Congressional Research Service
Informing the legislative debate since 1914

Nationwide Injunctions: Law, History, and Proposals for Reform

September 8, 2021

Congressional Research Service
https://crsreports.congress.gov
R46902

CRS REPORT
Prepared for Members and
Committees of Congress

Congressional Research Service
Informing the legislative debate since 1914

SUMMARY

R46902

September 8, 2021

Joanna R. Lampe
Legislative Attorney

Nationwide Injunctions: Law, History, and Proposals for Reform

In recent years, nationwide injunctions have generated significant debate among scholars, advocates, judges, and legislators. Sometimes also called national injunctions, universal injunctions, non-party injunctions, or even cosmic injunctions, nationwide injunctions are defined not by their geographic scope but rather by the entities to which they apply. Most commentators use the term "nationwide injunction" to refer to an injunction *against the government* that prevents the government from implementing a challenged law, regulation, or other policy *with respect to all persons and entities*, whether or not such persons or entities are parties participating in the litigation.

Commentators debate both the historical roots of nationwide injunctions and numerous legal issues surrounding the modern judicial practice related to nationwide injunctions. With respect to historical analysis, commentators generally agree that no nationwide injunctions issued in the early years of the Republic and that such injunctions have become more common in the last two decades. Beyond those key areas of agreement, scholars debate many important points, including when the first nationwide injunction issued, whether other types of injunctive relief provide relevant historical precedent for current nationwide injunctions, and whether such historical precedent is relevant to the propriety of nationwide injunctions today.

Although courts at all levels of the federal judiciary, including the Supreme Court, can and do issue nationwide injunctions, the legal basis for such injunctions is uncertain. As a legal matter, no federal statute explicitly authorizes the courts to issue nationwide injunctions, nor does any statute expressly limit the courts' ability to do so. Although several sitting Justices have expressed views regarding nationwide injunctions in non-binding separate opinions, to date, no majority of the Supreme Court has expressly ruled on the legality of nationwide injunctions. As a practical matter, therefore, current law does not strictly limit injunctive relief to the parties in each case.

Defenders of nationwide injunctions argue that such orders prevent widespread harm, reduce the burdens of litigation by eliminating the need for every person affected by a challenged policy to bring suit, and promote consistency and the rule of law by uniformly halting allegedly illegal government actions. Opponents counter that nationwide injunctions undermine established litigation procedures by allowing challengers to circumvent the requirements for bringing a class action or by triggering fast-tracked appeals in which the federal courts must evaluate a challenged policy based on a limited factual and legal record. Some contend that nationwide injunctions raise constitutional issues, because they award relief to people who are not parties to the litigation and who may lack standing to seek relief in federal court. Others argue that nationwide injunctions may prevent the government from effectively implementing its policies and create legal uncertainty as far-reaching government programs may proceed or halt at each level of the federal courts. Commentators also debate whether nationwide injunctions contribute to the politicization of the courts and erode judicial legitimacy.

This report provides Congress with legal analysis of nationwide injunctions. The report first presents an overview of injunctive relief in general and explains what commentators mean when they discuss nationwide injunctions in particular. It then outlines the historical debate around nationwide injunctions, presents key legal arguments for and against such injunctions, and briefly summarizes current judicial practice in this area. The report concludes by discussing selected recent proposals related to nationwide injunctions and key legal considerations for legislators evaluating those proposals.

Contents

What Is a Nationwide Injunction? 2
Overview of Injunctive Relief 2
"Nationwide" Injunctions: Non-Party Relief 4
The Debate over Nationwide Injunctions 6
The Disputed History of Nationwide Injunctions 7
The Legal Debate over Nationwide Injunctions 10
Constitutional Considerations 11
Litigation Procedure 16
Fairness, Efficiency, and Governance 21
The Role of the Judiciary 23
Politicization of the Courts 25
Special Contexts 27
Nationwide Injunctions in the Federal Courts 33
Considerations for Congress 36
Status Quo or Reform 36
Key Proposals and Legal Considerations 37
Who Should Implement Reforms? 38
How to Define "Nationwide Injunction"? 39
Substantive Regulations 41

Contacts

Author Information 45

The new President took office and promptly issued an executive order implementing aspects of his Administration's immigration policy. Within days, opponents of the policy sued in federal court, seeking an injunction barring enforcement of the executive order. Mere weeks after the inauguration, a trial court judge issued an order prohibiting the government from enforcing the new policy in its entirety, against parties to the litigation or anybody else—a nationwide injunction.

If this narrative sounds familiar, it may be because it occurred in both of the two most recent presidential Administrations. In February 2017, less than three weeks after President Donald Trump took office, a federal district court judge in Washington issued a nationwide injunction prohibiting the enforcement of President Trump's executive order barring foreign nationals from certain countries from entering the United States.[1] Similarly, in January 2021, within a week of President Joe Biden's inauguration, a district court judge in Texas issued a nationwide temporary restraining order barring enforcement of a Biden Administration executive order imposing a 100-day pause on deportations.[2]

Nationwide injunctions are not limited to immigration cases. Recent court decisions have granted nationwide injunctions affecting many areas of federal policy, including environmental law, health care regulation, civil rights, and more.[3] Scholars debate the precise historical origins of nationwide injunctions, but broadly agree that no such injunctions issued in the early years of the American Republic.[4] Commentators also generally agree that federal courts have issued nationwide injunctions with increasing frequency in recent years.[5]

Nationwide injunctions have generated significant discussion among attorneys,[6] legal scholars,[7] executive branch officials,[8] judges,[9] and legislators.[10] Defenders of nationwide injunctions argue that those orders prevent widespread harm, reduce the burdens of litigation by eliminating the need for every person affected by a challenged policy to bring suit, and promote consistency and the rule of law by uniformly halting allegedly illegal government actions. Some argue that nationwide injunctions are particularly appropriate in certain circumstances, including

---

[1] Washington v. Trump, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (enjoining enforcement of Executive Order 13769, "Protecting the Nation From Foreign Terrorist Entry Into the United States," 82 Fed. Reg. 8,977 (Jan. 27, 2017)).

[2] Texas v. United States, No. 6:21-cv-00003, 2021 WL 247877 (S.D. Tex. Jan. 26, 2021).

[3] *See, e.g.*, Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2097 nn.5-8 (2017); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 69 nn.3-8 (2019).

[4] *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 425-27 (2017); Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 924-25 (2020).

[5] *See, e.g.*, Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1071 (2018).

[6] *E.g.*, *Rule by District Judge: The Challenges of Universal Injunctions: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2020) (statement of Jesse Panuccio, partner at Boies, Schiller, Flexner LLP and Public Service Fellow with The C. Boyden Gray Center for the Study of the Administrative State at the Antonin Scalia Law School, George Mason University).

[7] *See Rule by District Judge: The Challenges of Universal Injunctions: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 10 (2020) (statement of Prof. Samuel L. Bray) (collecting recent scholarship on nationwide injunctions).

[8] *E.g.*, Press Release, Department of Justice (DOJ), Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions (Sept. 13, 2018), https://www.justice.gov/opa/press-release/file/1093881/download (last visited Sept. 2, 2021); Press Release, White House, Statement on Sanctuary Cities Ruling (Apr. 25, 2017); *see also Rule by District Judge: The Challenges of Universal Injunctions: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 10 (2020) (statement of Loren AliKhan, Solicitor General of the District of Columbia).

[9] *E.g.*, Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 599-601 (2020) (Gorsuch, J., concurring); Trump v. Hawaii, 138 S. Ct. 2392, 2424-29 (2018) (Thomas, J., concurring); *id.* at 2446 n.13 (Sotomayor, J., dissenting).

[10] *See infra* "Key Proposals and Legal Considerations."

immigration litigation, environmental and civil rights cases, and challenges to agency rulemaking under the Administrative Procedure Act (APA).

Opponents counter that nationwide injunctions undermine established litigation procedures by allowing challengers to circumvent the requirements for bringing a class action or by triggering fast-tracked litigation in which the federal courts must evaluate a challenged policy based on a limited factual and legal record. Some contend that nationwide injunctions raise constitutional concerns because they award relief to people who are not parties to the litigation and who may lack standing to seek relief in federal court. Others argue that nationwide injunctions may prevent the government from effectively implementing its policies, or that they can create legal uncertainty as implementation of challenged government programs may stop and start as a case moves through each level of the federal courts. In addition, some commentators assert that nationwide injunctions contribute to the politicization of the courts and erode judicial legitimacy.

This report provides Congress with legal analysis of nationwide injunctions. The report first gives an overview of injunctive relief in general and explains what commentators mean when they discuss "nationwide injunctions" in particular. It then outlines the historical debate around nationwide injunctions before presenting key legal arguments for and against such injunctions and briefly summarizing current judicial practice in this area. The report concludes by discussing selected recent proposals related to nationwide injunctions and key legal considerations for legislators evaluating those proposals.

What Is a Nationwide Injunction?

Nationwide injunctions are also sometimes called national injunctions, universal injunctions, non-party injunctions, non-particularized injunctions, or even cosmic injunctions.[11] Some of those terms suggest that the geographic reach of a court order is what defines a nationwide injunction.[12] However, the defining feature of a nationwide injunction is not its geographic scope but rather the entities to which it applies.

Overview of Injunctive Relief

To understand the debate around nationwide injunctions, it is helpful to begin with a general overview of injunctive relief. An injunction is a form of *equitable relief*—essentially a court-ordered remedy providing relief other than money damages[13]—by which a court either requires an entity to take a certain action or forbids an entity from taking a certain action.[14] As examples of the former type of injunction, sometimes called an "affirmative injunction" or a "mandatory injunction," a court might require a polluter to clean up environmental hazards or compel a

[11] *See* Sohoni, *supra* note 4, at 922; Panuccio, *supra* note 6, at 1; Howard M. Wasserman, *Concepts, Not Nomenclature: Universal Injunctions, Declaratory Judgments, Opinions, and Precedent*, 91 U. COLO. L. REV. 999, 1007 (2020).

[12] Some prefer terms that may avoid this confusion. *E.g.*, Trump v. Hawaii, 138 S. Ct. at 2425 n.1 (Thomas, J., concurring) (using the term "universal injunctions"); Panuccio, *supra* note 6, at 1 (using the term "non-party injunctions"). However, "nationwide inunction" appears to have emerged as the most commonly used term, *see, e.g.*, Trump v. Hawaii, 138 S. Ct. at 2425 n.1 (Thomas, J., concurring); Frost, *supra* note 5, at 1071. Accordingly, this report uses that term, except when quoting other sources.

[13] *Equitable Remedy*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A remedy, usu. a nonmonetary one such as an injunction or specific performance, obtained when available legal remedies, usu. monetary damages, cannot adequately redress the injury.").

[14] *Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A court order commanding or preventing an action.").

contracting party to deliver goods subject to the contract.[15] As examples of the latter type of injunction, sometimes called a "prohibitory injunction," a court could bar an individual from trespassing on certain land or forbid one company from violating another's intellectual property rights.[16] A court may issue an injunction against one or more individuals, corporations, or government entities. Injunctions are generally enforceable through civil contempt proceedings.[17] A person or entity that violates an injunction and is held in contempt may be fined,[18] and may also be jailed pending compliance.[19]

A court may issue injunctive relief at several stages in the litigation process. These forms of relief are closely related but have different names and follow different procedures.

- *Temporary restraining order (TRO)*—the most preliminary form of injunctive relief, a TRO serves to prevent imminent harm on a short-term basis while the court considers whether to enter a preliminary injunction. A court may enter a TRO without providing the party to be enjoined notice and an opportunity to respond.[20]
- *Preliminary injunction*—an injunction designed to preserve the status quo while a case remains pending. Before entering a preliminary injunction, a court considers a motion from the party seeking the injunction and provides the party to be enjoined the opportunity to respond. Briefing on a motion for preliminary injunction may be expedited when urgent action is required, or when a TRO has been sought but the court wants to hear from both sides. The court may modify or dissolve the injunction during litigation.[21]
- *Permanent injunction*—an injunction that issues once the court has decided a case on the merits. Such an injunction applies indefinitely unless the court sets an expiration date, the issuing court or another court of competent jurisdiction modifies the injunction, or the injunction is overturned on appeal.[22]

While a nationwide injunction may issue at any stage of litigation, many high-profile cases involving nationwide injunctions concern requests for a TRO or preliminary injunction.[23]

---

[15] *Mandatory Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An injunction that orders an affirmative act or mandates a specified course of conduct.—Also termed *affirmative injunction*.").

[16] *Prohibitory Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An injunction that forbids or restrains an act. • This is the most common type of injunction.").

[17] *Civil Contempt*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[18] Frost, *supra* note 5, at 1071.

[19] *Id.*; *Civil Contempt*, BLACK'S LAW DICTIONARY (11th ed. 2019). One scholar notes, however, that as a practical matter courts seldom impose "coercive or punitive contempt techniques" on government officials. Doug Rendleman, *Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity*, 91 U. COLO. L. REV. 887, 936 (2020).

[20] *Temporary Restraining Order*, BLACK'S LAW DICTIONARY (11th ed. 2019) While courts issue TROs against the federal government in some nationwide injunction cases, one commentator notes that he has found no examples of nationwide injunctions against the United States issued *without notice* and opines, "I cannot think of an emergency that clamors for such immediate attention that the judge should grant the plaintiff an ex parte TRO against the ubiquitous United States without any notice at all." Rendleman, *supra* note 19, at 966.

[21] *Preliminary Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[22] *Permanent Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[23] *E.g.*, Texas v. United States, No. 6:21-cv-00003, 2021 WL 247877 (S.D. Tex., Jan. 26, 2021) (granting nationwide TRO); Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (same); Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (granting nationwide preliminary injunction).

Courts apply a four-part test in determining whether a preliminary injunction should issue. A plaintiff seeking a preliminary injunction must establish that

- she is likely to succeed on the merits—in a challenge to government action, this means that the plaintiff will likely be able to show that the action at issue is unlawful;
- she is likely to suffer irreparable harm in the absence of preliminary relief;
- the balance of equities tips in her favor; and
- an injunction is in the public interest.[24]

In theory, a party seeking injunctive relief faces a high bar: the Supreme Court has stated that "[a] preliminary injunction is an extraordinary remedy never awarded as of right," and a permanent injunction "is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."[25] Thus, there is a difference between a court "striking down" a law or policy and enjoining its enforcement: a court may find that a law or policy is (or is likely) invalid but may nonetheless deny injunctive relief.[26] However, the factors courts consider when weighing requests for injunctive relief are open-ended, and courts may differ in how they apply those factors.[27] Some commentators worry that the subjective multi-factor tests for injunctive relief give courts too much discretion and create arbitrary or unpredictable outcomes.[28]

"Nationwide" Injunctions: Non-Party Relief

The term "nationwide injunction" is not defined in any federal statute or majority decision of the Supreme Court, but that term and related terms[29] are used fairly consistently in lower court decisions and legal commentary. As used in those sources, a nationwide injunction is generally defined as an injunction *against the government* that prevents the government from implementing

[24] Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008). Consideration of the "balance of equities" requires the reviewing court to compare the harm to the plaintiff if an injunction *does not* issue with the harm to the defendant if an injunction *does* issue. *See id.* at 25-26. The Supreme Court has also explained that the balance of equities and the public interest "merge" when plaintiffs seek an injunction against the government, as is the case in litigation over nationwide injunctions. Nken v. Holder, 129 S. Ct. 1749, 1760-1762 (2009). The factors necessary to support a permanent injunction are similar. *See* eBay v. MercExchange. L.L.C., 547 U.S. 388, 391 (2006) (To obtain a permanent injunction, a "plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction").

[25] *Winter*, 555 U.S. at 24, 32.

[26] Some commentators argue that a Supreme Court order striking down a law or policy is similar to a nationwide injunction as a practical matter because the Supreme Court's resolution of legal issues is binding on all federal courts. However, unless the Court also enters an injunction, its ruling may control the outcome of future cases but does not directly require the government to take or not take any action with respect to non-parties. For further discussion of whether the propriety of nationwide injunctions depends on what court issues them, see *infra* "Supreme Court Versus Lower Courts."

[27] Bray, *supra* note 4, at 465-68.

[28] *Id.* at 465 ("Judicial decisions on when an injunction should be issued are recognized by scholars to be a muddle of inconsistent generalizations. There are relevant principles, but they are indeterminate and inconsistent with one another.").

