁸ The purpose of pre-enforcement review is to enable potential defendants to assert their defenses anticipatorily.²⁶⁹ A declaratory judgment achieves that purpose.²⁷⁰

2. *The Variety of Agency Functions*

This article has focused on regulations that impose duties of conduct on private persons. Regulations of private conduct are a central part of administrative government, but they are only a part. Some agency actions, including regulations of conduct, purport to affect private legal positions. Some purportedly binding actions impose duties, whereas others relieve private persons from pre-existing duties, the way issuing a license does.²⁷¹ Many agency activities do not purport to affect private legal positions, although

267. If a court assumes that the decision not to vacate postpones the question whether the regulation was void ab initio, rather than deciding that question, it should so inform the parties. *See supra* Section II(A)(1) (raising but rejecting the possibility that remand without vacatur postpones the decision as to ab initio validity until agency proceedings on remand are complete). A court that adopts the assumption of ab initio validity and does not vacate, but believes that it has the authority to make a later vacatur retroactive, should also make that clear, so that regulated parties and the agency know that the issue of ab initio validity may be determined later, in the court's discretion. *See supra* note 34 (noting that courts may believe they have discretion to make vacatur retroactive after first remanding without vacating).

268. The Declaratory Judgment Act enables federal courts to "declare the rights and other legal relations of any interested party seeking such declaration" 28 U.S.C. § 2201(a). Absence of duty, or liberty, is a legal relation of the regulated party with the government. *See Hohfeld, supra* note 130 (describing jural relations).

269. *See Abbott Lab's, Inc. v. Gardner*, 387 U.S. 136 (1967) (explaining that absent pre-enforcement review, regulated parties can obtain judicial review only by violating the regulation and defending in enforcement proceedings).

270. Declaratory judgments "have the force and effect of a final judgment or decree" 28 U.S.C. § 2201(a).

271. The foundational administrative law case *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), for example, involved agency decisions about the licensing of nuclear reactors, construction and operation of which without a license is forbidden.

they may have substantial practical effects on private persons.²⁷² Agency decisions are made through different processes, including trial-like formal proceedings, notice-and-comment rulemaking, and less structured decision-making processes.²⁷³ Litigation involving agencies includes enforcement suits by the government seeking sanctions, enforcement suits by the government seeking prospective injunctive relief, pre-enforcement suits by regulated parties, and suits for injunctions against government activity like highway construction.²⁷⁴ Among those different forms of litigation, some appear as special statutory review proceedings, while others appear as more generic forms of litigation, like suits for injunctions and declaratory judgments.²⁷⁵

A court that is prepared to rethink the doctrine of remand without vacatur should recognize that variety, and the inadequacy of the analogy between agencies and lower courts. As just noted, one crucial dimension along which agency functions differ involves their effects on private legal positions. Regulations of private conduct directly affect regulated parties' legal positions by imposing duties. Agency formal adjudications that impose civil penalties are another example of agency action that directly affects private legal positions.²⁷⁶ But many of the operations of agencies, like construction projects, have no such effects. They are not quasi-

272. See, e.g., *Eagle Found. v. Dole*, 813 F.2d 798 (7th Cir. 1987) (reviewing the decision to build a highway through a nature preserve).

273. So-called formal, trial-like proceedings for adjudication or rulemaking are governed by 5 U.S.C. §§ 554–556, notice-and-comment rulemaking is governed by 5 U.S.C. § 553, and many agency decisions need not be made through any process specifically prescribed by statute. See, e.g., *Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019) (reviewing a decision concerning the census that was not required to be made through either formal proceedings or notice and comment rulemaking).

274. See, e.g., *Yakus v. United States*, 321 U.S. 414 (1944) (deciding a criminal prosecution to enforce a regulation); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (deciding government's suit to enjoin future violations of a regulation); *Abbott Lab'ys, Inc. v. Gardner*, 387 U.S. 136, (1967) (deciding suit by regulated parties seeking pre-enforcement review); *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402 (1971) (deciding suit for injunction against the construction of a highway).

275. *Checkosky* was a special statutory proceeding under 15 U.S.C. § 78y, see *supra* Section II.A.2 (describing *Checkosky*); *Abbott Laboratories* was a suit in district court for declaratory and injunctive relief, see 387 U.S. at 139 (noting that plaintiffs sought declaratory and injunctive relief in district court).

276. See, e.g., 33 U.S.C. § 1319(g) (providing for administrative civil penalties under the Clean Water Act).

legislative or quasi-adjudicatory, but are government operations with physical, not jural, consequences.

