ONLY WHERE JUSTIFIED: TOWARD LIMITS AND EXPLANATORY REQUIREMENTS FOR NATIONWIDE INJUNCTIONS

*Milan D. Smith, Jr.**

Introduction

As this Article is submitted to the editors, at least eight cases are currently pending before the Ninth Circuit involving the propriety of a nationwide injunction.[1] In my almost fourteen years on the bench, I have never before seen nationwide injunctions handed down with the frequency that I

* Circuit Judge, United States Court of Appeals for the Ninth Circuit. I thank my law clerk, Marina Cassio, for her valuable assistance and scholarship in the preparation of this Article. The views expressed are mine alone and do not represent the views of the U.S. Court of Appeals for the Ninth Circuit.

1 *See* Doe 1 v. Trump, 418 F. Supp. 3d 573 (D. Or.), *stay denied*, 944 F.3d 1222 (9th Cir. 2019); Washington v. U.S. Dep't of Homeland Sec., 408 F. Supp. 3d 1191 (E.D. Wash. 2019), *stay granted sub nom.* City & County of San Francisco v. U.S. Citizenship & Immigration Servs., 944 F.3d 773 (9th Cir. 2019); E. Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922 (N.D. Cal. 2019), *stay granted in part*, 934 F.3d 1026 (9th Cir. 2019) (in full disclosure, I sat on the motions panel that issued this decision), *and stay granted in full*, 140 S. Ct. 3 (2019) (mem.), *and argued*, No. 19-16487 (9th Cir. Dec. 2, 2019); Innovation Law Lab v. Nielsen, 366 F. Supp. 3d 1110 (N.D. Cal. 2019), *stay granted sub nom.* Innovation Law Lab v. McAleenan, 924 F.3d 503 (9th Cir. 2019), *and stay granted in part, denied in part sub nom.* Innovation Law Lab v. Wolf, 951 F.3d 986 (9th Cir.), *and aff'd sub nom.* Innovation Law Lab v. Wolf, 951 F.3d 1073 (9th Cir. 2020), *and stay granted pending cert. sub nom.* Wolf v. Innovation Law Lab, No. 19A960, 2020 WL 1161432 (U.S. Mar. 11, 2020) (mem.); E. Bay Sanctuary Covenant v. Trump, 349 F. Supp. 3d 838 (N.D. Cal. 2018) (temporary restraining order), *stay denied*, 354 F. Supp. 3d 1085 (N.D. Cal. 2018), *and stay denied pending appeal*, 932 F.3d 742 (9th Cir. 2018), *and stay denied*, 139 S. Ct. 782 (2018), *and aff'd*, 950 F.3d 1242 (9th Cir. 2020); City & County of San Francisco v. Sessions, 349 F. Supp. 3d 924 (N.D. Cal. 2018) (entering permanent injunction but staying decision pending appeal), *appeal docketed*, No. 18-17308 (9th Cir. Dec. 4, 2018); Ramos v. Nielsen, 336 F. Supp. 3d 1075 (N.D. Cal. 2018), *appeal docketed*, No. 18-16981 (9th Cir. Oct. 12, 2018); Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1049–50 (N.D. Cal. 2018), *aff'd*, 908 F.3d 476, 520 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019) (mem.). I count in this number those cases still on the Ninth Circuit's docket despite issuance of a final decision, such as due to pending U.S. Supreme Court activity.

see now. Commentators have taken notice.[2] Supreme Court Justices have taken notice.[3] Members of Congress have taken notice.[4]

I use the term "nationwide injunction" as shorthand for a specific phenomenon: federal district court orders enjoining the federal government from implementing a particular executive policy, anywhere, and with regard to anyone in the nation.[5] It is these injunctions that have attracted so much critical attention lately. And it is also these injunctions that have attracted my interest as I have considered a plethora of such orders coming before the Ninth Circuit. I believe that identifying this limited category of interest helps point the way toward remedies that sweep no more broadly than the problem they are actually trying to solve.

Thus, I enter the already cacophonous nationwide injunction conversation with the aim of adding some nuance. Not all nationwide injunctions are created equal. For instance, a nationwide injunction may be better justified in protecting a single plaintiff suffering an injury with nationwide causes

2 *See, e.g.*, Spencer E. Amdur & David Hausman, Response, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49 (2017); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1 (2019); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Michael T. Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017); Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67 (2019).

3 *See* Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 599–601 (2020) (mem.) (Gorsuch, J., concurring in the grant of the stay) (Thomas, J., joining in concurrence) (criticizing the "increasingly common practice of trial courts ordering relief that transcends the cases before them," and calling for the Court to confront "underlying equitable and constitutional questions" at an appropriate juncture); Trump v. Hawaii, 138 S. Ct. 2392, 2424–25 (2018) (Thomas, J., concurring) (observing that "[i]njunctions that prohibit the Executive Branch from applying a law or policy against anyone—often called 'universal' or 'nationwide' injunctions—have become increasingly common," expressing "skeptic[ism] that district courts have the authority" to issue them, and calling for the Court to "address their legality"); *see also* Wolf v. Cook County, 140 S. Ct. 681, 681–84 (2020) (mem.) (Sotomayor, J., dissenting from the grant of stay) (acknowledging Justices Thomas and Gorsuch's expressed concerns with nationwide injunctions, while criticizing the Court for granting emergency stays even of more limited injunctions).

4 *See, e.g.*, Nationwide Injunction Abuse Prevention Act of 2019, H.R. 4292, 116th Cong. (2019); *Rule by District Judge: The Challenges of Universal Injunctions: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2020).

5 It is often noted that the remarkable thing about a nationwide injunction is not actually its geographical scope but is instead its extension beyond protection of just the individual plaintiff. *See, e.g.*, Frost, *supra* note 2, at 1067 (highlighting injunctions that "bar[ ] the executive from enforcing federal laws and policies against *anyone*, not just the plaintiffs in the case before them"). I would argue that this framing misses two aspects of the phenomenon: (1) the geographic scope of the order is *also* of concern, not so much with regard to Article III as with regard to prudential concerns and comity, owing to its impact on percolation of legal issues through multiple lower courts; and (2) the plaintiff seeking the injunction is sometimes not actually subject to enforcement of the challenged executive action at all, making the protection offered by the injunction *entirely* about nonparties as a direct matter, with the plaintiff protected only indirectly.

rather than in protecting numerous individuals suffering the same injury nationwide, or likewise in protecting a plaintiff directly harmed by the challenged action rather than one indirectly harmed by the harm directly impacting others.

Ultimately, I argue that nationwide injunctions are justified in certain contexts, and in those contexts are within the Article III powers of a court sitting in equity. Actual practice has gone considerably further, however, than the circumstances I would endorse. In particular, I argue that current law and practice underprioritizes percolation of important legal questions across multiple circuits, awards relief to organizational plaintiffs with dubious standing and/or equitable right to obtain it, and inappropriately relies on assumptions about injuries to nonparties. It is time for courts to declare rules that more narrowly constrain the issuance of nationwide injunctive relief. At a minimum, we should ask district courts to provide a more rigorous explanation of the propriety of nationwide scope.

In Part I of this Article, I discuss the existing law and current debates surrounding nationwide injunctions. I consider the origins of both the apparent recent surge in the issuance of nationwide injunctions and the apparent recent surge in skepticism concerning nationwide injunctions. In Part II, I analyze the potential justification for issuance of a nationwide injunction that I find most compelling, and on which basis I argue a court is well within the bounds of Article III notwithstanding the indirect benefits of such injunction to nonparties. In Part III, I consider three other sometimes-asserted justifications that I argue courts should rule are insufficient reasons to grant nationwide injunctions, whether on Article III grounds or simply as a prudential matter. In Part IV, I analyze two problems with nationwide injunctions that I find particularly problematic. I argue that these problems, in combination with numerous other disadvantages of nationwide injunctions noted by other commentators, should move courts to attempt reforms aimed at limiting the circumstances under which nationwide injunctions may be issued. In Part V, I discuss potential reform ideas. I conclude that both substantive limits and certain procedural requirements would help limit the issuance of nationwide injunctions to cases in which they are truly justified.

