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Universal Remedies, Section 706, and the APA

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NOTICE & COMMENT

Universal Remedies, Section 706, and the APA, by Ronald M. Levin & Mila Sohoni

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The debate over the propriety of the nationwide or "universal" injunction continues to unfold. Just this month, in a dissenting opinion in *Little Sisters of the Poor v. Pennsylvania*, Justices Ginsburg and Sotomayor took a stand in favor of the permissibility of such injunctions, balancing off comments to the contrary in earlier opinions by Justices Gorsuch and Thomas.

The debate among commentators also remains in flux. In particular, in a recent JREG post and accompanying bulletin, Professor John Harrison has set forth a fresh argument about the judicial

review provisions of the Administrative Procedure Act (APA) and their relationship to the universal injunction. Hailed by one observer as "explosive," Harrison's work swiftly received a prominent citation at the Supreme Court in the Solicitor General's reply brief in *Trump v. Pennsylvania*, the companion case to *Little Sisters.* Accordingly, we felt it worthwhile to write this response to his contentions. For the sake of conciseness, we will concentrate our attention on the blog post, referring to the much lengthier bulletin only as necessary to flesh out our critique of the blog post.

We have each written separately about the APA and universal injunctions, including in an amicus brief and a recently posted draft article by one of us (Sohoni, *The Power to Vacate a Rule*). (That article contains portions of the analysis below.) But Harrison adds a new twist to the debate. His chief claim is that "section 706 . . . does not address remedies at all. … The APA addresses remedies not in section 706, but in section 703." The implications of this broad assertion extend well beyond the context of universal injunctions; they raise questions about the fundamental structure of the APA. As such, this column may be of interest to readers who are not necessarily very interested in universal injunctions as such.

Like the famous Robert Rauschenberg artwork "Erased de Kooning Drawing," the impact of Harrison's argument flows from what it erases. In the 70-plus years since the APA was enacted, administrative lawyers have never construed Section 703 as addressing remedies. Even if the *tabula* were actually *rasa*, moreover, we would still urge against Harrison's reading of the APA. That law's text, structure, legislative history, and purposes all support the view correctly held by courts and commentators: the APA deals with remedies—including universal remedies—in Sections 705 and 706, not in Section 703.

We turn first to Section 703. That provision states that the "form of proceeding for judicial review" shall be the relevant "special statutory review proceeding," or "in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of mandatory or prohibitory injunction or habeas corpus)." By its terms, it speaks to "form," not to remedial consequences. A provision that says that in some circumstances you may style your suit as a suit for an injunction is clearly not the same as a provision that purports to identify the interim or final remedies that you may receive as the suit progresses to judgment. Section 703 is comparable to Federal Rule of Civil Procedure 2, which states that in federal civil litigation "[t]here is one form of action—the civil action." We have never heard anyone suggest that Rule 2 tacitly incorporates all, or

for that matter any, of the law of remedies in civil litigation.

Indeed, Harrison's reading of the APA ignores the overall structure of the Act's judicial review provisions. These provisions progress from section to section in a logical fashion. To simplify somewhat, Section 702 addresses who can sue, Section 703 addresses where and how to sue, Section 704 addresses what sorts of agency action can be challenged, Section 705 addresses interim remedies pending judicial review, and Section 706 addresses scope of judicial review and final remedies.

The legislative history is no help to Harrison's thesis, either. The congressional reports basically repeated the statutory language that is now Section 703 without significant elaboration. The widely respected *Attorney General's Manual on the APA* discusses the same provision over the space of seven pages. But that entire discussion addresses forms of action, venue, and other choice-of-forum considerations—not remedial principles.

As for case law, Harrison does not cite a single case to support his theory that Section 703 determines the circumstances in which one is entitled to an injunction, universal or otherwise. Nor are we aware of one.

The only sense we can make of Harrison's heretofore unheard-of reading of Section 703 is that it may be an attempt to make up for what he perceives to be the deficiencies of Section 706. So we will turn to that provision and Harrison's analysis of it.