A D.C. Circuit case from 1976, *Concerned About Trident v. Rumsfeld*,²⁷⁷ shows how remand without vacatur analysis asks the wrong questions about operational activity like construction projects. The case involved a challenge to the Navy's plan to build a submarine base and is often seen as an early example of remand without vacatur.²⁷⁸ *Concerned About Trident* might seem to exemplify the situation that remand without vacatur is designed to address. The court found that the Environmental Impact Statement (EIS) the Navy prepared was inadequate, but that the EIS's flaws could be corrected easily.²⁷⁹ Rather than enjoining the project, the court directed the Navy to correct the flaws with a new EIS and promptly report to the district court when it had done so.²⁸⁰

Concerned About Trident can be said to have remanded without vacating in a loose sense, but thinking about the case in those terms obscures analysis. First, applying the concepts of validity, invalidity, and vacatur to programmatic activity like a construction project is a category mistake. Unlike a lower-court order or an agency regulation of conduct, a government construction plan does not claim to bind private legal positions. Building a submarine base affects private people, but not by imposing a duty on them. For that reason, agency operations like construction plans can be lawful or unlawful, but they cannot be valid or invalid. Because they are neither valid nor invalid, the question whether they are valid *ab initio* does not arise. Neither does the question whether to vacate arise. A plan to build a submarine base or a highway can be enjoined, but it cannot be vacated. It cannot be deprived of legal force it does not purport to have.

Second, although the decision whether to enjoin a construction project requires equitable judgment, looking to cases that decided whether to vacate a regulation would hinder equitable analysis in cases like *Concerned About Trident*. A factor that is central in cases involving regulation—limits on agencies' authority to act retroactively—is irrelevant when the agency has not sought to

277. *Concerned About Trident v. Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1976).

278. See, e.g., TATHAM, *supra* note 6, at 58 (categorizing *Concerned About Trident* as a remand without vacatur case).

279. See *Concerned About Trident*, 555 F.2d at 830 (describing minor flaws in the EIS).

280. See *id.* at 830 (describing minor flaws in the EIS).

affect private legal positions. *Allied-Signal*, which is often relied on by courts deciding whether to vacate a regulation, weighed the disruptive effect of vacatur in its equitable balancing.²⁸¹ That disruptive effect came from the limits on retroactive regulation.²⁸² Delaying a construction project can be costly, but no legal principle keeps an agency from resuming its programmatic activities after it has brought them into compliance with the law.

When the question of ab initio validity is presented, courts should recognize and answer it. When that question is not applicable, courts should not be distracted by cases decided on the assumption that it is.

B. Vacatur and Universal Relief

This section discusses three consequences of the ab initio invalidity of unlawful regulations for the current debate over so-called universal relief in administrative law.

A court is said to give universal relief against a government agency when the court's remedy benefits everyone subject to the agency's action, not just the successful plaintiff.²⁸³ In recent years, district courts have issued a substantial number of injunctions that govern the government's conduct with respect to all persons subject to a regulation or policy, not only the parties.²⁸⁴ The practice is controversial, and the Supreme Court has not resolved the controversy. Justice Thomas has argued that universal injunctions

281. *Allied-Signal v. N.R.C.*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (considering the disruptive effects of vacatur).

282. *See id.* at 151 (finding vacatur disruptive because new user fees could not be imposed retroactively under the Supreme Court's cases).

283. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) is an example of the phenomenon and a source of the terminology. The case involved a challenge to restrictions on entry into the United States. *Id.* at 2404–06 (describing the challenged program). The district court found the restrictions unlawful and enjoined the executive from enforcing them against anyone, not only the plaintiffs. *Id.* at 2406 (describing the district court's decision). The Supreme Court found the restrictions lawful and reversed, *id.* at 2423, and therefore did not have to decide whether the part of the injunction concerning non-parties was independently erroneous. Justice Thomas, concurring, labeled injunctions that govern conduct as to non-parties "universal" injunctions, *id.* at 2424, and explained why that term is more useful than "nationwide" injunctions, *id.* at 2425 n.1 (explaining that an injunction that regulates the defendant's conduct concerning non-parties raises issues that an injunction that regulates conduct with respect to the plaintiff throughout the country does not).

284. *See* Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 5–6 (2019) (collecting cases).

“appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts” and that if they continue to be common the Supreme Court should address their legality.²⁸⁵ The fundamental objection is that Article III’s extension of the judicial power to cases and controversies, and traditional principles of federal remedial law, require that courts confine their remedies to the parties before them, and do not undertake to redress harms to non-parties.²⁸⁶ Scholars have criticized and defended the practice.²⁸⁷

Along with Article III and general federal remedies law, the APA and practice under it play an important role in the debate. Proponents of universal relief against federal agencies argue that the APA and principles of federal administrative law allow or require judicial remedies that benefit persons other than the parties before the court.²⁸⁸ With respect to regulations of conduct, two forms of universal relief have received attention. One is the universal injunction—an injunction directing the agency not to bring enforcement proceedings against anyone, not only the parties.²⁸⁹ The other is a remedy that operates directly on the legal status of the regulation, rather than through an order to the agency, and deprives the regulation of binding force.²⁹⁰ Either form of relief can be called vacatur, though vacatur is a good name for the second, because of the analogy with court-court relations built into that terminology. Appellate courts’ decisions affect the binding force of

285. *Trump*, 138 S. Ct. at 2425 (Thomas, J., concurring).

286. *See id.* (describing the constitutional and remedies law objections).

287. Criticisms of universal injunctions include Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017) (rejecting relief to non-parties), and Morley, *supra* note 284 (rejecting nationwide injunctions). Defenses include Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018) (arguing that universal injunctions are frequently permissible), Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920 (2020) (arguing that universal relief is consistent with long-standing equity practice), and Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67 (2019) (arguing that universal injunctions against the government permissibly rest on non-mutual preclusion).

288. *See, e.g.*, *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2412 n.28 (2020) (Ginsburg, J., dissenting) (arguing that section 706 of the APA “contemplates nationwide relief from invalid agency action”); Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121 (2020) (arguing that universal injunctions against enforcement of regulations was a familiar remedy when the APA was adopted).

289. *See, e.g.*, *Little Sisters*, 140 S. Ct. at 2367 (reviewing a universal injunction granted below).

290. Sohoni, *supra* note 288, at 1178 (stating that vacatur of regulations operates universally).

lower court decisions and are not limited to directives to the court being reviewed.

The *ab initio* invalidity of unlawful regulations has three implications for this debate. First, it shows that the fact that some regulations are void as such, and not only in some of their applications, does not imply that courts can or must give universal relief.²⁹¹ Facial invalidity, for example the facial invalidity of a regulation that should have gone through notice and comment but did not, arises when the regulation is adopted. That invalidity is later recognized by courts in deciding cases. The separation between the time of adoption and a later judicial holding shows that the latter does not cause the former. Courts do not need a power to bring about facial invalidity, only a power to recognize it and decide accordingly.

Second, *ab initio* invalidity helps clarify the differences among forms of universal relief and thereby helps clarify the different arguments in favor them. Injunctions against enforcement proceedings are an adequate remedy to implement a finding of *ab initio* invalidity. A court that finds that a regulation was inoperative when issued can fully vindicate the plaintiff's interest by enjoining enforcement proceedings, without having to take any separate step to invalidate the regulation.²⁹² The court might go beyond protecting the plaintiff, and enjoin enforcement universally, but the universal component is not necessary to give relief to the plaintiff. But if unlawful regulations are binding until displaced, to give full relief to the private party the court must give a remedy that operates directly on the legal status of the regulation, and not only on the agency as a party. The court must cause the regulation to become non-binding – must vacate it, in the terminology of remand without vacatur.

Because unlawful regulations are void *ab initio*, vacatur is not necessary to give relief to the party before the court. The party-specific remedy of an injunction, or a declaration, will be enough. That consequence of *ab initio* invalidity matters for the debate over universal relief, because it shows that an argument in favor of

291. See, e.g., *id.* at 1131 (stating that a successful facial challenge leads to vacatur and therefore universal relief).

292. A court that finds a regulation to have been void *ab initio* can also declare that the plaintiff has no duty to comply with it, without having to give a non-declaratory remedy that alters the regulation's legal status.

universal relief is not sound. The first step of that argument is that relief to non-parties is permissible when it inevitably results from relief to the parties before the court – when relief to non-parties is indivisible from relief to parties.²⁹³ For example, if a court in a nuisance case enjoins the defendant from making noise, the benefits of quiet will accrue to neighbors who are not plaintiffs as well as to the plaintiff.²⁹⁴ Even critics of relief to non-parties agree that indivisible relief is acceptable, because the benefits to non-parties are an inevitable result of vindicating the parties' rights.²⁹⁵ The second step of the argument is that relief from unlawful regulations requires vacatur and vacatur is indivisible. Vacatur nullifies a regulation altogether, and so relieves all persons from the duty to comply with it.