I. CONTEXT

Nationwide injunctions are not new, although there is serious scholarly debate about how old they are.[6] Before the recent surge in nationwide

6 *See, e.g.*, Bray, *supra* note 2, at 437 (dating nationwide injunctions to 1963); Sohoni, *supra* note 2, at 924–26 (arguing that nationwide injunctions involve equitable powers dating at least to the early twentieth century); Samuel Bray, *Response to The Lost History of the "Universal" Injunction*, REASON (Oct. 6, 2019), https://reason.com/2019/10/06/response-to-the-lost-history-of-the-universal-injunction/#; Mila Sohoni, *A Reply to Bray's Response to The Lost History of the "Universal" Injunction*, YALE J. REG. (Oct. 10, 2019), https://www.yalejreg.com/nc/a-reply-to-brays-response-to-the-lost-history-of-the-universal-injunction-by-mila-sohoni.

injunctions against policies of President Trump's administration,[7] nationwide injunctions halted numerous policies under President Obama's admin-

7 *See supra* note 1; *see also, e.g.*, HIAS, Inc. v. Trump, 415 F. Supp. 3d 669, 679–87 (D. Md. 2020), *appeal docketed*, No. 20-1160 (4th Cir. Feb. 13, 2020); New York v. U.S. Dep't of Homeland Sec., 408 F. Supp. 3d 334 (S.D.N.Y. 2019), *stay pending appeal denied*, Nos. 19-3591 & 19-3595, 2020 WL 95815 (2d Cir. Jan. 8, 2020), *and stay granted*, 140 S. Ct. 599 (2020) (mem.); Make the Road N.Y. v. Cuccinelli, 419 F. Supp. 3d 647 (S.D.N.Y 2019), *stay granted sub nom.* Dep't of Homeland Sec. v. New York,140 S. Ct. 599 (2020) (mem.); City of Chicago v. Barr, 405 F. Supp. 3d 748 (N.D. Ill. 2019) (entering permanent injunction but staying nationwide scope pending appeal), *appeal docketed*, No. 19-3290 (7th Cir. Nov. 19, 2019); New York v. U.S. Dep't of Commerce, 351 F. Supp. 3d 502 (S.D.N.Y.), *aff'd in part and rev'd in part*, 139 S. Ct. 2551 (2019); Pennsylvania v. Trump, 351 F. Supp. 3d 791, 830–35 (E.D. Pa.), *aff'd sub nom.*, 930 F.3d 543, 576 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 918 (2020) (mem.); Grace v. Whitaker, 344 F. Supp. 3d 96, 145–46 (D.D.C. 2018), *appeal docketed sub nom.* Grace v. Barr, No. 19-5013 (D.C. Cir. Dec. 9, 2019); City of Chicago v. Sessions, 321 F. Supp. 3d 855 (E.D. Ill. 2018) (entering permanent injunction but staying nationwide scope pending appeal); Stockman v. Trump, No. 17-1799, 2017 WL 9732572, at *16 (C.D. Cal. Dec. 22, 2017), *stay granted*, 139 S. Ct. 950 (2019) (mem.), *and vacated*, No. 18-56539, 2019 WL 6125075, at *1 (9th Cir. Aug. 26, 2019) (mem.); California v. Health & Human Servs., 281 F. Supp. 3d 806, 832 (N.D. Cal. 2017), *aff'd in part, vacated in part sub nom.* California v. Azar, 911 F.3d 558, 585 (9th Cir. 2018) (reducing nationwide scope to state plaintiffs only); Karnoski v. Trump, No. C17-1297, 2017 WL 6311305, at *10 (W.D. Wash. Dec. 11, 2017), *stay granted pending appeal*, 139 S. Ct. 950 (2019) (mem.); Stone v. Trump, 280 F. Supp. 3d 747, 767–69 (D. Md. 2017), *stay granted*, No. 17-2459, 2019 WL 5697228 (D. Md. Mar. 7, 2019); Doe 1 v. Trump, 275 F. Supp. 3d 167, 207–17 (D.D.C. 2017), *vacated sub nom.* Doe 2 v. Shanahan, 755 F. App'x 19, 20 (D.C. Cir. 2019) (per curiam), *concurring opinions filed at* 917 F.3d 694 (D.C. Cir. 2019); Hawaii v. Trump, 265 F. Supp. 3d 1140, 1160 (D. Haw. 2017) (temporary restraining order), *stay granted in part*, No. 17-17168, 2017 WL 5343014, at *1 (9th Cir. Nov. 13, 2017) (mem.), *and stay granted in full*, 138 S. Ct. 542, 542 (2017) (mem.), *and aff'd*, 878 F.3d 662, 702 (9th Cir. 2017), *rev'd*, 138 S. Ct. 2392, 2423 (2018); City of Chicago v. Sessions, 264 F. Supp. 3d 933, 951 (N.D. Ill. 2017) (preliminary injunction), *aff'd*, 888 F.3d 272 (7th Cir. 2018), *stayed as to nationwide scope*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 26, 2018), *vacated as moot*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018) (en banc); Nw. Immigrant Rights Project v. Sessions, No. C17-716, 2017 WL 3189032, at *7 (W.D. Wash. July 27, 2017); County of Santa Clara v. Trump, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017), *appeal dismissed as moot*, No. 17-16886, 2018 WL 1401847 (9th Cir. Jan. 4, 2018) (mem.); Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 565–66 (D. Md.), *aff'd in relevant part*, 857 F.3d 554, 605 (4th Cir.) (en banc), *stay granted in part by* 137 S. Ct. 2080, 2089 (2017) (per curiam) (as to foreign nationals lacking a bona fide relationship with an American person or entity), *and vacated as moot*, 138 S. Ct. 353, 353 (2017) (mem.); Hawaii v. Trump, 241 F. Supp. 3d 1119, 1139–40 (D. Haw.) (temporary restraining order), *converted to preliminary injunction*, 245 F. Supp. 3d 1227, 1237–39 (D. Haw.), *and aff'd in relevant part*, 859 F.3d 741, 789 (9th Cir.) (per curiam), *stay granted in part sub nom.* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2089 (per curiam) (as to foreign nationals lacking a bona fide relationship with an American person or entity), *and vacated as moot*, 138 S. Ct. 377, 377 (2017) (mem.); Washington v. Trump, No. C17-0141, 2017 WL 462040, at *2–3 (W.D. Wash. Feb. 3, 2017) (temporary restraining order), *stay denied*, 847 F.3d 1151, 1169 (9th Cir. 2017) (per curiam), *superseded by* Washington v. Trump, 858 F.3d 1168 (9th Cir. 2017); Darweesh v. Trump, No. 17 Civ. 480, 2017 WL 388504, at *1 (E.D.N.Y. Jan. 28, 2017).

istration.[8] Nationwide injunctions likewise plagued President George W. Bush's administration,[9] President Clinton's administration,[10] and multiple other administrations dating back at least to President Lyndon B. Johnson's administration.[11] It appears, however, that the phenomenon has recently increased by an order of magnitude.

A. Existing Law

Existing law is generally quite permissive regarding the issuance of nationwide injunctions,[12] which is to say that there is no law that squarely regulates them (as I have defined them here) as a category. Courts issuing nationwide injunctions often cite *Califano v. Yamasaki*,[13] a 1979 Supreme Court decision reviewing a nationwide injunction issued in protection of a

8 *See, e.g.*, *In re* Envtl. Prot. Agency, 803 F.3d 804, 808–09 (6th Cir. 2015), *order vacated sub nom. In re* U.S. Dep't of Def., 713 F. App'x 489 (6th Cir. 2018); Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 696 (N.D. Tex. 2016), *stay denied*, No. 7:16-cv-00108, 2017 WL 2964088, at *5–6 (N.D. Tex. Jan. 24, 2017); Nevada v. U.S. Dep't of Labor, 218 F. Supp. 3d 520, 534 (E.D. Tex. 2016), *stay denied*, 227 F. Supp. 3d 696, 698 (E.D. Tex. 2017); Nat'l Fed'n of Indep. Bus. v. Perez, No. 5:16-cv-00066, 2016 WL 3766121, at *46 (N.D. Tex. June 27, 2016); Associated Builders & Contractors of Se. Tex. v. Rung, No. 1:16-cv-425, 2016 WL 8188655, at *15 (E.D. Tex. Oct. 24, 2016); Wyoming v. U.S. Dep't of the Interior, 136 F. Supp. 3d 1317, 1354 n.52 (D. Wyo. 2015), *vacated sub nom.* Wyoming v. Sierra Club, No. 15-8134, 2016 WL 3853806, at *1 (10th Cir. July 13, 2016) (mem.); Texas v. United States, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016); Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex.) (enjoining parts of DACA and DAPA), *aff'd*, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271, 2272 (2016) (mem.) (per curiam); Sequoia Forestkeeper v. Tidwell, 847 F. Supp. 2d 1244, 1253 (E.D. Cal. 2012).

9 *See, e.g.*, Citizens for Better Forestry v. U.S. Dep't of Agric., Nos. C 05-1144, C 04-4512, 2007 WL 1970096, at *19 (N.D. Cal. July 3, 2007); California *ex rel.* Lockyer v. U.S. Dep't of Agric., 468 F. Supp. 2d 1140, 1144, 1149 (N.D. Cal. 2006), *aff'd*, 575 F.3d 999, 1005 (9th Cir. 2009); Earth Island Inst. v. Ruthenbeck, No. CIV F-03-6386, 2005 WL 5280466, at *3 (E.D. Cal. Sept. 20, 2005), *aff'd in part, remanded in part*, 490 F.3d 687, 699 (9th Cir. 2007), *rev'd on other grounds sub nom.* Summers v. Earth Island Inst., 555 U.S. 488, 501 (2009) (declining to reach the question whether "a nationwide injunction would be appropriate"); Am. Lands All. v. Norton, No. Civ.A. 00-2339, 2004 WL 3246687, at *3 (D.D.C. June 2, 2004).

10 *See, e.g.*, Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1408–10 (D.C. Cir. 1998); Heartwood, Inc. v. U.S. Forest Serv., 73 F. Supp. 2d 962, 977–80 (S.D. Ill. 1999); Am. Mining Cong. v. U.S. Army Corps of Eng'rs, 962 F. Supp. 2, 5 (D.D.C. 1997).