[29] *See supra* note 11 and accompanying text.

a challenged law, regulation, or other policy *against all persons and entities*, whether or not such persons or entities are parties participating in the litigation.[30]

To illustrate, consider a hypothetical court challenge to a federal regulation. Imagine that the Environmental Protection Agency (EPA) issues a new regulation requiring a permit for the emission of a certain pollutant. An organization that opposes the regulation sues EPA in district court, arguing that EPA failed to follow the required notice-and-comment procedures when it promulgated the regulation and that the regulation is therefore invalid.[31] The organization asks the court to issue a preliminary injunction barring enforcement of the regulation, contending that the permit requirement would cause irreparable harm to the organization and its members, and to others across the country that are similarly situated. If the court determines that the regulation is likely invalid and that injunctive relief is warranted, it may enter a preliminary injunction that protects the plaintiffs from the harm that they alleged in seeking injunctive relief—for example, by specifically barring EPA from requiring the organization or its members to obtain a permit. That type of injunction is sometimes called a *plaintiff-protective injunction*.[32] Perhaps, though, the court determines that the regulation is likely invalid, and that enforcement of the regulation would cause widespread harm, and issues an order barring EPA from implementing the rule in its entirety. That order, relieving *all* entities of the permit obligation while the plaintiffs' suit continues, is a nationwide injunction.[33]

The term "nationwide injunction" is potentially confusing because, while nationwide injunctions often apply anywhere in the country, the defining feature of a nationwide injunction is not its geographic scope but rather the entities to which it applies.[34] Many court orders granting

---

[30] *E.g.*, Frost, *supra* note 5, at 1070 (2018) (defining "nationwide injunction" to refer to "an injunction at any stage of the litigation that bars the defendant from taking action against individuals who are not parties to the lawsuit in a case that is not brought as a class action"); Chicago v. Barr, 961 F.3d 882, 912 (7th Cir. 2020) (defining "nationwide, or universal, injunctions" as "injunctive relief that extends beyond the parties before the court to include third parties"); DHS v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) (defining the term to mean "a court ... ordering the government to take (or not take) some action with respect to those who are strangers to the suit"). Often implicit or explicit in the definition of "nationwide injunction" is that such an injunction does not issue in class action litigation. *See, e.g.*, Bray, *supra* note 4, at 419 ("[I]n non-class actions, federal courts are issuing injunctions that are universal in scope—injunctions that prohibit the enforcement of a federal statute, regulation, or order *not only against the plaintiff, but also against anyone*."). Some define "nationwide injunction" to include injunctions that bind state governments or even private parties, if those injunctions grant relief to non-parties; however, the focus of recent discussion around nationwide injunctions is on injunctions against the federal government. *See, e.g.*, Frost *supra* note 5, at 1071. One scholar questions whether the accepted definition of "nationwide injunction" is adequate, noting that injunctions often described with the term are "not monolithic" and may raise different legal concerns depending on the specifics of each case. Portia Pedro, *Toward Establishing a Pre-Extinction Definition of "Nationwide Injunctions"*, 91 U. COLO. L. REV. 847, 867-70 (2020).

[31] A detailed understanding of notice-and-comment rulemaking is not necessary to understand nationwide injunctions, but for more information on notice-and-comment rulemaking see CRS In Focus IF10003, *An Overview of Federal Regulations and the Rulemaking Process*, by Maeve P. Carey and CRS Report R46673, *Agency Rescissions of Legislative Rules*, by Kate R. Bowers and Daniel J. Sheffner.

[32] Bray *supra* note 4, at 420. Another scholar terms this form of relief a "Plaintiff-Oriented Injunction" and prefers the term "Defendant-Oriented Injunction" for nationwide injunctions. Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J. L. & PUB. POL'Y 487, 500 (2016) ("A Plaintiff-Oriented Injunction vindicates the plaintiffs' rights, but otherwise leaves the underlying statute or regulation undisturbed.... A Defendant-Oriented Injunction, in contrast, allows a single judge of ostensibly limited territorial jurisdiction to completely prohibit the defendant agency or official from enforcing the challenged provision against anyone throughout the state or nation.").

[33] For a real-life example of litigation similar to this hypothetical, except that the nationwide injunction was issued by an appellate court, see In re EPA, 803 F.3d 804 (6th Cir. 2015) (*vacated sub nom* In re United States Dep't of Def., 713 Fed. App'x. 489 (6th Cir. 2018) (Mem)).

[34] *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2425 n.1 (2018) (Thomas, J., concurring) ("These injunctions are

injunctive relief apply anywhere in the United States (or even more broadly) without fitting the technical definition of a nationwide injunction outlined above.[35] For instance, an injunction prohibiting one party from violating another party's copyright is not limited to the state or the federal judicial district where it is entered,[36] and the federal Bankruptcy Code expressly grants the bankruptcy court exclusive jurisdiction over a debtor's property, wherever located.[37] Nor is it necessary that a nationwide injunction reach conduct in all fifty states. For example, federal regulations sometimes apply to specific areas within the United States, but a court order blocking implementation of a regulation in all such areas, even where the specific plaintiff has no interest, would still fall within the definition of a "nationwide injunction."[38] Some commentators also draw comparisons between nationwide injunctions against the *federal* government and injunctions against *state* governments fully barring enforcement of certain state laws or policies.[39] In both cases, a salient feature of the injunction is that it blocks the government from enforcing a law or policy against parties to the litigation and non-parties alike.[40]

The Debate over Nationwide Injunctions

Nationwide injunctions have generated scholarly discussion on multiple fronts. Commentators debate numerous legal issues surrounding modern judicial practice related to nationwide injunctions and also disagree on the historical roots of those injunctions. In the absence of binding precedent, courts facing a decision about the scope of injunctive relief have drawn upon these arguments and weighed them on a case-by-case basis.[41]

The debate over nationwide injunctions does not split neatly along partisan lines.[42] High-profile policies of both major political parties have been delayed or permanently halted by nationwide injunctions,[43] and the question of whether a nationwide injunction should issue in any given case

---

distinctive because they prohibit the Government from enforcing a policy with respect to anyone, including nonparties—not because they have wide geographic breadth. An injunction that was properly limited to the plaintiffs in the case would not be invalid simply because it governed the defendant's conduct nationwide.")

[35] *See, e.g.*, Wasserman, *supra* note 11, at 1104 ("[A]ll injunctions are and should be nationwide. All injunctions protect the plaintiff against the defendants' unconstitutional or unlawful conduct everywhere the plaintiff may be or may go."). One commentator divides "[t]he concept of nationwide injunction" into "five distinct categories of orders," terming the relief many commentators call "nationwide injunction" a "nationwide defendant-oriented injunction." Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1 (2019).

[36] Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 451 (1932).

[37] Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV 29, 35 (2019) (citing 28 U.S.C. § 1334(e)(1)).

[38] *See, e.g.*, Laura Bies, *National Forest Roadless Areas: The Battle Rages On*, 34 WILDLIFE SOC. BULL. 1417 (2006) (describing nationwide injunction against regulation restricting logging in roadless areas of national parks).

[39] *E.g.*, Sohoni *supra* note 4, at 926 (citing W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943)); Wasserman, *supra* note 11, at 1105 ("An injunction prohibiting enforcement of a state law should be as nationwide as an injunction prohibiting enforcement of federal law—it protects the plaintiff against enforcement of the constitutionally defective state law everywhere she is or might go.").

[40] *Cf.* Trammell, *supra* note 3, at 72 n. 24 ("Just as a 'nationwide injunction' does not necessarily apply nationwide, it technically does not even have to be an injunction. Although there are critical differences between preliminary injunctions, temporary restraining orders, and permanent injunctions, ... when such relief directly and intentionally benefits nonparties, the concerns are overwhelmingly the same.").

[41] *See infra* "Nationwide Injunctions in the Federal Courts."

[42] *See, e.g.*, *Rule by District Judge: The Challenges of Universal Injunctions: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 2 (2020) (statement of Prof. Nicholas Bagley).

[43] *E.g.*, *supra* notes 1 and 2.

is distinct from questions including whether the challenged government action is legally permissible or advisable as a policy matter.[44]

The Disputed History of Nationwide Injunctions

There is significant scholarly debate around the history of nationwide injunctions. Legal scholars have written extensively on nationwide injunctions, and it may seem surprising that factual questions around the history of nationwide injunctions remain unsettled.

It is not always straightforward to identify court orders granting or denying nationwide injunctions.[45] In some cases, courts issue orders explicitly stating that they apply "nationwide" or otherwise block a challenged measure in its entirety.[46] However, there is no standard language that courts use when issuing nationwide injunctions, nor is there an applicable federal statute or a controlling Supreme Court case that courts routinely cite in such orders.[47] Similarly, a court order denying injunctive relief or entering a more limited plaintiff-protective injunction may not indicate whether the plaintiff sought a nationwide injunction.

While a full exploration of the history of nationwide injunctions is outside the scope of this report, a brief survey is instructive because some scholars argue that the historical pedigree of nationwide injunctions determines their current legal status. As noted above, an injunction is a form of equitable relief, meaning a court order providing relief other than money damages.[48] American equity jurisprudence is derived from the English common law system that existed before the Founding.[49] Accordingly, some commentators attempt to trace the history of nationwide injunctions back to the Founding or earlier and assert that nationwide injunctions lack historical or legal legitimacy to the extent they depart from historical equity jurisprudence.[50]

---

[44] *See, e.g.*, Bray *supra* note 4, at 423. In discussing nationwide injunctions, Professor Bray asserts that even when a court finds that the plaintiff is likely to win on the merits, it must make a separate decision about the scope of relief. "It would be easy for a legal scholar, consciously or unconsciously, to think that a 'sound' decision on the merits should be paired with a national injunction, while an 'unsound' decision should be enforced with an injunction protecting only the plaintiff." *Id.* As this Report will discuss further, the search for consistent principles or constraints on nationwide injunctions arises, in some cases, from a desire to ensure that the court's view of the proper scope of relief is not unduly influenced by its view of merits of the underlying case.

[45] *See, e.g.*, Sohoni, *supra* note 4, at 1001.

[46] *E.g.*, In re EPA, 803 F.3d 804, 809 (6th Cir. 2015), vacated sub nom. In re Dept. of Def., 713 Fed. App'x. 489 (Mem) (6th Cir. 2018) ("The Clean Water Rule is hereby STAYED, nationwide, pending further order of the court.").

[47] Some courts issuing nationwide injunctions cite Califano v. Yamasaki, 442 U.S. 682, 702 (1979) for the proposition that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *E.g.*, Chicago v. Barr 961 F. 3d 882, 920-21 (7th Cir. 2020) (citing *Califano* and stating, "It is widely accepted—even by self-professed opponents of universal injunctions—that a court may impose the equitable relief necessary to render complete relief to the plaintiff, even if that relief extends incidentally to non-parties.").

[48] *See Equitable Remedy*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[49] *See, e.g.*, Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318-19 (1999). "Common law" refers to "'[e]stablished customs' and '[e]stablished rules and maxims' that were discerned and articulated by judges," as opposed to statutory law enacted by a legislature. Gamble v. United States, 139 S. Ct. 1960, 1982 (2019) (Thomas, J., concurring) (quoting 1 W. Blackstone, Commentaries on the Laws of England 68–69 (1765)).

[50] *E.g.*, Bray *supra* note 4, at 423 ("The equitable doctrines and remedies of the federal courts must have a basis in traditional equity. The national injunction lacks the requisite basis."); Paul J. Larkin, Jr. & GianCarlo Canaparo, *One Ring to Rule Them All: Individual Judgments, Nationwide Injunctions, and Universal Handcuffs*, 96 NOTRE DAME L. REV. REFLECTION 55, 61-62 (2020) ("In a civil action, a court can award the same type of monetary or injunctive relief available in England at law or equity when this nation came into being. That is all.... Nationwide injunctions differ markedly from the remedies contemplated by Article III because the former exceed the party-specific reach of the judgment and partake more of legislation."); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2426 (2018) (Thomas, J.,

Commentators broadly agree that nationwide injunctions as currently understood did not exist in the pre-Founding English courts of equity, that no nationwide injunctions issued in the early years of the Republic, and that such injunctions have become more common in the last two decades.[51] In a May 2019 address, Attorney General William Barr stated that federal courts "issued only 27 nationwide injunctions in all of the 20th century."[52] By contrast, as of February 2020, the Department of Justice (DOJ) had identified 12 nationwide injunctions issued during the presidency of George W. Bush, 19 issued during Barack Obama's presidency and 55 such injunctions issued against the Trump Administration.[53] Beyond the general agreement that nationwide injunctions have increased in recent years, scholars debate many significant points, including when the first nationwide injunction issued, whether other types of injunctive relief provide historical precedent for current nationwide injunctions, and the extent to which historical precedent is relevant to the legality of nationwide injunctions today.

One prominent critic of nationwide injunctions, Professor Samuel Bray, contends that nothing resembling a nationwide injunction existed at English common law, and that "[t]here were apparently no national injunctions against federal defendants for the first century and a half of the United States."[54] To the extent early injunctive relief sometimes protected multiple people, Professor Bray argues that such relief was not analogous to the modern nationwide injunction. Instead, he explains, the cases in which such injunctions issued were more similar to modern class action suits, involving discrete groups of plaintiffs raising localized grievances such as challenges to a municipal ordinance, rather than generalized challenges to a national law or policy.[55] Professor Bray traces the rise of nationwide injunctions in American jurisprudence to the 1960s and 1970s, identifying the 1963 D.C. Circuit case *Wirtz v. Baldor Electric Co.* as the first nationwide injunction.[56] He posits that the subsequent increase in nationwide injunctions stems in part from changing ideas about the role of the courts.[57] While acknowledging that nationwide injunctions have become increasingly common since the mid-twentieth century, Professor Bray asserts that "[p]rotecting nonparties with an injunction is a remedial choice. It is a relatively new choice, and like all remedial choices, it needs to be justified."[58] Based on historical and constitutional analysis as well as concerns about the practical consequences of nationwide injunctions, he ultimately concludes that "[i]n a [legal] system like ours, there is no room for the national injunction."[59]

---

concurring) ("[W]hether the authority comes from a statute or the Constitution, district courts' authority to provide equitable relief is meaningfully constrained. This authority must comply with longstanding principles of equity that predate this country's founding.").

[51] *See, e.g.*, Bray *supra* note 4, at 425-27; Sohoni, *supra* note 4, at 924-25; Frost, *supra* note 5, at 1071.

[52] William P. Barr, Attorney General, Remarks to the American Law Institute on Nationwide Injunctions (May 21, 2019).

[53] Jeffrey A. Rosen, Deputy Attorney General, Address at the Administrative Conference of the United States Forum on Nationwide Injunctions and Federal Regulatory Programs (Feb. 12, 2020).

[54] Bray, *supra* note 4, at 428

[55] *Id.* at 425-27.

[56] *Id.* at 438 (citing 337 F. 2d 518 (D.C. Cir. 1963)).

[57] *Id.* at 448-52. Professor Bray also ties the emergence of nationwide injunctions to the fact that in the American judicial system equitable power rests with numerous district court judges instead of the single Chancellor who presided at English common law. *See id.* at 446-448.

[58] *Id.* at 457.

[59] *Id.* at 482. As discussed further below, Professor Bray also raises constitutional concerns about nationwide injunctions.

Two members of the Supreme Court have approved of the foregoing historical analysis. In a concurrence in *Trump v. Hawaii*, Associate Justice Clarence Thomas cited Professor Bray's discussion of the history of nationwide injunctions and concluded that the practice is "legally and historically dubious."[60] Likewise, Associate Justice Neil Gorsuch authored a concurring opinion in *Department of Homeland Security [DHS] v. New York*, joined by Justice Thomas, in which he cited Professor Bray and stated that the increase of nationwide injunctions "is not normal. Universal injunctions have little basis in traditional equitable practice. And they hardly seem an innovation we should rush to embrace."[61] Other legal commentators have also adopted and expanded upon Professor Bray's historical critique of nationwide injunctions.[62]

The foregoing historical narrative does not enjoy universal acceptance among judges and legal scholars. For instance, Professor Mila Sohoni provides a competing history of nationwide injunctions, contending that "Article III courts have issued injunctions that extend beyond just the plaintiff for well over a century."[63] Professor Sohoni states that the Supreme Court "itself issued a universal injunction in 1913."[64] She also identifies multiple federal court decisions dating back to the late 19th and early 20th centuries that granted relief to nonparties, including injunctions against both federal and state laws and federal agency actions.[65] In light of those decisions, she reasons that "it would be a sharp departure from precedent and practice to treat Article III as requiring the equitable remedial powers of federal courts to be cabined" to limit nationwide injunctions.[66]

Other commentators have likewise argued that the modern nationwide injunction has deep historical roots. Professor Amanda Frost points to "bills of peace" issued by the English courts of equity, which "allowed courts to issue remedies to individuals closely connected and similarly situated to the plaintiff," and contends that "the historical practice supports the conclusion that courts have always had the authority to issue equitable relief that encompasses nonparties."[67] Also, in an amicus brief filed in the U.S. Court of Appeals for the Seventh Circuit, a group of scholars who study legal and constitutional history proffered that in the early history of the Republic, "[n]ot only did equity courts have the equitable power to grant injunctions that look like modern nationwide injunctions (save they did not run against the federal government itself), but they in fact issued injunctions of astonishing scope."[68] They further described equity courts as possessing "the equitable powers to issue nationwide injunctions in the early republic," and as having "long issued injunctions that protect the interests of non-parties."[69] In an opinion granting a nationwide injunction, the Seventh Circuit relied in part on analysis by the foregoing amici and Professor Sohoni to conclude that "there is a substantial historical basis for the concept of injunctive relief that extends to the benefit of nonparties."[70]

---

[60] Trump v. Hawaii, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring).

[61] DHS v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) (internal citations omitted).

[62] *See, e.g.*, Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 354-57 (2018); Morley, *supra* note 35, at 31-32.

[63] Sohoni, *supra* note 4, at 924.

[64] *Id.* (citing Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913)).

[65] *Id.* at 943-993.

[66] *Id.* at 927.

[67] Frost, *supra* note 5, at 1081.

