

ARTICLES

IN DEFENSE OF NATIONWIDE INJUNCTIONS

AMANDA FROST*

With increasing frequency, courts are issuing nationwide injunctions barring the executive from enforcing federal laws and policies against anyone, not just the plaintiffs in the case before them. Nationwide injunctions halted President Obama’s initiative granting deferred action to undocumented immigrants and his Department of Education’s interpretive guidance on the treatment of transgender students in public schools. More recently, district courts enjoined President Trump’s travel ban, as well as his administration’s policy of withholding federal funds from “sanctuary cities.” Legal scholars have criticized the practice, Congress is considering legislation to prohibit it, and commentators are calling for the Supreme Court to address it. A consensus is forming that courts should never issue nationwide injunctions, period. Indeed, some scholars contend that federal courts lack the constitutional authority to do so under any circumstances.

This Article provides the first sustained academic defense of nationwide injunctions. In some cases, nationwide injunctions are the only means to provide plaintiffs with complete relief, or to prevent harm to thousands of individuals who cannot quickly bring their own cases before the courts. And sometimes anything short of a nationwide injunction would be impossible to administer. When a district court is asked to pass on the validity of certain types of federal policies with nationwide effects—such as policies affecting the air or water, or the nation’s immigration system—it would be extremely difficult to enjoin application of the policy to some plaintiffs but not others. Furthermore, nothing in the Constitution’s text or structure bars federal courts from issuing a remedy that extends beyond the parties. To the contrary, such injunctions enable federal courts to play their essential role as a check on the political branches.

INTRODUCTION	1067
I. DEFINING THE PROBLEM.....	1070
A. <i>Defining the Term “Nationwide Injunction”</i>	1070
B. <i>Recent Nationwide Injunctions</i>	1071
1. <i>Nationwide Injunction of the Trump Administration’s Travel Ban</i>	1072

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- 2. *Nationwide Injunction of the Trump Administration’s Withholding of Federal Funds from “Sanctuary Cities”* 1074
- 3. *Nationwide Injunction of the Obama Administration’s Deferred Action Initiatives* 1076
 - a. *Nationwide Injunction of Deferred Action for Parents of Americans (DAPA)*..... 1076
 - b. *Nationwide Injunction of the Trump Administration’s Rescission of Deferred Action for Childhood Arrivals (DACA)* 1077
- 4. *Nationwide Injunction of the Obama Administration’s Transgender Bathroom Policy* 1078
- 5. *Nationwide Injunction of Regulation Altering the Definition of “Waters of the United States”* 1079
- II. NATIONWIDE INJUNCTIONS AND THE CONSTITUTIONAL LIMITS ON “JUDICIAL POWER” 1080
 - A. *The Constitution’s Text* 1080
 - 1. *The Historical Understanding of the “Judicial Power”* 1080
 - 2. *Standing to Sue* 1081
 - B. *The Constitution’s Structure* 1086
 - 1. *Dispute Resolution Versus Law Declaration* 1087
 - 2. *Separation of Powers* 1088
 - C. *Conclusion* 1090
- III. THE BENEFITS OF NATIONWIDE INJUNCTIONS..... 1090
 - A. *Providing Complete Relief to the Plaintiffs* 1090
 - B. *Protecting Nonparties from Irreparable Injury* 1094
 - C. *Administrability* 1098
 - D. *Insufficient Grounds for Nationwide Injunctions* 1101
- IV. THE COSTS OF NATIONWIDE INJUNCTIONS 1104
 - A. *Forum Shopping* 1104
 - B. *The Risk of Conflicting Injunctions* 1106
 - C. *Impedes Percolation of Legal Issues* 1107
 - D. *Infringes on the Rights of Nonparties* 1109
 - E. *Doctrinal Inconsistencies* 1110
 - 1. *The Limited Precedential Value of Lower Federal Court Decisions*..... 1111
 - 2. *United States v. Mendoza’s Exception to Offensive Nonmutual Collateral Estoppel for the Government*..... 1112
 - 3. *The Preclusive Effect of Class Actions* 1114
- V. THE FUTURE OF NATIONWIDE INJUNCTIONS 1115
- CONCLUSION 1118

INTRODUCTION

Over the past few years, courts have issued nationwide injunctions barring the executive from enforcing federal laws and policies against *anyone*, not just the plaintiffs in the case before them. Nationwide injunctions halted President Obama's initiative granting deferred action to undocumented parents of U.S. citizens and lawful permanent residents,¹ his Department of Education's interpretive guidance on the treatment of transgender students in public schools,² and enforcement of a federal regulation requiring that federal contractors report labor violations.³ A few years later, district courts enjoined nationwide President Trump's ban on entry into the United States by refugees and nationals of six predominantly Muslim countries,⁴ and his administration's policy of withholding federal funds from so-called "sanctuary cities" that refused to assist federal officials in enforcing immigration laws.⁵ Most recently, a district court issued a nationwide injunction that barred the federal government from rescinding the deferred action status granted to 690,000 undocumented immigrants brought to the United States as children.⁶

The whiplash-inducing effect of the change in presidential administrations has highlighted the power of a single district court judge to halt executive programs in their tracks.⁷ Legal scholars have criticized

¹ *Texas v. United States*, 86 F. Supp. 3d 591, 604 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.).

² *Texas v. United States*, 201 F. Supp. 3d 810, 835–36 (N.D. Tex. 2016).

³ *Associated Builders & Contractors of Se. Tex. v. Rung*, No. 1:16-CV-425, 2016 WL 8188655, at *15 (E.D. Tex. Oct. 24, 2016). *See also* *NFIB v. Perez*, No. 5:16-cv-00066, 2016 WL 3766121, at *46 (N.D. Tex. June 27, 2016) (issuing a nationwide injunction against a Department of Labor regulation); *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 696 (N.D. Tex. 2016).

⁴ *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1160 (D. Haw. 2017), *aff'd in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *rev'd*, 138 S. Ct. 2392 (2018); *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 633 (D. Md. 2017); *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md.), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir.), *vacated as moot*, 138 S. Ct. 353 (2017) (mem.); *Hawaii v. Trump*, 245 F. Supp. 3d 1227, 1237–39 (D. Haw.), *aff'd in part, vacated in part*, 859 F.3d 741 (9th Cir.), *vacated as moot*, 138 S. Ct. 377 (2017) (mem.); *Washington v. Trump*, No. C17-0141, 2017 WL 462040, at *2 (W.D. Wash.), *stay pending appeal denied* by 691 F. App'x 834 (9th Cir.) and 853 F.3d 933 (9th Cir. 2017); *Darweesh v. Trump*, No. 17 Civ. 480 (AMD), 2017 WL 388504, at *1 (E.D.N.Y. Jan. 28, 2017).

⁵ *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 951–52 (N.D. Ill. 2017); *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017).

⁶ *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1049–50 (N.D. Cal. 2018).

⁷ Shortly after the Hawaii District Court issued its decision halting President Trump's travel ban, Attorney General Jeff Sessions declared: "I really am amazed that a judge sitting on an island in the Pacific can issue an order that stops the president of the United States from [exercising] what appears to be clearly his statutory and constitutional power." Charlie Savage, *Jeff Sessions Dismisses Hawaii as 'an Island in the Pacific,'* N.Y. TIMES

the practice,⁸ Congress is considering legislation to prohibit it,⁹ and commentators are calling for the Supreme Court to address it.¹⁰ A consensus is rapidly forming that courts should *never* issue nationwide injunctions, period.¹¹ Indeed, at least one scholar has argued that fed-

(Apr. 20, 2017), <https://www.nytimes.com/2017/04/20/us/politics/jeff-sessions-judge-hawaii-pacific-island.html> (internal quotation marks omitted). But as a senator, Sessions had praised a nationwide injunction halting President Obama's deferred action initiative.

⁸ See generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017) [hereinafter Morley, *Nationwide Injunctions*]; Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487 (2016) [hereinafter Morley, *De Facto Class Actions*]; Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017); Howard M. Wasserman, "*Nationwide Injunctions*" Are Really "Universal" Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. (forthcoming 2018); Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068 (2017); Daniel J. Walker, Note, *Administrative Injunctions: Assessing the Propriety of Non-Class Collective Relief*, 90 CORNELL L. REV. 1119 (2005).

⁹ See Injunctive Authority Clarification Act of 2018, H.R. 6730, 115th Cong. (2018) (barring injunctions against enforcement of the law against nonparties). See also *The Role and Impact of Nationwide Injunctions by District Courts: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 115th Cong. (2017) [hereinafter *Hearing*] (discussing potential legislative responses to nationwide injunctions); see also Assigning Proper Placement of Executive Action Lawsuits Act (APPEAL Act), H.R. 2660, 115th Cong. (2017) (restricting cases challenging executive orders, actions, or memoranda to the U.S. Federal District Court for the District of Columbia).

¹⁰ Vikram David Amar, *The Supreme Court Needs to Clarify When District Court Injunctions Blocking Federal Policies Can Extend Beyond the Actual Plaintiffs in a Case*, VERDICT (Oct. 20, 2017), <https://verdict.justia.com/2017/10/20/supreme-court-needs-clarify-district-court-injunctions-blocking-federal-policies-can-extend-beyond-actual-plaintiffs-case> (urging the Supreme Court to address the proper scope of injunctions); Katie Benner, *A DACA Question: Should Judges Use Local Cases to Halt National Orders?*, N.Y. TIMES (Jan. 14, 2018), <https://www.nytimes.com/2018/01/14/us/politics/federal-injunctions-judicial-power.html> ("There is speculation that the Supreme Court will address universal injunctions in the coming year.").

¹¹ See *supra* note 9. The leading commentary defending nationwide injunctions are two responses to Bray's Harvard Law Review article. See Spencer E. Amdur & David Hausman, Response, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49 (2017); Suzette M. Malveaux, Response, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56 (2017). Both raise important points about the necessity of nationwide injunctions to protect similarly-situated nonparties and to avoid duplicative litigation. However, both are brief essays rather than full articles, and they do not address in detail the arguments made in this Article about the constitutionality of nationwide injunctions, the compatibility of nationwide injunctions with the structure of the federal judicial system, and the criteria courts should consider before issuing such injunctions.

eral courts lack the constitutional authority to do so under any circumstances.¹²

This Article is a defense of nationwide injunctions, albeit a qualified one. Nationwide injunctions come with significant costs and should never be the default remedy in cases challenging federal executive action. As their critics point out, nationwide injunctions encourage forum shopping, politicize the courts, create the risk of conflicting injunctions, and potentially give enormous power to a single district court judge.¹³ But in some cases, nationwide injunctions are also the only means to provide plaintiffs with complete relief and avoid harm to thousands of individuals similarly situated to the plaintiffs. And sometimes anything short of a nationwide injunction would be impossible to administer. When a district court is asked to pass on the validity of certain types of federal policies with nationwide effects—such as those affecting the air or water, or the nation’s immigration system—it would be extremely difficult to enjoin application of the policy to some plaintiffs but not others.¹⁴

Nothing in the Constitution’s text or structure bars federal courts from issuing a remedy that extends beyond the parties; to the contrary, such injunctions enable federal courts to play their essential role as a check on the political branches. Without nationwide injunctions, the federal courts would be powerless to protect thousands or millions of people from potentially illegal or unconstitutional government policies—policies that can be applied with minimal notice or process, and to many who lack the ability to bring their individual cases before the courts.¹⁵ The need for such injunctions is particularly great in an era when major policy choices are increasingly made through unilateral executive action affecting millions.¹⁶

As a theoretical matter, the debate over nationwide injunctions reveals deep divisions among scholars over the role of the federal courts, and particularly the lower federal courts, in our system of government. Do the federal courts exist primarily to resolve disputes

¹² See Bray, *supra* note 8, at 471 (“The court has no constitutional basis to decide disputes and issue remedies for those who are not parties.”).

¹³ See *infra* Part IV.

¹⁴ See *infra* Part III.

¹⁵ See Amanda Frost, *The Hidden Constitutional Threat in Trump’s Travel-Ban Lawsuit*, WASH. POST (Apr. 24, 2018), https://www.washingtonpost.com/opinions/the-hidden-constitutional-threat-in-trumps-travel-ban-lawsuit/2018/04/24/cf24441a-472c-11e8-8b5a-3b1697adcc2a_story.html (arguing that without nationwide injunctions, vindicating the rights of people unable to afford attorneys would take months or years).

¹⁶ See *infra* Part II.

between parties, or to declare the meaning of law for everyone?¹⁷ Is precedent alone a sufficient tool with which to correct the government's legal and constitutional errors, or may courts use injunctions to accomplish the same goals?¹⁸ May courts adjust their traditional equitable powers to counter expanding executive power—particularly when the executive can act strategically to avoid both judgments in individual cases and decisions by the Supreme Court?¹⁹ As these questions suggest, one's view of the propriety of nationwide injunctions may turn on one's deep-seated beliefs about the role of the judiciary and the scope of judicial power vis-à-vis the political branches.

The Article proceeds as follows. Part I defines the terms used and then briefly describes recent cases in which courts have issued nationwide injunctions. Part II addresses the federal courts' constitutional authority to issue equitable remedies requiring the defendant to cease taking action affecting nonparties. This Part also explains how such injunctions are consistent with the structure of the federal court system and the role of the federal judiciary in the separation of powers. Part III describes the benefits of nationwide injunctions, and Part IV deconstructs the increasingly strident critiques of such injunctions. Together, Parts III and IV demonstrate that nationwide injunctions serve important purposes that, at times, outweigh their costs.

In conclusion, Part V provides a guide to federal courts faced with the question of whether to issue a nationwide injunction. This Part describes the factors a court should consider before issuing an injunction that bars a defendant from taking action against those who are not parties to the lawsuit.

I

DEFINING THE PROBLEM

A. *Defining the Term "Nationwide Injunction"*

Injunctions are an equitable remedy to control a party's conduct. Under Federal Rule of Civil Procedure 65, federal district courts may issue temporary restraining orders or preliminary injunctions at an early stage of the litigation. Courts may also issue permanent injunctions as the relief accompanying a final judgment.²⁰ A district court has broad discretion when crafting appropriate injunctive relief, for

¹⁷ See *infra* Section II.B.1 (describing the debate over the dispute resolution versus the law declaration models of judging).

¹⁸ See *infra* Section IV.E.1 (describing scholarship discussing the distinction between precedent and the power of a judgment).

¹⁹ See *infra* Section II.B.2 (discussing the role of the federal courts in the constitutional structure).

²⁰ *E.g.*, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

“breadth and flexibility are inherent in equitable remedies.”²¹ If a party violates an injunction, the court can hold civil or criminal contempt proceedings and impose fines or imprisonment.²²

This Article uses the term “nationwide injunction” to refer to an injunction at any stage of the litigation that bars the defendant from taking action against individuals who are not parties to the lawsuit in a case that is not brought as a class action. That term is somewhat misleading, however, because no one denies that district courts have the power to enjoin a defendant’s conduct anywhere in the nation (indeed, the world) as it relates to *the plaintiff*²³; rather, the dispute is about *who* can be included in the scope of the injunction, not *where* the injunction applies or is enforced. For that reason, some scholars refer to injunctions that bar the defendant from taking action against nonparties as “universal injunctions,” “global injunctions,” or “defendant-oriented injunctions.”²⁴ Despite its potential to confuse, this Article uses the term “nationwide injunction” because it is the name that courts repeatedly use when issuing this type of injunction.

The Article focuses on the use of nationwide injunctions against the federal executive branch to enjoin implementation of federal laws and policies, because that is the context in which they have most frequently been issued and has been the focus of most scholarly criticism.²⁵ Many of the points made here, however, will also apply to similar injunctions against states and private parties.

B. Recent Nationwide Injunctions

As many commentators have noted, over the last decade courts have issued nationwide injunctions with increasing frequency, often in cases involving controversial executive branch policies.²⁶ Because it is

²¹ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

²² See generally 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2941 (3d ed. 2018).

²³ See *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) (“[T]he District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction.”); *Bray*, *supra* note 8, at 471 (arguing that “the courts should issue injunctions that protect the plaintiffs, not injunctions that protect nonparties”); *Morley*, *Nationwide Injunctions*, *supra* note 8, at 620 (“In one sense, most federal injunctions could be considered ‘nationwide’ because the defendant is generally prohibited from violating the plaintiff’s rights anywhere—not just within the geographic jurisdiction of the issuing court.”).