To begin with, his contention that Section 706 does not address remedies is manifestly incompatible with that provision's text. Subsection (1) states that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." Obviously, the latter part of that phrase states review criteria, and the former half identifies the remedy that the court must grant if those criteria are satisfied. Section 706 then goes on to pair that affirmative remedial power with a complementary remedy: the negative power to "hold unlawful and set aside" the agency actions specified in subsection (2). For example, suppose a reviewing court finds that an agency's adjudicative order is "arbitrary [or] capricious" or "unsupported by substantial evidence" or taken "without observance of procedure required by law." Few if any administrative lawyers would doubt that Section 706 directs the court to remedy that agency action by "hold[ing] it unlawful and set[ting it] aside."

Harrison's attention, however, is focused on other situations, particularly that of an enforcement

proceeding in which an agency seeks to apply one of its rules against a respondent. He argues that the phrase "set aside" does not always have to mean "nullify." Rather, at least some of the time, "[when Section 706] tells courts to set agency action aside, it instructs them not to decide the case according to that action. The court is to put the agency action off to the side, as it were." He compares this situation to a court case in which a party resists liability under a statute that the party alleges is unconstitutional. If the court agrees, it will not actually order the statute deleted from the U.S. Code; it will simply order the government not to apply the statute, at least as against the objecting party. Similarly, Harrison argues, in an administrative context, a reviewing court can "trea[t] the agency action [i.e., rule] as legally ineffective, so that no sanction is imposed on the defendant."

Now, there is some intuitive force to Harrison's notion that courts simply disregard (rather than invalidate) a rule in the context of an enforcement proceeding. But that isn't because of an unnatural reading of "set aside" in Section 706. It's because in the enforcement context the "agency action" under review is the agency's adjudicative decision applying the rule in the respondent's case. An order that nullifies (yes, "sets aside") the agency's order that applies the rule to the respondent gives that party all the relief it needs.

Harrison's reading doesn't work at all, however, when the cause of action is a direct attack on the rule under the APA. In such a suit, the *rule* is the reviewable agency action, and—if the rule is unlawful—the rule is, or may be, set aside. Harrison fails to come to grips with the fact that, in cases involving direct review of a rule, nullification has evolved into a standard administrative law remedy. As the D.C. Circuit remarked in 1998, "When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." The "set aside" language of Section 706 underwrites this commonplace form of relief.

Elsewhere, each of us has discussed the historical roots of this type of "set aside" remedy under the APA. Although rules were most often reviewed in enforcement proceedings during the pre-APA period, direct review of rules did sometimes occur—for example, in actions filed under the Urgent Deficiencies Act and the Federal Communications Act. These statutes plainly contemplated that a judicial challenge, if successful, would result in the wholesale nullification of the rules in dispute—not just a "disregarding" of the rule as to the plaintiff. The Supreme Court decided multiple cases recognizing that assumption in the decades preceding the APA's passage. These statutes were

called to Congress's attention during the deliberations leading up to enactment of the APA, and Section 706 incorporated the same assumption.

At that time, the surest route to review of a rule was a special statutory scheme such as the ones just mentioned. By 1967, however, the *Abbott Labs* trilogy had settled that the APA allowed for facial challenges to regulations, even in the absence of a special statutory review provision expressly authorizing such a suit, and this holding has become well accepted in administrative law. This is a crucial point, because Harrison himself acknowledges that, in a case arising under a special statutory review provision, a court may "set aside" an agency rule in the sense of "overturning" or invalidating it. Even on Harrison's reading, then, there is no intrinsic semantic or jurisprudential obstacle to understanding the term "set aside" in Section 706 to denote the judicial act of invalidating a regulation universally: to Harrison, universal vacatur is just what Section 706 *means* in cases involving a special review statute. But—particularly in the post-*Abbott Labs* world—his distinction between statutory and nonstatutory judicial review looks artificial and obsolescent. There is no reason to think that the *meaning* of the Section 706 term "set aside" varies depending on whether the case arises in one of these contexts as opposed to the other.