11 *See, e.g.*, Bresgal v. Brock, 637 F. Supp. 280, 282–84 (D. Or. 1986), *aff'd in part and modified in part*, 843 F.2d 1163, 1168–72 (9th Cir. 1987); McDonald v. McLucas, 371 F. Supp. 831, 837 (S.D.N.Y. 1974), *aff'd*, 419 U.S. 987 (1974) (mem.); Harlem Valley Transp. Ass'n v. Stafford, 360 F. Supp. 1057, 1065 (S.D.N.Y. 1973), *aff'd*, 500 F.2d 328, 332–37 (2d Cir. 1974); Flast v. Cohen, 392 U.S. 83, 89–90 (1968) (acknowledging that injunctive relief sought by plaintiffs was not limited to New York City, casting no doubt on the propriety of such scope); Wirtz v. Baldor Elec. Co., 337 F.2d 518, 536 (D.C. Cir. 1964) (Washington, J., Supplemental Opinion).

12 *See* Bray, *supra* note 2, at 444 ("There is no rule against national injunctions; nor is there a rule requiring them.").

13 442 U.S. 682 (1979).

certified nationwide class, for two propositions: "[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs. . . . [T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class."[14]

These propositions are somewhat in tension, as the "violation established" may exceed the scope of the violation that must be enjoined to afford the plaintiff "complete relief." In any event, the "complete relief" proposition appears to be used as often to widen the scope of relief as to narrow it.[15]

Moreover, when district courts grant nationwide injunctions, those decisions are reviewed deferentially for abuse of discretion.[16] Thus, a three-judge appellate panel is limited in the extent to which it can reevaluate the equities of a nationwide injunction absent clear legal standards by which the district court failed to abide. Even if an appellate court ultimately acts to stay or vacate a nationwide injunction improvidently granted, that injunction binds the federal government in the interim and brings its policy to a halt.

A defining feature of an injunction is that it is enforceable through contempt proceedings.[17] Federal officials who violate an injunction—even if an appeal is pending and even if the government ultimately prevails in the appeal or in a final decision by the district court—are at personal risk of criminal sanctions.[18] Both the original plaintiffs and nonparties alike may bring contempt proceedings if they are beneficiaries of the injunction,[19] and nationwide injunctions are apt to have numerous beneficiaries.

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14 *Id.* at 702.

15 *See, e.g.*, Pennsylvania v. President U.S., 930 F.3d 543, 576 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 918 (2020) (mem.); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 512 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019) (mem.), *argued*, No. 15-587 (Nov. 12, 2019); Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 605 (4th Cir.), *stayed in part by* 137 S. Ct. 2080 (per curiam), *and vacated and remanded*, 138 S. Ct. 353 (2017) (mem.).

16 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2962 (3d ed., 1999).

17 *Id.* § 2960.

18 *Id.* For a recent instance of civil and criminal contempt proceedings against a government official, see United States v. Arpaio, 951 F.3d 1001, 1003–04 (9th Cir. 2020) (describing contempt convictions for violation of injunction issued in Ortega-Melendres v. Arpaio, 836 F. Supp. 2d 959, 992–93 (D. Ariz. 2011), *aff'd*, 695 F.3d 990, 1002 (9th Cir. 2012)).

19 *See* FED. R. CIV. P. 71 ("When an order grants relief for a nonparty . . . , the procedure for enforcing the order is the same as for a party."); 12 WRIGHT ET AL., *supra* note 16, § 3032. The enforceability of an injunction by nonparties dates back at least to the nineteenth century. *See, e.g.*, Farmers' Loan & Tr. Co. v. Chi. & Atl. Ry. Co., 44 F. 653, 659 (C.C.D. Ind. 1890) ("Every person not being a party in any cause, . . . in[ ] whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause . . . ." (quoting FED. EQUITY R. 10, 42 U.S. (1 How.) xxxix, xliv (1843) (superseded 1912), *cited in* FED. R. CIV. P. 71 advisory committee note (1937))).

Nationwide injunctions therefore differ in an important way from noninjunctive court decisions regarding the lawfulness or constitutionality of a federal policy.[20] A noninjunctive district court decision that a federal policy is unlawful or unconstitutional in the context (for example) of a 42 U.S.C. § 1983 claim for damages, a defense against enforcement of the policy, or a declaratory judgment has no precedential effect even within the same district[21] and no preclusive effect on the federal government except with regard to the parties to that same case.[22] This is true even if the district court's holding is that the policy is unconstitutional on its face.[23] A court may expect or hope, as a practical matter, that federal defendants will alter their behavior promptly in response to the court's ruling,[24] but this is not the same as legally requiring as much.[25]

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20 *See* 33 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 8301–09 (2d ed. 1996) (canvassing types of cases that may result in a judicial decision that an agency action is unlawful or unconstitutional).

21 *See, e.g.*, *In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1176 (D.C. Cir. 1987) ("Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit."), *aff'd sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 135 (1989).

22 United States v. Mendoza, 464 U.S. 154, 162 (1984).

23 I note, however, that some debate exists regarding the propriety of facial invalidation even outside the injunction context. *See* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1321–23 (2000).

Additionally, doctrines exist to discourage invalidity rulings in the declaratory judgment context, where findings of unlawfulness may be less tethered to specific applications to the plaintiffs. *See* 10B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2763 (4th ed. 2016); *see also, e.g.*, Cole v. McClellan, 439 F.2d 534, 535–36 (D.C. Cir. 1970) (per curiam) (declining to grant declaratory relief absent "a showing of need arising out of immediate threats to constitutional rights").

24 *See* 7AA WRIGHT ET AL., *supra* note 16, § 1785.2; *see also, e.g.*, Stanton v. Bd. of Educ., 581 F. Supp. 190, 195 (N.D.N.Y. 1983) ("[T]he defendants are responsible public officials, and it can be assumed without anxiety that any determination favoring named plaintiffs will apply to all persons similarly situated." (quoting Domingo v. Toia, No. 77-cv-217, slip op. at 4 (N.D.N.Y. Aug. 24, 1977) (Foley, J.))). However, government actors do not always modify their behavior vis-à-vis nonparties absent an order enforceable by those nonparties. *See, e.g.*, Bizjak v. Blum, 490 F. Supp. 1297, 1301 (N.D.N.Y. 1980) (certifying class "[i]n light of the defendants' history of noncompliance"). *See generally* Allan D. Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C. L. REV. 123 (1977) (discussing agency practice of continuing to defend regulations held unlawful on a circuit-by-circuit basis), *cited in* Bray, *supra* note 2, at 444 n.160.

25 Professor Bray attributes the idea that courts should issue injunctions requiring across-the-board compliance with their rulings to two Judge Friendly opinions issued in 1973. Bray, *supra* note 2, at 441 (first citing Vulcan Soc'y of the N.Y.C. Fire Dep't, Inc. v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973); and then citing Galvan v. Levine, 490 F.2d 1255, 1257 (2d Cir. 1973)). Professor Bray reads these opinions to technically conclude only that the *practical* effect of a decision of unconstitutionality in a case involving individual (nonclass) plaintiffs would be the government defendants' acquiescence to that ruling with regard to all similarly situated individuals. *Id.* at 442–43. Professor Bray suggests that later courts' *misreading* of Judge Friendly as speaking to the *legal* effect of the decisions led to the assumption that courts should issue universal injunctions against the

B. Ongoing Debates

The rise of the nationwide injunction begs the question: Is the underlying trend more that the judiciary is aggrandizing itself with power to declare national policy that should belong to the executive?[26] Or is it that the executive is aggrandizing itself with power to declare national policy that should belong to the legislature?[27] Of course, not all nationwide injunctions are issued on the basis of a separation-of-powers violation. Often the announced violations sound in individual liberties, statutory interpretation, or administrative procedure. Yet even these issues contain a separation-of-powers element. The separation of powers under our Constitution is *designed* to safeguard individual liberties[28]—the improper assumption of too much power by one branch puts those liberties in jeopardy. Likewise, when the executive branch exceeds statutory authority or sidesteps administrative procedural requirements, it is exceeding the constraints which it is the legislative branch's prerogative to create.

To the extent the rise in nationwide injunctions simply reflects a rise in unlawful executive actions, one might think that there is no cause for concern regarding judicial overreach. And yet the nationwide injunction poses unique problems for the judiciary and often mires courts in questions they are ill suited to answer. It is perhaps not surprising, then, that nationwide injunctions are currently the subject of a vigorous scholarly debate.

For instance, one academic battlefield concerns the historical origins of nationwide injunctions as a matter of equity, and thus the power of federal district courts under Article III, properly construed, to issue them. Perhaps most prominently, Professor Bray argues that nationwide injunctions are incompatible with the historical powers of a federal district court sitting in equity.[29] He dates the first nationwide injunction to 1963,[30] citing this late emergence as evidence of a lack of constitutional authority. He argues that that two shifts in jurisprudential philosophy, combined with "renewed judicial confidence" in the wake of *Brown v. Board of Education*, created the conditions from which nationwide injunctions emerged: (1) a shift from

policies deemed unconstitutional. *Id.* (citing McDonald v. McLucas, 371 F. Supp. 831 (S.D.N.Y. 1974)).

26 *See, e.g.*, Bray, *supra* note 2, at 445.

27 *See, e.g.*, Frost, *supra* note 2, at 1119; Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1694–1707 (2019).

28 *See* Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417, 1418 (2008).