²⁴ See, e.g., *Morley*, *De Facto Class Actions*, *supra* note 8 (using the term “defendant-oriented injunction”); *Wasserman*, *supra* note 8 (arguing in favor of the term “universal injunction”); see also *Bray*, *supra* note 8 (using the term “national injunction”).

²⁵ See *supra* note 8.

²⁶ See *Bray*, *supra* note 8, at 419 & n.6 (identifying the increase in nationwide injunctions and scholarship discussing it).

helpful to ground the debate over the propriety and constitutionality of nationwide injunctions in the facts of actual cases, I have briefly summarized below several recent cases involving such injunctions. I chose these particular cases because they present a variety of situations in which courts have issued such injunctions—from environmental regulations to civil rights to immigration policies—and because the injunctions were intended to serve different purposes.

I will refer back to these cases throughout this Article when discussing the arguments for and against federal courts' authority to issue such injunctions and the circumstances under which it is appropriate for them to do so. I will assume that these cases were decided correctly on the merits for the purpose of analyzing the propriety of the nationwide injunction, because no coherent discussion of that remedy can turn on the merits of a particular case.²⁷ Rather, the question is whether nationwide injunctions in these cases were permissible remedies in light of the courts' conclusions that the plaintiffs were likely to prevail (in cases involving preliminary injunctions) or had successfully proven their case (in cases involving permanent injunctions).

1. *Nationwide Injunction of the Trump Administration's Travel Ban*

Shortly after taking office, President Trump issued an executive order barring the nationals of seven predominantly Muslim countries from entering the United States.²⁸ That order was immediately challenged in court. Within a week, a federal district court in Washington had issued a nationwide injunction of the travel ban, which the Ninth Circuit affirmed.²⁹ The Trump administration then revoked that executive order and issued a second order in its place temporarily barring entry into the United States of all refugees, as well as nationals from six predominantly Muslim countries.³⁰ Again, the order was challenged, and again courts issued nationwide injunctions barring the order from going into effect anywhere.³¹

The United States then petitioned for a stay of the injunction in the U.S. Supreme Court, which narrowed the district court's injunction but kept it in place for nonparties who were "similarly situated"

²⁷ See Bray, *supra* note 8, at 423 (making the same point).

²⁸ Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

²⁹ *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) (per curiam).

³⁰ Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (revoking and replacing Exec. Order No. 13,769, 82 Fed. Reg. 8977).

³¹ For a chronological summary of events surrounding the passage of these executive orders, see Meridith McGraw, *A Timeline of Trump's Immigration Executive Order and Legal Challenges*, ABC NEWS (June 29, 2017), <https://abcnews.go.com/Politics/timeline-president-trumps-immigration-executive-order-legal-challenges/story?id=45332741>.

to the plaintiffs.³² The Court eventually dismissed the case on the ground that it had become moot.³³

On September 24, 2017, President Trump issued a new proclamation placing entry restrictions on the nationals of eight foreign countries after concluding those countries did not adequately manage and share information about the threats posed by their nationals.³⁴ Again, that executive action was challenged in court. The plaintiffs once again sought a nationwide injunction, arguing that they could only get complete relief for their injuries if the travel ban was enjoined nationwide, and that in any case immigration policy must be uniform nationwide. The lower courts agreed and granted a nationwide injunction, but this time the Supreme Court stayed the injunction in full during the pendency of the appeal.³⁵ In its petition for a writ of certiorari, the United States asked the Court to address not only the legality of the proclamation restricting entry, but also the legality and propriety of the nationwide injunctions entered by the lower courts. The Court granted that petition.

In the spring of 2018, the Supreme Court upheld the entry restrictions against statutory and constitutional challenge by a 5-4 vote.³⁶ But the majority did not address the scope of injunctive relief. In a concurrence, Justice Thomas stated that he was “skeptical” that lower courts had the authority to enter nationwide injunctions, and urged the Court to address the issue in the future if courts continued to issue them.³⁷ In her dissent, Justice Sotomayor did not address the issue at length, but noted in a footnote that “[g]iven the nature of the Establishment Clause violation and the unique circumstances of this case, the imposition of a nationwide injunction was ‘necessary to provide complete relief to the plaintiffs.’”³⁸

³² *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087–88 (2017) (per curiam).

³³ *Trump v. Hawaii*, 138 S. Ct. 377 (2017) (mem.).

³⁴ Proclamation No. 9645, *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public Safety Threats*, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

³⁵ Order, *Trump v. Hawaii*, 138 S. Ct. 542 (2017).

³⁶ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

³⁷ *See id.* at 2424–29 (2018) (Thomas, J., concurring) (attacking the legal and historical precedent for nationwide injunctions).

³⁸ *Id.* at 2446 n.13 (2018) (Sotomayor, J., dissenting) (quoting *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994)).

2. *Nationwide Injunction of the Trump Administration's Withholding of Federal Funds from "Sanctuary Cities"*

On January 25, 2017, President Trump issued Executive Order 13,768, which threatened to withhold federal funding from state or local governments that refused to cooperate in federal immigration enforcement.³⁹ The U.S. Department of Justice (DOJ) subsequently imposed two new immigration-enforcement-related conditions on the award of a federal grant, which required that localities agree to cooperate with federal officials to obtain federal funding. The City of Chicago sued, arguing that the federal government lacked constitutional and statutory authority to condition federal funding on the requirement that the city participate more actively in federal immigration enforcement.

On September 15, 2017, a federal district court granted a nationwide preliminary injunction barring DOJ from implementing its conditional funding policy.⁴⁰ In a subsequent opinion denying the government's motion for a stay of the injunction pending appeal, the district court concluded that the "extraordinary remedy" of a nationwide injunction was appropriate because it was "based on the need for federal uniformity and [because of] the unfairness resulting from disparate applications" of the law.⁴¹ In addition, the court noted that a nationwide injunction promoted judicial economy by avoiding the need for multiple rulings by other district courts.⁴²

On appeal, a majority of the Seventh Circuit panel affirmed the injunction. It noted that nationwide injunctions raised concerns and should be "utilized only in rare circumstances."⁴³ But the court went on to explain that nationwide injunctions "can be beneficial in terms of efficiency and certainty in the law, and more importantly, in the avoidance of irreparable harm and in furtherance of the public interest."⁴⁴ The court held that a nationwide injunction was justified here because the case presented a narrow issue of law that was not fact-dependent and would not vary from one locality to another, and thus "does not present the situation in which courts will benefit from allowing the issue to percolate through additional courts."⁴⁵ Noting that dozens of cities and localities had also contested the funding

³⁹ Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

⁴⁰ *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 951–52 (N.D. Ill. 2017).

⁴¹ *City of Chicago v. Sessions*, No. 17-C-5720, 2017 WL 4572208, at *4 (N.D. Ill. Oct. 13, 2017).

⁴² *Id.* at *3.

⁴³ *City of Chicago v. Sessions*, 888 F.3d 272, 288 (7th Cir. 2018).

⁴⁴ *Id.* at 289.

⁴⁵ *Id.* at 291.

restriction, the majority concluded that the “public interest would be ill-served here by requiring simultaneous litigation of this narrow question of law in countless jurisdictions.”⁴⁶ Finally, the majority observed that federal funding is allocated to states and localities from a single pool according to a strict formula, and thus the “conditions imposed on one can impact the amounts received by others.”⁴⁷ Accordingly, it found that “piecemeal relief is ineffective to redress the injury, and only nationwide relief can provide proper and complete relief.”⁴⁸ Judge Daniel Manion agreed with the majority on the merits, but dissented regarding the scope of the injunction. Judge Manion argued that the injunction did not need to apply beyond the City of Chicago because “there is no need to protect [other jurisdictions] in order to protect Chicago.”⁴⁹

The government then sought rehearing en banc only with respect to the nationwide scope of the injunction, and the Seventh Circuit granted its petition and stayed the district court’s preliminary injunction “as to geographic areas in the United States beyond the City of Chicago pending the disposition of the case by the en banc court.”⁵⁰ For procedural reasons, the Seventh Circuit subsequently vacated its decision to rehear the issue en banc, but the appropriate scope of injunctive relief is likely to come back before the Seventh Circuit in the near future once the District Court enters a final judgment in the case.⁵¹

⁴⁶ *Id.* at 292 (noting also that thirty-seven cities and counties, participating as amici, had requested that the district court uphold the injunction, and the United States Conference of Mayors, representing 1400 cities nationwide, had sought to intervene).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 300 (Manion, J., concurring in part and dissenting in part).

⁵⁰ Order Staying Preliminary Injunction in Part, *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018) (No. 17-2991); Order Granting Petition for Rehearing En Banc at 1, *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018) (No. 17-2991).

⁵¹ See *City of Chicago v. Sessions*, 2018 WL 4268814 (Aug. 10, 2018). On July 27, 2018, the District Court granted Chicago’s motion for summary judgment and stated its intent to enter a permanent nationwide injunction, as well as its plan to “stay[] the nationwide scope of the permanent injunction” in keeping with the Seventh Circuit’s earlier ruling. *Id.* at *1–2. In response, the Seventh Circuit vacated its decision to rehear the case en banc because the “preliminary injunction has all but evaporated.” *Id.* at *2. However, the Seventh Circuit announced that it would “expedite its consideration” of an appeal from the District Court’s final judgment, when entered. *Id.*

3. *Nationwide Injunction of the Obama Administration's Deferred Action Initiatives*

a. *Nationwide Injunction of Deferred Action for Parents of Americans (DAPA)*

In 2014, twenty-six states filed suit in a federal district court in Texas, challenging President Obama's initiative granting a temporary reprieve from removal and work authority to the undocumented immigrant parents of U.S. citizens and lawful permanent residents. They argued that the initiative, known as Deferred Action for Parents of Americans or DAPA, violated the Administrative Procedure Act (APA), the Immigration and Nationality Act, and the President's constitutional obligation to take care that the laws be faithfully executed. The states sought a nationwide preliminary injunction to halt DAPA from going into effect anywhere in the United States.⁵²

The district court found that only Texas had standing to bring the lawsuit based on Texas's claim that it would be required to provide DAPA recipients with state-subsidized driver's licenses, costing the state money.⁵³ The court also concluded that the plaintiffs were likely to prevail and would suffer irreparable injury without a preliminary injunction, and that the public interest favored such an injunction.

The United States argued that an injunction halting DAPA should apply only in Texas, because only Texas had standing to sue. But the court agreed with Texas that a geographically limited injunction would not alleviate Texas's injury because DAPA recipients in other states could travel to Texas, take up residence, and apply for driver's licenses—thereby causing Texas the same financial injury.⁵⁴ Accordingly, it issued a nationwide injunction. The Fifth Circuit affirmed, and the United States petitioned for review in the U.S. Supreme Court, though it did not challenge the legality of the nationwide injunction specifically. An eight-member Supreme Court split

⁵² See *Texas v. United States*, 86 F. Supp. 3d 591, 607 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

⁵³ *Id.* at 614–44.

⁵⁴ *Texas v. United States*, 787 F.3d 733, 768–69 (5th Cir. 2015) (concluding that “there is a substantial likelihood that a partial injunction would be ineffective because DAPA beneficiaries would be free to move between the states”); see also *Plaintiffs' Opposition to Defendants' Motion to Stay Pending Appeal the Court's February 16, 2015 Order of Preliminary Injunction*, *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015) (No. 15-40238) at 19–20 (arguing that if deferred action were granted to undocumented immigrants in other states, those individuals could then travel to Texas and seek driver's licenses). I have argued elsewhere that Texas's claimed injury did not constitute a cognizable injury for the purposes of establishing standing to sue under Article III. Amanda Frost & Stephen I. Vladeck, *Opinion, Limit State Access to Federal Court*, N.Y. TIMES (Dec. 22, 2015), <https://www.nytimes.com/2015/12/22/opinion/limit-state-access-to-federal-court.html>.

4-4, affirming in a per curiam opinion that set no precedent.⁵⁵ Shortly after President Trump took office, his administration rescinded DAPA, and the plaintiffs subsequently dismissed their lawsuit.⁵⁶

b. Nationwide Injunction of the Trump Administration's Rescission of Deferred Action for Childhood Arrivals (DACA)

In 2012, the Obama administration established a program known as Deferred Action for Childhood Arrivals (DACA), which granted temporary relief from removal and authorization to work legally in the United States to certain undocumented immigrants who had been brought to the United States as children. On September 5, 2017, then-Acting Secretary of Homeland Security, Elaine Duke, issued a memo rescinding DACA. That memo explained that Texas and other plaintiffs in the DAPA litigation had sent a letter to Attorney General Jeff Sessions stating they would challenge DACA in court unless DACA was rescinded by September 5, 2017.⁵⁷ The rescission memo announced that DACA benefits were no longer available to any noncitizen who had not already applied, and that existing grants of deferred action would expire beginning in March 2018.

Shortly thereafter, a number of states, organizations, corporations, educational institutions, and individuals filed lawsuits challenging DACA's rescission on the ground that it violated the APA because it was arbitrary and capricious and issued without notice and comment, and that it violated the Constitution's Equal Protection Clause, among other grounds.⁵⁸ Several of the district courts hearing these challenges sided with the plaintiffs and issued nationwide preliminary injunctions requiring the Trump administration to maintain DACA, at least for some recipients.⁵⁹

Texas, along with a handful of other states, then filed a new lawsuit before the same federal district judge who heard its challenge to DAPA, this time seeking to have DACA declared unlawful and enjoined nationwide. This new litigation created the prospect of conflicting nationwide injunctions.

⁵⁵ *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016).

⁵⁶ Plaintiffs' Stipulation of Voluntary Dismissal at 1, *Texas v. United States*, No. 14-CV-254, 2017 WL 5476770, at *1 (S.D. Tex. Sept. 12, 2017).

⁵⁷ See *NAACP v. Trump*, 298 F. Supp. 3d 209, 218–19 (D.D.C. 2018) (discussing the recession of DACA).

⁵⁸ *Id.* at 220–23 (summarizing the ongoing litigation challenging DACA rescission).

⁵⁹ *Id.* at 243. See also *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 409 (E.D.N.Y. 2018); *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1036–37 (N.D. Cal. 2018).

The government filed a brief noting that district courts in the Second and Ninth Circuits have “issued legally incorrect and over-broad nationwide preliminary injunctions” that require the federal government to “continue (most of) DACA nationwide.” If the Texas District Court were to issue an injunction ordering the government to end DACA, then the government will “face simultaneously conflicting court orders,” which, the government noted in an aside “highlights the impropriety of issuing nationwide injunctions as a general matter.” The government explained that in “similar situations, courts have typically held that the appropriate course is for a district court to refrain from issuing a conflicting injunction.” In other words, the government’s brief seemed to suggest that the Texas District Court should avoid a direct conflict with the courts that had already ruled on this issue.

On August 31, 2018, the district court issued a decision stating that the plaintiffs “have clearly shown” that DACA is likely unlawful. Nonetheless, the court declined to issue a preliminary injunction because plaintiffs had waited six years to challenge DACA, even as its recipients had come to rely on it, and accordingly the public interest did not support a preliminary injunction.⁶⁰

4. *Nationwide Injunction of the Obama Administration’s Transgender Bathroom Policy*

In 2016, thirteen states sued the U.S. Department of Education and other federal agencies, challenging their conclusion that Title VII and Title IX require that public schools provide restrooms, locker rooms, showers, and similar facilities that match students’ gender identity rather than their biological sex. Earlier that year, the Department of Justice and Department of Education had jointly sent a letter to schools across the country indicating that they must “immediately allow students to use” such facilities “of the student’s choosing,” or “risk losing Title IX-linked funding.”⁶¹ The states argued that the new policy was contrary to law and thus violated the APA. The district court agreed, issuing a nationwide preliminary injunction that barred the new policy for transgender students’ use of bathrooms from going into effect anywhere in the nation.⁶²

The government then asked the court to both clarify and narrow the injunction. The government reminded the court that injunctions

⁶⁰ Texas v. United States, No. 1:18-CV-00068, 2018 WL4178970, at *61–62 (Aug. 31, 2018).

⁶¹ Texas v. United States, 201 F. Supp. 3d 810, 816 (N.D. Tex. 2016).