[68] Br. of Legal Historians as Amici Curiae Supporting Plaintiff and Appellee the City of Chicago, Chicago v. Barr, 961 F. 3d 882 (7th Cir. 2020) (No. 18-2885), 2018 WL 6173238 at *6.

[69] *Id.* at *8.

[70] Chicago v. Barr, 961 F. 3d 882, 914 (7th Cir. 2020).

Even if the history of nationwide injunctions was clear-cut, past practice with respect to these injunctions would not necessarily determine their legality. Some scholars assert that, regardless of their history in England and during the early years of the Republic, nationwide injunctions have now become firmly established in American jurisprudence.[71] Conversely, some argue that seeking to establish historical roots for current practices should not halt further development of the relevant legal doctrine.[72] One scholar asserts that the modern American judiciary differs from the pre-Founding English courts in numerous respects, including the existence of "statutes establishing private rights of action (especially in the area of civil rights), the institutional design of the U.S. federal court system, and the separation of powers—all realities that differ greatly from equitable practice in 1789."[73] She offers that recent changes in the legal system are beneficial, and cautions that grounding modern equity jurisprudence in historical practice as it existed in England in the late 18th century may perpetuate systems that marginalize certain groups of people.[74] Similarly, another scholar ties the increase in nationwide injunctions since the 1960s to "several inflection points that redefined the role of courts in vindicating individual rights" and argues that nationwide injunctions are consistent with other recent legal developments.[75] The enactment of the APA in 1946 may also have granted the federal courts authority that they did not possess in early America.[76] Finally, as the following section discusses in more detail, numerous scholars have raised legal arguments for and against nationwide injunctions that do not relate to their historical pedigree.

The Legal Debate over Nationwide Injunctions

There is limited binding legal authority governing the federal courts' ability to issue nationwide injunctions. No federal statute explicitly authorizes the courts to issue such injunctions, nor does any statute expressly limit their ability to do so, and the Supreme Court has not expressly ruled on the legality of nationwide injunctions.[77] As a practical matter, courts at all levels of the federal judiciary have issued nationwide injunctions.[78] The Supreme Court has issued nationwide injunctions, and has issued and upheld other injunctions that protect persons other than the

---

[71] For example, Professor Sohoni points to several prominent ways in which modern American equity jurisprudence differs from pre-Founding common law jurisprudence. She concludes, "if one accepts that purely plaintiff-protective injunctions against enforcement suits by federal officers are today constitutionally legitimate, then one has accepted that ... federal courts can go beyond what chancery courts did in England at the time of the Founding. And once one is at that point, then what sense is there in drawing a line based on adherence to original meaning between plaintiff-protective injunctions and injunctions that reach beyond the plaintiffs? At least in public law cases against federal defendants, the ship of strict original meaning sailed away long ago[.]" Sohoni, *supra* note 4, at 1005-06.

[72] *E.g.*, *Chicago*, 961 F. 3d at 914 (summarizing position of amicus brief filed by legal historians: "Although concluding that nationwide injunctions are historically grounded, the legal historians cautioned against an approach that would anchor equitable remedies too closely to the 'notoriously difficult subject' of history, noting that the continuity of some traditional equity practices should not foreclose adapting equitable remedies to modern circumstances."),

[73] Pedro, *supra* note 30, at 876-77.

[74] *Id.* at 873.

[75] Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977, 991-97 (2020).

[76] *See infra* "Judicial Review of Agency Action."

[77] *See, e.g.*, Bray, *supra* note 4, at 444; Larkin & Canaparo, *supra* note 50, at 63; Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring). Federal Rule of Civil Procedure 65 establishes procedures for the issuance of injunctive relief but does not expressly address nationwide injunctions. *See* Fed. R. Civ. P. 65. As discussed below, the Administrative Procedure Act arguably authorizes injunctive relief against a federal agency that affects third parties, but that authority is not explicit.

[78] *See, e.g.*, Sohoni, *supra* note 4, at 924-28.

plaintiffs.[79] This status quo suggests at a minimum that current law does not strictly limit injunctive relief to the parties in each case. However, several sitting Justices have expressed views on nationwide injunctions in non-binding separate opinions.[80]

In the absence of clearly controlling legal authority, commentators examining the legal status of nationwide injunctions may evaluate nationwide injunctions in light of general constitutional principles, compatibility with other existing litigation procedures, norms around the role of the federal courts, and ideals of fairness, efficiency, and good governance. In addition to those general considerations, some scholars contend that nationwide injunctions may raise unique legal issues in particular contexts, including immigration law, environmental litigation, and litigation under the APA.

Constitutional Considerations

Some scholars debate whether federal courts have the constitutional authority to issue nationwide injunctions. As noted above, federal courts at all levels of the judicial branch have issued nationwide injunctions.[81] Despite invitations to address the practice in recent cases, no majority opinion of the Supreme Court has yet addressed the constitutionality of nationwide injunctions.[82] Thus, there is currently no binding constitutional authority limiting the federal courts' ability to issue nationwide injunctions. However, as this section outlines, some commentators have called on the Supreme Court to curb the practice on constitutional grounds, and two members of the current Court have expressed interest in doing so.[83]

---

[79] For an example of a universal stay against a regulation issued by the Supreme Court, see, e.g., West Virginia v. EPA, 136 S. Ct. 1000, 1000 (2016) (mem.). Other injunctions that the Court has issued or upheld arguably do not fit the strictest definition of "nationwide injunction," either because they barred enforcement of state rather than federal law or policy or because they barred enforcement against a defined group of people; however, numerous Supreme Court decisions have granted relief that applied to non-plaintiffs outside the context of a certified class action. *See, e.g.*, Sohoni, *supra* note 4, at 924-25, ("The Court itself issued a universal injunction in 1913, ... when it temporarily enjoined a federal statute from being enforced not just against the plaintiffs but also against 'other newspaper publishers.'" (citing Journal of Commerce & Commercial Bulletin v. Burleson, 229 U.S. 600, 600 (1913) (per curiam))); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925) (affirming injunction fully barring enforcement of a state statute that required children to attend public school); West Virginia State Bd. of Ed. v. Barnette 319 U.S. 624 (1943) (affirming injunction fully barring enforcement of state regulation requiring teachers and students to salute the flag); Trump v. International Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (staying lower courts' orders to the extent they barred enforcement against "foreign nationals who lack any bona fide relationship with a person or entity in the United States," but "leav[ing] the injunctions entered by the lower courts in place with respect to respondents *and those similarly situated*") (emphasis added).

[80] DHS v. New York, 140 S. Ct. 599, 599-601 (2020) (Gorsuch, J., concurring); Trump v. Hawaii, 138 S. Ct. at 2424-29 (Thomas, J., concurring); *id.* at 2446 n.13 (Sotomayor, J., dissenting).

[81] *See supra* notes 78 & 79.

[82] For example, one of the consolidated cases in Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020), involved a challenge to a nationwide injunction. *See* Petition for Writ of Certiorari, Trump v. Pennsylvania (No. 19-454). However, the Court ultimately ruled for the petitioners on the merits and thus vacated the injunction in full without considering the proper scope of relief. *See* 140 S. Ct. at 2373; *see also, e.g.*, *DHS*, 140 S. Ct. at 599 (staying nationwide injunction without a substantive majority opinion); Trump v. Hawaii, 138 S. Ct. at 2423 (in case involving a nationwide injunction, reversing grant of injunction without considering its scope because plaintiffs were not likely to success on the merits).

[83] *See* DHS v. New York, 140 S. Ct. 599, 599-601 (2020) (Gorsuch, J., concurring); Trump v. Hawaii, 138 S. Ct. at 2424-29 (Thomas, J., concurring). Aspects of this debate are closely tied to the historical debate outlined in the previous section, because some scholars, commentators, and judges look to historical practice to help define the scope of the federal judicial power. However, the constitutional analysis of nationwide injunctions is not wholly dependent on their historical status.

Consideration of the constitutionality of nationwide injunctions requires some background understanding of the scope of the federal judicial power. Article III of the Constitution establishes the federal judiciary and grants the federal courts the power to hear certain "Cases" and "Controversies."[84] The federal courts have interpreted that language to require that anyone seeking to bring suit in federal court must have *standing*—that is, the plaintiff must have an individualized and concrete interest in the litigation.[85] Specifically, to demonstrate standing, a plaintiff must show that (1) she has suffered (or will imminently suffer) an *injury in fact* that is (2) *caused* by the defendant and (3) *redressable* by a court ruling in the plaintiff's favor.[86] The plaintiff's injury must be particular to her. While the injury need not be unique to the plaintiff and may be shared by others who are similarly situated, a plaintiff does not have standing to raise a grievance that is shared by all members of the general public.[87] If a plaintiff does not have standing, the federal courts lack jurisdiction over her claims, meaning that the courts do not have the constitutional power to hear the case and must dismiss it.[88]

Multiple commentators have argued that many nationwide injunctions are inconsistent with Article III standing principles. For instance, Professor Michael T. Morley points to the standing requirement of redressability and contends that the requirement implies that "a plaintiff must have standing not only to assert a cause of action, but also to pursue each form of relief she seeks."[89] Professor Morley further states that plaintiffs generally have standing to protect only their own rights, not the rights of others, and that "[o]nce a court orders that a plaintiff's rights be enforced, her claim is mooted."[90] Thus, he argues, if a plaintiff-protective injunction would adequately safeguard the rights of the parties to a case, a federal court lacks the constitutional authority to order more expansive relief: the "redressability requirement thus prevents a plaintiff from bootstrapping, based on the injury she has suffered to her own rights, to seek an injunction protecting the rights of others."[91] Professor Bray also embraces this "claimant-focused understanding of the judicial power," under which "Article III defines the judicial role as "redress[ing] an injury resulting from a specific dispute."[92] He contends, "Once a federal court has given an appropriate remedy to the plaintiffs, there is no longer any case or controversy left

[84] U.S. CONST. art. III, § 2.

[85] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-62 (1992). For additional discussion of Article III standing doctrine, see "Legal Background of Article III Standing" section of CRS Report R45636, *Congressional Participation in Litigation: Article III and Legislative Standing*, by Kevin M. Lewis.

[86] *Lujan*, 504 U.S. at 560-61.

[87] *Id.* at 573-74 ("We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.").

[88] *Id.* at 573-78.

[89] Morley, *supra* note 32, at 524; *see also* Cass *supra* note 37, at 36 ("The redressability requirement plays an important role in assuring that litigation resolves narrowly focused controversies, rather than simply eliciting judges' views on general policy disputes"); Jonathan Remy Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 N.D. L. REV. 1985, 2008 (2019) ("[a] showing of standing requires consideration of how the court can redress the plaintiff's injury.").

[90] Morley, *supra* note 32, at 525.

[91] *Id.* This principle has roots in equity as well as constitutional law. Supreme Court caselaw holds that injunctive relief should be narrowly tailored to address the harm before the court. *See, e.g.*, Califano v. Yamasaki, 442 U.S. 682, 702 (1979).

[92] Bray *supra* note 4, at 471.

for the court to resolve.... The court has no constitutional basis to decide disputes and issue remedies for those who are not parties."[93]

Similarly, in his concurrence in *Trump v. Hawaii*, Justice Thomas wrote that nationwide injunctions "appear to be inconsistent with long-standing limits on equitable relief and the power of Article III courts," including "American courts' tradition of providing equitable relief only to parties."[94] Justice Gorsuch also discussed constitutional questions around nationwide injunctions in his concurrence in *DHS v. New York*:

> Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit. When a district court orders the government not to enforce a rule against the plaintiffs in the case before it, the court redresses the injury that gives rise to its jurisdiction in the first place. But when a court goes further than that, ordering the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies. Injunctions like these thus raise serious questions about the scope of courts' equitable powers under Article III.[95]

By contrast, other commentators contend that the Constitution does not limit the federal courts' ability to issue nationwide injunctions. Some scholars dispute the proposition that the courts' authority is confined to the bare minimum required to resolve concrete disputes between specific parties, pointing to instances where the Supreme Court has instead taken a more expansive view of its role by declaring the law for parties before the Court and others.[96] Some point to the well-known statement in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is" in support of this broader conception of judicial authority.[97] Others cite circumstances in which the Supreme Court, on its own initiative, considers issues beyond the immediate dispute between the parties, asserting that the Court "increasingly directs parties to brief new issues that the Court itself has added and appoints amici curiae to argue points that the parties do not actually contest."[98] Commentators also point to circumstances where federal courts routinely grant relief to persons not before the court, such as class actions,

---

[93] *Id.*; *see also* Larkin & Canaparo, *supra* note 50, at 69 ("[A] district court lacks jurisdiction to grant a prevailing party relief on an issue not in dispute in the case and unnecessary to fully remedy the plaintiff's injury. It logically follows that a district court lacks jurisdiction to award relief to a nonparty as to whom there is, by definition, no 'Case' or 'Controversy' with anyone before any litigation is brought."); Wasserman, *supra* note 62, at 360 ("The constitutional problem is not the existence of a constitutionally defective law, but the threat of enforcement of that constitutionally defective law against particular persons.... That limitation precludes relief going beyond preventing harm to the plaintiff by attempting to prevent harm to people not before the court, at least where unnecessary to prevent harm to the plaintiff."); Samuel Bray, *The Big National Injunction Case*, VOLOKH CONSPIRACY (June 26, 2018), https://reason.com/2018/06/26/the-big-national-injunction-case/ (last visited September 3, 2021) ("Article III is not just about standing but about remedies, and the remedies given must be tailored not to abstractions like the extent of the violation by the defendant but to the 'the plaintiff's particular injury.'").

[94] Trump v. Hawaii, 138 S. Ct. 2392, 2425, 2427 (2018) (Thomas, J. concurring).

[95] DHS v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring).

[96] *E.g.*, Frost, *supra* note 5, at 1087 ("Federal courts serve a dual function: They exist to resolve disputes between the parties before them and also to declare the meaning of law for everyone. Scholars dispute the degree to which law declaration is merely incidental to dispute resolution, rather than an independent and significant aspect of the judicial power.").

[97] *Id.* n.103 (citing 5 U.S. 137, 177 (1803)); Rendleman, *supra* note 19, at 894; *see also infra* "Judicial Review of Agency Action" for discussion of non-constitutional questions related to the proper scope of judicial review.

[98] Trammell, *supra* note 75, at 988.

cases brought by a "next friend" or other representative of the true party in interest, and claims based on third-party standing.[99]

Some who defend the constitutionality of nationwide injunctions also reason that Article III standing doctrine does not limit courts' ability to issue such injunctions because the questions of standing and remedy are distinct issues.[100] Standing, they note, is a threshold question that generally arises early in litigation and determines whether a plaintiff may bring suit at all; if standing does not exist, the case must be dismissed.[101] By contrast, courts may reach the question of remedy only after determining that a plaintiff has standing and considering the merits of the case.[102] Regardless of whether nationwide injunctions also benefit non-parties, these commentators explain that such injunctions issue in cases where courts have found that the plaintiffs have standing to sue and to seek injunctive relief.[103] Some commentators dispute this understanding, arguing that the Supreme Court has interpreted Article III to require plaintiffs to demonstrate standing not only to sue in general, but also to seek particular remedies; however, it is debatable whether or how the cases they cite apply to requests for nationwide injunctions.[104]

Whether a nationwide injunction raises constitutional questions may depend on the specific facts of the case. Courts offer differing reasons for issuing nationwide injunctions.[105] Sometimes a court expressly extends the relief granted beyond what is required to protect the plaintiffs in order to protect persons not before the court who may have trouble bringing their own claims,[106] or simply because the court finds that a challenged policy is plainly unlawful.[107] Sometimes courts determine that it is not feasible as a practical matter to narrowly tailor relief to reach only the plaintiff.[108] In other cases, courts find that nothing less than a nationwide injunction will fully

---

[99] Frost, *supra* note 5, at 1083-85; *see also id.* at 1083 (discussing "prophylactic injunctions that go beyond the plaintiff's 'actual injury'" in order to prevent non-compliance by the defendant).

[100] Trammell, *supra* note 75, at 981 ("Standing presents a quintessential threshold question, whereas the appropriate scope of remedy—including whether a remedy may directly benefit a nonparty—is a logically distinct matter"); *id.* at 984-85 ("the Supreme Court's current doctrine strongly suggests that standing has no bearing on the basic problem of nationwide injunctions—that is, how broadly a remedy may sweep and, specifically, whether it may benefit people who were not actual parties to a lawsuit"); Frost *supra* note 5, at 1083 ("standing is required to get into federal court, but it does not govern the scope of the remedy a court may issue.").

[101] *E.g.*, Rendleman *supra* note 19, at 916.

[102] *Id.* at 917.; Trammell, *supra* note 75, at 985.

[103] Trammell, *supra* note 75, at 985.

[104] Bray, *supra* note 4, at 472 (citing City of Los Angeles v. Lyons, 461 U.S. 95, 103-06 (1983)); *see also* Morley, *supra* note 32, at 489 n. 11. *But see* Trammell, *supra* note 75, at 985 (arguing that "courts correctly recognize that scope-of-remedy questions—such as those concerning the propriety of nationwide injunctions—are important and often vexing, but they are not threshold justiciability questions and thus are distinct from standing.").

[105] *See generally infra* "Nationwide Injunctions in the Federal Courts."