29 Bray, *supra* note 2, at 425–27. Professor Bray's article appears to have formed the basis for Justice Thomas's concurrence in *Trump v. Hawaii*, in which Justice Thomas urged the Court to "address the[ ] legality" of nationwide injunctions should "their popularity continue[ ]." 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring); *see id.* at 2427 (citing Bray, *supra* note 2, at 425); *see also* Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 599–601 (2020) (Gorsuch, J., concurring in the grant of the stay) (citing Bray, *supra* note 2, at 471–72).

30 Bray, *supra* note 2, at 437 (citing Wirtz v. Baldor Elec. Co., 337 F.2d 518 (D.C. Cir. 1963)).

conceptualizing suits against federal officers as suits to prevent enforcement of a policy in a particular case to conceptualizing them as suits against the policy itself; and (2) a shift from conceptualizing judicial holdings that a policy could not be enforced as holdings that a higher law controlled to conceptualizing them as holdings "striking down" the challenged law.[31] He contends that federal courts should adopt a rule that injunctions protect only the plaintiff, meaning that they extend no further than such relief as the plaintiff would have standing to enforce in contempt proceedings.[32]

By contrast, Professor Sohoni argues that numerous cases from the early twentieth century demonstrate that Article III is not an absolute bar to nationwide injunctions.[33] She analyzes several injunctions against the enforcement of federal statutes, state statutes, and even a federal administrative action, which she claims demonstrate the exercise of all powers necessary for issuance of a nationwide injunction. She concludes that many current reform proposals would undercut these long-established exercises of judicial authority outside of the currently contentious context, and that the particular reform proposal of judicially narrowing Article III is not historically supported.[34]

The proper interpretation of Article III, in light of historical orders handed down by federal district courts sitting in equity, is beyond the scope of this Article. My concerns[35] and proposals[36] sound primarily in prudential and equitable considerations. To the extent that nationwide injunctions under current law and practice raise genuine Article III concerns, however, I do not believe that they would do so if limited in the ways I propose here.[37]

Another area of contention in the scholarly literature is the relationship between nationwide injunctions and offensive nonmutual preclusion.[38] Professor Morley argues that nationwide injunctions are in sharp tension with the considerations underlying the Supreme Court's decision in *United States v. Mendoza*.[39] *Mendoza* held that the Court's relatively recent erosion of the mutuality requirement for issue preclusion should not extend to cases in which the federal government is the defendant.[40] The Court reasoned that the federal government is involved in a uniquely massive number of lawsuits which often raise the same questions, that percolation of the answers to these

31 *Id.* at 445, 449–52.

32 *Id.* at 469.

33 Sohoni, *supra* note 2, at 924–28, 1008–09.

34 Professor Bray and Professor Sohoni have continued to debate the relevant history. *See supra* note 6.

35 *See infra* Parts III and IV.

36 *See infra* Part V.

37 *See infra* note 66 and accompanying text.

38 Offensive nonmutual preclusion occurs when a plaintiff estops a defendant from relitigating an issue on which the defendant previously lost in a different case, involving a different plaintiff. *See* 18A WRIGHT ET AL., *supra* note 16, § 4464.

39 *See* Morley, *supra* note 2, at 627–33 (citing United States v. Mendoza, 464 U.S. 154 (1984)).

40 *Mendoza*, 464 U.S. at 158.

questions through multiple lower courts is ultimately beneficial, that government resources should be preserved from having to appeal every case, and that subsequent administrations should be able to relitigate the same questions on different grounds.[41] Professor Morley argues that *Mendoza* is grounded in a more comprehensive analysis of the federal judicial system than *Califano*, and that the law governing nationwide injunctions should be modified to comply with *Mendoza*'s limits.[42] Specifically, Professor Morley would limit nationwide injunctions to cases in which district courts certify a nationwide class, and would limit nationwide class certification primarily to cases in which the Supreme Court has already spoken unambiguously to the relevant legal issue.[43]

Professor Trammell similarly argues that general preclusion principles should be applied to nationwide injunctions in such a way as to limit the circumstances under which they are issued relative to current practice.[44] Professor Trammell suggests that nationwide injunctions are appropriate when the federal government has acted in bad faith, which occurs most unambiguously where federal officials refuse to abide by settled law.

In contrast, Professor Clopton argues that it is *Mendoza* that merits rethinking and advocates an analysis that focuses more on potential plaintiffs than the defendant.[45] He argues that district courts considering issuing a nationwide injunction should employ *Parklane Hosiery Co. v. Shore*'s[46] concept of deserving nonparties. In the absence of deserving nonparties, nationwide injunctive relief would generally be limited to successfully certified class actions. In defense of district courts' Article III power to issue nationwide injunctions, Professor Clopton claims that, while district court decisions lack *precedential* effect, their *judgments* are entitled to full faith and credit. He traces the apparent lack of nationwide injunctions throughout much of the country's history more to the contemporary lack of nonmutual preclusion than contemporary understandings of the courts' powers in equity.[47]

Although I agree with Professor Clopton that *Mendoza* and *Califano* are not wholly incompatible, I agree with Professor Morley that some of *Mendoza*'s policy reasoning ought to be applied to nationwide injunctions as well. I consider this issue in Section IV.A.

Most pertinent to my own evaluation of the nationwide injunction is the normative battlefield regarding whether, and in what circumstances, courts *ought* to issue nationwide injunctions. The existing arguments in this sphere

41 *Id.* at 159–62.

42 Morley, *supra* note 2, at 633.

43 *See id.* at 620–21, 656–57.

44 Trammell, *supra* note 2, at 103–05.

45 Clopton, *supra* note 2, at 5–6, 39–42.

46 439 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.").

47 Clopton, *supra* note 2, at 15–17.

are well canvassed by Professor Frost. Professor Frost argues that nationwide injunctions are within district courts' equitable powers but should not be a default remedy.[48] She argues that nationwide injunctions are an appropriate remedy in three instances: (1) when necessary to provide complete relief to the parties; (2) when necessary to prevent irreparable injury to nonparties similarly situated; and (3) when an injunction of more limited scope would be impracticable to administer.[49] By contrast, she contends that uniformity of federal law is not a sufficient reason by itself to issue a nationwide injunction, as it is counterbalanced by the benefits of percolation amongst multiple lower courts before the Supreme Court ultimately resolves the pending issue.[50] She acknowledges that the availability of nationwide injunctions creates certain perverse incentives, including forum shopping, wait-and-see plaintiff behavior, and bypassing class certification requirements.[51] She advocates for a special scope hearing to be held by any district court considering issuance of a nationwide injunction, at which all the costs and benefits of nationwide scope can be appropriately weighed.[52]

I agree with Professor Frost that nationwide injunctions may sometimes be justified even though they should never be the default remedy. However, I disagree with Professor Frost regarding precisely *which* circumstances justify a nationwide injunction.[53]

In the remaining sections I engage substantively with the existing scholarly debate. I first close this Section, however, with a metaobservation: The reason that nationwide injunctions have drawn such intense critical attention recently likely has little to do with some of the formal concerns typically articulated by commentators (e.g., the historical nature of equity, preclusion doctrine, class certification requirements). Instead, the reason is likely a perception that major battles over national policy are now being fought not between parties in Congress, but between the executive and the judiciary.[54]

48 Frost, *supra* note 2, at 1069.

49 *Id.* at 1090.

50 *Id.* at 1101–03.

51 *Id.* at 1104–06, 1114–15.

52 *Id.* at 1116.

53 *See infra* Part III.

54 The reason nationwide injunctions are drawing so much critical attention *now* is likely because President Trump and the Department of Justice have made it a *cause célèbre*. *See* Tessa Berenson, *Inside the Trump Administration's Fight to End Nationwide Injunctions*, TIME (Nov. 4, 2019), https://time.com/5717541/nationwide-injunctions-trump-administration ("Members of the Trump administration have made it a mission at the highest levels of the White House and the Justice Department to put an end to nationwide injunctions."); *see also, e.g.*, Alison Frankel, *AG Barr Joins Renewed Trump Administration Push to Curtail Nationwide Injunctions*, REUTERS (May 22, 2019), https://www.reuters.com/article/us-otc-injunctions/ag-barr-joins-renewed-trump-administration-push-to-curtail-nationwide-injunctions-idUSKCN1SS2U4 ("'One judge can, in effect, cancel . . . policy with the stroke of the pen,' Barr said. 'No official in the United States government can exercise that kind of nationwide power, with the sole exception of the president. And the Constitution subjects him to nationwide election, among other constitutional checks, as a prerequisite to wielding that power.'" (alteration in original)); Sarah N. Lynch, *Attorney General Vows to*

The judiciary is not meant to be political, and yet the judiciary is often seen as political when it checks a political decision by the executive.

The question of the proper role of the judiciary is older than the judiciary itself. Reasonable minds may disagree about whether federal courts ought to be engaged in law declaration in addition to dispute resolution, as well as which model actually dominates in practice.[55] Judges are unelected officials who should not be solving generalized grievances or making major policy choices that belong to the people. The nationwide injunction appears to be a vehicle by which judges may exercise a great deal of power to shape national policy. Therein lies the real crux of the concern, and therein lies the commensurate outcry by some against an overreaching judiciary.