⁶² *Id.*

“should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs,” and argued that the injunction should be limited to the thirteen states that were parties to the litigation.⁶³ The government further argued that it had the right to assert its interpretation of Title VII and IX when litigating cases in other courts that had previously agreed with the government’s interpretation of “sex” in those statutes to mean gender identity.⁶⁴

The district court rejected that argument, explaining that a “nationwide injunction is necessary because the alleged violation extends nationwide.”⁶⁵ The court also stated that if it limited the injunction to the plaintiff states who were parties to the case, it would “risk[] a ‘substantial likelihood that a geographically-limited injunction would be ineffective’”—though it did not explain why this would be the case.⁶⁶

The district court tried to minimize the impact of its injunction, however. It noted that those states that “did not want to be covered by this injunction” could allow students to choose their preferred bathrooms under state law. The court further commented that the “injunction should not unnecessarily interfere with litigation currently pending before other federal courts on this subject,” and asked the parties to file a pleading describing such litigation “so the Court can appropriately narrow the scope” of its injunction if necessary.⁶⁷

5. *Nationwide Injunction of Regulation Altering the Definition of “Waters of the United States”*

In 2015, eighteen states challenged a final rule promulgated by the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency (EPA) broadly defining “waters of the United States.”⁶⁸ The states argued that the rule violated the Clean Water Act by expanding the agencies’ jurisdiction and was promulgated in violation of the APA. A number of district courts had heard related challenges and had issued a patchwork of injunctions in response. The Sixth Circuit agreed with the challengers that the rule was unlawful. That court ordered the agencies to stay implementation of the rule nationwide after finding that a stay would reduce “confusion” and

⁶³ See *Texas v. United States*, No. 7:16-cv-00054-O, 2016 WL 7852331, at *1 (N.D. Tex. Oct. 18, 2016) (internal quotation marks omitted) (citing *Califano v. Yamaski*, 442 U.S. 682, 702 (1979)).

⁶⁴ *Id.*

⁶⁵ *Id.* at *4.

⁶⁶ *Id.* at *2 (quoting *United States v. Texas*, 809 F.3d 134, 187–88 (5th Cir. 2015)).

⁶⁷ *Texas v. United States*, 201 F. Supp. 3d at 836.

⁶⁸ *In re EPA*, 803 F.3d 804, 805–06 (6th Cir. 2015), *vacated on other grounds sub nom. In re Dep’t of Def.*, 713 F. App’x 489, 490 (6th Cir. 2018).

“uncertainty” and “restore uniformity of regulation under the familiar, if imperfect, pre-Rule regime, pending judicial review.”⁶⁹

II

NATIONWIDE INJUNCTIONS AND THE CONSTITUTIONAL LIMITS ON “JUDICIAL POWER”

Assuming the benefits of nationwide injunctions outweigh the costs in some cases—a question addressed in detail in Parts III and IV of this Article—do federal courts have the constitutional authority to issue injunctions affecting nonparties? The text of Article III does not spell out the scope of the judiciary’s equitable powers, but tradition and precedent suggest that broad remedial injunctions are constitutionally permissible, and in some cases essential, as a means of enabling the courts to check the political branches.

A. *The Constitution’s Text*

1. *The Historical Understanding of the “Judicial Power”*

The first sentence of Article III of the U.S. Constitution declares that “[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”⁷⁰ The “judicial Power” includes the power to issue both legal and equitable remedies,⁷¹ but the text of Article III does not spell out the scope of those remedies.⁷²

Federal courts’ equitable powers derive from traditional equity, which serves as both a source of, and limit on, courts’ exercise of that power.⁷³ Tradition provides little clarity in this instance, however. No rule has ever barred courts from issuing injunctions controlling a defendant’s conduct vis-à-vis nonparties.⁷⁴ To the contrary, the “bill of

⁶⁹ *Id.* at 808.

⁷⁰ U.S. CONST. art. III, § 1.

⁷¹ *See id.* § 2 (“The judicial Power shall extend to all Cases, in Law and Equity . . .”).

⁷² EDWARD S. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 16 (1914) (“[A]s to what [the judicial] power is, what are its intrinsic nature and scope, [the Constitution] says not a word.”).

⁷³ *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999) (stating that the Judiciary Act of 1789 gave federal courts the “authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries” (quoting *Atlas Life Ins. Co. v. W.I.S., Inc.*, 306 U.S. 563, 568 (1939))); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 (1991) (“The law of remedies, like all law, is largely convention, and what counts as a full or adequate remedy is scarcely less so.”).

⁷⁴ *Bray*, *supra* note 8, at 421 (noting that “traditional equity lacked [a] sharply defined rule” against enjoining defendants from enforcing the law against nonparties).

peace,” which allowed courts to issue remedies to individuals closely connected and similarly situated to the plaintiff, suggests that, in traditional equity courts could grant injunctions that applied to nonparties, albeit in a more circumscribed context than the broad nationwide injunctions issued today.⁷⁵ Accordingly, the historical practice supports the conclusion that courts have always had the authority to issue equitable relief that encompasses nonparties.

In any case, federal courts’ equitable authority should keep pace with the expansion of the political branches’ role in enacting laws and implementing policies with nationwide effect.⁷⁶ The narrower scope of injunctions in traditional equity may be due to the limited scope and nature of the laws being challenged, and not an inherent limit on the powers of the federal courts. Accordingly, the historical understanding of “judicial Power” does not bar modern courts from issuing broad equitable relief affecting nonparties in response to sweeping executive orders and actions. Indeed, historical antecedents such as the bill of peace illustrate that federal courts have long exercised such authority.⁷⁷

2. *Standing to Sue*

Some scholars argue that Article III’s “case or controversy” requirement limits not only who has standing to sue, but also the

⁷⁵ *Id.* at 426 (describing the bill of peace and acknowledging that in traditional equity courts had the power to grant remedies to nonparties).

⁷⁶ *Union Pac. Ry. Co. v. Chi., Rock Island & Pac. Ry. Co.*, 163 U.S. 564, 601 (1896) (explaining that equity must evolve “to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed”).

⁷⁷ *See* 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE* RULE 23(a) § 1751 (3d ed. 2018) (describing how the English Court of Chancery developed the bill of peace to enable an equity court to hear an action by or against representatives of a group if the plaintiff could show that the number of people was so large as to make joinder impracticable, that all members of the group possessed a joint interest in the question, and that the named parties were adequate representatives of the group). Even if federal courts have the constitutional authority to issue nationwide injunctions, however, some commentators argue that Congress withheld authority to do so in the Judiciary Act of 1789. *See* Bray, *supra* note 8, at 473. In *Grupo Mexicano*, the Supreme Court explained that the Judiciary Act of 1789 limits federal courts to exercising only those “remedies which had been devised and were being administered by the English Court of Chancery at the time of the separation of the two countries.” *Id.* at 473 n.318 (internal citation omitted). But that argument once again begs the question of whether nationwide injunctions are analogous to the type of relief exercised by the pre-1789 Chancellor. As just discussed, the existence of the bill of peace, and the absence of a clear prohibition against injunctions affecting nonparties, suggests that there is a credible argument that nationwide injunctions are not a sharp break with pre-1789 practice. *But see* Bray, *supra* note 8, at 425–27 (concluding that nationwide injunctions cannot be traced to traditional equitable practices).

scope of federal courts' power to order equitable relief.⁷⁸ The standing requirement mandates that the plaintiff have an "injury in fact" that is traceable to the challenged conduct and redressable by a court.⁷⁹ Both Samuel Bray and Michael Morley argue that Article III allows courts to issue remedies only to parties with standing, and not others.⁸⁰ Bray asserts that "[o]nce a federal court has given an appropriate remedy to the plaintiffs, there is no longer any case or controversy left for the court to solve."⁸¹

Even under this narrow view of courts' equitable power, however, courts can issue injunctions that apply to nonparties as long as they are crafted in terms of providing complete relief to the plaintiff. For example, in a school desegregation case, the only way to alleviate the plaintiff's injury is to require the defendant to allow *all* nonwhite students in the jurisdiction to attend the school; an order requiring the defendant to admit only the plaintiff would not address the injury. Likewise, in the litigation challenging the Department of Justice's policy of withholding funding from so-called "sanctuary cities," the Seventh Circuit upheld the nationwide injunction because funds were distributed nationwide from a single pool of money, and thus "conditions imposed on one can impact the amounts received by others."⁸² Accordingly, that court concluded "piecemeal relief is ineffective to redress the injury, and only nationwide relief can provide proper and complete relief."⁸³ In these cases, the defendant is required to take action affecting parties other than the plaintiff for the purpose of addressing the *plaintiff's* injury, which is consistent with the view that courts cannot order equitable relief beyond that needed to provide a remedy to the plaintiff.

In any case, the claim that courts cannot issue equitable relief extending further than needed to address the plaintiff's "actual injury" is at odds with long judicial practice. When a court finds that a statute is unconstitutional on its face, it does not hold that the statute applies to everyone but the plaintiff; rather, it holds that the statute is

⁷⁸ U.S. CONST. art. III, § 2, cl. 1; see Bray, *supra* note 8, at 471; Morley, *De Facto Class Actions*, *supra* note 8, at 523–37 (arguing that courts "likely lack subject-matter jurisdiction" to grant nationwide injunctions because "[f]ederal courts are limited to adjudicating live 'cases' and 'controversies'").

⁷⁹ *Allen v. Wright*, 468 U.S. 737, 751 (1984).

⁸⁰ Bray, *supra* note 8, at 471; see also Morley, *De Facto Class Actions*, *supra* note 8, at 523–27 (arguing that Article III's case and controversy requirement bars federal courts from issuing nationwide injunctions).

⁸¹ Bray, *supra* note 8, at 471.

⁸² *City of Chicago v. Sessions*, 888 F.3d 272, 292 (7th Cir. 2018).

⁸³ *Id.*

invalid.⁸⁴ Likewise, as the D.C. Circuit has explained, “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.”⁸⁵

Courts regularly issue remedies broader than required to address the injury that gave plaintiff standing to sue. For example, federal judges sometimes issue prophylactic injunctions that go beyond the plaintiff’s “actual injury.”⁸⁶ The Supreme Court upheld such a prophylactic injunction in *Hutto v. Finney*, which prohibited a prison from ever putting prisoners into solitary confinement for more than thirty days, even though this practice did not violate the Eighth Amendment in every case.⁸⁷ The Court explained that because the defendant prison had not complied with the district court’s earlier orders, and because the conditions as a whole in the isolation cells amounted to cruel and unusual punishment, the district court was “justified in entering a comprehensive order to insure against the risk of inadequate compliance.”⁸⁸ Similarly, courts may enjoin a defendant from engaging in conduct that could, in the future, be “anticipated” to cause the plaintiff harm based on the defendants’ past conduct, even though the potential future injury would not, on its own, have been sufficient to establish standing.⁸⁹ In short, standing is required to get into federal court, but it does not govern the scope of the remedy a court may issue.

Indeed, under some circumstances courts allow individuals who themselves have no injury to proceed with litigation, which further suggests that courts have the power to issue remedies that extend beyond the plaintiff’s actual injuries. For example, courts will hear cases that have become moot as long as they are “capable of repetition yet evading review.”⁹⁰ Likewise, courts will allow individuals to

⁸⁴ Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 *STAN. L. REV.* 235, 265–66 (1994) (discussing how facial challenges to statutes in First Amendment claims effectively assert the rights of others).

⁸⁵ *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1988) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)).

⁸⁶ See Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 *BUFF. L. REV.* 301 (2004) (defending prophylactic injunctions).

⁸⁷ 437 U.S. 678, 685–88 (1978).

⁸⁸ *Id.* at 687.

⁸⁹ See *NLRB v. Express Publ’g Co.*, 312 U.S. 426, 435 (1941) (“A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from defendant’s conduct in the past.”).

⁹⁰ *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007); see, e.g., *Turner v. Rogers*, 564 U.S. 431, 439–40 (2011) (permitting a plaintiff to proceed even after her case has become moot if she can show that “(1) the challenged action is in its duration too short to

file cases in the role of a “next friend,” even though the plaintiff before the court himself has no injury, but simply a close connection with an individual who is injured.⁹¹ The doctrine of third-party standing allows an individual who is injured to vindicate the legal rights of one who is not before the court—disaggregating the injured party from the rights holder.⁹² Most relevant, associations are permitted to file suit in their own names as long as they can show that some of their members have suffered injury, the lawsuit is germane to the organization’s purpose, and the participation of the individual members is not needed to litigate the case—a doctrine that intentionally permits a party who is not injured to litigate on behalf of those who are.⁹³ These flexible doctrines allowing plaintiffs to file suit even when they have no injury, or to assert another person’s legal rights, suggest courts have the concomitant power to issue remedies that go beyond a plaintiff’s actual injuries.

The class action device further demonstrates that courts have the constitutional authority to enjoin defendants from taking action affecting nonparties. Under Federal Rule of Civil Procedure 23, a few named individuals can bring a lawsuit on behalf of all similarly situated individuals across the nation as long as they satisfy the four class certification requirements listed in Rule 23(a), as well as Rule 23(b)(2)’s requirement that the “party opposing the class has acted . . . on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole.”⁹⁴

be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again” (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975))). Similarly, courts can decide whether to certify a class action even after the named plaintiff’s claims have become moot. *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 404 (1980) (“We . . . hold that an action brought on behalf of a class does not become moot upon expiration of the named plaintiffs’ substantive claim, even though class certification has been denied.”).

⁹¹ See, e.g., *Padilla v. Rumsfeld*, 352 F.3d 695, 700 (2d Cir. 2003) (holding that detainee’s attorney had standing to file a habeas corpus petition on his behalf as his “next friend” because she had been unable to obtain his signature), *rev’d on other grounds*, 542 U.S. 426 (2003); see also *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 333–34 (1980) (holding that the EEOC may bring a class action without meeting the requirements of Rule 23).

⁹² See *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 634 (1980); see also *Dorf*, *supra* note 84, at 265–66 (discussing how facial challenges to statutes effectively assert the rights of others).

⁹³ *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343–44 (1977); see also *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011).

⁹⁴ FED. R. CIV. P. 23 (a)-(b); see also 7AA C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1775 (3d ed. 2018) (“Class members need not be aggrieved by or desire to challenge defendant’s conduct in order for some of them to seek relief under Rule 23(b)(2).”).

Rule 23(a)'s requirements are primarily intended to protect the rights of absent class members, not the defendants. They require the court to find that the class is sufficiently numerous to justify a class action, that the named plaintiffs' claims are similar to the absent class members that they seek to represent, and that named plaintiffs will be adequate representatives of the class.⁹⁵ As long as those requirements are met, and the party opposing the class "has acted or refused to act on grounds that apply generally to the class," a court can issue injunctive relief that applies to *everyone* within the class, whether that person was named in the lawsuit, appeared in court, or even knew a class action had been brought on his or her behalf.⁹⁶

Class actions are premised on the quasi-fiction that absent class members are parties to the suit,⁹⁷ but absent class members appear no differently situated from the nonparties who benefit from nationwide injunctions. Absent class members, like nonparties affected by a nationwide injunction, have never appeared before a court, may not even be aware of the lawsuit, and never have to demonstrate that they have a "case" or "controversy." If federal courts have the constitutional authority to award relief to absent class members who never appear and lack standing to sue, it is hard to see why the Constitution bars them from issuing nationwide injunctions that affect people who never appear and lack standing to sue.

Critics of nationwide injunctions point out that granting such relief is in tension with the existence of class actions. Why require plaintiffs to go to the trouble of certifying a class if they can get

⁹⁵ See Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 388 (1988) (discussing the procedural protections afforded absent class members under Rule 23).

⁹⁶ FED. R. CIV. P. 23(b)(2); see also Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34, 35–36 (2011) ("The [absent] class members are bound by a court judgment they may not have known about, much less consented to. This extraordinary situation is justified by the class's homogeneity and cohesiveness."); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1616 (2007) (observing that Rule 23 seeks to protect the due process rights of absent class members, but describing the protection as "paternalistic" because it is focused on discerning whether the class representatives protect the absent class members' rights "enthusiastically and in good faith").

⁹⁷ *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 342 (1980) (Stevens, J., concurring); *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1229 (10th Cir. 2008) ("[T]he filing of a class action, in a classic legal fiction, causes the courts to treat members of the asserted class as if they 'have instituted their own actions, at least so long as they continue to be members of the class . . .'" (quoting *In re WorldCom Sec. Litig.*, 496 F.3d 245, 255 (2d Cir. 2007))).

nationwide injunctive relief without doing so?⁹⁸ The point is valid as a matter of policy, but it does not address the constitutional question. If class actions are constitutionally permissible, then it would seem that Article III does not prevent federal courts from ordering defendants to cease taking action as it affects individuals who would not have had standing to sue.