That argument is incorrect. Because unlawful regulations are void when issued, no separate step of vacatur is needed to make them invalid. Party-specific injunctive and declaratory remedies are adequate, and they are divisible.

Third, recognizing *ab initio* invalidity leads to questions about vacatur that currently have no well-accepted answers. To be a meaningful remedial option in light of *ab initio* invalidity, vacatur must have some invalidating effect on regulations that never had binding force. Claiming that a court can invalidate an already invalid regulation may seem nonsensical, but already-invalid enactments can in a sense be invalidated. When Congress repeals a statutory provision that is wholly unconstitutional, the repealing statute has legal effect despite the earlier provision's invalidity. Repeal deprives a statutory rule of a necessary condition for being legally binding, a necessary condition that is distinct from the requirement that the content of statutory law be consistent with the Constitution. In addition to having substance consistent with the

293. See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04(b) (AM. L. INST. 2010) (defining as indivisible remedies such that "relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants").

294. Injunctions against noise-making activities are a standard remedy for nuisances arising from excess noise. See, e.g., *Gilbough v. W. Side Amusement Co.*, 64 N.J. Eq. 27 (N.J. Ch. 1902) (granting injunction against playing baseball on Sunday due to noise that disturbed neighbors).

295. Professor Frost stresses indivisibility of relief in defending universal injunctions. Frost, *supra* note 287, at 1082–84, 1090–92. Professor Morley, a critic, agrees that incidental benefits to non-parties are acceptable when they inevitably result from relief to parties. Morley, *supra* note 284, at 38.

Constitution, a statutory rule must also be consistent with all subsequent statutes – the earlier rule must not have been repealed.

Whether and how courts can undo regulations in a way that resembles repeal is not clear. Congress repeals statutes by exercising legislative power. A court can hold that a statutory rule is unconstitutional but cannot affect the rule’s legal status in the same way Congress can.²⁹⁶ Agencies rescind regulations by exercising the power with which the regulation was adopted. A court can order an agency to rescind a regulation, but courts that say they are vacating regulations do not order rescission. A court can enjoin enforcement proceedings, but anti-enforcement injunctions do not operate on the regulation’s legal status. An appellate court can operate on the binding force of a lower court’s judgment. When courts conduct judicial review in suits against agencies, however, they are deciding a case between parties, not exercising appellate jurisdiction over the agency.²⁹⁷

Courts often assume that they can vacate a regulation the way an appellate court can vacate a lower court’s order, but do not have a well-established account of the legal details of vacatur.²⁹⁸ The lack of such an account raises questions not only about vacatur as a universal remedy, and about vacatur in the doctrine of remand without vacatur, but about the relationship between courts and agencies. I will not seek to answer those questions here, but at this point only to raise them.

296. See *Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335, 2351 n.8 (2020) (plurality opinion of Kavanaugh, J.) (explaining that when a court “invalidates” a law, the court does not formally repeal the law).

297. See *supra* notes 234–235 (discussing *Garland v. Ming Dai*, 142 S. Ct. 1669 (2021)).

298. An important recent example is *Gorss Motels, Inc. v. FCC*, 20 F.4th 87 (2d Cir. 2021). In that case the Second Circuit found that a 2006 FCC order was void, not because the court independently found that the order was unlawful, but because the D.C. Circuit had “vacated” the order in 2017. *Id.* at 96. The majority found that a court of appeals can give a remedy that operates on the regulation itself, eliminating any legal effect the regulation may have, and that goes beyond operating on the parties and setting a precedent. *Id.* at 96–97. Judge Menashi, in dissent, argued that the majority had embraced either non-mutual preclusion against the government, contrary to the Supreme Court’s cases, or had treated a D.C. Circuit precedent as binding on the Second Circuit, which it was not. *Id.* at 99–100 (Menashi, J., dissenting). The majority did not explain the nature and source of a remedy of vacatur that is distinct from either of the party-specific consequences of judicial decisions that Judge Menashi identified.

CONCLUSION

Ab initio validity of unlawful regulations, and the availability of a remedy of vacatur, are natural assumptions when review of agencies is analogized to appellate review of lower courts. Those assumptions are not correct, however, because the analogy on which they rest is flawed. The question whether to vacate an unlawful regulation does not arise, because unlawful regulations never become part of the body of governing law.