[106] *See, e.g.*, Frost, *supra* note 5, at 1094-98; *cf.* Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (citing injury to the states challenging an Executive Order "and multiple other parties interested in the proceeding.") (internal quotes and citations omitted).

[107] *See* Morley, *supra* note 32, at 504 ("Some jurisdictions have held that a court should presumptively enjoin government defendants from enforcing an invalid legal provision against anyone, to the extent of its invalidity."); *see also* Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 272-74 (4th Cir. 2018), vacated, 138 S. Ct. 2710 (2018) ("[B]ecause we find that the Proclamation was issued in violation of the Constitution, enjoining it only as to Plaintiffs would not cure its deficiencies."); Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1408-10 (D.C. Cir. 1998) (explaining that a nationwide injunction is appropriate when a court reviewing agency action under the APA finds such action to be unlawful).

[108] *See. e.g.*, Hawaii v. Trump, 859 F.3d 741, 787-88 (9th Cir. 2017), vacated sub nom. *Int'l Refugee Assistance Project*, 138 S. Ct. 377 ("[T]he Government did not provide a workable framework for narrowing the geographic scope of the injunction.").

protect the rights of the plaintiff.[109] As examples of the latter type of cases, Professor Amanda Frost cites desegregation cases, where "an order requiring the defendant to admit only the plaintiff would not address the injury," and challenges to certain funding restrictions, where funding denied to one potential recipient would automatically go to others.[110]

Multiple courts and most commentators, including some critics of nationwide injunctions, agree that where a nationwide injunction is the only means to provide complete relief to existing parties, such an injunction is properly understood as a plaintiff-protective injunction that does not raise Article III concerns.[111] Associate Justice Sonya Sotomayor endorsed that view in a dissent in *Trump v. Hawaii*, writing that "[t]he District Court did not abuse its discretion by granting nationwide relief. Given the nature of the Establishment Clause violation and the unique circumstances of this case, the imposition of a nationwide injunction was necessary to provide complete relief to the plaintiffs."[112] Scholars debate how frequently a nationwide injunction is truly necessary to provide complete relief to the parties.[113]

While many commentators have staked out positions firmly for or against the constitutionality of nationwide injunctions, a few have sought a middle ground, arguing that nationwide injunctions are neither barred nor clearly authorized under Article III standing doctrine.[114] Some scholars acknowledge other legal and policy objections to nationwide injunctions, but warn against raising those objections to the level of constitutional concern.[115] Some of those non-constitutional objections are discussed in the following sections.

---

[109] *See. e.g.*, Texas v. United States, 787 F.3d 733, 743-46 (2015)*; see also* Cass, *supra* note 37, at 39-40 ("The point was not that a nationwide injunction would be more beneficial to the interests asserted by Texas and the other plaintiff states. Rather, it was that a traditional, geographically restricted injunction well might provide no meaningful relief at all.... [T]he Fifth Circuit's test, at bottom, was the traditional balancing test for injunctive relief, attending to the specific interests of the parties before the court even if the remedy ultimately had nationwide scope.")

[110] Frost, *supra* note 5, at 1082 ("[I]n the litigation challenging the Department of Justice's policy of withholding funding from so-called 'sanctuary cities,' the Seventh Circuit upheld the nationwide injunction because funds were distributed nationwide from a single pool of money, and thus 'conditions imposed on one can impact the amounts received by others.'").

[111] *See, e.g.*, Morley, *supra* note 32, at 491; Milan Smith, *Only Where Justified: Toward Limits and Explanatory Requirements for Nationwide Injunctions*, 95 N.D. L. REV. 2013, 2026 (2020); TSTA/NEA v. El Paso Cty. Cmty. Coll. Dist., 730 F.2d 258, 273-74 (5th Cir. 1984).

[112] Trump v. Hawaii, 138 S. Ct. 2392, 2446 n.13 (2018) (Sotomayor, J., dissenting) (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994)) (internal quotation marks omitted).

[113] *E.g.*, Wasserman, *supra* note 62, at 386-390 (discussing nationwide injunction cases in which a narrower injunction might have provided complete relief to the plaintiffs); *cf.* Bray, *supra* note 4, at 466-89 (arguing that the "complete relief" principal is not clearly defined and not an effective limit on nationwide injunctions); Smith, *supra* note 111, at 2026 (arguing that the complete relief principle imposes a limit on injunctive relief and "[i]t does not necessarily follow that courts *must* issue injunctive relief that provides complete relief to the plaintiffs").

[114] Nash, *supra* note 89, at 2010 ("[T]hese doctrines provide evidence that Article III standing does not tie the scope of an injunction directly to the injury suffered by the aggrieved plaintiff. To say, however, that these doctrines necessarily validate the nationwide injunction is quite a stretch. A true nationwide nonparty injunction presents one of the greatest possible disjunctions between a plaintiff's actual injury and injunctive scope."); *see also* Smith, *supra* note 111, at 2015 ("[N]ationwide 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.").

[115] *E.g.*, Trammell, *supra* note 75, at 980 (arguing that "manufacturing a constitutional home" for legitimate objections to nationwide injunctions best understood in policy terms "distorts and impoverishes Article III").

Litigation Procedure

Some commentators analyze nationwide injunctions from a procedural perspective, debating whether such injunctions conflict with or undermine other established facets of the federal litigation process. Key topics of discussion include whether nationwide injunctions prevent courts from fully exploring legal and factual issues, whether they improperly provide relief to persons who are not participating in the litigation, and whether they conflict with the legal doctrine of collateral estoppel by preventing the government from relitigating legal issues in multiple cases.

Record Development and Percolation

Some commentators argue that the issuance of nationwide injunctions may lead federal courts to make less-well-informed decisions in two related ways. First, some believe, the issuance of a nationwide injunction may prevent development of the legal and factual record in the particular case in which the injunction issues. Second, and more generally, some view the issuance of nationwide injunctions as inhibiting the "percolation" of important legal issues through multiple federal courts.

With respect to the first concern, some commentators posit that, compared to other kinds of cases, those involving nationwide injunctions improperly limit the opportunity for development of the legal and factual record.[116] In ordinary litigation, the parties often conduct discovery to establish the factual record for a case, which may include documents, witness testimony, or other relevant evidence.[117] Disputed questions of fact may proceed to trial before a judge or jury.[118] The parties also usually submit motions papers or briefs discussing legal issues relevant to the case.[119] By contrast, cases involving nationwide injunctions often proceed on an expedited basis. Parties seeking a nationwide injunction frequently do so by requesting a TRO or a preliminary injunction, claiming that they will suffer irreparable harm if the motion is not granted by a particular deadline.[120] Those types of motions generally come very early in the litigation process, before there is a chance for full development of the factual and legal record.[121] While litigants must ordinarily wait for a final judgment disposing of a case in its entirety before appealing, court orders granting or denying injunctive relief are immediately appealable, and such appeals often are also considered on an expedited basis.[122] This process means that cases involving nationwide injunctions may move from the district court to the court of appeals and finally to the Supreme Court in a matter of weeks.[123] Some commentators worry that this expedited process provides the

[116] *See, e.g.*, Bray, *supra* note 4, at 461-62; Frost, *supra* note 5, at 1108.

[117] Fed. R. Civ. P. 26-37; *see also* 8 Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 2001 et seq. (3d ed. 2021).

[118] Fed. R. Civ. P. 39.

[119] Fed. R. Civ. P. 7; *see also* 5 Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 1182 et seq. (3d ed. 2021).

[120] *E.g.*, Texas v. United States, 515 F. Supp. 3d 627 (S.D. Tex., 2021) (granting nationwide TRO); Washington v. Trump, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (same); Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (granting nationwide preliminary injunction); *see, e.g.*, Beth A. Williams, Assistant Attorney General, Office of Legal Policy, DOJ, *Discussion on Nationwide Injunctions: Introductory Remarks, 2019 Federalist Society Texas Chapter Conference*, 24 TEX. REV. L. & POL. 315, 319 (2020).

[121] Williams, *supra* note 120, at 319.

[122] *Compare* 28 U.S.C. § 1291 (appeal from final decisions of district courts) *with* 28 U.S.C. § 1292 (appeal from interlocutory decisions, including orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions").

[123] For example, the immigration order at issue in *Trump v. Hawaii* was issued on September 24, 2017 and published in

parties and the courts with insufficient time for full development and examination of the factual and legal record in high-stakes cases.[124]

While the foregoing concern around record development relates to the consideration of the law and facts in individual cases, the second concerns percolation—that is, allowing consideration of legal issues by multiple federal courts *across multiple cases* so that the issues are explored thoroughly before the Supreme Court weighs in.[125] The Supreme Court has recognized an interest in percolation.[126] The Court's frequent practice of declining petitions for certiorari until there is a "circuit split," where two or more federal appeals courts have reached different conclusions on a legal question, is one way that the Court fosters percolation.[127] However, some courts and commentators assert that the issuance of nationwide injunctions undermines percolation.[128] Because cases involving nationwide injunctions often move quickly through the courts, they argue, there may not be enough time for multiple lower courts to consider an issue before an expedited appeal reaches the Supreme Court.[129] The issuance of a nationwide injunction may also deter new plaintiffs from filing additional challenges to the enjoined policy because they have no incentive to spend resources to oppose a policy that has already been halted.[130] Furthermore, some commentators argue that one court's decision to issue a nationwide injunction may discourage other courts from considering the same issue, either because a ruling on a policy that is already enjoined in full would have no practical effect, or to avoid the risk of different courts issuing conflicting injunctions.[131] Those commentators contend that the absence of multiple

---

the Federal Register three days later. Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public–Safety Threats, 82 Fed. Reg. 45161 (Sept. 27, 2017). The district court entered a nationwide injunction against the order on October 17, 2017. State v. Trump, 265 F. Supp. 3d 1140 (D. Haw. 2017). After the Ninth Circuit affirmed, the Supreme Court granted certiorari on January 19, 2018. Trump v. Hawaii, 138 S. Ct. 923 (2018). The Court issued its final decision in the case in June 2018. Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[124] *E.g.*, Bray, *supra* note 4, at 461-62; DHS v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("Rather than spending their time methodically developing arguments and evidence in cases limited to the parties at hand, both sides have been forced to rush from one preliminary injunction hearing to another, leaping from one emergency stay application to the next, each with potentially nationwide stakes, and all based on expedited briefing and little opportunity for the adversarial testing of evidence.").

[125] *See* Arizona v. Evans, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that 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 pronouncement by this Court.").

[126] United States v. Mendoza, 464 U.S. 154, 160 (1984) ("A rule allowing nonmutual collateral estoppel against the Government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.").

[127] *See* Sup. Ct. R. 10 (listing circuit splits as one factor in the decision whether to grant certiorari).

[128] *E.g.*, Williams, *supra* note 120, at 318; Frost, *supra* note 5, at 1108 (citing Va. Soc'y for Human Life, Inc. [VSHL] v. FEC, 263 F.3d 379, 393 (4th Cir. 2001) (noting that nationwide injunctions can "deprive the Supreme Court of the benefit of decisions from several courts of appeals"), overruled on other grounds by Real Truth About Abortion, Inc. v. FEC, 681 F.3d 544, 550 n.2 (4th Cir. 2012)).

[129] *E.g.*, Wasserman, *supra* note 62, at 378-79.

[130] *E.g.*, Smith, *supra* note 111, at 2032; Bray, *supra* note 4, at 461-62.

[131] *See, e.g.*, Williams, *supra* note 120, at 320-21 ("When a single district judge enters a nationwide injunction, he or she prevents every other district judge in the country, and every circuit judge outside his or her own circuit, from issuing a ruling with any practical effect."). For additional discussion of the possibility of conflicting injunctions see *infra* "Fairness, Efficiency, and Governance."

appeals court decisions on an issue may deprive the Supreme Court of a valuable resource in deciding difficult cases.[132]

Others respond to concerns around record development and percolation by explaining that those concerns are not unique to nationwide injunctions. For instance, some note that class actions and multidistrict litigation may also limit percolation by consolidating claims from multiple individuals in a single suit.[133] Moreover, many cases involving requests for injunctive relief are litigated on an expedited basis, which may limit opportunities for record development and percolation regardless of whether the plaintiffs seek a nationwide injunction or a more limited injunction. In addition, some courts and scholars maintain that cases involving nationwide injunctions are less likely to raise the type of issues that benefit most from percolation because they often involve facial challenges to laws or regulations that do not depend on how those authorities apply to particular individuals.[134] Some further suggest that the participation of non-parties as amici curiae in the lower courts mitigates concerns around full exploration of all legal perspectives.[135] Some scholars note that the issuance of a nationwide injunction does not necessarily prevent other courts from considering the same issues, but offer that the effect on percolation is one factor that each court should consider when choosing a remedy in the particular case before it.[136] Similarly, some commentators agree that percolation and record development are legitimate policy considerations, but propose that the benefits from nationwide injunctions may outweigh any downsides arising from limitations in these areas.[137] By contrast, some scholars challenge the notion that percolation provides significant benefits as a general matter, and specifically deny that "the percolation process should weigh as a significant factor in ongoing debates concerning nationwide injunctive relief."[138]

---

[132] *E.g.*, Wasserman, *supra* note 62, at 378-79; DHS v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("By their nature, universal injunctions tend to force judges into making rushed, high-stakes, low-information decisions.").

[133] *See, e.g.*, Frost, *supra* note 5, at 1108, 1111; Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 38-39 (2019) (citing class action caselaw and arguing that "a policy preference in favor of percolation is not a trump card" against nationwide injunctions).

[134] A facial challenge is a claim that the challenged policy is unlawful on its face—that is, that the law or regulation is unlawful as written, without regard to how it is applied. For discussion of the propriety of nationwide injunctions in cases raising facial challenges, see, e.g., Suzette Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 58 (2017); Chicago v. Sessions, 888 F.3d 272, 292 (7th Cir. 2018) ("There are some legal issues which benefit from consideration in multiple courts—such as issues as to the reasonableness of searches or the excessiveness of force—for which the context of different factual scenarios will better inform the legal principle. But a determination as to the plain meaning of a sentence in a statute is not such an issue. For that issue, the duplication of litigation will have little, if any, beneficial effect.").

[135] *E.g.*, Clopton, *supra* note 133, at 38-39. *But see* Nash, *supra* note 89, at 2003 (arguing that briefing by amici is not a full substitute for multiple lower court decisions).

[136] Frost, *supra* note 5, at 1108-09; *see also* Trammell, *supra* note 3, at 100 ("[N]ationwide injunctions are not categorically forbidden. Rather, [concerns around] not wanting to freeze the law after a single lawsuit, facilitating percolation, and not forcing the government to appeal every adverse decision ... should inform whether a nationwide injunction is proper."); Malveaux, *supra* note 134, at 58.

[137] *See, e.g.*, Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO.WASH. L. REV. 1121, 1184 (2020); Malveaux, *supra* note 134, at 58 ("[T]here are occasions when an issue is sufficiently ripe and particularly pressing such that it should be ruled on sooner rather than later.").

[138] Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363, 367 (2021); *cf.* Rendleman, *supra* note 19, at 947-48 ("Fostering percolation is not a policy that is persuasive enough to override a judge's ability to grant a nationwide national government injunction when circumstances otherwise warrant that relief.").

Relief for Non-Parties

One feature of nationwide injunctions is that, because they bar enforcement of a challenged law or policy in its entirety, they may provide relief for persons who are not parties to the litigation. As discussed above, some scholars raise constitutional objections to court orders that grant relief to non-parties.[139] Commentators also debate other legal issues related to relief for non-parties via nationwide injunctions.

Discussion in this area often compares nationwide injunctions with class action lawsuits, in which one or more representative plaintiffs bring suit on behalf of others who are similarly situated.[140] Like nationwide injunctions, class actions have also generated their own share of scholarly discussion and calls for reform.[141] However, class actions are explicitly authorized and governed by the Federal Rules of Civil Procedure, so commentary comparing nationwide injunctions with class actions often invokes class actions as a legitimate and widely-accepted vehicle for courts to award far-reaching relief.[142]

Some critics of nationwide injunctions cite the explicit authority for class actions under Federal Rule of Civil Procedure 23 and distinguish nationwide injunctions as improperly allowing parties to circumvent established class action procedures.[143] For instance, Professor Morley disapproves of the fact that some courts have cited the availability of nationwide injunctions as a reason for denying class certification.[144] He also asserts that individual suits seeking nationwide injunctions resemble "spurious" class actions, which were permitted under an earlier version of Rule 23, but which 1966 amendments to the rule sought to eliminate.[145] Some commentators state that nationwide injunctions conflict with Supreme Court caselaw, and that, in the absence of class certification, an "action is not properly a class action" and should not be treated as such."[146]

Some defenders of nationwide injunctions counter that nationwide injunctions are analogous to class actions, serving many of the same interests and raising some of the same concerns.[147] Some go further, asserting that nationwide injunctions may avoid certain legal concerns unique to class actions.[148] In response to arguments that broad injunctive relief is *only* appropriate in formal class actions, some commentators view those arguments as overly restrictive because class action proceedings are burdensome and time-consuming.[149] They also reason that nationwide injunctions

---

[139] *See supra* "Constitutional Considerations."

[140] *See* Fed. R. Civ. P. 23; 75 Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 1751 et seq. (3d ed. 2021).