Although the doctrines discussed suggest that courts can issue injunctive relief that extends beyond the plaintiff, the constitutional question remains unresolved. Lower courts have made inconsistent statements about the appropriate scope of injunctive relief, at times suggesting that injunctive relief should not extend beyond the parties before the court, at other times insisting on it.⁹⁹ The Supreme Court has never directly addressed the issue, which came before the Court most recently in the litigation challenging the Trump administration's travel ban. While the second iteration of the travel ban was on appeal, the Supreme Court narrowed the lower court's injunction but allowed it to remain in place for all "parties similarly situated to" the plaintiffs¹⁰⁰—which strongly suggests that the Court did not consider its equitable powers to be limited to providing relief to the plaintiffs and no one else. The question was raised directly in the litigation over the third iteration of the travel ban, but the Court upheld the ban and the majority chose not to address the scope of injunctive relief.¹⁰¹ In a concurrence, Justice Thomas noted the recent critiques of nationwide injunctions, and stated the Court should address the issue in the future if courts continued to issue them.¹⁰²

B. *The Constitution's Structure*

At its core, the debate over nationwide injunctions is really a debate about the role of the federal courts in the constitutional structure. Are courts primarily intended to resolve disputes between the

⁹⁸ Interestingly, some judges have refused to certify class actions on the ground that a class action is unnecessary because a nationwide injunction would provide equivalent relief. See Daniel Tenny, Note, *There Is Always a Need: The "Necessity Doctrine" and Class Certification Against Government Agencies*, 103 MICH. L. REV. 1018, 1019 n.8 (2005) (citing cases).

⁹⁹ See Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2032–33 (2017) (describing inconsistent pronouncements by various courts of appeals).

¹⁰⁰ *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam). Writing separately, Justice Thomas criticized nationwide injunctions and urged the Court to address the issue in the future if lower courts continued to issue them. *Id.* at 2090.

¹⁰¹ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Justice Thomas again wrote separately in concurrence specifically to address the nationwide scope of the injunction. *Id.* at 2424–29.

¹⁰² See *id.* at 2424–29 (2018) (Thomas, J., concurring) (attacking the legal and historical precedent for nationwide injunctions).

parties, or do they also declare the meaning of federal law for everyone? To what degree are courts intended to serve as a check on the political branches, and should their authority expand in lockstep with that of Congress and the President? The reaction to nationwide injunctions turns, in large part, on these larger questions about the place of the courts in our system of government.

1. *Dispute Resolution Versus Law Declaration*

Federal courts serve a dual function: They exist to resolve disputes between the parties before them and also to declare the meaning of law for everyone. Scholars dispute the degree to which law declaration is merely incidental to dispute resolution, rather than an independent and significant aspect of the judicial power.¹⁰³ The tension between these two models can be seen in a range of doctrines and their exceptions: the prohibition against advisory opinions (dispute resolution), countered by the common practice of giving alternative grounds for decisions (law declaration); the rule against judicial issue creation (dispute resolution), and the many exceptions to that rule (law declaration); the requirement of standing (dispute resolution), with exceptions for associational standing, the “one good plaintiff” rule, and for moot cases that are capable of repetition yet evading judicial review (law declaration). The debate over nationwide injunctions is closely related to these larger questions about the judicial role.

Those opposed to nationwide injunctions tend to see courts as primarily resolvers of individual disputes. These scholars either reject the law declaration model completely or view the courts’ power to declare the meaning of the law as incidental to their dispute resolution role. Bray perceives judges’ increased use of nationwide injunctions as reflecting a shift in their perception of their role vis-à-vis unconstitutional statutes—one that mirrors the shift from dispute resolution to

¹⁰³ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); see also *id.* (“Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”); RICHARD H. FALLON, JR., ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 76–79 (7th ed. 2015) (describing dispute resolution and law declaration models of judicial decisionmaking); Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 496–98 (2009) (promoting a law declaration model); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 665 (2012) (stating that the law declaration model is now dominant). But see Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191 (2011) (promoting a dispute resolution model).

law declaration.¹⁰⁴ He argues that traditionally, judges viewed their rulings not as invalidating unconstitutional laws but as refusing to apply them in the cases before them.¹⁰⁵ In contrast, he notes that today courts speak of having “struck down” a challenged statute or regulation. “[I]nstead of seeing courts as preventing or remedying a specific wrong to a person and only incidentally determining the constitutionality of a law,” he explains, “now many see courts as determining the constitutionality of a law and only incidentally preventing or remedying a specific wrong to a person.”¹⁰⁶ Likewise, another critic of nationwide injunctions explains: “Courts that view their role to be the defense of public values and constitutional principles, rather than simply the adjudication of private disputes, will strongly prefer [nationwide injunctions].”¹⁰⁷

In other words, those scholars who view courts as primarily serving to resolve individual disputes generally reject nationwide injunctions as overreaching, while those who believe that a significant aspect of the judicial function is law declaration generally view such injunctions more favorably. That is not to say that proponents of the dispute resolution model will inevitably reject all nationwide injunctions, or that those in the law declaration camp will put no limits on judicial power to issue such injunctions. But scholars’ underlying assumptions about the judicial role are likely to shape their responses to this form of equitable relief.

2. *Separation of Powers*

Attitudes towards nationwide injunctions also turn on one’s view of the courts as a check on the political branches. If courts are limited to deciding individual cases and lack the power to issue broader injunctions, then they lose a significant tool with which to curb abuses of power by the other branches.

Nationwide injunctions are an essential means by which courts can halt unconstitutional or illegal federal policies that may cause irreparable harm to thousands or millions of people.¹⁰⁸ The United States must obey judgments in individual cases in which it is a defen-

¹⁰⁴ Bray, *supra* note 8, at 451.

¹⁰⁵ *Id.* But see THE FEDERALIST NO. 78 (Alexander Hamilton) (stating that federal courts’ duty is “to declare all acts contrary to the manifest tenor of the Constitution void”).

¹⁰⁶ THE FEDERALIST NO. 78, *supra* note 105.

¹⁰⁷ Morley, *De Facto Class Actions*, *supra* note 8, at 520.

¹⁰⁸ Cf. Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher & Revesz*, 99 YALE L.J. 801, 814–16 (1990) (describing the harm that results from nonacquiescence, in which parties who “are unable to obtain the benefit of circuit court rules . . . may suffer serious harms, such as the termination of subsistence benefits or deportation”); Fallon & Meltzer, *supra*

dant, but it is not bound to follow either district or circuit court precedent in future cases.¹⁰⁹ The executive can, and often does, act strategically to avoid generating either circuit or Supreme Court precedent, such as by choosing not to appeal and mooting cases in which plaintiffs seek to do so.¹¹⁰ The political branches can announce a new federal policy at the eleventh hour, when it is difficult for most of the affected individuals to quickly file suit. Class certification may be impossible or time consuming and difficult to obtain. The executive can be expected to fight class certification by mooting claims by named plaintiffs or challenging whether the named class members are adequate representatives. Absent nationwide injunctions, all of these strategies can be used to avoid judicial decisions affecting more than a few individuals at a time—unless courts have the power to issue nationwide injunctions.

Of course, district court judges can err, mistakenly halting an executive program that a higher court ultimately determines is lawful. But when they do, they will quickly be reversed—albeit after a delay of a few days, or at most weeks, that may temporarily frustrate implementation of federal policy.¹¹¹ When district courts are presented with a legal challenge to an illegal executive policy that goes into effect immediately, however, a nationwide injunction by a lower federal court may be the only realistic way to prevent the political branches from overstepping their bounds. The stakes are high either way, but the trade-off is clear: Eliminating nationwide injunctions takes away the risk that lower courts will mistakenly halt implementation of perfectly legal federal policies, but it also creates the risk that the federal government will deprive thousands or millions of their rights during the months or years it can take before the Supreme Court can resolve the matter.

note 73, at 1778–79 (arguing in favor of “a system of constitutional remedies adequate to keep government generally within the bounds of law”).

¹⁰⁹ See generally Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 *YALE L.J.* 679 (1989) (describing nonacquiescence).

¹¹⁰ Cf. Diller & Morawetz, *supra* note 108, at 820 (noting that the government has considerable control over which cases get before the Supreme Court, allowing it to “shop around for the most favorable set of facts for Supreme Court review”); *id.* at 817 n.66 (noting that when deciding whether to follow circuit court precedent, an “agency is . . . likely to be influenced by the cold calculus that affected parties will lack the resources to appeal”).

¹¹¹ *City of Chicago v. Sessions*, 888 F.3d 272, 290 (7th Cir. 2018) (noting that “the appellate process itself operates to minimize the potential for erroneous or overbroad injunctions” because “[i]n fairly short order, the appellate process can ensure that multiple judges review the determination, thus acting as a check on the possibility of a judge overly-willing to issue nationwide injunctions”).

C. Conclusion

As this discussion of the constitutionality of nationwide injunctions illustrates, the Constitution's text does not bar such injunctions. Indeed, nationwide injunctions are consistent with a host of existing doctrines allowing courts to issue remedies to individuals who have not demonstrated a legally cognizable injury for the purpose of Article III standing. Such injunctions are also not unprecedented historically. They can be viewed as an extension of the bill of peace available in England at the time of the Constitution's framing, which also allowed courts to grant remedies to nonparties. Although nationwide injunctions have been issued more frequently over the last fifty years, that may be the natural response to the expansion of federal law and the recent increase in major policy changes made through unilateral executive action.

The harder and more interesting question is whether nationwide injunctions are consistent with the role of the federal courts in the constitutional structure, and in particular about whether such remedies are essential as a means of ensuring the courts serve as a check on the political branches. Although that question can be framed as one about the constitutional structure and separation of powers, it also shades into the policy debates regarding the costs and benefits of nationwide injunctions—a topic I address below.

III

THE BENEFITS OF NATIONWIDE INJUNCTIONS

Although federal courts have the constitutional authority to issue nationwide injunctions, such broad injunctions are not justified in every case. Nationwide injunctions come with both costs and benefits that courts should consider carefully before issuing them. Such injunctions are an appropriate remedy in three categories of cases: when they are the only method of providing the plaintiff with complete relief; when they are the only means of preventing irreparable injury to individuals similarly situated to plaintiffs; and when they are the only practical remedy because a more limited injunction would be chaotic to administer and would impose significant costs on the courts or others. In cases in which nationwide injunctions can serve one or more of these goals, the benefits of such an injunction may outweigh the costs.

A. *Providing Complete Relief to the Plaintiffs*

The Supreme Court has explained that “injunctive relief should be no more burdensome to the defendant than necessary to provide

complete relief to the plaintiffs.”¹¹² Implicit in that statement is the assumption that injunctions should be broad enough to provide such relief.¹¹³ In some cases, an injunction that enforces rights of individuals who are not parties to the lawsuit is required to achieve that goal. School desegregation cases provide a paradigmatic example. If an African American plaintiff challenges a segregated public school system, granting an injunction requiring the defendant school system to admit the plaintiff only, and no other African American child, would not alleviate the plaintiff’s injury.¹¹⁴ Challenges to policies that cross state lines—such as regulations concerning clean air and water, as well as some immigration policies—also require broad injunctions. In such cases, the “very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated.”¹¹⁵

Recent cases challenging federal immigration laws and policies illustrate the need for nationwide injunctions to relieve the injuries suffered by the plaintiffs in those cases. In the challenge to the second iteration of President Trump’s travel ban, the state of Hawaii claimed that the travel ban injured “its residents, its employers, its educational institutions, and its sovereignty,”¹¹⁶ and in particular prevented it from recruiting students and faculty to attend its University.¹¹⁷ An individual plaintiff, a Muslim imam, was injured because the ban barred a close relative from an affected country from visiting him and his family in Hawaii, and also because he claimed the ban denigrated his religion.¹¹⁸ The Hawaii District Court issued a nationwide injunc-

¹¹² *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

¹¹³ See *Bray*, *supra* note 8, at 466 (noting that the quoted language from *Califano v. Yamasaki* suggests that “when a national injunction is needed for complete relief a court *should* award one, and when it is not needed for complete relief a court *should not* award one”); *Carroll*, *supra* note 99, at 2031 & n.71 (2017) (noting the principle that the remedy “should be commensurate with the scope of the violation”).

¹¹⁴ *Cf.*, e.g., *Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963) (barring defendant from discriminating against all black patrons as a remedy for plaintiffs’ right to desegregated transportation).

¹¹⁵ *Id.*; see also *Prof’l Ass’n of Coll. Educators v. El Paso Cty. Cmty. Coll. Dist.*, 730 F.2d 258, 273–74 (5th Cir. 1984) (“An injunction . . . is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in [a] lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled.”). Professor Michael Morley has referred to cases in which a remedy for the plaintiff requires a remedy for all as “indivisible rights” cases. See *Morley, De Facto Class Actions*, *supra* note 8, at 491–92 (noting that “[i]n certain cases, it would be impossible to fully enforce a plaintiff’s rights without completely invalidating a statute or regulation as it applies to everyone”).

¹¹⁶ *Hawaii v. Trump*, 859 F.3d 741, 760 (9th Cir.), *vacated as moot*, 138 S. Ct. 377 (2017).

¹¹⁷ *Id.* at 765.

¹¹⁸ *Id.* at 760.

tion against enforcement of portions of the travel ban, and the Ninth Circuit affirmed the injunction to the extent it covered entry of nationals from the six designated countries.¹¹⁹ Although the Supreme Court narrowed the injunction to “foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States,” it kept in place an injunction prohibiting the government from applying the executive order’s ban on entry to nonparties.¹²⁰ (The litigation was eventually mooted when the order expired.)¹²¹

The injunction’s broad scope was essential to protect the plaintiffs’ interests. As Hawaii explained, restrictions on the entry of foreign nationals would impede the University’s ability to recruit these noncitizens to be students or faculty and would discourage many from applying for admission or job openings or accepting an offer.¹²² Nor would an injunction specific to Hawaii be feasible in the immigration context, because the United States does not restrict travel among the fifty states by a noncitizen lawfully residing in one of them.¹²³ For sim-

¹¹⁹ *Id.* at 789.

¹²⁰ *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017).

¹²¹ A third iteration of the travel ban was upheld by the U.S. Supreme Court. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018). As discussed previously, however, whether a nationwide injunction is justified cannot turn on the merits. That is, the lower court’s conclusions regarding the legality of the travel ban must be assumed to be correct when determining whether a nationwide injunction was an appropriate remedy.

¹²² *See* Response to Application for Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit at 16, *Trump v. Hawaii*, 138 S. Ct. 377 (2017) (mem.) (No. 16-1540) (describing how the travel ban results in “harm to [Hawaii’s] ability to recruit and retain faculty and students from overseas”); *id.* at 39 (“[A] narrower injunction would not fully redress Plaintiffs’ injuries. The Order denigrates and burdens all Muslims, including Dr. Elshikh and subjects Hawaii’s residents to the ‘universal sting’ of discrimination”); Memorandum in Support of Plaintiff’s Motion for Temporary Restraining Order at 37, *Hawaii v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017) (No. 17-00050 DKW-KSC) (explaining that the travel ban prevents nationals of the designated countries from visiting Hawaii, resulting in lost revenues, and would chill international tourism generally, and would affect the internationally diverse faculty and student body at Hawaii’s educational institutions); Complaint for Declaratory and Injunctive Relief ¶ 72, *Hawaii v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017) (No. 17-00050 DKW-KSC), 2017 WL 466295 (“As a result of the Executive Order, State universities and State agencies cannot accept qualified applicants for open positions—as students, researchers, post-docs, faculty members, or employees—if they are residents of the seven designated countries.”); *id.* ¶ 73 (“Beyond universities and government entities, other employers within the State cannot recruit and/or hire workers from the seven designated countries.”); *id.* ¶ 75 (“The Executive Order is depressing international travel to and tourism in Hawai’i.”); *id.* ¶ 76 (“Even with respect to countries not currently targeted by the Executive Order, there is a likely ‘chilling effect’ on tourism to the United States and to Hawai’i.”).