In the bulletin version of his essay, Harrison offers what he regards as a counterexample to this historical understanding of "set aside" as Congress would have understood it in 1946. A 1937 statute provided that any application for an "interlocutory or permanent injunction . . . setting aside, in whole or in part, any Act of Congress [as unconstitutional]" must be referred to a three-judge district court. As an initial matter, the statute's relevance to the present discussion is attenuated: the 1937 law addressed constitutional challenges to statutes, whereas the APA addresses judicial review of regulations, which is hardly the same. Moreover, even on its own terms, the example is ill-founded. Harrison notes that the Senate report on that statute quoted *Massachusetts v. Mellon* for the proposition that the Court's judicial review power "amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise might stand in the way of the enforcement of a legal right." But the committee report language on which Harrison relies was not actually addressed to the "set aside" provision of the 1937 law (Section 3). Rather, this section of the report, headed "Interventions and Appeals," pertained to Section 1 of the law, which authorized the Attorney General to intervene in suits challenging constitutionality of federal statutes and to appeal adverse decisions directly to the Supreme Court. The thrust of this discussion was that the Attorney General could not be authorized to intervene in the absence of a case or controversy. It was not directed to

the issue of remedy at all.

Far more relevant, we think, is the section of the report headed “Injunctions,” which did discuss Section 3. There, the committee explained the language pertaining to “set aside” by stating: “This provision corresponds to the provisions of existing law relating to injunctive proceedings where orders of the Interstate Commerce Commission are involved.” The committee’s reference to the ICC implies that the relief authorized by the 1937 statute was intended to be functionally equivalent to the nullification power that had become established in the ICC context.

Rather than attempt to rewrite the meaning of the term “set aside” in Section 706, Harrison could have stood on firmer ground had he written that Section 706 “does not address remedies *exhaustively*.” That proposition is obviously true. Many of the principles that fill a casebook on Remedies existed long before the APA was enacted. The Act was intended to complement them, not entirely supersede them. Indeed, as one of us has discussed elsewhere, a longstanding line of cases holds that a court may sometimes withhold equitable relief even when the literal language of a statute seems to require it. The now-prevalent practice of remanding rules without vacating them illustrates this point in the context of Section 706. In other words, the words “shall set aside” in Section 706 are understood to mean “shall generally,” not “shall invariably.”

This brings us at last to the topic of “universal” injunctions. When a court issues a *preliminary* injunction against the enforcement of a rule, or when it stays a rule’s effective date, the court obviously does not “set the rule aside.” That interim form of relief rests both on equitable principles and on Section 705—an important provision of the APA that Harrison leaves unmentioned. Certainly, though, the scope of the preliminary or interim relief authorized by the APA should be coextensive with the scope of the permanent relief that the APA would authorize if the lawsuit were successful. The well-entrenched practice of vacating rules under Section 706, a form of relief that by definition operates “universally,” thus amply supports the conclusion that the APA likewise authorizes universal preliminary remedies. Similarly, while some courts may frame a final remedy in the form of a permanent universal injunction against enforcement of a rule, that form of relief is in sum and substance identical in its effect to a Section 706 “set aside” order. The court’s choice of one verbal formula rather than the other should not change the situation: in either event, the decree can bar the agency—which is a party to the case—from enforcing the rule against anyone.

In conclusion, many questions persist about when to allow nationwide or universal injunctions against

executive branch action. The prevailing view seems to be that such relief is sometimes warranted and sometimes not, depending on a variety of prudential factors. We take no position in this post about how those choices should be made. In some circumstances, limitation in the geographical sweep of an injunction against an agency rule might be warranted (e.g., to permit dialogue among circuits, or to discourage forum-shopping). But we believe that in other situations a universal injunction will be appropriate. Regardless of how these prudential factors cash out in particular cases, however, we should make every effort to keep straight the elementary issue of where our attention ought to be trained. Sections 705 and 706 may leave the reviewing court with some leeway in shaping preliminary and final remedies, but at least they are directly relevant to the issue at hand. That is more than can be said about Section 703, which doesn't deal with the subject of remedies at all.

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