II. Best Justification: Complete Relief for the Plaintiff

The potential justification for nationwide injunctions that I find most compelling as an equitable consideration is the provision of complete relief to the plaintiff.[56] In the classic case where we are talking about an individual harmed by an executive policy,[57] a successful case on the merits often entitles the plaintiff to no less. Imagine a fisherman whose livelihood is imperiled by an invalid order that allows pollution of the watershed.[58] Enjoining implementation of the order, even if limited to the watershed encompassing the plaintiff's fishery, might benefit numerous nonparties, including other fishermen, environmentalists, recreational enthusiasts, drinking water consumers, and agricultural irrigation water users. The fact that the injunction would benefit nonparties does not diminish its validity as a remedy for the actual plaintiff. Nor would the geographic scope of the injunction affect its valid-

Fight Nationwide Court Injunctions, Reuters (Sept. 13, 2018), https://www.reuters.com/article/us-usa-justice-courts/attorney-general-vows-to-fight-nationwide-court-injunctions-idUSKCN1LT34A (reporting that Attorney General Sessions attacked a nationwide injunction against the administration's first order restricting travel from seven majority-Muslim countries by saying "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 what appears to be clearly his statutory and constitutional power," and argued that "[t]his trend must stop. We have a government to run. The Constitution does not grant to a single district judge the power to veto executive branch actions").

Most of the scholarship on nationwide injunctions, and the only Supreme Court opinions (minority concurrences) questioning their validity writ large, has emerged in just the past three or four years. *See supra* notes 2–3. For one exception, see Daniel J. Walker, Note, *Administrative Injunctions: Assessing the Propriety of Non-Class Collective Relief*, 90 Cornell L. Rev. 1119 (2005). By contrast, the frequency of nationwide injunction issuance appears to have been growing fairly steadily over several decades. *See supra* notes 7–11.

55 *See* Frost, *supra* note 2, at 1087 & n.103.

56 *See, e.g.*, *id.* at 1090–94.

57 I discuss the nontypical case, involving an organization only indirectly affected by a challenged policy, in Section IV.B.

58 My hypothetical here is loosely inspired by *Yurok Tribe v. United States Bureau of Reclamation*, 231 F. Supp. 3d 450 (N.D. Cal. 2017).

ity,[59] if the relevant watershed extended as far. Imagine a Gulf of Mexico fishery impacted by an order affecting pollution of the Mississippi River basin, which includes all or parts of thirty-two states within the jurisdiction of ten different federal circuit courts.

The exercise of the court's equitable powers in this scenario is not meaningfully different from a nuisance case between private parties.[60] If an individual plaintiff, privately injured by a public nuisance, successfully sues to enjoin the nuisance, the court's order is no less valid by virtue of its beneficial impact on nonparties also in the vicinity of the nuisance. Nor is it any less valid on account of those nonparties living across a state border, or even on account of the defendant needing to take action across the state border in order to abate the nuisance.[61]

Cases involving nationwide funds provide another example of where complete relief for the plaintiff arguably requires a nationwide injunction. For example, in *Washington v. Reno*, the Sixth Circuit reviewed a district court's nationwide preliminary injunction regarding telephone systems in federal prisons.[62] The Bureau of Prisons (BOP) was in the process of replacing its collect call system, under which inmates could make unlimited collect calls, with a direct-dial system, under which inmates were limited to twenty approved call recipients, were blocked from calling elected officials or the media, and had to purchase advance credits for their calls. To pay for the installation of the new phone system, the BOP was using money from a trust fund statutorily established for the benefit of inmates' general welfare.

Without certifying a class of affected inmates, the district court entered a preliminary injunction requiring the BOP, among other things, to cease implementing the direct-dial system unless the collect call system remained available, and to cease using money from the trust fund to install the direct-dial system. On appeal, the Sixth Circuit vacated the injunction against further installation of the direct-dial system, ruling against plaintiffs on the merits of their First Amendment, due process, and Administrative Procedure Act challenges.[63] The Sixth Circuit further held that the installation of a phone system could be reasonably viewed as benefitting the inmate population.[64] It nevertheless affirmed the issuance of a nationwide preliminary injunction enjoining the use of trust-fund moneys for aspects of the new direct-dial system purchased primarily for security purposes (e.g., monitoring equipment). As to this "limited" form of relief, the Sixth Circuit further affirmed the dis-

59 The geographic scope may be relevant to the balance of equities, however, as discussed below.

60 *See* Trump v. Hawaii, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring) (citing Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 564 (1851)).

61 *See, e.g.*, The Salton Sea Cases, 172 F. 792, 812–16 (9th Cir. 1909) (injunction designed to prevent defendant from flooding plaintiff's land in California ultimately required defendant to fix a faulty irrigation canal in Mexico).

62 Washington v. Reno, 35 F.3d 1093, 1095–96 (6th Cir. 1994).

63 *Id.* at 1099–1100, 1104. This was largely because the court concluded that those challenges had been assuaged by the Bureau's intervening regulatory changes.

64 *Id.* at 1102.

trict court's nationwide scope.[65] The court concluded that, since the trust fund was a nationwide fund, the plaintiffs would be just as injured by depletions of the fund attributable to improper expenditures at other prisons as at the facility where the plaintiffs themselves were incarcerated.

The Sixth Circuit's reasoning regarding complete relief was reasonable. I do not believe that its decision, grounded in affording complete relief to the plaintiffs, raises the Article III concerns typically articulated regarding nationwide injunctions. As long as a court has subject matter jurisdiction over the case (which includes a plaintiff with standing) and personal jurisdiction over the defendant, Article III does not prevent the court from enjoining the defendant's conduct in a way that happens to benefit nonparties or that reaches beyond the court's geographic territory.[66]

Nevertheless, a court sitting in equity has discretion to tailor the remedy to which the plaintiff is entitled, and may elect not to provide the plaintiff with the "complete" relief prayed for if other equitable considerations move the court to narrow or deny the requested remedy. The Supreme Court in *Califano v. Yamasaki* stated only that "injunctive relief should be *no more* burdensome to the defendant than necessary to provide complete relief to the plaintiffs."[67] It does not necessarily follow that courts *must* issue injunctive relief that provides complete relief to the plaintiffs. The balance of the equities may indicate otherwise.

For instance, the Sixth Circuit might have concluded in *Washington* that the balance of the equities between plaintiffs, whose only cognizable injury in the end was the loss of funds for recreational equipment and the like, and defendants, who would become subject to contempt proceedings based on the vague standard of whether their purchases were "primarily" for security purposes rather than general welfare purposes, supported defendants. In my hypothetical about the Gulf of Mexico fishery, the court might conclude that the balance of the equities between the plaintiff, who stood to suffer the economic injury of loss of the fishery, and the thirty-two states' worth of individuals and entities who stood to suffer economic losses if the injunction were issued, particularly in a case where the regulation's deficiencies appeared curable,[68] supported defendants.

Thus, I contend that nationwide injunctions are constitutionally permissible in cases where they are necessary to afford complete relief to the plaintiff, but that they are never required.

III. Insufficient Justifications

A. Protection of Similarly Situated Nonparties

Another purported justification for nationwide injunctions is the protection of individuals who cannot quickly bring their own legal challenges and

65 *Id.* at 1103–04.

66 11A Wright et al., *supra* note 16, § 2945.

67 Califano v. Yamasaki, 442 U.S. 682, 702 (1979) (emphasis added).

68 *See infra* note 87.

who would otherwise suffer irreparable harm.[69] I believe that this rationale invites judicial overreach.

When a court includes within an injunction relief designed solely to protect nonparties, it adjudicates a case or controversy that is not before it. It denies the federal government an opportunity to litigate against those other individuals or entities, and it denies the federal defendant fair notice of their injuries. Its coercive ordering of executive officials to do or not do something, divorced from the relief that the actual plaintiff has standing to assert, raises serious separation-of-powers concerns.

The argument in favor of expressly protecting nonparties for their own sake sounds in justice and the public interest. It resonates with the consideration of the public interest now long baked into the federal tests for issuance of a preliminary or permanent injunction.[70] Particularly in the instance of a disadvantaged group widely suffering a lack of access to the courts, it is understandable to wish that courts could reach out and protect that group without its members needing to bring a great multitude of individual challenges.

But Congress has designed a system to address this very problem: the class action. The class action is the modern descendant of the bill of peace used by English courts in equity to enable "a portion of the parties in interest to represent the entire body."[71] Now applicable in both law and equity,[72] Federal Rule of Civil Procedure 23 requires a court to make specific findings before certifying a class. It first provides, as prerequisites to any class certification, that (1) the class must be "so numerous" that actual joinder is "impracticable"; (2) the class must share common questions of law or fact; (3) the representative parties must be asserting claims or defenses "typical" of the class; and (4) the representative parties must "fairly and adequately" protect the class.[73] It then limits the device further by providing that only three types of class actions are permissible: (a) cases in which individual lawsuits would either create incompatible standards for the defendant or be dispositive of other potential class members' rights anyway; (b) cases in which the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"; or (c) cases in which common questions of law or fact "predominate."[74]

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69 *See, e.g.*, Nw. Immigrant Rights Project v. Sessions, No. C17-716, 2017 WL 3189032, at *7 (W.D. Wash. July 27, 2017) ("The Preliminary Injunction is granted on a nationwide basis as to any other similarly situated non-profit organizations who, like NWIRP, self-identify and disclose their assistance on *pro se* filings. Therefore, the Court prohibits the enforcement of 8 C.F.R. § 1003.102(t) during the pendency of this preliminary injunction on a nationwide basis."); Frost, *supra* note 2, at 1094.