¹²³ *See Hawaii v. Trump*, 859 F.3d 741, 788–89 (9th Cir. 2017) (concluding that “the Government did not provide a workable framework for narrowing the geographic scope of the injunction,” and that even if such narrowing were desirable, “the Government has not proposed a workable alternative form of the TRO that accounts for the nation’s multiple

ilar reasons, a Maryland district court judge also issued a preliminary injunction enjoining this iteration of the travel ban nationwide.¹²⁴

This same logic supported a Texas District Court's decision to issue a nationwide injunction banning implementation of President Obama's 2014 initiative granting deferred action to undocumented immigrant parents of U.S. citizens and lawful permanent residents. Although twenty-six states filed suit, the district court found that only Texas had standing to bring the lawsuit based on Texas's claim that it would be forced to provide these new recipients of deferred action with state-subsidized driver's licenses. Nonetheless, the Fifth Circuit affirmed the district court's nationwide injunction after Texas argued that recipients of deferred action in other states could travel to Texas, take up residence, and then apply for driver's licenses—thereby causing Texas the same injury.¹²⁵

The obligation to provide complete relief to the plaintiff also justifies nationwide injunctions in cases involving issues that cross state lines—such as pollution of the air or water, tainted food, or defective products. For example, in *Northwest Environmental Advocates v. EPA*,¹²⁶ several regional and national environmental and conservation organizations sued the EPA, challenging under the Clean Water Act a federal regulation exempting ships from the requirement to obtain a permit before discharging ballast water. The groups claimed that the exemption for ballast waters injured their “members’ recreational, aesthetic, scientific, educational, conservational, and economic interests in the natural resources of [the] waters [of the United States],” but they did not seek class certification or identify potentially injured members in every state that would be affected by the regula-

ports of entry and interconnected transit system and that would protect the proprietary interests of the States at issue here while nevertheless applying only within the States’ borders” (quoting *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017)); see also *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (plurality opinion) (observing that “equitable remedies are a special blend of what is necessary, what is fair, and what is workable”).

¹²⁴ *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md.), *aff’d in part, vacated in part*, 857 F.3d 566 (4th Cir.), *vacated as moot*, 138 S. Ct. 353 (2017) (mem.).

¹²⁵ *Texas v. United States*, 787 F.3d 733, 769 (5th Cir. 2015) (refusing to confine the injunction to Texas, as the government requested, because “there is a substantial likelihood that a partial injunction would be ineffective because DAPA beneficiaries would be free to move between states”); see also *Plaintiffs’ Opposition to Defendants’ Motion to Stay Pending Appeal the Court’s February 16, 2015 Order of Preliminary Injunction*, *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015) (No. 15-40238) at 19–20 (arguing that if deferred action were granted to undocumented immigrants in other states, those individuals could then travel to Texas and seek driver’s licenses).

¹²⁶ No. C 03-054760 SI, 2005 WL 756614, at *1 (N.D. Cal. Mar. 30, 2005) (granting plaintiffs’ motion for summary judgment and denying defendants’ motion).

tion.¹²⁷ After finding the regulation violated the Clean Water Act, the Court vacated the regulation containing the exemption under the APA's requirement that a court "hold unlawful and set aside" agency action found to be "not in accordance with law."¹²⁸

Neither the plaintiffs nor the defendant suggested that the court enter a geographically limited injunction, and for good reason. The environmental harm from discharge of ballast waters could not be easily contained geographically, and thus prohibiting ballast water discharge in some regions of the United States but not others would not have alleviated the plaintiffs' injury. As this case illustrates, it would be difficult to craft injunctive relief limited to the plaintiff alone, or to a single geographic region, in cases involving easily dispersed or mobile items, such as cases concerning endangered species or the safety of food or medical devices.¹²⁹

Opponents of nationwide injunctions have argued that the only appropriate method of obtaining such relief is to certify a class action under Federal Rule of Civil Procedure 23(b)(2), which allows a court to grant relief to all plaintiffs within the class.¹³⁰ As discussed in more detail in Section III.B, certifying a class can be both difficult and time consuming, and thus is not always an available remedy when a court is asked to take immediate action to prevent imminent injury. But in any case, why should an individual plaintiff be forced to seek class certification to obtain complete relief for *himself*? Rule 23(b)(2) does not require that plaintiffs who meet those conditions seek class certification just because other, similarly situated individuals will be affected by an injunction intended to relieve the plaintiff's injury.¹³¹

B. *Protecting Nonparties from Irreparable Injury*

Nationwide injunctions are at times the only way to prevent irreparable injury to individuals who cannot easily or quickly join in

¹²⁷ Complaint for Declaratory Judgment and Injunctive Relief at ¶ 10, *Nw. Env'tl. Advocates v. EPA*, No. C 03-05760 SI, 2006 WL 2669042 (N.D. Cal. Sept. 18, 2006), 2003 WL 23795666. The states of New York, Illinois, Michigan, Minnesota, Wisconsin, and Pennsylvania eventually intervened as well. *Nw. Env'tl. Advocates*, 2006 WL 2669042, at *7.

¹²⁸ *Nw. Env'tl. Advocates*, 2006 WL 2669042, at *10-11 (granting plaintiffs' motion for permanent injunctive relief).

¹²⁹ See, e.g., *Am. Lands All. v. Norton*, 2004 WL 3246687, at *3 (D.D.C. June 2, 2004) (imposing nationwide injunction prohibiting the Fish and Wildlife Service from violating the Endangered Species Act's notice-and-comment requirement).

¹³⁰ *Bray*, *supra* note 8, at 475-76 (arguing that when "an injunction protecting only the plaintiff proves too narrow. . . . [T]here is an obvious answer: a class action" and arguing that "broad injunctive relief" should be obtained using a Rule 23(b)(2) class action).

¹³¹ See *Carroll*, *supra* note 99, at 2026 (noting that "[e]ven when a plaintiff's claim would fit neatly into Rule 23(b)(2), the plaintiff can choose to bring it on a nominally individual basis" because Rule 23(b)(2) "does not . . . require a plaintiff to invoke its provisions").

litigation. For example, in cases challenging a new obstacle to casting a ballot issued on the eve of an election, or an exemption allowing industry to begin drilling or logging in a previously protected area, or an immigration policy that will immediately change immigration status, a large group of individuals can face imminent and irreparable injury and yet be incapable of quickly bringing their individual cases before courts.

The first iteration of the travel ban litigation is a salient recent example of the problem. Millions of people were affected by the executive order banning travel into the United States by the nationals of seven predominantly Muslim countries, as well as halting the entry of all refugees.¹³² The order went into effect upon issuance, barring entry even by those who had already obtained visas and were en route to the United States at the time the order was issued.¹³³ A number of lawsuits were filed within hours and days of the executive order's implementation on behalf of individuals, entities, and states affected by the travel ban.¹³⁴

Most of the thousands of individuals affected by the travel ban lacked the capacity to file suit quickly, however. By definition, all were outside of the United States, all were noncitizens, and most did not have access to lawyers familiar with the U.S. immigration system. In any case, the judicial system would not have had the capacity to provide thousands of plaintiffs with a quick resolution of their claims for relief on an individual, case-by-case basis. Requiring all of the affected noncitizens to remain outside the United States unless and until they are able to file individual lawsuits and obtain a judicial remedy would delay their entry into the United States for months or years, often causing them irreparable injury.¹³⁵

Nor would a class action necessarily have provided immediate relief to those individuals. A class will only be certified if it satisfies the numerosity, commonality, and typicality requirements of Federal Rule of Civil Procedure 23(a), and if the named parties can prove that

¹³² See Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (revoking and replacing the original travel ban).

¹³³ Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

¹³⁴ McGraw, *supra* note 31.

¹³⁵ See, e.g., Raphael Minder, *For Syrian Girl in Need of Medical Care, Trump's Travel Ban Adds to a Nomadic Tragedy*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/2017/02/01/world/europe/trump-travel-ban-syria-refugees.html> (describing the effect of the travel ban on a Syrian family seeking medical care for their child); see also *It's Working Out Very Nicely*, THIS AMERICAN LIFE (Feb. 3, 2017), <https://www.thisamericanlife.org/609/its-working-out-very-nicely> (describing the hardships suffered by those affected by the travel ban).

they will adequately represent the class.¹³⁶ Demonstrating these prerequisites is difficult and time consuming and has been getting harder as a result of recent court decisions and federal legislation.¹³⁷ Courts have heightened the evidentiary standard for class certification, requiring hearings and sometimes significant amounts of evidence on the merits of the case before certifying the class.¹³⁸ In recent years,

¹³⁶ See FED. R. CIV. P. 23(a); see also 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:28 (5th ed. 2012) (explaining the purposes behind each of the four requirements under Rule 23(a)); *Moss v. U.S. Secret Serv.*, No. 1:06-cv-3045-CL, 2015 WL 5705126, at *3 (D. Or. Sept. 28, 2015) (“The purpose of the typicality requirement is to ensure that the interests of the named parties are aligned with the interests of the class so that the named parties’ pursuit of their own claims will benefit the class.”).

¹³⁷ See, e.g., *Jennings v. Rodriguez*, 138 S. Ct. 830, 851–52 (2018) (questioning propriety of class certification under Federal Rule of Civil Procedure 23(b)(2) for claims brought under the Due Process Clause); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (restricting class certification under Federal Rule of Civil Procedure 23(b)(2) to only those cases where a “single injunction or declaratory judgment” will provide relief to each class member); see also Carroll, *supra* note 99, at 2034 (“Over the past two decades, courts and lawmakers have created various obstacles that make it more difficult for plaintiffs to achieve class certification, including certification under Rule 23(b)(2).”); John C. Coffee, Jr. & Alexandra D. Lahav, *Battered but Unbowed: A 2016 Update on Class Actions*, in 20TH ANN. NAT’L INST. ON CLASS ACTIONS D1, D-21 (2016) (listing several barriers to class certification under Rule 23(b) and noting the costs of delay for litigants); Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 594–95, 615 (2012) (describing the “notable decline” in certification of civil rights class actions from 2001 to 2007 and suggesting it may be due to the Supreme Court precedent “defin[ing] a range of constitutional rights to require individualized inquiries, which may then run afoul of the commonality requirement”); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 729 (2013) (arguing that “in recent years courts have cut back sharply on plaintiffs’ ability to bring class action lawsuits”); David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 792 (2016) (describing how *Wal-Mart* “raises the bar for class certification,” including under Rule 23(b)(2)); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 442–43 (2013) (describing recent litigation over aspects of class certification).

¹³⁸ In antitrust, environmental, and civil rights cases, defendants have successfully challenged certification on the ground that the named representative’s claims are not typical of the class’s claims. See, e.g., *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 158–59 (1982) (holding that the named plaintiffs’ claims of discrimination in the promotion process were not typical of the claims of class members discriminated against in hiring); *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 489–90 (N.D. Cal. 2008) (finding lack of typicality in a price-fixing claim because the class representatives were individual consumers and most of the class were large wholesale purchasers). Courts will also refuse to certify a class if the defendants will raise unique defenses to the named plaintiffs’ claims that will not apply to all or most other class members. See 1 RUBENSTEIN, *supra* note 136, § 3:45 (listing examples of unique defenses and noting that a unique defense will defeat typicality if it is likely to be a “major focus” of the litigation). In addition, requiring plaintiffs in such cases to first obtain class certification might preclude individual members of that class from pursuing more individualized remedies, such as money damages, for the same harm. See Carroll, *supra* note 99, at 2029–30 & n.67 (noting differences in litigation strategies between class and non-class litigants given the risk that absent class members could be precluded from bringing omitted claims); Edward F. Sherman, “Abandoned Claims” in *Class Actions: Implications for Preclusion and Adequacy*

courts have started to deny class certification if they think there has been a flaw in class definition. These courts typically deny certification without first allowing the plaintiffs to amend that definition in response to the court's concerns.¹³⁹ Under Federal Rule of Civil Procedure 23(f), defendants can seek interlocutory review of a court's decision to certify a class, adding further delay and expense to the certification process. Noting these difficulties, one commentator has described the class certification process as a "drawn-out procedural bog," which comes with significant expense and delay for the would-be class members.¹⁴⁰

The travel ban litigation illustrates the difficulty of obtaining class certification quickly. The ban affected individuals in many different situations, and the strength of their claimed due process rights to enter the United States differed: Some were refugees; some were visa holders with close connections to the United States; some had lived in the United States for years but had recently left; others were seeking to come to the United States for the first time.¹⁴¹ Their injuries varied as well: Some were harmed economically by not being able to enter the United States; others were separated from their families or were at risk of having their education or medical treatments disrupted by the ban.¹⁴² Accordingly, it is likely the defendant would have challenged certification on the ground that the named representatives' claims were not common or typical of the class members they sought to represent,¹⁴³ and it is not clear that courts could have certified the class within hours or days—the time frame necessary to avoid irreparable injury to the tens of thousands of refugees and visa holders attempting to enter the United States—if they were inclined to certify at all.

of Counsel, 79 *GEO. WASH. L. REV.* 483, 483–85 (2011) (describing how classwide equitable claims can preclude members of the class from bringing claims for individual damages).

¹³⁹ See Klonoff, *supra* note 137, at 761–65 (describing the denial of certification based on class definitions as a "judicial overreaction").

¹⁴⁰ Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 *SUP. CT. REV.* 183, 208.

¹⁴¹ See Exec. Order No. 13,769, 82 *Fed. Reg.* 8977 (Jan. 27, 2017).

¹⁴² See *Trump Executive Order: Victims of US Entry Ban Tell Their Stories*, BBC NEWS (Jan. 30, 2017), <http://www.bbc.com/news/world-us-canada-38785028> (describing the travel ban's effect on refugees and immigrants from the banned countries).

¹⁴³ See *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980) ("The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiffs' claims."); *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466–68 (4th Cir. 2006) (concluding that plaintiffs' antitrust claims against Microsoft were not typical of those class members who were large institutional customers and who had negotiated independent contracts with Microsoft).

Immigration is just one area in which a change in government policy might injure thousands or millions of individuals who lack the ability to file suit quickly themselves. New restrictions on state voting laws enacted on the eve of an election, or an exemption allowing emission of air or water pollutants, can also have immediate, harmful effects on thousands of people, most of whom will not be able to file suit.¹⁴⁴ Typically, the U.S. Supreme Court will take months or years to address the issue, and its ruling would therefore come years too late for those who had lost the right to vote, or who had suffered the ill effects of breathing polluted air or drinking contaminated water. Furthermore, the executive could act strategically to block a case from reaching the Supreme Court—for example, by mooting individual claims or by choosing not to appeal losses in the district or appellate courts—making it impossible for most to obtain relief as a result of decisions by a federal appellate court.¹⁴⁵ In short, nationwide injunctions provide a mechanism for courts to protect all those who could be harmed by a federal policy when only a few have the ability to quickly bring their case before a court.

C. *Administrability*

Nationwide injunctions are sometimes the only practicable method of providing relief and can avoid the cost and confusion of piecemeal injunctions. The Supreme Court has explained that “equitable remedies are a special blend of what is necessary, what is fair, and what is *workable*.”¹⁴⁶ Under the four-part test required for both preliminary and permanent injunctions, courts are required to take into account an injunction’s effect on the “public interest”—that is, its effect on third parties, including those required to administer and

¹⁴⁴ See, e.g., Emergency Motion for a Stay, or in the Alternative, Summary Vacatur at 3, 9–10, *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) (No. 17-1145) (seeking an emergency judicial stay of the Environmental Protection Agency (EPA)’s administrative stay of provisions of its New Source Performance Standards for emissions of methane and other air pollutants from the oil and gas industry, arguing that “[e]very day that the administrative stay is in place irreparably harms Petitioners and their members, as well as all Americans similarly situated”); Erik Eckholm & Richard Fausset, *As New Rules Take Effect, Voters Report Problems in Some States*, N.Y. TIMES (Nov. 4, 2014), <https://www.nytimes.com/2014/11/05/us/election-tests-new-rules-on-voting.html> (describing lawsuits filed over last minute changes in state voting rules).

¹⁴⁵ See *supra* note 104 and accompanying text.

¹⁴⁶ *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (plurality opinion) (emphasis added); see also *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam) (reaffirming that courts must balance “what is necessary, what is fair, and what is workable” in assessing equitable remedies).

obey the law.¹⁴⁷ Accordingly, in some cases nationwide injunctions can be justified on the ground that they are the least disruptive remedy for the third parties affected by them. As Judge Gregg Costa put it, “[f]or regulatory schemes that depend on nationwide application for effective implementation, a patchwork of traditional, parties-only injunctions may be more disruptive than even an injunction that halts enforcement in full.”¹⁴⁸

Again, the recent litigation challenging executive immigration policies illustrates the point. Hawaii sought to enjoin President Trump’s travel ban on the ground that prohibiting entry into the United States by foreign nationals would harm its economy, university, and individuals living within the state. As already explained, a geographically limited injunction would not have alleviated Hawaii’s injuries. But in any case, a geographically limited injunction would have been both ineffective and extraordinarily confusing to the thousands of people required to implement and obey it.