[141] *See generally, e.g.*, Richard Marcus, *Evolution v. Revolution in Class Action Reform*, 96 N.C. L. REV. 903 (2018).

[142] Fed. R. Civ. P. 23.

[143] *E.g.*, Smith, *supra* note 111, at 2026-28; Williams, *supra* note 120, at 319; Bray, *supra* note 4, at 464-65.

[144] Morley, *supra* note 32, at 504 ("some courts use their ability to completely enjoin enforcement of a law through a Defendant-Oriented Injunction as a justification for refusing to certify a proposed class, on the grounds that class certification is purportedly unnecessary"); *see also id*. at 507-08.

[145] *Id.* at 501.

[146] *Id.* at 510 (citing Baxter v. Palmigiano, 425 U.S. 308, 310 n.1 (1976)); *see also* Larkin & Canaparo, *supra* note 50, at 65.

[147] *See, e.g.*, Rendleman, *supra* note 19, at 957-59; Trammell, *supra* note 3, at 114.

[148] Frost, *supra* note 5, at 1109 (arguing that because class actions bind class members, even those who do not participate in the litigation, but nationwide injunctions do not, nationwide injunctions avoid "due process concerns that can arise in the class action context"); *see also* Trammell, *supra* note 3, at 114-15.

[149] *E.g.*, Rendleman, *supra* note 19, at 959; Malveaux, *supra* note 134, at 59.

are not necessarily a way of circumventing class actions because not all cases where nationwide injunctions are warranted could satisfy class certification standards.[150]

The issue of relief for non-parties extends beyond the class action context. For instance, according to some commentators, granting relief to non-parties may be counterproductive, sometimes even providing supposed benefits to persons who do not want them.[151] Professor Morley goes further, arguing that nationwide injunctions may violate the due process rights of third parties by, among other things, "allowing a court to adjudicate and enforce their rights without first giving them notice and an opportunity to be heard or opt out."[152] Others counter that courts already issue orders that benefit non-parties in a variety of widely accepted contexts, such as the abatement of a nuisance or a determination of title to property.[153]

Some scholars prefer to focus on the government defendant subject to a nationwide injunction rather than the parties and non-parties who benefit from the injunction.[154] Because a nationwide injunction does no more than bind a defendant who is subject to the court's jurisdiction, they argue, it is a legitimate exercise of the court's equitable power.[155] The shift in focus from parties to beneficiaries "directs attention to the public and away from the defendant," according to one commentator, obscuring the key fact that the court has jurisdiction over the defendant and the power to enjoin the defendant.[156]

The same commentator also asserts that concerns about relief for non-parties are overstated because, "[i]f a defendant violates an injunction, a nonparty lacks the legal ability to enforce it; only the plaintiff or the judge can enforce the injunction with civil or criminal contempt."[157] Thus, while non-parties may receive incidental benefits from a nationwide injunction, they do not receive the same right of enforcement as a prevailing plaintiff.[158] Another commentator argues that limiting federal courts' authority to issue nationwide injunctions based on concerns about relief for non-parties could "strip federal courts of much of their remedial power over defendants in 'nationwide injunction' cases" and leave the political branches unchecked.[159]

Collateral Estoppel

Some commentators suggest that nationwide injunctions may conflict with Supreme Court doctrine holding that the federal government is not subject to non-mutual collateral estoppel.[160] The doctrine of collateral estoppel generally means that a party that has had an opportunity to litigate an issue fully in one case may not relitigate the same issue in future cases. However, the

---

[150] *E.g.*, Malveaux, *supra* note 134, at 59 (citing Bray, *supra* note 4, at 476).

[151] Morley, *supra* note 32, at 517; *cf.* Rendleman, *supra* note 19, at 950-51 (explaining that injunctions may either benefit or harm non-parties).

[152] Morley, *supra* note 32, at 527-31.

[153] Sohoni, *supra* note 4, at 932; *see also* Pedro, *supra* note 30, at 870-71 ("The potential ideological bias in framing the targeted injunctions as 'nationwide injunctions' also serves to make these injunctions seem legally exceptional and controversial even if they aren't.").

[154] Rendleman, *supra* note 19, at 955; Pedro, *supra* note 30, at 871-72.

[155] Rendleman, *supra* note 19, at 955.

[156] *Id.*

[157] *Id.* at 954.

[158] *Id.*

[159] Pedro, *supra* note 30, at 871-72.

[160] *E.g.*, Morley, *supra* note 32, at 517-18 (citing United States v. Mendoza, 464 U.S. 154, 158 (1984)); Larkin & Canaparo, *supra* note 50, at 66-72.

Supreme Court held in *United States v. Mendoza* that the federal government was not subject to non-mutual collateral estoppel, meaning the government may relitigate issues on which it loses in future cases involving different parties.[161] The Supreme Court held that litigation against the government should be treated differently than other cases, "both because of the geographic breadth of Government litigation and also, most importantly, because of the nature of the issues the Government litigates."[162] The Court also cited the percolation concerns discussed above, explaining that applying non-mutual collateral estoppel against the government "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular issue."[163]

Nationwide injunctions have a similar practical effect to non-mutual collateral estoppel, and as the foregoing discussion shows, they raise concerns related to those the Supreme Court identified in *Mendoza*. Some critics of nationwide injunctions therefore contend that such injunctions are inconsistent with *Mendoza*.[164] On the other hand, one scholar believes that such a reading of *Mendoza* is too broad, and that in fact "*Mendoza* does not reflect a categorical approach to non-mutual preclusion against the government."[165] Likewise, he argues, "nationwide injunctions are not categorically forbidden."[166]

Other commentators question whether *Mendoza* is relevant to the debate over nationwide injunctions. *Mendoza* did not involve a nationwide injunction, and some scholars assert that the considerations that supported the holding in *Mendoza* do not apply in the context of nationwide injunctions.[167] One scholar goes further, emphasizing that *Mendoza* was wrongly decided because it improperly grants the government special treatment.[168] He advocates that *Mendoza* should be overruled or, at a minimum, should not be extended to the context of nationwide injunctions.[169]

Fairness, Efficiency, and Governance

Nationwide injunctions also implicate questions of fairness, judicial efficiency, and good governance. Commentators point to each of these considerations both to critique and to defend nationwide injunctions.

With respect to fairness, some commentators argue that nationwide injunctions promote fairness and uniformity by treating all regulated parties alike.[170] They assert that it is fairer to pause a challenged policy with respect to everybody rather than to block the policy for some while others

---

[161] *Mendoza*, 464 U.S. at 158.

[162] *Id.* at 159.

[163] *Id.* at 160.

[164] Morley, *supra* note 32, at 518; Larkin & Canaparo, *supra* note 50, at 66-72.

[165] Trammell, *supra* note 3, at 100.

[166] *Id.*; *see also* Smith, *supra* note 111, at 2022 ("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.").

[167] *See, e.g.*, Frost, *supra* note 5, at 1113.

[168] Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 21-29 (2019).

[169] *Id.* at 38-45.

[170] *E.g.*, Malveaux, *supra* note 134, at 61; *Rule by District Judge: The Challenges of Universal Injunctions: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 6 (2020) (statement of Prof. Mila Sohoni); *see also, e.g.*, Wirtz v. Baldor Electric Co., 337 F.2d at 534. ("[A] court order enjoining the Secretary's determination for the sole benefit of [the] plaintiffs-appellees who have standing to sue would ... give them an unconscionable bargaining advantage over other firms in the industry.").

remain subject to it—particularly when some persons subject to a law or policy may not be able to challenge it.[171] Others counter that consistency does not warrant entering an injunction that is broader than necessary, that other procedures (such as class actions) can adequately protect the rights of absent stakeholders, or that it is fair for different persons to be treated differently when they make different choices about whether and how to challenge a law or policy.[172] Some critics of nationwide injunctions also describe such injunctions as unfairly imposing a heightened burden on the government.[173] This disproportionate burden occurs when multiple plaintiffs file separate suits seeking nationwide injunctions against a single government policy: the failure of a plaintiff in one case to obtain a nationwide injunction is not fatal to another plaintiff's request in another case, but only one plaintiff needs to prevail against the government for a policy to be blocked in its entirety.[174] As one commentator has written, "the government has to run the table. But the challengers ... can shop 'till the rule drops."[175]

With respect to judicial efficiency, some feel that nationwide injunctions promote the efficient use of judicial resources. They assert that requiring every person affected by a challenged policy to bring suit challenging the policy in order to obtain relief may place a heavy burden on the members of the public bringing those suits and the federal courts that hear the cases.[176] However, other competing considerations, such as the need for thorough and reliable judicial decisions, may outweigh the interest in efficiency.[177] Furthermore, the availability of class actions may mitigate efficiency concerns around the need for multiple lawsuits.[178] Relatedly, one commentator argues that allowing plaintiffs to circumvent class actions can "jeopardize" efficiency by "undermin[ing] the court's ability to consider the full range of relevant facts and interests when determining liability and fashioning relief."[179]

There is also controversy about whether nationwide injunctions tend to support or undermine general ideals of good governance. According to critics, such injunctions can improperly prevent the government from implementing its chosen policies.[180] Some cite cases in which a series of nationwide injunctions halted multiple attempted changes to particular policies, leaving the

---

[171] *E.g.*, Malveaux, *supra* note 134, at 61; Sohoni, *supra* note 170, at 6. Persons who oppose a law or policy may be unable to challenge it in court for various reasons. Some may lack the resources to bring suit. Others may oppose the policy but lack standing to sue. Some, such as individuals located abroad, may be unable to participate in U.S. court proceedings as a practical matter.

[172] *E.g.*, Bray, *supra* note 4, at 473-76; Smith, *supra* note 111, at 2026-28; E. Bay Sanctuary Covenant v. Barr, 934 F.3d 1026, 1030 n.8 (9th Cir. 2019) ("[T]he fact that injunctive relief may temporarily cause the Rule to be administered inconsistently in different locations is not a sound reason for imposing relief that is broader than necessary.").

[173] *E.g.*, Morley, *supra* note 32, at 494; Williams, *supra* note 120, at 319.

[174] *E.g.*, Cass, *supra* note 37, at 43-44 (noting the "the asymmetry of the stakes" and arguing, "[g]iven the usual rules of estoppel and enforcement of injunctions, a win for the government does not end litigation, while a win anywhere, anytime for plaintiffs effectively precludes the enjoined officials or offices from continuing to apply the policy.").

[175] Bray, *supra* note 7, at 4-5.

[176] *E.g.*, Rendleman, *supra* note 19, at 947 ("If the issues are clearly drawn, judicial economy militates against multiple lawsuits and delayed relief."); Frost, *supra* note 5, at 1101 ("In at least some cases, efficiency and judicial economy support a nationwide injunction over dozens (or more) lawsuits challenging the same practice."); *see also* Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998); Chicago v. Sessions, 888 F.3d 272, 289 (7th Cir. 2018) (explaining that nationwide injunctions "can be beneficial in terms of efficiency and certainty in the law, and more importantly, in the avoidance of irreparable harm and in furtherance of the public interest.").

[177] Larkin & Canaparo, *supra* note 50, at 70.

[178] *E.g.*, Morley, *supra* note 35, at 20.

[179] Maureen Carroll, *Aggregation for Me, but Not for Thee: the Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2021 (2015).

[180] *E.g.*, Williams, *supra* note 120, at 317; Bagley, *supra* note 42, at 6-9.

federal government unable to make changes for many years.[181] Similarly, some posit that nationwide injunctions can create uncertainty for regulated parties and the public at large, particularly if different courts halt and then restart challenged policies.[182] Moreover, if different plaintiffs seek nationwide injunctions in multiple cases, there is a risk that the government may become subject to incompatible requirements under different court orders.[183] However, it is not clear that such conflicting injunctions actually issue in a meaningful number of cases.[184]

A contrary view is that nationwide injunctions support good governance by preventing the implementation of laws and policies that are likely to be held unconstitutional or otherwise invalid.[185] Some rules can be challenged before they become effective, and suspending those rules before they go into effect may serve general notions of justice and the rule of law and prevent the instability and waste of resources that could occur if challenged policies take effect only to be invalidated later.[186] Defenders of nationwide injunctions perceive broad injunctive relief as appropriate when a challenged policy is blatantly unconstitutional or represents severe overreach by the political branches.[187] Some courts have similarly held that broad injunctions against unlawful policies may serve the public interest.[188]

The Role of the Judiciary

Discussion of nationwide injunctions may also raise questions around the proper role of the judiciary within the federal government. In considering this question, scholars sometimes distinguish between a "dispute resolution" model of judicial review—where courts exist only to resolve discrete disputes between specific parties—and a "law declaration" model of judicial review—where courts announce the law as a general matter, not just as it applies in a given

[181] Bagley, *supra* note 42, at 6-9 (citing examples including litigation around rules interpreting the phrase "waters of the United States" and noting it was possible that "neither the Obama administration nor the Trump administration may ever actually be able to put into effect rules to address the Supreme Court's concerns [with a prior rule]. This is no way to run a government.").

[182] *Id.* at 9; *cf.* Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B. U. L. REV. 615, n.21 (2017) ("The impact of orders of varying breadth from federal district and circuit courts throughout the nation also contributed to substantial uncertainty on the path to the Supreme Court's ruling upholding the right to same-sex marriage in Obergefell v. Hodges, 135 S. Ct. 2584, 2591 (2015).").

[183] *E.g.*, Morley, *supra* note 32, at 504-05; *see also* DHS v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("[T]he routine issuance of universal injunctions is patently unworkable, sowing chaos for litigants, the government, courts, and all those affected by these conflicting decisions.").

[184] Bert I. Huang, *Coordinating Injunctions*, 98 TEX. L. REV. 1131, 1332 n.11 and sources cited (2020). Professor Huang suggests that to decrease further the risk of conflicting injunctions, "[e]ach district judge should issue or stay her injunction in accordance with the outcome she thinks most district judges would choose." *Id.* at 1335 (emphasis removed).

[185] Rendleman, *supra* note 19, at 898 ("Federal courts use national government injunctions as remedies to stop improper measures from the two political branches and to protect citizens' constitutional and other substantive rights. A nationwide national government injunction may be the only way to extend complete relief to plaintiffs, protect their entitlements, and to avoid illegal or unconstitutional government policies that harm thousands of others.").

[186] *E.g.*, AliKhan, *supra* note 8, at 3-4; Cass, *supra* note 37, at 60 (noting that parties may expend resources they cannot recover if required to comply with unlawful regulations and concluding, "Where there is a strong showing of regulatory overreach—of a decision that exceeds legal authority or of a basis for action that transgresses constitutional strictures—courts appropriately may enter broader injunctive relief while review proceeds.).

[187] *E.g.*, Rendleman, *supra* note 19, at 906-11.

[188] *See, e.g.*, Wirtz v. Baldor Electric Co., 337 F.2d 518, 534-35 (D.C. Cir. 1963) (stating that the lawsuit sought to "vindicate the public interest in having congressional enactments properly interpreted and applied" and concluding, "As it is principally the protection of the public interest with which we are here concerned, no artificial restrictions of the court's power to grant equitable relief in the furtherance of that interest can be acknowledged.").

case.[189] Some critics of nationwide injunctions assert that the power of the federal courts is or should be limited to dispute resolution; nationwide injunctions are inconsistent with this view because they constitute law declaration in that they determine how the law applies to parties and non-parties alike.[190] In this view, when the courts embrace the law declaration model of judicial review by granting nationwide injunctions, they overstep their role and may encroach on the domain of the political branches.[191] Some specifically worry that courts issuing nationwide injunctions usurp Congress's legislative function or contravene the intent of the Framers in establishing the nation's constitutional system of separation of powers.[192]

By contrast, many scholars perceive federal courts as properly taking on both dispute resolution and law declaration roles.[193] Some find support for this view in writings of the Framers, including Alexander Hamilton's statement in Federalist No. 33 that acts of Congress "which are not pursuant to its constitutional powers" will not "become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such."[194] Similarly, in one of the foundational cases of American law, *Marbury v. Madison*, Chief Justice Marshall wrote that "[i]t is emphatically the duty of the Judicial Department to say what the law is."[195] *Marbury* established the long-standing practice of judicial review of the actions of the political branches, which is arguably consistent with the law declaration model of judicial power.[196] Scholars also cite more recent examples of judicial doctrines expressly contemplating that federal court decisions will reach beyond the immediate parties to the case.[197] Several defenders of nationwide injunctions support such injunctions as promoting separation of powers interests by preventing overreach by the political branches.[198]

In response to concerns around expansion of the judicial role, Professor Frost asserts that the federal government as a whole has expanded its reach since the Founding, with the political branches—and especially the executive branch—increasingly implementing policies with

---

[189] *See, e.g.*, Frost, *supra* note 5, at 1987 & n.103.

[190] *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2027-28 (2018) (Thomas, J., concurring) ("Misuses of judicial power, [Alexander] Hamilton reassured the people of New York, could not threaten 'the general liberty of the people' because courts, at most, adjudicate the rights of "individual[s]."") (quoting The Federalist No. 78 (Alexander Hamilton); Cass, *supra* note 37, at 33; Bray, *supra* note 4, at 449-52, Wasserman, *supra* note 62, at 355.

[191] *E.g.*, Bray, *supra* note 4, at 471; Morley, *supra* note 35, at 40.