70 *See infra* note 117.

71 Smith v. Swormstedt, 57 U.S. (16 How.) 288, 303 (1853).

72 For a summary of the relevant history, see 7A WRIGHT ET AL., *supra* note 16, § 1751.

73 FED. R. CIV. P. 23(a).

74 FED. R. CIV. P. 23(b).

This intricate system is designed to protect both potential class members and defendants. Nationwide injunctions issued specifically to provide relief to nonparties circumvent the Rule 23 requirements for issuing class-wide relief. The system is not without its flaws, which are beyond the scope of this Article. But efforts to help similarly situated individuals who cannot quickly or easily get into court themselves should focus on reforms to the class-action device itself, not on bolstering a nationwide-injunction rationale that evades the design of the class action altogether.[75]

B. Nationwide Violation

Another purported justification sometimes asserted for a nationwide injunction is the remediation of a nationwide violation.[76] The argument to which I refer is not that the plaintiff is suffering a nationwide harm, but that the defendant's conduct causing the plaintiff's harm corresponds to a nationwide law or policy that the court has found unlawful. Almost all federal laws and policies are, by definition, nationwide in their application. Accordingly, this reason alone cannot justify the issuance of a nationwide injunction against enforcement or implementation.

The oft-cited maxim from which this argument seems to derive is the *Califano* statement that "the scope of injunctive relief is dictated by the extent of the violation established."[77] The problem with reading this authority to endorse broad findings of nationwide violations is that plaintiffs have standing to challenge only that conduct by which plaintiffs have personally suffered a concrete injury.[78] In light of *Califano*'s immediately preceding mandate that injunctive relief be "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs,"[79] I believe *Califano* is better read to support the proposition that the scope of injunctive

75 Given the different considerations applicable in review of an injunction that is limited in scope to a certified class, even if that class arguably extends "nationwide," I do not count such cases as "nationwide injunction" cases for purposes of this Article. *See, e.g.*, Al Otro Lado, Inc. v. McAleenan, No. 17-cv-02366, 2019 WL 6134601 (S.D. Cal. Nov. 19, 2019), *appeal docketed sub nom.* Al Otro Lado v. Wolf, No. 19-56417 (9th Cir. Dec. 5, 2019), *and stay denied*, 952 F.3d 999 (9th Cir. 2020); Padilla v. Immigration & Customs Enforcement, No. C18-928 (W.D. Wash. July 2, 2019), *stayed in part*, No. 19-35565 (9th Cir. July 22, 2019), *argued*, No. 19-35565 (9th Cir. Oct. 22, 2019); Gonzalez Rosario v. U.S. Citizenship & Immigration Servs., 365 F. Supp. 3d 1156 (W.D. Wash. 2018), *argued sub nom.* Nw. Immigrant Rights Project v. U.S. Citizenship & Immigration Servs., No. 18-35806 (9th Cir. Feb. 4, 2020); Inland Empire–Immigrant Youth Collective v. Nielsen, No. EDCV-17-2048, 2018 WL 1061408 (C.D. Cal. Feb. 26, 2018), *appeal stayed*, No. 18-55564 (9th Cir. Jun. 28, 2019).

76 *See, e.g.*, City of Chicago v. Sessions, 264 F. Supp. 3d 933, 951 (N.D. Ill. 2017) ("This injunction against imposition of the notice and access conditions is nationwide in scope, there being no reason to think that the legal issues present in this case are restricted to Chicago or that the statutory authority given to the Attorney General would differ in another jurisdiction.").

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

78 *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547–48 (2016).

79 *Califano*, 442 U.S. at 702.

relief should match the scope of the violation established by the plaintiff with regard to the plaintiff's injuries. The object of *Califano*'s extent-of-the-violation statement, in context, was to demonstrate that geography was not an independent constraint. Notably, *Califano* was decided in the context of a certified nationwide class. It had no occasion to speak to the question of whether courts are competent to rule on violations as to nonparties in the absence of class certification.

The nationwide violation argument inappropriately invites a single judge to police the entire federal executive vis-à-vis the entire public. As articulated in *Mendoza*,[80] there are sound reasons to allow the executive to relitigate important questions of national policy, and statutory and constitutional interpretation.[81]

C. Administrative Procedure Act

Courts and commentators sometimes cite the Administrative Procedure Act (APA) as sufficiently justifying, or indeed compelling, the issuance of a nationwide injunction in a case to which the APA applies.[82] I argue that even if the APA requires vacatur of an agency action, it does not necessarily follow that it also requires an injunction.

As a preliminary matter, § 705 grants reviewing courts, "to the extent necessary to prevent irreparable injury," the authority "to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."[83] Section 705 appears to contemplate that the rule itself will be postponed, not just the rule's application to a specific plaintiff. On this understanding, it suggests a congressional thumb on the scale opposite the executive's frequently asserted interest in implementing policy without delay. However, it does not necessarily follow that an injunction should issue, which is traditionally a matter for the court's equitable

80 *See supra* note 41 and accompanying text.

81 Another version of this concept occurs in immigration cases where a court issues a nationwide injunction on the basis of constitutional and statutory commands that immigration policy be uniform nationwide. *See, e.g.*, Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 511–12 (9th Cir. 2018) ("DACA *is* national immigration policy, and an injunction that applies that policy to some individuals while rescinding it as to others is inimical to the principle of uniformity."), *cert. granted*, 139 S. Ct. 2779 (2019) (mem.), *argued*, No. 18-587 (Nov. 12, 2019). I am doubtful that this rationale is sound either, as it is belied at least by the existence of circuit splits, intracircuit splits, and Board of Immigration Appeals inconsistencies as a matter of course.

82 *See, e.g.*, Earth Island Inst. v. Ruthenbeck, 490 F.3d 687, 699 (9th Cir. 2007) ("The nationwide injunction, as applied to our decision to affirm the district court's invalidation of [the challenged regulations], is compelled by the text of the Administrative Procedure Act."), *rev'd on other grounds sub nom.* Summers v. Earth Island Inst., 555 U.S. 488 (2009).

I note that almost *all* executive action is subject to the APA. *See, e.g.*, HIAS, Inc. v. Trump, 415 F. Supp. 3d 669, 682–84 (D. Md. 2020) (concluding that even an executive order case involves the APA given the joinder of defendant federal officials other than the President), *appeal docketed*, No. 20-1160 (4th Cir. Feb. 13, 2020).

83 5 U.S.C. § 705 (2018).

discretion. A rule or order may be held not yet effective, and therefore enforcement of it be without legal authorization, without such enforcement being a violation of an injunction subjecting a federal official to contempt proceedings.

Subsection 706(2) directs "the reviewing court"—that is, *any* reviewing court—to "hold unlawful and set aside agency action," specifically defined to include "the whole . . . of an agency rule, order, [etc.],"[84] that the court finds to be arbitrary or capricious, unconstitutional, in excess of statutory authority, or otherwise unlawful.[85] Subsection 706(2) thus appears to contemplate that an unlawful agency rule or order, assuming its unlawfulness is more than just a matter of its application to the plaintiff, will be set aside entirely.[86] Nor does § 706(2) direct courts to set aside the agency rule or order only within the reviewing court's own geographic territory. One interpretation of this provision is that Congress has expressed a policy judgment counter to percolation. Instead of allowing multiple court rulings and devising rules allowing those decisions to coexist until the Supreme Court weighs in, Congress has directed that an agency rule or policy be vacated in its entirety as soon as one court decides that it should be.[87] Another interpretation, however, is that

84 *Id.* §§ 551(13), 706(2).

85 *Id.* § 706(2).

86 *See, e.g.*, Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting) (explaining that when a single judge "invalidate[s]" an agency rule, a single plaintiff injured by the rule effectively achieves relief for all similarly situated nonparties); Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (concluding that Justice Blackmun's view on this point was representative of "all nine Justices"; "[w]hen 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" (quoting Harmon v. Thornburgh, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)).

The D.C. Circuit applies a two-part test to determine whether vacatur of a rule is appropriate in cases where it remands to the agency to fix a flawed rule. Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (considering "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change" (quoting Int'l Union, United Mine Workers v. Fed. Mine Safety & Health Admin., 920 F.2d 960, 967 (D.C. Cir. 1990)); *see also, e.g.*, North Carolina v. Envtl. Prot. Agency, 531 F.3d 896, 929 (D.C. Cir. 2008) (per curiam) (vacating interstate air pollution rule in its entirety under this test), *amended on reh'g by* 550 F.3d 1176 (D.C. Cir. 2008) (per curiam) (remanding to EPA without vacatur after concluding that rule was too fully entwined with the regulatory regime); 33 WRIGHT ET AL., *supra* note 20, § 8382.