We know this for a fact, because a district court in Massachusetts issued just such a geographically limited injunction a few days after the travel ban went into effect. That court ordered Customs and Border Protection officials to “notify airlines that have flights arriving at Logan Airport . . . that individuals on these flights will not be detained or returned based solely on the basis of the Executive Order.”¹⁴⁹ The order was confusing not only for the federal immigration officials required to follow it, but also for the foreign officials and airline personnel who determine who is permitted to board airplanes headed to the United States.¹⁵⁰ In the confusion that followed, some foreign nationals were permitted to enter the United States through Boston’s Logan Airport, but many others were barred from doing so.

¹⁴⁷ See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (explaining that district courts must consider four factors before issuing preliminary injunctions: 1) whether the party seeking the preliminary injunction is likely to succeed on the merits; 2) whether the party seeking the preliminary injunction is likely to suffer irreparable harm in the absence of such relief; 3) whether the balance of equities favors the party seeking a preliminary injunction; and 4) whether the preliminary injunction is in the public interest).

¹⁴⁸ Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), <https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem/>; see also *City of Chicago v. Sessions*, 888 F.3d 272, 292–93 (7th Cir. 2018) (affirming the district court’s nationwide injunction, in part on the grounds that the “public interest would be ill-served here by requiring simultaneous litigation of this narrow question of law in countless jurisdictions”).

¹⁴⁹ *Tootkaboni v. Trump*, No. 17-cv-10154, 2017 WL 386550, at *1 (D. Mass. Jan. 29, 2017).

¹⁵⁰ See Maria Sacchetti, *Confusion Rules After Court Order Temporarily Halts Trump Immigration Ban*, BOS. GLOBE (Jan. 30, 2017), <https://www.bostonglobe.com/metro/2017/01/29/confusion-rules-after-court-order-temporarily-halts-trump-immigration-ban/1ZkPhKuY7JON24jfkOLU8O/story.html>.

And some immigrants switched their flights to fly into Logan Airport and then traveled by train, bus, car, or domestic flight to their original destination—rendering the geographic limit on the injunction pointless.¹⁵¹

Another example comes from the environmental context. In 2015, the Sixth Circuit issued a nationwide stay of a final rule adopted by the U.S. Army Corps of Engineers and the EPA broadly defining “waters of the United States.”¹⁵² Eighteen states had challenged the Rule, arguing that it violated the Clean Water Act by expanding the agencies’ jurisdiction and was promulgated in violation of the APA.¹⁵³ The Sixth Circuit noted that district courts around the country had already issued disparate rulings on this question, and that the rule had been preliminarily enjoined in thirteen states.¹⁵⁴ That court then ordered the agencies to stay implementation of the rule nationwide because these patchwork injunctions would create “confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing.”¹⁵⁵ In short, the court concluded that piecemeal injunctions were unworkable and opted for a more easily administrable nationwide injunction.

The APA appears to authorize nationwide injunctions in cases challenging federal agency action. Under 5 U.S.C. § 706(2), courts are required to “hold unlawful and set aside” agency action it finds to be invalid—language that suggests that when a court finds a rule was promulgated in violation of the procedures laid out in the APA, or is contrary to an agency’s governing statute, then the rule can no longer apply to *anyone*. Indeed, that is how the D.C. Circuit has long interpreted it.¹⁵⁶

Some critics of nationwide injunctions have argued that if chaos and confusion follows from an injunction that is limited in scope, then the executive can choose voluntarily to cease implementing its federal policy nationwide.¹⁵⁷ But it is not clear why the executive branch alone gets to make this choice and not a court, especially when that

¹⁵¹ *Id.*

¹⁵² *In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015), *vacated on other grounds sub nom. In re Dep’t of Def.*, 713 F. App’x 489, 490 (6th Cir. 2018).

¹⁵³ *Id.* at 805–06.

¹⁵⁴ *Id.* at 808.

¹⁵⁵ *Id.*

¹⁵⁶ *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) (“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.”); *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1408–10 (D.C. Cir. 1998).

¹⁵⁷ *See Bray*, *supra* note 8, at 476 (arguing that “[i]f the agency wants to respond to a narrower injunction by adopting the district court’s resolution as a rule for the nation, it can do so,” but should not be forced to do so by a court issuing a nationwide injunction).

court is required to take into account the effect of any proposed injunction on the “public interest.”¹⁵⁸

Finally, a related benefit of nationwide injunctions is that they avoid duplicative litigation that would needlessly sap the resources of litigants and courts. The Seventh Circuit affirmed a district court’s nationwide injunction of the Trump administration’s policy of withholding funds from jurisdictions that limited their cooperation in immigration enforcement after concluding that the “public interest would be ill-served” by duplicative litigation in multiple jurisdictions.¹⁵⁹ Judge Costa made a similar point when he asked whether we would want to go back to a system in which “1600 injunctions had to issue against a single provision of a New Deal statute” to put a stop to it nationwide.¹⁶⁰ In at least some cases, efficiency and judicial economy support a nationwide injunction over dozens (or more) lawsuits challenging the same practice.¹⁶¹

D. Insufficient Grounds for Nationwide Injunctions

As just explained, nationwide injunctions are at times required to provide complete relief to plaintiffs, to protect similarly-situated non-parties, and to avoid the chaos and confusion that comes from a patchwork of injunctions. In such cases, nationwide injunctions may be appropriate, at times even essential. But nationwide injunctions are not justified in every case challenging a national policy—a fact that some courts have failed to appreciate.¹⁶²

For example, a district court judge in Texas issued a nationwide injunction barring the Obama administration’s transgender bathroom policy on the ground that a “nationwide injunction is necessary

¹⁵⁸ See *supra* note 147 and accompanying text. Moreover, if the Executive can and should voluntarily cease implementing a federal policy nationwide whenever a piecemeal injunction would be disruptive, then its decision would come with all the same costs that these critics have flagged as accompanying nationwide injunctions: The parties could forum shop for a favorable district court judge, that judge’s ruling would then lead the government to cease implementing the policy nationwide, and the Supreme Court would be pressured to take the case quickly to resolve the situation. See *infra* Part IV. The only difference would be that the Executive, rather than a court, chose to broaden the scope of the injunction—and again, it is not clear why the executive alone should make that choice.

¹⁵⁹ *City of Chicago v. Sessions*, 888 F.3d 272, 292 (7th Cir. 2018).

¹⁶⁰ Costa, *supra* note 148.

¹⁶¹ Cf. Diller & Morawetz, *supra* note 108, at 817 (criticizing the federal government’s policy of nonacquiescence in part because it significantly increases the federal courts’ workload).

¹⁶² See *Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016) (issuing a nationwide injunction against the Obama administration transgender policy because “the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class” (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979))).

because the alleged violation extends nationwide.”¹⁶³ A district court in Illinois gave the same reason to support of its nationwide injunction barring implementation of the Trump administration’s policy of restricting funding to sanctuary cities.¹⁶⁴ Similarly, a number of courts have argued that nationwide injunctions are essential to protect the uniform application of federal law.¹⁶⁵ In most contexts, however, neither the fact that a federal law or policy extends nationwide (as most do), nor uniformity provides an adequate rationale for nationwide injunctions.

To the contrary, our federal judicial system is intentionally designed to allow lower courts to reach different conclusions about the meaning of federal law—conflicts in interpretation that remain unless and until the Supreme Court chooses to resolve the split. Plaintiffs usually have a choice of state or federal court when asserting a federal claim, and often can select among various federal district courts as well. District court decisions have no precedential value, and federal courts of appeals are free to diverge from the decisions of other circuits. Occasionally Congress chooses to promote uniformity over percolation by requiring that certain categories of cases be brought in a single forum, but those areas of law are the exception. For the most part, Congress has structured the federal judiciary to prioritize percolation over the uniform, nationwide interpretation of federal law. Accordingly, federal courts cannot justify nationwide

¹⁶³ *Texas v. United States*, No. 7:16-cv-00054-O, 2016 WL 7852331, at *4 (N.D. Tex. Oct. 18, 2016).

¹⁶⁴ *City of Chicago v. Sessions*, No. 17-C-5720, 2017 WL 4572208, at *2 (N.D. Ill. Oct. 13, 2017) (defending a nationwide injunction on the ground that the case was a “facial challenge to a federal statute” and that “the Attorney General’s authority to impose [funding] conditions on the City [of Chicago] will not differ from his authority to do so elsewhere”). A panel of the Seventh Circuit later defended the scope of the injunction on different grounds, and the Seventh Circuit then granted a petition for rehearing *en banc* to determine the appropriate scope of the injunction. Briefing and oral argument in that case is scheduled for the fall of 2018.

¹⁶⁵ *Hawaii v. Trump*, 859 F.3d 741, 787–88 (9th Cir. 2017) (providing that “The Congress shall have Power . . . [t]o establish an *uniform* Rule of Naturalization” (quoting U.S. CONST. art. I, § 8, cl. 4) and supporting the use of nationwide injunctions in the immigration context because uniform enforcement of immigration law is particularly important), *vacated as moot*, *Trump v. Hawaii*, 138 S. Ct. 377 (2017) (mem.); *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015) (issuing a nationwide injunction of President Obama’s deferred action program because “the Constitution requires ‘a *uniform* Rule of Naturalization’; Congress has instructed that ‘the immigration laws of the United States should be enforced vigorously and uniformly’; and the Supreme Court has described immigration policy as ‘a comprehensive and *unified* system’” (first quoting U.S. CONST. art. I, § 8, cl. 4; then quoting Immigration and Reform Control Act of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384) (emphasis added by the Fifth Circuit) (footnotes omitted)).

injunctions on the ground that it is essential to achieve immediate uniformity in the interpretation of federal law.

A few courts have suggested that uniformity is particularly important in the context of immigration law, citing Article I, Section 8 of the Constitution, which grants to Congress the power to “establish an uniform Rule of Naturalization.”¹⁶⁶ But the constitutional mandate that Congress regulate naturalization does not suggest that federal judges have no room to disagree with each other on the meaning of immigration law, or that the first court that addresses the meaning of a federal immigration statute has the power to control other courts’ resolutions of that question. To be sure, the *nature* of immigration itself may require nationwide injunctions in some cases. As explained above, nationwide injunctions may, at times, be needed in cases challenging federal immigration policies and practices to provide complete relief to the plaintiffs, protect third parties, avoid duplicative litigation, and for ease of administration. But uniformity in the interpretation of immigration law is not always more important than other values, such as allowing the law to develop among the lower courts. Moreover, nationwide injunctions do not necessarily ensure uniform interpretation of federal law. A federal district court’s nationwide injunction does not prevent other courts from weighing in on the same question and reaching a different result or reaching the same result based on a different rationale.

Finally, some have argued that nationwide injunctions are needed to promote the rule of law.¹⁶⁷ These commentators conclude that if a federal program or policy has been held unlawful, it would violate rule of law principles to continue to apply it to those who were not parties to the litigation. Once again, however, our judicial system is designed to permit courts to reach different results in similar cases, with the backstop of Supreme Court review to eventually reconcile conflicts. Until the Supreme Court has spoken, it does not violate the rule of law for one court to hold that a federal program is lawful even as another court concludes that it is not.¹⁶⁸

¹⁶⁶ U.S. CONST. art. I, § 8, cl. 4.

¹⁶⁷ See, e.g., *Costa*, *supra* note 148 (“[F]or challenges to policies that are plainly unlawful, the rule of law would favor speedy and uniform judicial action.”).

¹⁶⁸ See, e.g., *Mast, Foos, & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (1900) (“Comity is not a rule of law, but one of practice, convenience, and expediency. . . . [Otherwise,] the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades; but it does not command.”); *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979) (“Although we are not bound by another circuit’s decision . . . a sister circuit’s reasoned decision deserves great weight and precedential value. As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned

IV THE COSTS OF NATIONWIDE INJUNCTIONS

In addition to the benefits described in Part III, nationwide injunctions also come with significant costs—costs that district courts have too often failed to consider. Nationwide injunctions promote forum shopping, politicize the judiciary, allow a single district court judge to control policy for the nation, prevent the percolation of federal law, can lead to conflicting injunctions, and put pressure on the Supreme Court to quickly resolve cases that are often in an embryonic stage with a poorly developed evidentiary record. These are costs that should be taken into account by courts before issuing such injunctions.

Abolishing nationwide injunctions is both an over- and under-inclusive reaction to these problems, however. These problems are not caused by nationwide injunctions alone, but are also the product of recently-expanded state standing doctrines, statutes giving a broad choice of venue, and the doctrines making it difficult to certify class actions. Doing away with nationwide injunctions will not solve these problems, and in any case there are more effective ways to address them short of eliminating nationwide injunctions in all cases.

A. *Forum Shopping*

Critics of nationwide injunctions argue that they encourage litigants to seek out the district court judge most likely to stop a federal policy in its tracks. Litigants who do not succeed can always file a new case in another district hoping for a better result, enabling them to “[s]hop ‘til the statute drops.”¹⁶⁹ In addition, the federal judiciary’s reputation as impartial and nonpartisan suffers when the public watches judges in the “red state” of Texas halt Obama’s policies, and judges in the “blue state” of Hawaii enjoin Trump’s.¹⁷⁰

Examples of forum shopping are easy to find. Texas and the twenty-five states who sued to enjoin President Obama’s initiative to grant deferred action to undocumented immigrants appeared to have strategically filed their case in the Brownsville Division of the

analysis will allow, thus avoiding unnecessary burdens on the Supreme Court docket.”); *see also* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1578 (2008) (“The courts of appeals are generally hesitant to depart from precedent set in other jurisdictions, despite being under no obligation to adhere to decisions by sister circuits.”).

¹⁶⁹ Bray, *supra* note 8, at 460; *see also* Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J. F. 242, 242 (2017) (critiquing nationwide injunctions because they encourage forum shopping); Wasserman, *supra* note 8 (same).

¹⁷⁰ *See* Costa, *supra* note 148 (“Most troubling, the forum shopping [nationwide injunction] incentivizes on issues of substantial public importance feeds the growing perception that the courts are politicized.”).

Southern District of Texas, where they were nearly certain to have the case assigned to Judge Andrew Hanen, who was already on record as opposing Obama's immigration policies.¹⁷¹ The same forum shopping strategy was used by the states challenging the Department of Education's transgender bathroom policy in public schools.¹⁷² And it was no coincidence that the travel ban litigation was filed in "blue states" such as Hawaii, Washington, and Maryland, where the judges were more likely to rule in the plaintiff's favor.

Forum shopping, and the politicization of the judiciary that inevitably accompanies it, is a valid concern, but abolishing nationwide injunctions is both an over- and under-inclusive response to that problem. Forum shopping is not limited to cases involving nationwide injunctions. Under federal law, litigants have the option to file most cases arising under federal law in either state or federal court and can also choose among different federal districts.¹⁷³ As a result, litigants quite reasonably take advantage of the fact that they have a choice of forum to search out the judge that they think will be friendly to their legal claims. Indeed, many consider choice of forum among federal and state courts to be a feature of the American judicial system, not a bug.¹⁷⁴

If forum shopping generally is a problem, Congress could amend venue statutes to restrict the number of courts in which a case could be filed without eliminating nationwide injunctions. If forum shopping is particularly problematic in the context of nationwide injunctions because it allows an outlier judge to halt a federal policy nationwide, Congress could channel cases seeking nationwide injunctions into a single forum. Indeed, pending legislation proposes doing just that. The Assigning Proper Placement of Executive Action Lawsuits Act (APPEAL Act) would give the federal district courts in Washington, D.C. exclusive original jurisdiction over all lawsuits challenging an executive order, action, or memorandum.¹⁷⁵ Other options to prevent

¹⁷¹ Andrew Kent, *Nationwide Injunctions and the Lower Federal Courts*, *LAWFARE* (Feb. 3, 2017), <https://www.lawfareblog.com/nationwide-injunctions-and-lower-federal-courts/>.