[192] *E.g.*, Cass, *supra* note 37, at 57-59; Larkin & Canaparo, *supra* note 50, at 63 ("Because a universal injunction partakes more of the nature of a 'Law' than a judgment resolving a 'Case' or 'Controversy,' the decision made at the Constitutional Convention to confine the judiciary to the latter is powerful evidence that courts should limit themselves to entering a judgment that does no more than resolve the case at hand and remedy the injury suffered by the parties."); *see also* Trump v. Hawaii, 138 S. Ct. at 2026-29 (Thomas, J., concurring).

[193] *See, e.g.*, Frost, *supra* note 5, at 1087 ("Federal courts serve a dual function: They exist to resolve disputes between the parties before them and also to declare the meaning of law for everyone. Scholars dispute the degree to which law declaration is merely incidental to dispute resolution, rather than an independent and significant aspect of the judicial power.").

[194] Rendleman, *supra* note 19, at 893-94.

[195] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[196] *See, e.g.*, Frost, *supra* note 5, at 1087 n.103; Rendleman, *supra* note 19, at 894.

[197] *See* Frost, *supra* note 5, at 1083 ("When a court finds that a statute is unconstitutional on its face, it does not hold that the statute applies to everyone but the plaintiff; rather, it holds that the statute is invalid. Likewise, as the D.C. Circuit has explained, 'when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.'") (quoting Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1988)) (additional citation omitted).

[198] *E.g.*, Rendleman, *supra* note 19, at 898; Frost, *supra* note 5, at 1088-89; Pedro, *supra* note 30, at 873.

nationwide effect.[199] It is thus appropriate, in her view, for the judiciary to take on additional authority to check the expanded reach of the political branches, particularly when the political branches abuse their authority.[200] Another scholar reasons that the political branches may strategically choose to act in ways they believe push or even exceed constitutional limits, and that possibility "complicates efforts to assess when courts are intruding into the political domain, as opposed to merely fulfilling legitimately assigned tasks consistent with the limited domain set forth in the Constitution and elaborated in statutes."[201] Limits on nationwide injunctions may thus impair the ability of the courts to provide a legitimate and necessary check on the political branches.[202] In her analysis of nationwide injunctions under the APA, Professor Sohoni contends that *critiques of nationwide injunctions* in fact serve to undermine judicial legitimacy, and that even if the Supreme Court limited the courts' ability to issue such relief, it might not "dispel the cloud of criticism from political actors looming over the federal courts today."[203]

Politicization of the Courts

A separate debate around the role of the courts concerns whether an increase in nationwide injunctions raises issues related to politicization of the judiciary. Traditionally, many have viewed the federal courts as non-political entities and stressed that the non-political nature of courts fosters public confidence in judicial impartiality.[204] However, cases involving nationwide injunctions often involve high-stakes political issues and litigants that split along partisan political lines.[205] As Professor Ronald Cass has written:

> [T]he pattern that emerges is the routine use of suits seeking nationwide injunctions in highly politically salient cases with relatively consistent blocs of public officials and interest groups, from relatively consistent parts of the nation, lining up in opposition. Reflecting the same pattern seen in the actual political arena, suits by Republicans from "red states" opposed President Obama's administration on matters related to health care, environmental and public land regulation, and immigration, while suits by Democrats from "blue states" have opposed President Trump's administration on those same issues.[206]

---

[199] Frost, *supra* note 5, at 1081 ("[F]ederal courts' equitable authority should keep pace with the expansion of the political branches' role in enacting laws and implementing policies with nationwide effect."); *id.* at 1090 ("Although nationwide injunctions have been issued more frequently over the last fifty years, that may be the natural response to the expansion of federal law and the recent increase in major policy changes made through unilateral executive action.").

[200] *Id.* at 1088 ("If courts are limited to deciding individual cases and lack the power to issue broader injunctions, then they lose a significant tool with which to curb abuses of power by the other branches. Nationwide injunctions are an essential means by which courts can halt unconstitutional or illegal federal policies that may cause irreparable harm to thousands or millions of people.").

[201] Cass, *supra* note 37, at 61-62; *see also* Michael S. Greve, *Clean Power, Dirty Hand*s, LAW & LIBERTY (Feb. 1, 2016) https://lawliberty.org/clean-power-dirty-hands/ (last visited Sept. 4, 2021).

[202] *See* Pedro, *supra* note 30, at 871-2 ("If federal courts no longer had (or began to choose not to use) remedial authority to prevent defendants from violating the Constitution or statutes ... then the only significant restraint on defendants would be whatever limit each defendant chose to put on itself."); *id.* at 873 ("Taking these potentially misguided arguments to their logical ends would likely strip the federal judiciary of authority to adjudicate the disputes legitimately before the courts, which could create separation of powers and judicial supremacy problems.").

[203] Sohoni, *supra* note 137, at 1189, 1191.

[204] *See, e.g.*, Williams, *supra* note 120, at 319-20; Cass, *supra* note 37, at 60-62; *see also* The Federalist No. 79 (Alexander Hamilton) (describing measures to ensure "the complete separation of the judicial from the legislative power").

[205] Cass, *supra* note 37, at 53; *see also* Morley, *supra* note 32, at 519-20.

[206] Cass, *supra* note 37, at 53.

In Professor Cass's view, this pattern risks "[i]nserting the judiciary into quintessentially political fights, even when there is a substantial legal issue to be decided on recognizably legal grounds," and it reinforces "the perception that judges base decisions on political preferences, or at least are affected by those preferences."[207] Many observers do attribute political motivations to judges who issue nationwide injunctions in high-profile cases,[208] and some of the leading academic commentary also suggests that courts may have political leanings that affect nationwide injunction cases.[209] Some scholars dismiss concerns about politicization, stating that the judiciary was significantly politicized before the current debate around nationwide injunctions arose, or that nationwide injunctions are not unique among the many factors that contribute to the politicization of the judiciary.[210] As a practical matter, nationwide injunctions give courts a powerful tool that has a greater potential to affect the policy sphere than narrower, plaintiff-oriented injunctions.[211]

Related to concerns around politicization, multiple commentators suggest that nationwide injunctions may increase the incentive for plaintiffs to forum shop—that is, to seek out courts or even individual judges that they believe are likely both to disapprove of a challenged policy and to enjoin it broadly.[212] One scholar asserts that nationwide injunctions create "incredibly strong incentives for plaintiffs to rush to file suit in jurisdictions thought most likely to provide a sympathetic forum for their claims. The first judge to decide a matter frequently has an outsized impact on the development of the law with respect to that specific issue."[213] If the court rules in favor of plaintiffs who selected the forum, it may compound perceptions both that the judiciary is politicized[214] and that improper political considerations have influenced the relief granted in the

---

[207] *Id.* at 53-54; *see also id.* at 54-55 (stating that even if courts do not routinely decide cases based on political considerations, "when politically active parties engage courts in challenges to decisions made in the political domain it is difficult to separate the resulting decisions from an appearance of judicial entanglement with politics.").

[208] *E.g.*, Mark Joseph Stern, *Conservative Judges Keep Doing This Thing They Say They Hate*, SLATE (June 16, 2021) https://slate.com/news-and-politics/2021/06/conservative-judges-nationwide-injunction-biden.html ("Republicans' crusade against nationwide injunctions stopped dead in its tracks when Joe Biden entered the White House. Since Jan. 20, 2021, GOP state attorneys general have already sought and received multiple nationwide injunctions against Biden's policies—all from conservative judges."); Rick Lowry, *Judges for the #Resistance*, POLITICO (Apr. 25, 2018) https://www.politico.com/magazine/story/2018/04/25/judges-for-the-resistance-218104/ ("There is a lawlessness rampant in the land, but it isn't emanating from the Trump administration. The source is the federal judges who are making a mockery of their profession by twisting the law to block the Trump administration's immigration priorities.").

[209] *E.g.*, Bray, *supra* note 4, at 459-60 ("It is no accident which courts have given the major national injunctions in the last three administrations. In the George W. Bush Administration, it was federal courts in California. In the Obama Administration, it was federal courts in Texas. Now, in the Trump Administration, the national preliminary injunctions have come from federal courts in several less conservative circuits (the Fourth, Seventh, and Ninth).").

[210] *E.g.*, Rendleman, *supra* note 19, at 93-46.

[211] *E.g.*, Bray, *supra* note 4, at 460.

[212] Cass, *supra* note 37, at 42-51; Bray, *supra* note 4, at 460 ("The pattern is as obvious as it is disconcerting. Given the sweeping power of the individual judge to issue a national injunction and the plaintiff's ability to select a forum, it is unsurprising that there would be rampant forum shopping."); Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1091 (2017) (Nationwide injunctions "incentivize[] an extreme race to courthouses more inclined to issue nationwide injunctions and more sympathetic to the plaintiff's position.").

[213] Cass, *supra* note 37, at 42; *see also id.* at 43 ("[T]he less sweeping the potential remedy, the lower the benefit from raising the odds of obtaining it.").

[214] *Id.* at 48 ("[F]orum shopping self-consciously seeks out judges who lie at an extreme among the relevant class of judges, because the most extreme judges have the greatest probability of deciding a matter in a way that correlates with the interests of one party to a dispute" and the practice "underscores the widely shared perception that at least some judges can be expected to make decisions that are heavily influenced by personal inclinations.").

particular case.[215] It may also motivate future plaintiffs to engage in forum shopping.[216] However, some commentators doubt that nationwide injunctions significantly increase the incentive to forum shop because the incentive to seek out a favorable judge is strong regardless of the specific relief a plaintiff seeks.[217] Others recommend that Congress or the courts could mitigate forum shopping through the use of targeted procedural reforms.[218]

Special Contexts

Some commentators have suggested that nationwide injunctions may be more or less appropriate in certain specific circumstances, which may depend on which court is considering a case, the parties to the litigation, or the subject matter at issue.

Supreme Court Versus Lower Courts

Some contend that nationwide injunctions are least appropriate when issued by the trial-level district courts, but raise fewer concerns when they are issued by the Supreme Court.[219] Supreme Court decisions bind all lower federal courts and control future Supreme Court cases that raise the same legal issues through the doctrine of *stare decisis*.[220] By contrast, district court decisions do not control the outcome of future cases.[221] While judges in other cases may look to prior district court decisions as persuasive authority and adopt their reasoning if they find it compelling, they are not required to do so.[222] Appellate court decisions occupy a middle ground: they act as binding precedent in the judicial circuit where they issue, controlling the outcome of cases raising the same legal issues in the same appeals court and the district courts within the circuit.[223] Outside the issuing circuit, appeals court decisions constitute only persuasive authority.[224]

Because the Supreme Court's resolution of legal issues is binding on all federal courts, some commentators argue that Supreme Court orders are similar to nationwide injunctions as a practical matter. As one commentator writes, "whether an injunction affirmed (or otherwise entered) by the Supreme Court technically is nationwide, no one would understand the effect of the Court's holding to extend only to the parties to the suit in question."[225] On the other hand, when a district court issues a nationwide injunction, its *legal reasoning* carries no greater precedential weight than any other district court decision—the ruling does not bind other federal courts considering the same legal issue. However, because a nationwide injunction bars

---

[215] *See supra* note 208.

[216] *Id.* at 51 (Politicization "is the cause and consequence of forum shopping for the cases that are most publicly notable and of most concern.").

[217] *E.g.*, Frost, *supra* note 5, at 1105-06; Rendleman, *supra* note 19, at 938-39; Malveaux, *supra* note 134, at 57.

[218] *E.g.*, Frost, *supra* note 5, at 1105-06; Trammell, *supra* note 3, at 109. For discussion of selected proposals, see *infra* "Substantive Regulations."

[219] *E.g.*, *Morley*, *supra* note 32, at 501-02.

[220] *See generally* CRS Report R45319, *The Supreme Court's Overruling of Constitutional Precedent*, by Brandon J. Murrill.

[221] Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011).

[222] Cass, *supra* note 37, at 65.

[223] *See generally* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787 (2012).

[224] *See id.*

[225] Nash, *supra* note 89, at 1997. For similar reasons, nationwide injunctions may raise fewer concerns when issued by a lower federal court that enjoys exclusive jurisdiction, such as the D.C. Circuit exercises in certain APA litigation. *See* Cass, *supra* note 37, at 76.

enforcement of a law or policy in its entirety, some commentators argue that a district court entering a nationwide injunction deprives other courts that may consider the issue of *practical power* to rule differently, thus improperly expanding the power of the district courts. One scholar contends, "if a lower court decision were binding on other courts ... each lower court exercising that power would in effect enjoy the power of the Supreme Court."[226] He reasons that this power would constitute a "realignment of authority ... clearly at odds with the long-accepted structure of, and constitutional design for, the federal judiciary."[227]

Other scholars contend that it does not matter whether a nationwide injunction issues from a district court, an appeals court, or the Supreme Court. Some commentators assert that the Constitution "confers a singular power upon all federal courts to decide 'Cases [] in ... Equity.' It does not allocate different types of equitable remedial power to courts at different levels of the federal judicial hierarchy."[228] Thus, there is no reason why the Supreme Court should have more authority than a district court to grant a certain form of relief.[229] With respect to concerns about district courts assuming power out of proportion with the precedential weight of their decisions, one commentator offers that such concerns are overstated because non-binding persuasive authority plays a significant role in judicial decisionmaking. Specifically, he argues that while decisions of the lower federal courts do not formally bind federal courts in other jurisdictions, as a practical matter, "[w]hen the law is developing rapidly in trial courts and there is very little appellate law on the issue," federal courts often look to cases from other districts or circuits as persuasive authority.[230]

State and Organizational Plaintiffs

Some commentators argue that nationwide injunction cases involving certain plaintiffs raise unique legal issues, especially related to the plaintiffs' standing to sue.[231] One area that has prompted scholarly discussion is suits by state governors or attorneys general seeking to protect the rights or interests of their residents.[232] For instance, one commentator postulates that Article III standing doctrine allows states to seek nationwide injunctions, but imposes some limits on the practice.[233] He ultimately concludes that state standing to seek nationwide injunctions should be no broader than individuals' standing to do so, with the possible exception of "settings where no nonstate plaintiff has standing to sue in the first place."[234] Another pair of scholars offer that special considerations should apply when states seek a nationwide injunction.[235] Those scholars

---

[226] Cass, *supra* note 37, at 66.

[227] *Id.* Among several possible reforms related to nationwide injunctions, Professor Morley suggests giving district court decisions some *stare decisis* effect so that courts would have less incentive to issue nationwide injunctions, although he acknowledges that this reform could have unintended effects outside the area of nationwide injunctions. *See* Morley, *supra* note 35, at 53-56.

[228] Sohoni *supra* note 4, at 927 (quoting U.S. CONST. art. III, § 2, cl. 1).

[229] *Id.*; *see also* Trammell, *supra* note 3, at 78-81.

[230] Rendleman, *supra* note 19, at 948-49.

[231] For discussion of general standing issues related to nationwide injunctions, see *supra* "Constitutional Considerations."

[232] *See generally* Nash, *supra* note 89; Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955 (2019).

[233] Nash, *supra* note 89, at 1987.

[234] *Id.*

[235] Mank & Solimine, *supra* note 232, at 1967-72.

recommend that courts weigh additional factors such as the number and political leanings of any states that support or oppose a nationwide injunction.[236]

A related debate concerns litigation by organizations. Sometimes organizations challenge policies that do not directly regulate them or their members but that allegedly have substantial indirect effects on them.[237] These situations often arise in the immigration context, for instance when a university argues that a restrictive immigration policy impairs its ability to attract talented students and faculty[238] or a non-profit that assists refugees asserts that the policy limits its client pool.[239] These circumstances may spur courts to issue nationwide injunctions when it is not practicable to determine precisely which individuals affected by the policy might have a relationship with a plaintiff organization.[240] However, some commentators argue that even if nationwide injunctions are appropriate in some cases, they may be less appropriate "to provide complete relief to an organizational plaintiff whose members are only *indirectly* affected by the challenged order."[241] In the alternative, they suggest, a court might enter an injunction that protects only the plaintiff organization and "leave to later enforcement efforts whether the person targeted for future enforcement of the challenged law is connected to the named plaintiff and thus protected by the injunction."[242]

Judicial Review of Agency Action

There is significant scholarly discussion around the proper role of nationwide injunctions in litigation under the APA.[243] The APA provides for judicial review of certain types of rulemaking and other actions of executive agencies, and therefore often provides the basis for cases seeking nationwide injunctions.[244] Section 706 of the statute provides that a court reviewing agency action under the APA "shall ... hold unlawful and set aside agency action, findings, and conclusions" that the court finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," unconstitutional, or deficient in any of several other enumerated respects.[245] Although the APA does not expressly authorize courts to issue nationwide injunctions,[246] this statutory language arguably provides a stronger basis for nationwide injunctions in APA cases than in other kinds of cases. The D.C. Circuit, which handles a large volume of APA litigation, has held that

---

[236] *Id.* at 1973-77.

[237] This situation is distinct from cases where an organization brings suit on behalf of its members, claiming that they are *directly* affected by a challenged policy. For instance, non-profit organizations challenging environmental regulations often submit affidavits from their members asserting that specific individuals experience harm due to the challenged policy in specific locations across the United States. If such claims of harm are sufficiently widespread, they may also support issuance of a nationwide injunction. *See, e.g.*, S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 969 (D.S.C. 2018).

