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Enjoin some, enjoin all

Concerns about single federal judges issuing nationwide injunctions are overstated as they are a necessary tool for ensuring judicial efficiency, protecting constitutional rights, and preventing conflicting rulings across multiple courts.

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Concerns about a single federal judge issuing a nationwide injunction are overblown. Of course, not every constitutional challenge warrants such relief, judges err, and the power of judicial review needs careful handling. But the alternative is far worse - challenging a federal law in all 94 federal district courts is wasteful and risks inconsistent results. And the underlying concept of judicial power to invalidate laws is fundamental to our system of ordered liberty because protecting individWithout that protection, the people would be helpless against legislative and executive branch power.

Our founders understood the need for a robust judicial branch to protect liberty. In the Federalist Papers, Alexander Hamilton dismissed concerns about judicial tyrants. If anything, he thought, the greater risk was leaving courts too weak. In Federalist 78, Hamilton described the judiciary as the "least dangerous" branch because it lacked power over either sword or purse, having "neither force nor will, but merely judgment." That made it the weakest of the three branches, and the judiciary's natural frailty put it in continual jeopardy of being overpowered.

His solution was to give the courts "complete independence" with lifetime tenure and fixed compensation, and the power to declare laws unconstitutional. Absent that power, he said, "all the reservations of particular rights or privileges would amount to nothing." Thus, the federal constitution interposes the courts between the people and the government to keep the other branches in line. The practical limits on a court's ability to enforce its rulings explain why only this branch was entrusted with a power denied to the others. Indeed, courts have used injunctions since the common-law days, when equity required relief that extended beyond a particular territorial jurisdiction.

Even so, courts are reluctant to exercise this power. Invalidating a law is not done lightly, and courts have high standards for issuing injunctions. To obtain preliminary injunctive relief, a plaintiff must show a likelihood of success on the merits, likely irreparable harm without preliminary relief, that the balance of equities tips in the plaintiff's favor, and that the public interest favors an injunction. Federal courts require proof of an articulated connection to a plaintiff's particular harm and a showing of nationwide impact or sufficient similarity to other plaintiffs to foreclose litigation elsewhere. And there are further limits: courts must narrowly tailor injunctions to remedy the specific harm, so a nationwide injunction must be a necessary remedy.

When that showing is made, a nationwide injunction best preserves judicial economy. So, it's odd for anyone concerned with efficiency and conserving public funds to complain about a single judge having national injunction power. Which is cheaper: 94 trial-court decisions contradicting each other, or one linear path to a final decision? (One, obviously.) In Federalist 80 Hamilton called the alternative of

allowing multiple parallel courts to make final-and-equal decisions on the same issues "a hydra in government," from which "nothing but contradiction and confusion can proceed." Forcing the government to fight appeals in multiple appellate circuits has similar downsides: it's a waste of taxpayer resources, risks inconsistent results, and generally is worse all around. Instead, one judge issues an injunction, one circuit reviews it, and one final review adds up to just three venues. That's far less expensive than dispatching an army of government lawyers across the country.

Underlying this efficiency issue is the reality of what a federal court is doing here: judging a law's validity. That's why it's inaccurate to view nationwide injunctions as reaching beyond the actual litigants to embrace unnamed parties. The controversy actually concerns the law itself - and since the law applies everywhere, a decision that the law is facially unconstitutional means it's unenforceable everywhere. Nor does every constitutional challenge require a national injunction. For example, in as-applied challenges the policy might lawfully apply to others, making a nationwide injunction improper. But a law that fails a facial challenge is invalid anywhere, so there's no sound argument for limiting an injunction's reach.

Similarly, federal judges also have power to enjoin unconstitutional state acts, which by their nature can appear in multiple venues. There is no principled basis for preventing a federal court from issuing a statewide injunction against a facially unconstitutional state law. And if multiple states adopt the same wrongful policy, there's little reason to require a challenge in each state. If it's unconstitutional in one state then it's unlawful in all of them.

In fact, conflicting results from suits in multiple jurisdictions create even greater uncertainty around an executive act's validity. Even worse, injunctions that only protect the plaintiffs create a patchwork of enforcement. And even if all those affected could afford lawyers, it makes little sense to inundate our courts with a wave of litigation for each new executive order. Nor are class action lawsuits a solution; the class certification requirements are a poor fit for the remedy that a nationwide injunction achieves.

Some argue that national injunctions slow executive action. But this argument proves too much. Our policy process is intended to be slow and diffuse. A design that maximizes swift and concentrated decisions is called a dictatorship or a monarchy. Having just escaped that, James Madison's intent to preclude it from our nation's future was a prime motivator in his constitutional design process. Dividing power among the branches prevents it from concentrating anywhere - at the cost of efficiency. Madison and Hamilton understood that you can have freedom or dispatch, but not both.

Hamilton called the judiciary the least dangerous branch because it lacked enforcement powers. This was no oversight: to the founders (many of them lawyers), no powers of purse or sword were necessary because it was unthinkable that public servants in a nation of laws would disobey court orders. If the courts need anything more than respect for the law to command compliance, then only those who can enforce their edicts have actual authority. In that scenario only might is right - and then the Republic is already lost. Concerns about overused nationwide injunctions pale in comparison.

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