¹⁷² *See id.*

¹⁷³ *See* 28 U.S.C. § 1391 (2012) (providing a choice of venue for civil litigants); *Tafflin v. Levitt*, 493 U.S. 455, 458–59 (1990) (describing the presumption of concurrent state court jurisdiction over federal causes of action); *THE FEDERALIST* NO. 82 (Alexander Hamilton) (noting that state courts have concurrent jurisdiction over federal claims unless Congress says otherwise).

¹⁷⁴ *See generally* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 *WM. & MARY L. REV.* 639 (1981) (describing the benefits of jurisdictional choice).

¹⁷⁵ Assigning Proper Placement of Executive Action Lawsuits Act (APPEAL Act), H.R. 2660, 115th Cong. (2017).

forum shopping include assigning a judge by lottery¹⁷⁶ and requiring that nationwide injunctions be issued only by three-judge district courts with the right to take an immediate appeal to the U.S. Supreme Court.¹⁷⁷

B. *The Risk of Conflicting Injunctions*

Nationwide injunctions also raise the risk of conflicting injunctions, which could result in a defendant being held in contempt of court no matter which injunction the defendant tried to obey. Conflicting injunctions have yet to pose significant problems, however, despite over fifty years of experience with nationwide injunctions.¹⁷⁸ Conflicting injunctions are rare, in part because the comity doctrine requires judges to avoid issuing such injunctions when possible, and in part because courts can and do alter their injunctions when they learn of such conflicts.¹⁷⁹ Indeed, in the litigation over DACA, the government has asked the Texas district court to avoid issuing a conflicting injunction, noting that in “similar situations, courts have typically held that the appropriate course is for a district court to refrain from issuing a conflicting injunction.” On the infrequent occasion when such a conflict arises, the usual result is that the judges back down, staying their injunctions or narrowing them to eliminate the conflict.¹⁸⁰ As these courts’ responses suggest, principles of due process would protect a defendant from being held in contempt for disobeying one court’s injunction while attempting to obey another’s. And in the

¹⁷⁶ Forum shopping was also perceived as problematic in the analogous context of challenges to administrative action, in which parties engaged in an intense “race to the courthouse” to obtain a favorable forum. Congress responded by enacting a statute requiring that the reviewing circuit be determined by lottery from among the circuits in which petitions for review had been filed within ten days of the order being challenged. See Pub. L. No. 100-236, 101 Stat. 1731 (1988) (amending 28 U.S.C. § 2112(a) (1982)); see also 100 CONG. REC. S11,105 (daily ed. May 5, 1987) (statement of Sen. Grassley) (explaining that the lottery system would prevent the “race[s] to the courthouse” that occur when lawyers compete to file their case in a sympathetic forum).

¹⁷⁷ See Costa, *supra* note 148 (proposing this solution).

¹⁷⁸ See Amdur & Hausman, *supra* note 11, at 52 (describing the risk of conflicting injunctions as “vanishingly low”).

¹⁷⁹ The principle of comity requires that courts of “coordinate jurisdiction and equal rank . . . exercise care to avoid interference with each other’s affairs.” *W. Gulf Mar. Ass’n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728 (5th Cir. 1985) (citing *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952)); see also *United States v. AMC Entm’t, Inc.*, 549 F.3d 760, 771–73 (9th Cir. 2008) (describing its policy of limiting its injunctions to its geographic jurisdiction in cases in which other circuits have issued conflicting rulings).

¹⁸⁰ See, e.g., *Feller v. Brock*, 802 F.2d 722, 727–28 (4th Cir. 1986) (“Prudence requires that whenever possible, coordinate courts should avoid issuing conflicting orders.”); see also *Bray*, *supra* note 8, at 463 (noting that “[t]ypically” one of the judges who issued conflicting injunctions “backs down, narrowing or staying one of the issued injunctions, or else an appellate court reverses one of them”).

rare situation in which a district court refused to back down, the problem could be addressed by the Supreme Court in fairly short order. In short, abolishing nationwide injunctions out of fear of conflicting injunctions is a bit like using a steak knife to remove a splinter. The risk of such conflicts is minor and not worth the high cost of eliminating nationwide injunctions in cases where they are essential to provide complete relief, avoid irreparable injury to similarly situated nonparties, or craft a manageable injunction.

In any case, eliminating nationwide injunctions would not eliminate the risk of conflicting injunctions, which are a natural byproduct of a judicial system that permits courts with overlapping jurisdiction to reach different results.¹⁸¹ For example, in 2015 a federal district court in Alabama declared that same sex marriage was protected under the U.S. Constitution's Equal Protection Clause even as Alabama Chief Justice Roy Moore, acting in his role as chief administrative officer of the Alabama state courts, prohibited probate judges from granting marriage licenses to same sex couples.¹⁸² Probate judges in Alabama were put in a difficult position of choosing between the conflicting commands of two different judicial systems—a problem that persisted until the Supreme Court resolved the issue. These sorts of conflicting rulings are the cost we pay for allowing lower courts to reach divergent conclusions about the meaning of federal law—a cost that many think is worthwhile because it also allows for the percolation of these issues among different jurists before final resolution by the Supreme Court.¹⁸³

C. Impedes Percolation of Legal Issues

Nationwide injunctions can also stymie the development of the law and the percolation of legal issues in the lower courts. The Supreme Court prefers to resolve questions about the meaning and constitutionality of federal law after multiple lower courts have had a chance to weigh in on the questions in different factual contexts.¹⁸⁴ If

¹⁸¹ See Bray, *supra* note 8, at 473–74 (noting that our legal system permits lower courts to reach different results on the same legal question).

¹⁸² See Howard M. Wasserman, *Crazy in Alabama: Judicial Process and the Last Stand Against Marriage Equality in the Land of George Wallace*, 110 NW. L. REV. ONLINE 1, 3–5 (2015).

¹⁸³ See Bray, *supra* note 8, at 473–74 (explaining how the structure of the federal judicial system intentionally allows courts to reach divergent decisions on the meaning of federal law); Frost, *supra* note 168, at 1567 (same); Morley, *Nationwide Injunctions*, *supra* note 8, at 654 (discussing the benefits of percolation).

¹⁸⁴ See *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (describing the benefits of percolation in the context of certifying nationwide class actions); see also *United States v. Mendoza*, 464 U.S. 154, 160, 162–63 (1984) (explaining that refusing to apply nonmutual

the first district court to address the constitutionality of a federal law issues a nationwide preliminary injunction barring that law from going into effect, it can force the Supreme Court to address the question without the benefit of additional viewpoints from other lower federal courts and without a fully developed factual record.¹⁸⁵

In *Califano v. Yamasaki*, the Supreme Court addressed this same problem in the context of a nationwide class action under Federal Rule of Civil Procedure 23(b)(2).¹⁸⁶ Although the Court recognized that nationwide class actions can hinder the percolation of federal law, it “decline[d] to adopt the extreme position that such a class may never be certified.”¹⁸⁷ Instead, it encouraged district courts to “take care to ensure that nationwide relief is indeed appropriate in the case before it” and that “certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts” before taking action.¹⁸⁸ In other words, *Califano* concluded that percolation does not always outweigh the benefits of providing nationwide relief.

In any case, a nationwide injunction issued by one court need not always stop other courts from weighing in on the matter.¹⁸⁹ For example, although district courts issued nationwide injunctions against the travel ban, both the Fourth and Ninth Circuit reviewed those decisions and issued their own opinions in those cases.¹⁹⁰ Likewise, although nationwide injunctions have barred the executive from with-

offensive collateral estoppel to the government would “better allow thorough development of legal doctrine by allowing litigation in multiple forums”).

¹⁸⁵ See, e.g., *Va. Soc’y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (noting that nationwide injunctions can “deprive the Supreme Court of the benefit of decisions from several courts of appeals”), *overruled on other grounds by* *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 550 n.2 (4th Cir. 2012).

¹⁸⁶ 442 U.S. at 701–02.

¹⁸⁷ *Id.* at 702–03.

¹⁸⁸ *Id.* at 702.

¹⁸⁹ See *Biggs v. Quicken Loans, Inc.*, 990 F. Supp. 2d 780, 785–86 (E.D. Mich. 2014) (“The proposition that a district court may issue injunctions that bind parties outside its geographic jurisdiction is distinct from whether *this* Court *must*, as a matter of binding order or precedent, adopt the D.C. Circuit’s conclusion that [an agency action] is void *ab initio*.”).

¹⁹⁰ See *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1160–61 (D. Haw. 2017), *aff’d in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *rev’d*, 138 S. Ct. 2392 (2018); *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 633 (D. Md. 2017); *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md.), *aff’d in part, vacated in part*, 857 F.3d 554 (4th Cir.), *vacated as moot*, 138 S. Ct. 353 (2017) (mem.); *Hawaii v. Trump*, 245 F. Supp. 3d 1227, 1237–39 (D. Haw.), *aff’d in part, vacated in part*, 859 F.3d 741 (9th Cir.), *vacated as moot*, 138 S. Ct. 377 (2017) (mem.); *Washington v. Trump*, No. C17-0141, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017), *stay pending appeal denied* by 691 F. App’x 834 (9th Cir. 2017) and 853 F.3d 933 (9th Cir. 2017).

holding funds from so-called “sanctuary cities,” different federal courts continue to address the issue.¹⁹¹

In some cases, however, a nationwide injunction by one court could put an end to all litigation. For example, if a court enjoins an agency from commencing enforcement actions, and such actions are the only way in which a legal issue gets before a court, then no other court will be able to weigh in. Accordingly, courts should consider whether a broad nationwide injunction would prevent the law from percolating in the other circuits, and that cost should inform a court’s decision whether to enter such an injunction.

D. Infringes on the Rights of Nonparties

Some opponents of nationwide injunctions argue that they infringe on the due process rights of nonparties by adjudicating their legal claims without their consent. For example, Professor Michael Morley argues that many election law cases involve conflicting constitutional rights, such as the affirmative right to cast a ballot and the “defensive” right to have one’s vote be given “‘full value and effect, without being diluted or distorted by the casting of fraudulent’ or otherwise invalid ballots.”¹⁹² Nationwide injunctions promoting the right to vote—such as an injunction of a state law requiring voters to show a photo ID—could thus impinge on other voters’ interest in ensuring their own votes are not diluted by fraud.¹⁹³

However, nationwide injunctions do not preclude nonparties from bringing their own lawsuit in which they make different arguments or assert different rights.¹⁹⁴ Accordingly, they do not raise the due process concerns that can arise in the class action context when absent class members are not given notice of a suit, or do not have an opportunity to be heard or opt out.¹⁹⁵

¹⁹¹ See *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 951–52 (N.D. Ill. 2017) (concluding that the issues raised were present nationwide, and granting a nationwide injunction barring the government from imposing spending conditions on sanctuary cities); *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) (finding the Executive Order unconstitutional and issuing a nationwide injunction against its enforcement on the ground that “where a law is unconstitutional on its face, and not simply in its application to certain plaintiffs, a nationwide injunction is appropriate”).

¹⁹² See Morley, *De Facto Class Actions*, *supra* note 8, at 528 (quoting *Anderson v. United States*, 417 U.S. 211, 226 (1974)).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 531–33 (acknowledging that nationwide injunctions do not have res judicata effect on nonparties).

¹⁹⁵ See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985) (discussing the due process rights of absent class members); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628–29 (1997) (discussing the need to protect the due process rights of absent class members in the context of a settlement class).

Admittedly, in some cases nonparties will not be able to bring their competing claims to court as a practical matter. For example, nonparties may lack standing to bring a vote dilution claim on the ground that their right to vote is infringed by the absence of a state voter ID statute. But that limitation is the product of Article III's standing requirement, not a consequence of the judicial decision granting broad injunctive relief. In any case, nonparties can participate as amici in ongoing litigation, and their position may also be represented by the government attorneys defending the law being enjoined.

E. Doctrinal Inconsistencies

Critics of nationwide injunctions argue that they are inconsistent with the structure of our federal judicial system, and in particular with the nonexistent precedential value of district court opinions and the limited precedential effect of decisions by the federal courts of appeals.¹⁹⁶ They are also in tension with the rule that offensive non-mutual collateral estoppel does not apply in litigation against the federal government¹⁹⁷ and with the generally accepted view that agencies can refuse to follow circuit court precedent even when taking action within that circuit.¹⁹⁸ Finally, critics contend that nationwide injunctions are at odds with the existence of class actions under Federal Rule of Civil Procedure 23(b)(2) because they enable a court to provide classwide relief without first certifying a class.¹⁹⁹

Clearly, there are tensions between these doctrines and nationwide injunctions. But as any student in a Federal Courts class well knows, tensions abound in the structure and operation of the federal court system, which must incorporate competing goals into a system that has developed organically over time.²⁰⁰ The federal judicial system balances the advantages of uniform interpretation of federal law against federalism, regional autonomy, and the benefits of percolation. Individuals' due process rights are in uneasy tension with various methods of aggregating similarly-situated litigants' claims. Finality, efficiency, and speedy resolution of disputes must be weighed

¹⁹⁶ See, e.g., Bray, *supra* note 8, at 465.

¹⁹⁷ *United States v. Mendoza*, 464 U.S. 154, 160, 162–63 (1984).

¹⁹⁸ See generally Estreicher & Revesz, *supra* note 109 (defending the executive's practice of refusing to follow lower federal court precedent). But see Diller & Morawetz, *supra* note 108 (disputing the desirability and legitimacy of intracircuit nonacquiescence).

¹⁹⁹ See *infra* Section IV.E.3.

²⁰⁰ Cf. Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1769 (1992) ("[A] surprisingly large portion of jurisdictional doctrine makes little sense from any perspective, whether logical, conceptual, or practical.")

against fairness and accuracy. These tensions are inevitable and are not limited to cases involving nationwide injunctions.

1. *The Limited Precedential Value of Lower Federal Court Decisions*

In the federal judicial system, only the U.S. Supreme Court can issue a decision that establishes the meaning of federal law for the nation. District court decisions lack precedential value even in the district that issued them.²⁰¹ Federal appellate decisions are binding in the circuit in which they are issued but are no more than persuasive precedent everywhere else. Accordingly, nationwide injunctions can be seen as anomalous in a judicial system in which only the Supreme Court's decisions establish binding law for the nation.

But that view of the federal judicial system conflates the power of precedent with the power of a judgment.²⁰² Decisions by lower federal courts often have effect outside of the geographic region in which they sit. A district court's injunction applies across the United States, even when it bars the defendant from taking action against a single plaintiff and no one else. Under the Full Faith and Credit Clause, as long as the court had personal jurisdiction over the defendant, its judgments must be enforced by federal and state courts in other jurisdictions.²⁰³ District court judges presiding over class actions or assigned to multidistrict litigation can also issue decisions in consolidated cases that control the outcome of a legal issue across the United States.²⁰⁴ These results follow from the fact that the precedential effect of a judicial opinion is separate from its judgment. Accordingly, a district court decision holding the travel ban unconstitutional and enjoining the defendant from enforcing it against anyone does not create binding precedent that must be followed by other courts in future cases. In

²⁰¹ *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011).

²⁰² *See, e.g., Mondragon v. Thompson*, 519 F.3d 1078, 1081 (10th Cir. 2008) (explaining that one cannot “confuse[] an opinion with a judgment”); William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1845 (2008) (explaining that judgments in individual cases are “legally binding,” but arguing that judicial opinions are not); Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126 (1999) (observing that “[t]he operative legal act performed by a court is the entry of a judgment” and that written opinions simply provide “an explanation of reasons for that judgment”).

²⁰³ U.S. CONST. art. IV, § 1.

²⁰⁴ *See* 28 U.S.C. § 1407(b) (2012). Likewise, decisions by the lower federal courts can also have a legal effect on nonparties across the nation. For example, decisions by several federal courts of appeals can result in the conclusion by another circuit court, or the U.S. Supreme Court, that a constitutional right has been “clearly established” nationwide such that officers in other circuits no longer have qualified immunity. *See United States v. Lanier*, 520 U.S. 259, 269 (1997) (explaining that the law can be “clearly established” based on lower federal court precedent).

fact, other courts did weigh in on the constitutionality of the travel ban even after the Hawaii district court issued a nationwide injunction against it and decided those cases on different grounds.²⁰⁵

Admittedly, at times nationwide injunctions may, as a practical matter, foreclose litigation in other courts—such as when a federal agency is ordered not to initiate enforcement action, thereby precluding any opportunities to get the issue before another court. In such cases, the nationwide injunction acts as a *de facto* class action.²⁰⁶ But that result is not inherently at odds with the structure of our judicial system, nor is it all that unusual or unprecedented. After all, class actions, joinder rules, and the multidistrict litigation system are all intended to allow a single district court to issue a decision binding on many. In short, the precedential effect of a court's decision is typically more limited than the effect of its judgment.