87 *See* Earth Island Inst. v. Ruthenbeck, 490 F.3d 687, 699 (9th Cir. 2007). *But see* ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 2013–6: REMAND WITHOUT VACATUR 2 (2013), https://www.acus.gov/sites/default/files/documents/Remand%20Without%20Vacatur%20_%20Final%20Recommendation.pdf ("[N]o cases were identified in which a federal court of appeals held that remand without vacatur was unlawful under the APA . . . . Rather, courts generally accept the remedy as a lawful exercise of equitable remedial discretion."); Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 310 (2003) (contending that "set aside" command of § 706(2) does not overcome the "longstanding judicial presumption that militates against a finding that Congress has placed curbs on the courts' remedial discretion").

executive agencies and officials may continue relitigating the validity of the vacated action in other circuits until the Supreme Court declares it vacated nationwide.[88]

To the extent the APA requires a particular judicial remedy, assuming that requirement to be constitutional, courts should not ignore that requirement based on policy preferences or prudential concerns. However, I read § 706(2) at most to require nationwide vacatur,[89] not a nationwide injunction.[90] The discretion of courts sitting in equity should not be presumed to be restricted unless Congress has spoken clearly.[91] The APA does not clearly state that a court that finds an agency action unlawful must enjoin all federal officers from acting in accordance with that agency action, nationwide, on penalty of contempt.

IV. Problems

Commentators have recognized numerous problems with nationwide injunctions, including forum shopping, a risk of conflicting injunctions, an impediment to percolation of legal questions through multiple lower courts, tension with the restrictions on class actions, tension with the government's exemption from offensive nonmutual collateral estoppel, the politicizing of the judiciary, and the enormous power wielded by a single judge. I focus here on two problems that I find particularly significant.

A. Impeding Percolation

As stated by Justice Ginsburg, "when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final

88 *See* Vestal, *supra* note 24 (finding in a comprehensive survey of federal law no legal barrier to such relitigation).

89 I am doubtful that it does even that. *See* Zayn Siddique, *Nationwide Injunctions*, 117 Colum. L. Rev. 2095, 2120–26 (2017). For an example of a court not vacating a rule, despite finding it unlawful, outside the *Allied-Signal* context of curable deformities, see *Baeder v. Heckler*, 768 F.2d 547, 553 (3d Cir. 1985).

90 5 U.S.C. § 706(1) (2018), by contrast, uses language that more clearly refers to an injunction: "The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." *See also* South Carolina v. United States, 907 F.3d 742, 760 (4th Cir. 2018) (reading this interpretation in the "plain language of § 706(1)"); Vietnam Veterans of Am. v. Cent. Intelligence Agency, 811 F.3d 1068, 1081 (9th Cir. 2016) (finding "[t]he word 'shall' requires a court to compel agency action" in reviewing an injunction). *But see* Org. for Competitive Mkts. v. U.S. Dep't of Agric., 912 F.3d 455, 462 n.5 (8th Cir. 2018) (expressing "serious doubt" about whether "Congress in § 706(1) intended to foreclose all discretion that is inherent in the judiciary's equity jurisdiction"). Yet I would not read § 706(1) to require a court to compel agency action where the lawfulness of the inaction or delay is beyond the scope of the case or controversy that the court is deciding. In other words, I would still subject a § 706(1) injunction to the analysis I otherwise articulate in this Article, particularly in Section III.A above.

91 United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 496 (2001).

pronouncement by [the Supreme] Court."[92] The Supreme Court depends on the development of intercircuit conflicts to identify legal issues that merit its attention, as well as to help it decide those issues by offering an array of well-considered judicial perspectives.

Circuit courts also benefit from multiple judicial decisions involving the same legal questions. Multiple district court opinions reaching contrary results may help inform us of the full array of perspectives and arguments. Multiple district court opinions reaching the same result may help indicate that a particular position is worthy of adoption as circuit precedent. Multiple circuit court opinions in conflict or agreement have similar effects, informing our judgment whether we are considering a position as a matter of first impression or considering overruling a position on which other circuits disagree with us.

In the case of a correct but publicly controversial result, multiple courts reaching that same result help ensconce that result in the law and give it more legitimacy vis-à-vis the public and elected officials. If the result of a case is subject to significant reasonable disagreement, multiple courts reaching varying results create laboratories testing the different results' effects and ultimately help produce better decisions by subsequent courts.

Based on my experience as a federal judge, I believe that these virtues of percolation typically outweigh the virtues of rapidly compelled uniformity. When the federal government believes otherwise, it can conform its practice nationwide on a voluntary basis to the extent that different decisions do not impose conflicting mandates, or else it can seek Supreme Court review.

Nationwide injunctions do not always prevent percolation,[93] but they typically do. A nationwide injunction typically prevents the challenged government action such that it can no longer give rise to additional challenges. Although contemporaneously pending challenges may still reach decisions,[94] plaintiffs are unlikely to expend resources litigating a challenge to a federal policy that has already been enjoined nationwide. Plaintiffs may lack standing to do so, and their challenges may be considered moot.[95]

Thus, nationwide injunctions represent a considerable disruption to the ordinary rules of percolation supported by the nonprecedential effect of dis-

92 Arizona v. Evans, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

93 *See, e.g.*, California v. Health & Human Servs., 351 F. Supp. 3d 1267, 1299–1301 (N.D. Cal.) (injunction limited to state plaintiffs), *aff'd*, 941 F.3d 410, 421–23 (9th Cir. 2019) (not moot despite nationwide injunction issued by E.D. Pa.), *petition for cert. filed*, No. 19-1038 (Feb. 19, 2020).

94 *See, e.g.*, Stockman v. Trump, No. EDCV 17-1799, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017); Karnoski v. Trump, No. C17-1297, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017); Stone v. Trump, 280 F. Supp. 3d 747 (D. Md. 2017); Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017), *vacated sub nom.* Doe 2 v. Shanahan, 755 F. App'x 19 (D.C. Cir. 2019). All four of these nationwide injunctions pertained to the same executive order regarding transgender persons in the military.

95 These conclusions are not foregone, however, particularly to the extent that a nationwide injunction is only preliminary (including temporary restraining orders and interlocutory All Writs Act injunctions), or still subject to appeal or petition for certiorari.

trict court decisions, the availability of circuit splits, and *Mendoza*'s exemption of the federal government from offensive nonmutual preclusion. This disruption should be avoided unless clearly justified.

B. Organizational Plaintiffs

Although I endorse the complete relief theory as to the typical individual plaintiff,[96] I am less convinced of the propriety of a nationwide injunction styled to provide complete relief to an organizational plaintiff whose members are only indirectly affected by the challenged order.[97] Imagine a pro bono immigration-legal-services organization that sues to enjoin an immigration order.[98] The organization asserts standing based on the alleged injury to their use of resources to represent affected immigrants. The organization asserts irreparable harm based on the unavailability of monetary damages in Administrative Procedure Act challenges. The organization further asserts that it represents immigrants across the country. Assuming likelihood, or even a final determination, of success on the merits, should the district court issue a nationwide injunction?[99]

I am not sure that either standing considerations or equitable considerations fairly support it. As to standing,[100] the principle that troubles me the most is that standing should be limited to plaintiffs falling within the "zone of

96 *See supra* Part II.

97 I leave aside state plaintiffs, who straddle a middle ground in my view between individual plaintiffs and other organizational plaintiffs, and who are subject to unique standing standards. For an example of a nationwide injunction issued on the basis of providing "complete relief" to states, see *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 830–35 (E.D. Pa. 2019), *aff'd sub nom.*, 930 F.3d 543 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 918 (2020) (mem.). For scholarly commentary on this subject, see Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 Notre Dame L. Rev. 1955 (2019); Jonathan Remy Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 Notre Dame L. Rev. 1985 (2019).

98 My hypothetical here is broadly abstracted from *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026 (9th Cir. 2019).

99 Professor Bray's proposed restriction on nationwide injunctions—grant relief only as to the plaintiff—does not provide a satisfactory constraint here if we seek to narrow the scope. *See* Bray, *supra* note 2. Would the government be prohibited from enforcing the immigration rule only against those immigrants who might seek legal services from the plaintiff? Such an injunction might well be a de facto nationwide injunction. Would the court be unable to provide any remedy since the policy is not being enforced "against" the plaintiff organization? That result seems unfair unless we ground it in other considerations of equity.

100 The standing doctrine is a limit on the judiciary's power grounded in Article III's case-or-controversy requirement. "[T]he 'irreducible constitutional minimum' of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (citation omitted) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)).

interests" of the statute conferring the right of action.[101] Although under current law the zone-of-interests test is limited to statutory interpretation regarding legislatively conferred causes of action, I believe its former "prudential" label speaks to important broader concerns.[102]

For example, in a lawsuit alleging a constitutional deficiency in an executive policy, I am skeptical that a plaintiff whose own injury is *not* a deprivation or burdening of the relevant constitutional right should have standing to assert the challenge. If, in my above hypothetical, it is the immigrants' constitutional rights that are in dispute, I doubt that a case or controversy may be concretely presented without the appearance of at least one such immigrant before the court. The existing caselaw liberally treats economic injury as sufficient for purposes of standing, but I wonder whether this broad-brush approach—especially where nationwide injunctions may foreclose further litigation—deprives courts of the opportunity to make their decisions in the context of real facts about real constitutional injuries.

Similar concerns can be expressed in terms of equitable considerations. For instance, the theory under which my hypothetical legal organization is able to assert irreparable injury[103] creates a bit of a catch-22 for the government. Either assert sovereign immunity as to damages, only to get saddled with injunctions based on purely economic harm, or give up sovereign immunity as to damages. Of course, Congress could reassert sovereign immunity against injunctive relief, but there are multiple reasons why it may prefer not to do so. Congress could specifically assert sovereign immunity to injunctive relief premised on irreparable harm itself traceable to sovereign immunity. But this patch might be both over- and underinclusive.