[238] *See, e.g.*, Hawaii v. Trump, 859 F.3d 741, 789 (9th Cir. 2017); Washington v. Trump, 847 F.3d 1151, 1159 (9th Cir. 2017).

[239] *See, e.g.*, International Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 548-49 (D. Md. 2017).

[240] *See, e.g.*, Frost, *supra* note 5, at 1098-1100.

[241] Smith, *supra* note 111, at 2033 (emphasis added); *see also* Morley, *supra* note 32, at 546 ("[T]he concept of organizational standing cannot resolve difficulties concerning the proper scope of relief in individual-plaintiff cases.").

[242] Wasserman, *supra* note 62, at 371.

[243] 5 U.S.C. § 500 *et seq*.

[244] *See generally* CRS Legal Sidebar LSB10558, *Judicial Review Under the Administrative Procedure Act (APA)*, by Jonathan M. Gaffney; CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole.

[245] 5 U.S.C. § 706.

[246] *See, e.g.*, Williams, *supra* note 120, at 319.

nationwide injunctions are often appropriate in APA litigation: "When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed."[247]

Many accept the D.C. Circuit's approach as the conventional wisdom with respect to the availability of nationwide injunctions under the APA.[248] However, the authorization to "set aside" agency action does not necessarily permit issuance of a nationwide injunction.[249] Some scholars take a historical approach to the analysis, reasoning that nationwide injunctions were rare when Congress enacted the APA in 1946, and that the Congress that enacted the statute likely did not intend to authorize broad injunctive relief that marks a significant change from historical practice up to that point.[250] One scholar makes a textual argument, asserting that it does not make sense to read Section 706 of the APA to authorize nationwide injunctions because that section does not address remedies, which are governed by another section of the statute.[251] Instead, Section 706's directive to "set aside" unlawful action simply "means that courts are not to follow the agency action in deciding the case."[252] Some commentators contend that it is possible, and perhaps preferable, for courts to set aside agency action only as to individual challengers. Courts could then allow other regulated parties to assert that legal finding as precedent to prevent enforcement of the challenged policy in their own cases, "providing a basis for *resisting* enforcement" on a case-by-case basis, "rather than *precluding* enforcement" against all persons in a single injunctive order.[253]

Critiques of nationwide injunctions under the APA vary in scope. Some commentators conclude that nationwide injunctions may be permitted in some APA cases but caution that courts should grant such remedies sparingly.[254] Some scholars insist that the APA categorically does not authorize nationwide injunctions.[255] Under the Trump Administration, DOJ took the position that the APA does not authorize nationwide injunctions but, if it did so, it would raise constitutional

[247] Harmon v. Thornburgh, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989); *see also* Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1408-10 (D.C. Cir. 1998). The Supreme Court has not specifically considered whether the APA authorizes nationwide injunctions against agency action, though the Court has issued nationwide injunctions in APA cases. *See, e.g.*, West Virginia v. EPA, 136 S. Ct. 1000, 1000 (2016) (mem.).

[248] *E.g.*, Sohoni, *supra* note 137, at 1123; Christopher J. Walker, *Quick Reaction to Bray's Argument that the APA Does Not Support Nationwide Injunctions*, YALE J. REG., NOTICE & COMMENT (May 8, 2018), https://www.yalejreg.com/nc/quick-reaction-to-brays-argument-that-the-apa-does-not-support-nationwide-injunctions/.

[249] *E.g.*, John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. REG. BULL. 37, 41 (Apr. 12, 2020) https://digitalcommons.law.yale.edu/jregonline/1 ("The view that Congress has [called for universal remedies] in section 706 appears to be widespread. Congress has not done so.").

[250] *Id.* at 45 (looking at the legislative history of the APA and concluding, "For the drafters of the 1937 three-judge court statute, 'set aside' meant treat as non-binding."); *see also* Samuel Bray, *Does the APA Support National Injunctions?*, VOLOKH CONSPIRACY (May 8, 2018), https://reason.com/volokh/2018/05/08/does-the-apa-support-national-injunction/; Cass, *supra* note 37, at 74.

[251] Harrison, *supra* note 249, at 37.

[252] *Id.*

[253] Cass, *supra* note 37, at 73; *see also* Smith, *supra* note 111, at 2029 ("Even if the APA requires vacatur of an agency action, it does not necessarily follow that it also requires an injunction."); Harrison, *supra* note 249, at 42 ("In an enforcement proceeding, for example, to set the agency action aside is to treat it as legally ineffective, the way a court treats an unconstitutional statute as ineffective.").

[254] *E.g.*, Cass, *supra* note 37, at 76-77.

[255] *E.g.*, Harrison, *supra* note 249; Bray, *supra* note 250.

concerns because "an act of Congress cannot empower the federal courts to exceed the scope of the judicial power that the Constitution confers on them."[256]

The contrary view is that the APA's authorization to "hold unlawful and set aside agency action" properly empowers courts to enter nationwide injunctions against impermissible agency action.[257] According to Professor Sohoni, in light of pre-APA caselaw and the APA's text and legislative history, different considerations apply in challenges to agency action than in facial challenges to statutes.[258] As examples, she points to the text of the statute for support that the "APA empowers courts to determine *rule validity*, not just whether the *application* of the rule is valid."[259] She analogizes between APA review of agency action and appellate review of lower court decisions: "When a final decision of a lower court is vacated by an appellate court, that lower-court decision no longer has force. Similarly, when an agency promulgates a rule that is legally defective, that rule is an agency action that can likewise be vacated—'obliterate[d]'—by a reviewing court."[260] Based on this analysis, Professor Sohoni concludes that nationwide injunctions against agency action under the APA are constitutional[261] and that they do not impermissibly expand the power of lower court judges.[262]

Subject Matter

Certain types of cases may raise unique considerations related to nationwide injunctions. In particular, courts and commentators have identified areas where remedies limited to the plaintiffs arguably do not provide complete relief to the parties before the court. For instance, some courts have held that in desegregation cases, a court order requiring a segregated facility to admit a single plaintiff does not fully resolve the issues presented or provide the plaintiff with the full benefit of attending an integrated facility.[263] Similarly, relief in successful challenges to electoral districts cannot be limited to the parties to the case: as one commentator notes, "[a] state cannot have one set of congressional or legislative districts for individual plaintiffs in a case and a different set for everyone else."[264]

Environmental regulation is another area where commentators have raised unique considerations related to nationwide injunctions. Regulated actions in one state, such as the release of environmental pollutants or harm to endangered species, often affect neighboring states. Furthermore, federal environmental regulations often apply in multiple states or across the nation. Thus, some courts and commentators have concluded that it is reasonable for injunctions against

---

[256] Williams, *supra* note 120, at 319-20; *see also* DOJ, *supra* note 8, at 2, 7-8.

[257] *See generally*, Sohoni, *supra* note 137; *see also* Frost, *supra* note 5, at 1100. Some judges and commentators go further, arguing that the APA *requires* courts to vacate agency action that they hold to be invalid. *See* Sohoni, *supra* note 137, at 1177 n.288.

[258] Sohoni, *supra* note 137, at 1129-38.

[259] *Id.* at 1133.

[260] *Id.* at 1134 (quoting Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599, 611 (2004)) (alterations in original).

[261] *Id.* at 1180-81 (arguing that Congress has the power to allow the remedy of "universal vacatur" as part of its power to establish judicial review).

[262] *Id.* at 1181 ("Agencies, after all, exercise nationwide power. And Congress crafted the APA's remedial scheme to enlist federal courts to *check* those agencies. Nothing in the Constitution remotely *obligates* Congress to limit the judicial power of lower federal courts so that they may only set aside rules on a plaintiff-by-plaintiff basis.").

[263] *See, e.g.*, Morley, *supra* note 32, at 491 n.15.

[264] *Id.* at 491.

environmental policies to block such policies in full.[265] Challenges to such regulations may also be brought by organizations that represent individuals across the country and that seek relief benefiting members wherever they are located.[266] However, litigants do not always seek nationwide injunctions in cases challenging far-reaching environmental regulations, nor do courts always grant them.[267] Some appellate courts have reversed or narrowed lower court rulings granting nationwide injunctions in environmental cases.[268] Another consideration in environmental cases is that compliance with environmental regulations may impose substantial and non-recoverable costs on regulated parties. Thus, some commentators contend that nationwide injunctions against environmental regulations may be appropriate to prevent the need for regulated parties to take costly measures until the validity of a regulation is fully adjudicated.[269] On the other hand, some scholars cite environmental litigation as an example of an area where nationwide injunctions can cause significant disruption and uncertainty if injunctions stop and start as a case is on appeal or if multiple rounds of regulation are enjoined.[270]

Some commentators also point to immigration cases as an area where nationwide injunctions may be especially appropriate. With respect to challenged policies that *exclude* foreign nationals, some commentators assert that immigration restrictions may affect certain stakeholders in ways that make it difficult to target relief. For instance, a university may benefit from the academic, professional, and financial contributions of an indeterminate class of international students, faculty, and staff.[271] Likewise, states may allege economic consequences from either the admission or exclusion of foreign nationals.[272] Furthermore, immigration policies that bar individuals from entering the country may create a large class of people who are affected by an allegedly illegal policy but unable as a practical matter to challenge it in court.[273] With respect to

---

[265] *E.g.*, Wyoming v. U.S. Dep't of Agric., No. 07-CV-017-B, 2009 WL 10670655, at *2 (D. Wyo. June 15, 2009) (holding, in case challenging a rule limiting road construction in roadless areas in national forests, "Limiting the scope of the injunction to Wyoming ... would be illogical. The Rule was enacted and enforced on a nationwide basis. It was not tailored to address the forests of each state as separate entities. It would make little sense, then, to tailor the remedy by limiting the injunction to the State of Wyoming. If the Rule is illegal, as this Court has found it to be, then it is illegal nationwide, just as it was enforced nationwide."); *see also* Frost, *supra* note 5, at 1094 ("[I]t would be difficult to craft injunctive relief limited to the plaintiff alone, or to a single geographic region, in cases involving easily dispersed or mobile items, such as cases concerning endangered species or the safety of food or medical devices."). In general, the Supreme Court has held that the standard for obtaining an injunction is no more lenient for plaintiffs alleging environmental violations. *See* Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 156-58 (2010).

[266] *E.g.*, S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 968 (D.S.C. 2018).

[267] *Compare id.* (granting nationwide injunction against enforcement of rule interpreting the statutory phrase "waters of the United States") *with* Colorado v. EPA, 445 F. Supp. 3d 1295, 1313 n.12 (D. Colo. 2020), *rev'd* 989 F. 3d 874 (10th Cir. 2021) (noting, in challenge to subsequent "waters of the United States" rule, "Colorado does not seek a nationwide injunction ... , presumably because Colorado is downstream of no other state, so it is difficult for Colorado to argue that implementation of the New Rule elsewhere affects Colorado.").

[268] *See, e.g.*, U.S. Army Corps of Engineers v. Northern Plains Res. Council, 141 S. Ct. 190, 190 (Mem) (2020) (upon review of district court order vacating nationwide permit authorizing discharge of certain dredged or fill material into jurisdictional waters, staying the district court order "except as it applies to the Keystone XL pipeline").

[269] *E.g.*, Cass, *supra* note 37, at 60 ("Without an injunction delaying the administrative fiat, the practical result is to eliminate the prospect of meaningful review. Any investments in compliance (through reconfiguring businesses, purchasing new equipment, and changing aspects of everyday practice that limit exposure to penalties), even if not eliminating courts' willingness to consider challenges, plainly deprive judicial review of real significance.").

[270] *E.g.*, Bagley, *supra* note 42, at 7.

[271] *E.g.*, Washington v. Trump, 847 F.3d 1151, 1159-60 (9th Cir 2017).

[272] *E.g.*, Br. for Respondent at 77, Trump v. Hawaii, 138 S. Ct. 2392 (2018); Texas v. United States, 787 F.3d 733, 768 (5th Cir. 2015).

[273] Frost, *supra* note 5, at 1094-97.

policies that *admit* foreign nationals, because people can move freely within the United States once admitted, some assert that piecemeal injunctions of such immigration policies may afford no meaningful relief to states or other parties who seek to prevent illegal entry.[274]

As in the APA context, additional textual arguments may apply specifically to the availability of nationwide injunctions in immigration cases. Some courts granting or affirming nationwide injunctions in this area have pointed to a provision of Article I of the Constitution that empowers Congress to "establish an uniform Rule of Naturalization."[275] For example, in affirming a nationwide injunction against the Deferred Action for Parents of Americans and Lawful Permanent Residents program, one appellate court cited the foregoing constitutional text and concluded that "[a] patchwork system would 'detract[ ] from the "integrated scheme of regulation" created by Congress.'"[276] Some commentators disagree with that reasoning. For instance, Professor Bray contends that the foregoing constitutional text empowers *Congress* to legislate in this area but does not address the *courts'* authority to impose remedies in immigration cases.[277] Even Professor Frost, who generally defends the legality of nationwide injunctions, finds limited support for them in that text:

> [T]he constitutional mandate that Congress regulate naturalization does not suggest that federal judges have no room to disagree with each other on the meaning of immigration law, or that the first court that addresses the meaning of a federal immigration statute has the power to control other courts' resolutions of that question.[278]

Professor Frost also questions whether, as a practical matter, nationwide injunctions effectively ensure uniformity in immigration law.[279]

Nationwide Injunctions in the Federal Courts

Because no statute, court rule, or Supreme Court caselaw specifically governs the availability of nationwide injunctions, courts considering requests for such relief often look to more general or analogous authorities for guidance. Courts considering a request for a nationwide injunction (or reviewing a nationwide injunction case on appeal) generally consider three questions: (1) whether the plaintiffs have standing to sue, (2) whether *any* injunctive relief is warranted, and (3) if so, what is the proper scope of the injunction.[280]

The first issue, standing, presents a threshold question of whether the suit can go forward. As noted above, a plaintiff suing in federal court must have standing—essentially a personal and concrete interest in the litigation—or the court lacks the constitutional authority to hear the

---

[274] Cass, *supra* note 37, at 39-40; *see also* Texas v. United States, 787 F.3d at 769 ("[T]here is a substantial likelihood that a partial injunction would be ineffective because DAPA beneficiaries would be free to move between states.").

[275] U.S. CONST. art. I, § 8, cl. 4; *see also* Texas v. United States, 809 F.3d 134, 187-88 (5th Cir. 2015), Washington v. Trump, 847 F.3d at 1166-67.

[276] Texas v. United States, 787 F.3d at 769 (quoting Arizona v. United States, 132 S. Ct. 2492, 2502 (2012)) (additional citation omitted).

[277] Samuel Bray, *National Injunction Case Added to the Court's Docket*, VOLOKH CONSPIRACY (Oct. 19, 2020) https://reason.com/volokh/2020/10/19/national-injunction-case-added-to-the-courts-docket/ (last visited Sept. 4, 2021).

[278] Frost, *supra* note 5, at 1103.

[279] *Id.*

[280] *See generally, e.g.*, Texas v. United States, 515 F. Supp. 3d 627, 631-633(S.D. Tex., 2021) (considering standing, preliminary injunction factors, and scope of injunction in order); Hawaii v. Trump, 878 F. 3d 662 (9th Cir. 2017) (same).

case.[281] However, the courts' standing analysis generally differs significantly from the academic discussion of standing outlined in the previous section. While academic discussion of standing in nationwide injunction cases often focuses on the standing of *third party beneficiaries* of an injunction who are not before the court,[282] judicial standing analysis generally focuses on the standing of the specific individuals or groups bringing suit.[283] A person does not have standing to raise a "generalized grievance" that is "common to all members of the public," but almost any "concrete and particularized" injury is sufficient to confer standing.[284] Suits challenging government policies often feature multiple plaintiffs who claim different interests in the litigation, and courts may allow a case to proceed if just one plaintiff demonstrates standing, even if the standing of other plaintiffs is less clear.[285] If one or more plaintiffs seeking a nationwide injunction have standing, courts generally then consider whether the plaintiffs can satisfy the test for injunctive relief.[286] If the plaintiffs fail to show either standing or a general entitlement to relief, the court need not consider the propriety of granting a nationwide injunction.[287]

If the plaintiffs have standing and demonstrate their entitlement to injunctive relief, the court must then consider the proper scope of any injunction, including whether a nationwide injunction is appropriate. In analyzing that question, courts may weigh many of the legal and policy considerations outlined in the previous section.[288] However, the courts diverge in which factors they find most compelling. Sometimes the same factor may arguably weigh either for or against granting a nationwide injunction. For instance, sometimes courts will limit grants of injunctive relief to avoid reaching non-parties, but other courts have expressly granted nationwide injunctions partly for the benefit of non-parties who are not able to bring suit.[289] Similarly, some courts have held that a nationwide injunction is appropriate when a challenged policy is illegal in all applications,[290] while others have held challenged policies to be unlawful but have nonetheless limited relief to the parties before the court, or to the parties and others who are similarly situated.[291] Nationwide injunction cases often proceed on an expedited basis with a limited

[281] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

[282] *See supra* "Constitutional Considerations."

[283] *E.g.*, Hawaii v. Trump, 878 F. 3d at 680-82.

[284] *Lujan*, 504 U.S. at 560, 575 (quoting United States v. Richardson, 418 U.S. 166, 171, 176-77 (1974)).