2. *United States v. Mendoza's Exception to Offensive Nonmutual Collateral Estoppel for the Government*

Nationwide injunctions are also arguably inconsistent with the Supreme Court's decision in *United States v. Mendoza*, which held that offensive nonmutual collateral estoppel did not apply in litigation against the federal government.²⁰⁷ In *Mendoza*, the Court concluded that the benefits of collateral estoppel—efficiency, conservation of judicial resources, and consistency in judicial decisions—were outweighed by the costs incurred when the doctrine was employed against the federal government. The United States is by far the most active litigant in the federal courts, bringing or defending against claims in tens of thousands of cases every year.²⁰⁸ The Court reasoned that allowing nonmutual collateral estoppel against the government would “substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular issue.”²⁰⁹ It would also force the government to appeal every loss, rather than carefully select which appeals to take to the circuits and U.S. Supreme Court, and the Supreme Court would simultaneously lose the benefit of percolation of the law among the lower courts.²¹⁰ Finally, the executive would be deprived of its ability to change its

²⁰⁵ See cases cited *supra* note 190.

²⁰⁶ See Morley, *De Facto Class Actions*, *supra* note 8, at 490–91 (arguing that nationwide injunctions have a similar effect to class actions).

²⁰⁷ 464 U.S. 154, 158–64 (1984).

²⁰⁸ *Id.* at 159–60 (“[T]he government is a party to a far greater number of cases on a nationwide basis than even the most litigious private entity; in 1982, the United States was a party to more than 75,000 of the 206,193 filings in the United States District Courts.”).

²⁰⁹ *Id.*

²¹⁰ *Id.* at 160–61.

position on a legal question in subsequent litigation—something that often happens with a change in administration.²¹¹ For all those reasons, the Court concluded that nonmutual offensive collateral estoppel should not preclude the federal government in subsequent litigation.

Mendoza's conclusion that the costs of nonmutual offensive collateral estoppel against the federal government outweigh the benefits does not suggest the same is true of nationwide injunctions. The benefits of nationwide injunctions described in Part III—providing complete relief to the plaintiff, avoiding injury to others, and crafting workable injunctions that avoid chaos and confusion—are more significant than the bureaucratic benefits of efficiency and consistency offered in support of offensive nonmutual collateral estoppel. And the costs of nonmutual collateral estoppel are also greater than the costs of nationwide injunctions. Estoppel doctrines bar the government from relitigating an issue it lost before another court, but nationwide injunctions have no such preclusive effect. The government may continue to litigate cases in which it lost and was subject to a nationwide injunction, as it did after the nationwide injunction against the travel ban and the nationwide injunction barring the government from withholding funding from sanctuary cities.²¹² Accordingly, the government should not feel the same pressure to appeal a nationwide injunction, and such injunctions do not always freeze the development of the law. Nor do such injunctions bar a future administration from adopting a different position in litigation than the administration preceding it. For all these reasons, *Mendoza's* rejection of offensive nonmutual collateral estoppel does not demand a similar prohibition against nationwide injunctions.²¹³

²¹¹ *Id.* at 161–62.

²¹² See Frost, *supra* note 15; see also Estreicher & Revesz, *supra* note 109, at 685 (noting that even if an agency is required to follow a precedent established by one court of appeals nationwide, it could still challenge that court's conclusions in another circuit). In some cases, however, it might be difficult or impossible for the government to litigate an issue once a nationwide injunction is in place—a factor courts should consider before issuing such injunctions.

²¹³ The Supreme Court weighed the costs and benefits and came to the conclusion that the government was bound by collateral estoppel, as well as *res judicata*, when litigating against the same party. Even though applying those doctrines to the government came with some of the same costs identified with offensive nonmutual collateral estoppel—such as pressuring the government to appeal a loss, and keeping future administrations from adopting new litigation positions with respect to that litigant—the Court nonetheless thought that finality and fairness required that the government not be allowed to relitigate an issue it had previously lost against the same party. *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 173 (1984).

3. *The Preclusive Effect of Class Actions*

Nationwide injunctions are arguably also in tension with the existence of class actions. Federal Rule of Civil Procedure 23 allows a small number of plaintiffs to represent a larger group and obtain injunctive relief on behalf of them all, but Rule 23(a) first requires a court to certify the class after finding that the named plaintiffs meet the requirements of numerosity, commonality, and typicality, and prove that the representative parties adequately represent the class. Some scholars argue that nationwide injunctions are an improper end run around class certification requirements.²¹⁴

Important differences between nationwide injunctions and class actions suggest otherwise, however. After a class has been certified, a final judgment on the merits precludes the defendant and all the class members from litigating that same dispute again.²¹⁵ Nationwide injunctions do not have the same preclusive effect. Members of the affected class can litigate separately if they so choose; they are not bound by the result in an earlier case in which they were not made parties, even if the injunction affected them. The defendant is also free to continue to litigate the issue in the lower courts, although as a practical matter nationwide injunctions will sometimes prevent the issue from coming before another court.

Because nationwide injunctions do not have preclusive effect beyond the parties, they also do not need to come with all the procedural protections required by Rule 23(a)'s certification process. Rule 23(a) requires that the named plaintiffs show commonality and typicality, as well as demonstrate that they are adequate class representatives, primarily to protect absent class members' procedural due process rights.²¹⁶ Because a nationwide injunction has no preclusive effect, there is no need to provide similar protection to nonparties who are affected by a nationwide injunction.

Critics of nationwide injunctions object that their lack of preclusive effect creates an unfair asymmetry.²¹⁷ In class actions, the named

²¹⁴ Morley, *De Facto Class Actions*, *supra* note 8, at 494.

²¹⁵ *Hansberry v. Lee*, 311 U.S. 32, 41 (1940) (“[T]he judgment in a ‘class’ or ‘representative’ suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.”).

²¹⁶ *Id.* at 42–43 (stating that *res judicata* may not bind those not parties to an initial action, but creating an exception for class actions).

²¹⁷ Bray, *supra* note 8, at 460 (criticizing the “asymmetric effect” of nationwide injunctions); Morley, *De Facto Class Actions*, *supra* note 8, at 494 (criticizing the “asymmetric” results in nationwide class actions). As Professor Morley points out, nationwide injunctions bear some resemblance to “spurious” class actions, which were permitted under Federal Rule of Civil Procedure 23 prior to 1966. *Id.* at 500–01. A spurious class action permitted the named plaintiff to sue on behalf of the class and obtain

plaintiffs could lose, thereby precluding everyone in the class from re-litigating the issue. But an individual plaintiff seeking a nationwide injunction faces no such risk. If the plaintiff wins, all those similarly situated to him will benefit; if he loses, those same individuals can file their own lawsuits and try again. As Bray colorfully puts it, this asymmetry allows plaintiffs to “[s]hop ‘til the statute drops.”²¹⁸

To be sure, courts asked to issue nationwide injunctions should pay attention to this potentially unfair asymmetry. If individuals similarly situated to the plaintiff lost a similar case, then a district court should hesitate to grant a nationwide injunction—just as they must hesitate to apply offensive nonmutual collateral estoppel in a situation in which a plaintiff’s victory came after a string of similarly situated plaintiffs’ losses.²¹⁹ The asymmetry should not be overstated, however. Every loss comes with costs for similarly situated plaintiffs, because it will be cited as persuasive precedent against a ruling in the next plaintiff’s favor, as well as grounds for limiting the scope of injunctive relief.

V

THE FUTURE OF NATIONWIDE INJUNCTIONS

Although this Article defends nationwide injunctions, it is not an unqualified defense. Critics are correct that federal district judges at times issue nationwide injunctions unthinkingly, assuming that if a federal policy is unlawful then its enforcement must be enjoined as to

a decision in the class’s favor, after which class members could opt in to obtain relief. If the named plaintiff lost, however, the class members were not precluded from filing their own lawsuits. *Id.* Rule 23 was amended in 1966 to eliminate such actions on the ground that they were unfair to defendants. *See* Fed. R. Civ. P. 23 Advisory Committee’s Note to 1966 Amendment, 39 F.R.D. 69, 105–06. However, the spurious class action differed from nationwide injunctions in important ways. In a spurious class action, class members who opt in can seek to have the defendant held in contempt if the defendant does not comply with the court’s order, and they can assert *res judicata* if the defendant seeks to re-litigate any aspect of the case against them. Nonparties to a nationwide injunction cannot seek to have the defendant held in contempt for violating the injunction (though the plaintiff can do so, as can the court acting *sua sponte*), nor can they assert *res judicata* in subsequent litigation. Accordingly, the 1966 amendments to Rule 23 should not be read to imply a prohibition against nationwide injunctions—though they do provide further reason for courts to carefully weigh the costs and benefits of such injunctions before issuing them. *See infra* Part V.

²¹⁸ Bray, *supra* note 8, at 460.

²¹⁹ *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (“The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.”).

everyone.²²⁰ As described in Part IV, nationwide injunctions come with significant costs, and in many circumstances they may be unnecessary and inappropriate. But nationwide injunctions also come with important benefits and at times are an essential check on the political branches.²²¹ So the practical question is how to help courts determine when nationwide injunctions are justified and when they are not.

The best practice is for a federal district court to establish procedures to ensure that it has all the relevant information about the costs and benefits of the proposed scope of an injunction before issuing it. The court should hold a hearing at which the parties to the litigation, as well as interested third parties, can present evidence and make arguments about the proper scope of the remedy. The court should then issue a written ruling addressing the costs and benefits of an injunction in the case at hand that will provide a guide to the appellate courts, which may be asked to review the scope of the injunctive relief.

The costs and benefits of nationwide injunctions discussed above can serve as a guide to district courts making this determination. Is a nationwide injunction essential to provide the plaintiff with complete relief, protect nonparties from imminent and irreparable harm, or avoid duplicative litigation and administrative confusion? These are all factors that weigh in favor of such a remedy. Also relevant is whether a nationwide injunction will cut off the development of the law and concomitantly put pressure on the Supreme Court to hear the case, and whether it will come with the risk of conflicting injunctions. The risk of forum shopping and politicizing the courts should be taken into account as well. The default should be *against* issuing a nationwide injunction.²²² A single district court judge should not lightly assert control over federal policy for the nation, or take action that would prevent her fellow judges from reaching their own decisions in cases involving different plaintiffs. But when the benefits outweigh the costs, the courts should have this tool at hand.

²²⁰ Sam Bray, *Finally, a Court Defends the National Injunction*, WASH. POST: VOLOKH CONSPIRACY (Oct. 14, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/10/14/finally-a-court-defends-the-national-injunction/> (noting that courts often fail to address the counterarguments to nationwide injunctions, and justify issuing them on the ground that if the violation is nationwide, the scope of the remedy should be nationwide—which, if correct, would make nationwide injunctions “the norm for all challenges to the validity of a federal statute, regulation, or order”).

²²¹ See *supra* Part III.

²²² *City of Chicago v. Sessions*, 888 F.3d 272, 288 (7th Cir. 2018) (“In light of those concerns with limiting the input of other courts and with forum shopping, nationwide injunctions should be utilized only in rare circumstances.”).

As this discussion suggests, the facts of each case matter. Courts must look closely at the alleged harm and whether that harm can be alleviated by an injunction limited to the plaintiffs, or at the very least limited geographically, so as to more easily allow other district and circuit courts to address the question. Courts should consider whether a limited injunction will create costs for the judicial system or third parties, and whether a patchwork of different injunctions would lead to chaos or confusion. Courts should also consider whether an injunction that applies to the plaintiffs alone would leave hundreds, thousands, or millions of similarly situated people at risk of harm that cannot be alleviated by awaiting a Supreme Court decision on the question. And, as a closely related matter, they should consider whether a broad injunction is essential to ensure that the government remains within the bounds of the law.²²³

Scholars who oppose nationwide injunctions fear that district courts will be unable consistently and fairly to apply “indeterminate standards,” such as whether such an injunction is essential to afford the plaintiff “complete relief.”²²⁴ That problem is exacerbated by plaintiffs’ forum shopping, which leads plaintiffs to file suit before a friendly district court judge who is likely to enjoin the challenged federal policy nationwide, and in a friendly circuit whose judges are unlikely to stay the district court’s injunction under the deferential “abuse of discretion” standard. Accordingly, even if nationwide injunctions might be reasonable in some cases, these scholars see no way to avoid judicial overreach and thus prefer a bright-line rule barring them in all cases.²²⁵

But that critique gives too little credit to district courts. The vast majority of legal decisions, big and small, are based on indeterminate legal standards rather than bright-line, clear-cut rules. If a significant number of federal judges (or state judges, for that matter) are incapable of making reasonable decisions when applying such standards, then our legal system’s problems extend far beyond nationwide injunctions. These same judges will also abuse their powers by certifying classes that do not meet Rule 23(a)’s indeterminate standards for certification,²²⁶ or will allow parties to join as plaintiffs even if they

²²³ See Fallon & Meltzer, *supra* note 73, at 1778–79 (arguing that the Constitution requires remedies sufficient to ensure the government remains “generally within the bounds of law”).

²²⁴ Bray, *supra* note 8, at 479–81.

²²⁵ *Id.*

²²⁶ See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–52 (2011) (discussing the commonality prong of Federal Rule of Civil Procedure 23(a)).

fail to satisfy Rule 20's indeterminate standards for joinder,²²⁷ or will consolidate cases even if they do not satisfy the indeterminate standards for handling separate actions jointly under the multidistrict litigation statute.²²⁸ Worse still, these judges are charged with reaching final decisions on the merits in cases in which the legal standards are also indeterminate. If we are afraid that some significant number of federal judges can no longer be trusted to apply indeterminate standards neutrally and fairly, without ideological bias, then our entire legal system is in jeopardy.²²⁹

Admittedly, however, nationwide injunctions give a single district court judge unusual power to control federal policy for the nation, and forum shopping exacerbates the problem. Accordingly, broad discretion to grant nationwide injunctions may raise more concerns than broad discretion to resolve binary cases. If so, however, the better solution is to prevent forum shopping in cases in which parties seek a nationwide injunction—such as by directing such cases to a particular court, or randomly assigning them to an appropriate court²³⁰—rather than to eliminate nationwide injunctions completely.

CONCLUSION

Nationwide injunctions serve an important role in federal courts' remedial toolbox. At times, they are the only method of providing complete relief to the plaintiff, or protecting thousands of similarly situated individuals from harm, or crafting a workable injunction. The costs of nationwide injunctions admittedly can be high, and they should never be the default remedy upon finding a federal law or policy unlawful. But the benefits are significant as well—suggesting that even if they should be issued with more caution, they should not be abolished altogether.

The debate over nationwide injunctions tracks broader, long-standing disputes over the role of the federal courts in the constitutional structure. Nationwide injunctions are troubling to those scholars who perceive courts as primarily serving to resolve individual disputes and as playing a more cabined constitutional role in compar-

²²⁷ See, e.g., *Cooper v. Fitzgerald*, 266 F.R.D. 86 (E.D. Pa. 2010) (discussing the transactional relatedness prong of Federal Rule of Civil Procedure 20).

²²⁸ See generally 28 U.S.C. § 1407(a).

²²⁹ See *City of Chicago v. Sessions*, 888 F.3d 272, 290 (7th Cir. 2018) (acknowledging that the “equitable balancing” courts engage in before issuing injunction is an “imprecise process,” but noting that such imprecision is “endemic to injunctions, and courts are capable of weighing the appropriate factors while remaining cognizant of the hazards of forum shopping and duplicative lawsuits”).

²³⁰ See *supra* Section IV.A (discussing methods of preventing forum shopping).

ison to the political branches. In contrast, nationwide injunctions are more appealing to scholars who view the proper role of the federal courts as not only deciding individual cases, but also as declaring the meaning of federal law.

Likewise, for those who perceive the federal judiciary as a check on the political branches, nationwide injunctions are an essential tool. Without nationwide injunctions, the federal courts would be powerless to protect thousands or millions of people from potential illegal or unconstitutional government policies—policies that can be applied with minimal notice or process, and to many who lack the ability to bring their individual cases before the courts. Indeed, the recent surge in nationwide injunctions could be seen as a symptom of the real problem—the executive branch’s increasingly common practice of unilaterally making major policy changes outside of the legislative process.