Although I believe this concern regarding purely economic harm and the government's catch-22 is relevant to a court's equitable discretion, I am not convinced that incompatibility with the concept of irreparable harm is the precise problem. An economic loss of resources may be irreparable in a literal sense. Rather, what drives my concern with this phenomenon is a sense of the balance of the equities. Economic harm only indirectly attributable to a challenged executive action simply does not seem commensurate with the executive's interest in being able to continue to defend its policies before other courts, or with federal officials' interests in being able to conduct their affairs free of the threat of contempt proceedings.

It would be one thing if the economic harm were a result of individualized enforcement against the organization, in which case the balance of equities would likely favor at least an injunction specifically protecting the organization. But it is quite another where the harm is so indirect that com-

101 *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 (2014).

102 The zone-of-interests test used to be considered a matter of "prudential standing," but is now officially considered a matter of statutory interpretation regarding legislatively conferred causes of action. *Id.*

103 For one articulation of this theory, see *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018).

plete relief can only be provided with a nationwide injunction. In the latter case, the equities start to tip the other way.

The case of the indirectly harmed organizational plaintiff[104] thus nuances my embrace of the complete relief justification for nationwide injunctions. In such cases, I think complete relief ought to be particularly unlikely to be justified under a proper exercise of equitable discretion, and perhaps out of reach on standing grounds altogether.

V. Reforms

A. Three-Judge District Courts

One obvious reform option to counter the growing trend of *single* district court judges striking down national policies is to limit the issuance of nationwide injunctions to three-judge district courts. Congress has tried this before in similar circumstances, and the intervention largely failed. For the same reasons the three-judge district court system was problematic then, I would not recommend it now.

For much of the twentieth century, Congress subjected an evolving category of federal injunction cases to initial hearing by a specially constituted three-judge district court whose decision was directly appealable to the Supreme Court.[105] The evolving category was initially limited to interlocutory injunctions sought against enforcement of state statutes by state officers on the ground of unconstitutionality—a reaction to *Ex parte Young*.[106] It eventually grew to encompass all injunctions sought against enforcement of state statutes, state administrative orders, and federal statutes on grounds of unconstitutionality. It never reached injunctions sought against federal administrative orders, nor challenges brought solely on the basis of statutory noncompliance (like Administrative Procedure Act challenges).

The perceived ill was the invalidation of a statute or administrative order by a single unelected district court judge. The attempted remedy was to require at least two judges to agree to the initial invalidation, and to provide for rapid, guaranteed review by the Supreme Court. What the remedy-crafters failed to foresee was (1) the significant burden this system placed on the federal judiciary, and (2) the impediment this system would create against the percolation of federal law. The Supreme Court responded to these problems by narrowing, as much as possible, both the statutory trigger for the three-judge district court[107] and the precedential effect of the Court's

104 Organizational plaintiffs whose *members* are *directly* affected by a challenged federal policy present a different situation than that which I have considered in this Section, much more akin to that of the individual described in Part II above.

105 *See generally* 17A Wright et al., *supra* note 16, § 4234.

106 209 U.S. 123, 150–52 (1908) (establishing the power of the federal courts to enforce the Constitution against state officers, notwithstanding the state's immunity to suit under the Eleventh Amendment).

107 *See* Phillips v. United States, 312 U.S. 246, 251 (1941) (holding that the three-judge court statute is "not . . . a measure of broad social policy to be construed with great liberal-

summary affirmances of three-judge district court decisions.[108] Congress virtually abolished the procedure in 1976.[109]

The same problems would plague a system requiring three-judge district courts to adjudicate all complaints requesting nationwide injunctions. The right of direct appeal would impede percolation even more than the current nationwide injunction practice does by immediately entrenching results in Supreme Court precedent. Absent a right of direct appeal, a potential small gain in legitimacy would come at the cost of a significant burdening of the judiciary. Accordingly, I do not believe that Congress should reemploy this approach.

B. Scope Hearings

By contrast, I support calls for the procedural reform of requiring a special hearing regarding the appropriate scope of a potential nationwide injunction.[110] A district court should give full consideration to the costs and benefits of enjoining the federal government from enforcing or implementing a particular policy writ large. Moreover, it should fully explain its reasoning regarding the scope of the injunction in writing. It would help if the parties were directed to brief the appropriate scope of the injunction *after* the court has issued its substantive decision.[111] Accordingly, if the government loses, it would have an opportunity to present arguments regarding the appropriate scope of any injunction in light of the specific findings and conclusions reached by the district judge.

The written decision following such a hearing would be of great assistance to a reviewing court. We appellate judges are not generally in the business of crafting injunctions, and we do not have the benefit of district courts' experience enforcing injunctions over time to observe their workability and consequences. More thorough explanations of a district court's reasoning would help us evaluate challenges to the scope of an injunction.

We are, however, in the business of establishing precedential doctrine for our respective circuits that governs district courts' exercise of their equitable powers in general. I note that some of the downsides of nationwide injunctions—the incentive to forum shop, for instance—are better suited for

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ity, but . . . an enactment technical in the strict sense of the term and to be applied as such").

108 *See* Anderson v. Celebrezze, 460 U.S. 780, 784 n.5 (1983) ("We have often recognized that 'the precedential effect of a summary affirmance extends no further than "the precise issues presented and necessarily decided by those actions." A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain the judgment.'" (quoting Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 182–83 (1979))).

109 *See* WRIGHT ET AL., *supra* note 16, § 4234. The three-judge district court lives on in the context of certain voting rights and elections cases.

110 *See, e.g.*, Frost, *supra* note 2, at 1116.

111 This is admittedly more practical in the context of a permanent injunction than a preliminary injunction, temporary restraining order, or other emergency order.

appellate consideration (or congressional consideration) than for an individual district judge's hearing on the appropriate scope of an injunction in a particular case. It is the availability of nationwide injunctions in general that encourages forum shopping—once a district court judge is ruling on a particular motion for nationwide injunction, the forum has already been shopped. Concerns regarding macroeffects on the judiciary and on litigation practice—including forum shopping, the impediment to percolation, the politicizing of the judiciary, and the enormous power wielded by a single judge—are concerns that should inform whether and how strictly the judiciary and/or Congress create new categorically applicable rules to prevent or limit the issuance of nationwide injunctions. They are not concerns that an individual district court judge should be expected to weigh in an individual case against issuance of a specific nationwide injunction.

C. Substantive Limits

I also believe that certain stricter substantive limits are in order. As I have already articulated my rationale for each specific limit above, I merely collect my proposals here in summary and make them explicit.

First, I would strengthen the principle that injunctive relief should be narrowly tailored to the irreparable harm that will befall the plaintiff.[112] As a corollary, I would expressly abrogate a court's equitable discretion to issue injunctive relief to the extent that relief is purely protective of similarly situated nonparties (absent class certification),[113] or purely prohibitive of the defendants' generalized violation of the law.[114]

Second, I would interpret the Administrative Procedure Act to impose no constraint on a court's equitable discretion *not* to issue a nationwide injunction.[115]

Third, I would expressly limit the scope of parts three and four of the preliminary injunctions test.[116] I would limit the equities to be balanced to those of the actual parties, and I would limit consideration of the public interest to the question of whether it negates the propriety of injunctive relief (as opposed to whether it supports it).[117] Although it may sound heartless to

112 *See supra* Part III.

113 *See supra* Section III.A.

114 *See supra* Section III.B.

115 *See supra* Section III.C.

116 Preliminary injunctions (as well as temporary restraining orders and interlocutory stays or injunctions under the All Writs Act) differ from permanent injunctions in a significant way: the district court has not actually determined that the law or policy is invalid. In this context, the district court judge is invited to place much more weight on his or her own public policy preferences. (They also differ, however, in that the district court has less time and a more limited record on which to reach a decision, which may justifiably make the district court more wary of allowing irreparable harm to occur.)

117 These suggestions seem to be required by Supreme Court precedent anyway with regard to permanent injunctions. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (describing the third and fourth permanent injunction elements that a plaintiff must demonstrate as "(3) that, considering the balance of hardships *between the plaintiff and*

disregard the public interest, this assessment is highly subjective and perhaps the factor most likely to invite a judge to play a purely political role.

CONCLUSION

Nationwide injunctions are justified when their nationwide scope is incidental to the provision of complete relief to a deserving plaintiff. They are not justified when they represent an end-run around class-action requirements for the protection of nonparties or when their scope is tied only to the scope of the challenged policy without relation to the plaintiff's injuries. Even allowing for occasional justification, nationwide injunctions freight the system with significant costs for judicial legitimacy and for the development of the law. Accordingly, I join those voices calling for reforms that would limit the practice. Nationwide injunctions should issue only where fully justified.

defendant, a remedy in equity is warranted; and (4) that the public interest *would not be disserved* by a permanent injunction"—i.e., whether the public interest would be *served* by an injunction is irrelevant (emphasis added)). Arguably, however, they do not reflect the law on preliminary injunctions. *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (describing the third and fourth preliminary injunction elements that a plaintiff must establish as "that the balance of equities tips in his favor, and that an injunction is in the public interest").