[285] *See* Aaron-Andrew Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L. J. 481, 487-94 (2017).

[286] *See, e.g.*, Texas v. United States, 515 F. Supp. 3d 627, 634 (S.D. Tex., 2021); Hawaii v. Trump, 878 F. 3d at 683-701.

[287] Just as a district court may deny a request for a nationwide injunction if it finds that the plaintiff lacks standing or has not shown any entitlement to injunctive relief, an appellate court may also reverse a grant of injunctive relief on either of those grounds. For instance, in *Trump v. Hawaii*, the Supreme Court considered an appeal from a district court order granting a nationwide injunction and held that *no* injunctive relief was warranted because the plaintiffs had not shown their claims were likely to succeed on the merits. 138 S. Ct. 2392, 2423 (2018); *see also* Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2386 (2020) (in appeal from an order granting a nationwide injunction, holding that challenged policy was lawful).

[288] *See supra* "The Legal Debate over Nationwide Injunctions."

[289] *Compare* VSHL v. FEC, 263 F.3d 379, 393 (4th Cir. 2001), overruled on other grounds by Real Truth About Abortion, Inc. v. FEC, 681 F.3d 544, 550 n.2 (4th Cir. 2012) *with* Chicago v. Barr, 961 F.3d 882, 917 (7th Cir. 2020).

[290] *E.g.*, Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998); State v. Trump, 265 F. Supp. 3d 1140, 1160 (D. Haw. 2017); Wyoming v. U.S. Dep't of Agric., No. 07-CV-017-B, 2009 WL 10670655, at *2 (D. Wyo. June 15, 2009); S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 968-69 (D.S.C. 2018).

[291] *E.g.*, Trump v. International Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (staying lower courts' orders to the extent they barred enforcement against "foreign nationals who lack any bona fide relationship with a person or entity in the United States," but "leav[ing] the injunctions entered by the lower courts in place with respect to respondents *and those similarly situated*") (emphasis added); Hawaii v. Trump, 878 F. 3d at 702 (affirming grant of nationwide injunction but narrowing its scope to protect only "foreign nationals who have a credible claim of a bona

record. In those circumstances, some courts have favored issuing a nationwide injunction to preserve the status quo during litigation, while others have opted for more limited relief absent a decisive showing that a broad injunction is required.[292] Judicial decisions granting nationwide injunctions may focus on the need for uniformity in the law,[293] or the role of the judiciary as a check on the political branches.[294] Decisions narrowing or denying nationwide injunctions may instead emphasize interests such as promoting record development and percolation[295] or preventing judicial overreach.[296]

One key point of interest in nationwide injunction caselaw is the principle of "complete relief." In *Califano v. Yamasaki*, the Supreme Court cited the rule that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," and held that a court should "take care to ensure that nationwide relief is indeed appropriate in the case before it."[297] *Califano* involved a challenge to the certification of a nationwide class action and thus did not directly concern nationwide injunctions, but the decision is frequently cited in cases and commentary on nationwide injunctions. The language in *Califano* arguably compels courts to tailor relief as narrowly as possible, and courts sometimes cite the case when limiting the scope of injunctive relief.[298] By contrast, other courts cite *Califano*, or the general principle of complete relief, in support of decisions granting nationwide injunctions.[299]

Overall, because the factors courts consider in ruling on requests for nationwide injunctions are numerous and open-ended, and courts may apply them differently in different factual circumstances, it can be difficult to know in advance how a court will rule in a given case or to draw broad conclusions across cases. Courts considering requests for nationwide injunctions look

---

fide relationship with a person or entity in the United States"); *VSHL*, 263 F.3d at 393 (narrowing nationwide injunction to apply only to the plaintiff).

[292] *Compare* Texas v. United States, 515 F. Supp. 3d 627, 632 (S.D. Tex., 2021) ("[T]he scope of this injunction is something [the court] is willing to revisit after the parties fully brief and argue the issue for purposes of the upcoming motion for preliminary injunction. Though the scope of this TRO is broad, it is not necessarily permanent.") *with* E. Bay Sanctuary Covenant v. Barr, 934 F.3d 1026, 1029-30 (9th Cir. 2019) ("We agree with our dissenting colleague that 'time does not permit a full exploration of the merits of the "nationwide" issue.' But whereas he believes that such a factor supports the granting of a nationwide injunction until a merits panel can address the case, we reach precisely the opposite conclusion.").

[293] *E.g.*, Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 at *2 (W.D. Wash. Feb. 3, 2017); Texas v. United States, 515 F. Supp. 3d at 634; *but cf. E. Bay Sanctuary Covenant*, 934 F.3d at 1030 n.8 (in order staying in part nationwide injunction, stating that "the fact that injunctive relief may temporarily cause the Rule to be administered inconsistently in different locations is not a sound reason for imposing relief that is broader than necessary").

[294] *E.g.*, Chicago v. Barr, 961 F.3d 882, 918 (7th Cir. 2020)

[295] *E.g.*, *VSHL*, 263 F.3d at 393 (in decision narrowing nationwide injunction, noting that nationwide injunctions can "deprive the Supreme Court of the benefit of decisions from several courts of appeals"), overruled on other grounds by Real Truth About Abortion, Inc. v. FEC, 681 F.3d 544, 550 n.2 (4th Cir. 2012); *but cf.* Chicago v. Barr, 961 F.3d 882, 916 (7th Cir. 2020) (in case affirming nationwide injunction, acknowledging that granting a nationwide injunction "can truncate the process of judicial review," but concluding that, "[a]s a practical matter, the issuance of such an injunction is unlikely to dramatically foreclose all other review").

[296] *E.g.*, *VSHL*, 263 F.3d at 394 (Affirming a nationwide injunction "would in effect be imposing our view of the law on all the other circuits.").

[297] 442 U.S. 682, 702 (1979).

[298] *E.g.*, *VSHL*, 263 F.3d at 393; California v. Azar, 911 F. 3d 558, 582 (9th Cir. 2018).

[299] *E.g.*, Chicago v. Barr, 961 F.3d 882, 920-22, 928-31 (7th Cir. 2020); S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 968 (D.S.C. 2018); *see also* Texas v. United States, 515 F. Supp. 3d 627, 638-39 (2021) (holding that a nationwide TRO was required to effectively protect the plaintiff's interests). Notably, *Califano* itself emphasized the need for carefully tailored relief but ultimately upheld certification of a nationwide class. 442 U.S. at 703.

to prior judicial opinions as precedent, as they do when considering other issues.[300] However, given the fact-intensive test for injunctive relief, prior cases are rarely if ever clearly controlling. Some courts also directly cite legal scholarship on nationwide injunctions, but as the previous section outlines, academic sources raise a wide range of arguments for and against the practice.[301] Absent clear governing legal principles, some observers worry that judges may decide nationwide injunction cases based on their political preferences rather than legal rules.[302] Others assume that judges seek to apply the law impartially but note that political considerations may nonetheless affect case outcomes at the margins, or may *appear* to do so, when courts are required to decide high-stakes political matters with few strict legal limits.[303]

Considerations for Congress

Congress may consider changing the law related to nationwide injunctions, in light of the foregoing historical and legal debates. Congress has explored the issue: the Senate Judiciary Committee held a hearing on the practice in February 2020, and several recent legislative proposals seek to regulate nationwide injunctions.[304] Because current law generally leaves the question of whether a nationwide injunction should issue to the discretion of the judge or panel of judges hearing a case, subject to few firm limits, most proposed reforms related to nationwide injunctions would seek to place restrictions on the practice. Specific proposals vary significantly in scope and substance: as discussed further below, they range from a complete ban on nationwide injunctions to less comprehensive limits or other procedural changes. By contrast, some commentators support the current law related to nationwide injunctions and argue that no change to the status quo is warranted. This section outlines key considerations for Members of Congress exploring whether to change the law with respect to nationwide injunctions and, if so, what changes to make.

Status Quo or Reform

Currently, no statute, procedural rule, or Supreme Court decision expressly authorizes nationwide injunctions or limits their availability.[305] Courts at all levels of the federal judiciary, from the trial-level district courts to the Supreme Court, have issued nationwide injunctions since at least the middle of the 20th century.[306] While nationwide injunctions have existed for decades, scholars generally agree that they have issued with increasing frequency in recent years, with a

[300] For discussion of the precedential value of judicial opinions, see generally CRS Report R45319, *The Supreme Court's Overruling of Constitutional Precedent*, by Brandon J. Murrill.

[301] *See, e.g.*, *Chicago*, 961 F.3d at 912; E. Bay Sanctuary Covenant v. Barr, 934 F.3d 1026, 1030 (9th Cir. 2019); Texas v. United States, 515 F. Supp. 3d at 637-38; *see also* DHS v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring); Trump v. Hawaii, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring).

[302] *See supra* note 208.

[303] *E.g.*, Cass, *supra* note 37, at 53-54; Bagley, *supra* note 42, at 2-3.

[304] *Rule by District Judge: The Challenges of Universal Injunctions: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2020); *see also The Role and Impact of Nationwide Injunctions by District Courts: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Courts, Intellectual Property, & the Internet*, 115th Cong. (2017); *infra* "Key Proposals and Legal Considerations."

[305] *See, e.g.*, Bray, *supra* note 4, at 444 ("There is no rule against national injunctions; nor is there a rule requiring them."). Federal Rule of Civil Procedure 65 establishes procedures for the issuance of injunctive relief but does not expressly address nationwide injunctions. *See* Fed. R. Civ. P. 65.

[306] *See supra* note 79.

particularly large increase under the Trump Administration.[307] At the time of writing, it remains to be seen whether that trend will continue under the Biden Administration.[308]

As noted above, many commentators raise legal and policy objections to nationwide injunctions and call for limits on the practice. However, not all commentators agree that change is warranted in this area. One scholar has examined the current law and practice with respect to nationwide injunctions and concluded that "neither judicial nor legislative injunction reform of nationwide national government injunctions is needed."[309] Another scholar emphasizes the importance of injunctive relief as a protection for marginalized groups and expresses "alarm" that "scholars and jurists are contemplating what may be this generation's most significant change to available remedies without understanding and discussing the potential deleterious consequences of eliminating 'nationwide injunctions' for subordinated communities."[310]

Professor Sohoni, in written testimony before the Senate Judiciary Committee, has argued that "the universal injunction is both constitutional and legitimate"[311] and expressed concerns that legislation to limit nationwide injunctions could lead Congress to "inadvertently enact a law that unduly restricts judicial authority or that places into disarray long-settled law, practice, and understandings."[312] While not categorically ruling out nationwide injunction reform, Professor Sohoni has urged Congress to proceed with caution, thoroughly vetting any proposals and balancing both the costs and the benefits of nationwide injunctions.[313]

Key Proposals and Legal Considerations

If Congress determines that the law around nationwide injunctions should change, several key unanswered questions remain. Those questions include which branch of the federal government is best equipped to make any necessary reforms, how to define "nationwide injunctions" for purposes of such reforms, and what substantive changes to make.

---

[307] *See, e.g.*, Bray *supra* note 4, at 425-27; Sohoni, *supra* note 4, at 924-25; Frost, *supra* note 5, at 1071; *see also* Jeffrey A. Rosen, Deputy Attorney General, Address at the Administrative Conference of the United States Forum on Nationwide Injunctions and Federal Regulatory Programs (Feb. 12, 2020) (listing the number of nationwide injunctions issued under the last several presidential Administrations).

[308] As of September 2021, several courts have issued nationwide injunctions against Biden Administration policies. *See* Samuel Bray, *A National Injunction Setback for the Biden Administration*, VOLOKH CONSPIRACY (June 16, 2021) https://reason.com/volokh/2021/06/16/a-national-injunction-setback-for-the-biden-administration/ (last visited Sept 7, 2021); Mark Joseph Stern, *Conservative Judges Keep Doing This Thing They Say They Hate*, SLATE (June 16, 2021) https://slate.com/news-and-politics/2021/06/conservative-judges-nationwide-injunction-biden.html (last visited Sept. 7, 2021).

[309] Rendleman, *supra* note 19, at 914.

[310] Pedro, *supra* note 30, at 883.

[311] Sohoni, *supra* note 170, at 1.

[312] *Id.* at 7; *see also* Sohoni, *supra* note 4, at 924 (arguing that "the Article III objection to the universal injunction should be retired and that legislative efforts to outright strip the federal courts of the substantive power to grant such injunctions should halt."). Professor Sohoni has also defended nationwide injunctions in the specific context of APA litigation, arguing that if the Supreme Court limited the availability of nationwide injunctions under the APA it "would be toying with the source code of administrative law with unpredictable and potentially disruptive consequences." Sohoni, *supra* note 137, at 1190.

[313] Sohoni, *supra* note 170, at 7-8.

Who Should Implement Reforms?

Cases involving nationwide injunctions are governed by an overlapping array of constitutional requirements, federal statutes, procedural rules, and court-made legal doctrines. For example, Article III of the Constitution requires that any person bringing suit in federal court must have an individualized and concrete interest in the litigation that gives rise to standing to sue.[314] Both the Constitution and federal statutes establish the subject matter jurisdiction of the courts, determining what types of cases the courts may hear.[315] Numerous procedural rules apply to any federal civil litigation; for instance, Federal Rule of Civil Procedure 65 sets the procedures for issuance of injunctions and restraining orders by district courts.[316] Finally, legal tests created by judges and laid out in Supreme Court caselaw govern the substantive question of when an injunction is warranted.[317]

Because of the multiple relevant legal authorities, either Congress or the judicial branch has the constitutional power to change the law or practice related to nationwide injunctions. For instance, the Supreme Court could consider whether some or all nationwide injunctions raise constitutional issues, or the Court could articulate a new legal test that courts should apply when ruling on requests for nationwide injunctions.[318] Congress could not alter any applicable constitutional restraints (such as standing), but it could enact legislation to limit the jurisdiction of the federal courts to issue nationwide injunctions, channel requests for nationwide injunctions to a particular court, or impose special procedures in cases involving nationwide injunctions.[319] Furthermore, both the Supreme Court and Congress play a role in creating procedural rules for the lower federal courts under the Rules Enabling Act, so either branch could potentially establish new procedures specifically governing requests for nationwide injunctions.[320] While the executive branch cannot directly change the laws that apply to nationwide injunctions, it may seek to affect how Congress and the courts act in this area, for example by advocating for specific legal changes or adopting a particular litigation strategy.[321]

Many commentators who advocate for reform of nationwide injunctions argue that the courts should be primarily responsible for such changes. Some contend that nationwide injunctions raise constitutional concerns and thus call on the Supreme Court to limit the practice in its role as interpreter of the Constitution.[322] Others assert that the courts should lead reforms in this area because they have the greatest expertise in establishing judicial procedures and crafting

---

[314] *See* "Legal Background of Article III Standing" section of CRS Report R45636, *Congressional Participation in Litigation: Article III and Legislative Standing*, by Kevin M. Lewis; *see also supra* "Constitutional Considerations."

[315] *See* "Requirements for Judicial Review" section of CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole.

[316] Fed. R. Civ. P. 65; *see generally* CRS In Focus IF11557, *Congress, the Judiciary, and Civil and Criminal Procedure*, by Joanna R. Lampe.

[317] *See supra* note 24 and accompanying text.

[318] *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring) ("In sum, universal injunctions are legally and historically dubious. If federal courts continue to issue them, this Court is dutybound to adjudicate their authority to do so.").

[319] For general discussion of the authority of Congress to control the jurisdiction of the federal courts, see CRS Report R44967, *Congress's Power over Courts: Jurisdiction Stripping and the Rule of Klein*, coordinated by Kevin M. Lewis.

[320] 28 U.S.C. §§ 2071-77; *see also* CRS In Focus IF11557, *Congress, the Judiciary, and Civil and Criminal Procedure*, by Joanna R. Lampe.

[321] *See, e.g.*, DOJ, *supra* note 8; Williams, *supra* note 120.

[322] Bagley, *supra* note 42, at 2 ("My hope is that the Court will put an end to nationwide injunctions.").

appropriate remedies.[323] In the specific context of the APA, one commentator suggests that the Supreme Court should clarify whether the current statute authorizes the issuance of nationwide injunctions, and that the political branches could then act to accept or reject the Court's interpretation.[324]

Congress may also decide to act before the Court does. The legislature enjoys ample authority to establish and structure the lower federal courts, including by making rules governing court proceedings.[325] Some have therefore called on Congress to limit nationwide injunctions through legislation.[326] Congress could also amend specific statutes, such as the APA, to specify the type and scope of relief available under the statute.[327] As an alternative (or a prelude) to regulating nationwide injunctions, Congress could also take steps to encourage the judiciary to act on the issue, or seek additional information from the federal courts or other stakeholders.[328]

How to Define "Nationwide Injunction"?

If Congress seeks to enact legislation to govern nationwide injunctions, one key question that may arise is how to define such injunctions. As noted above, the phrase "nationwide injunction" commonly refers to an injunction against the government that prevents the government from enforcing a challenged law, regulation, or other policy against all persons and entities, whether or not such persons or entities are parties to the litigation.[329] However, the term is not universally accepted among scholars, and is not currently defined by statute or in a majority opinion of the Supreme Court.[330] In crafting legislation to regulate nationwide injunctions, Congress can take

---

[323] *E.g.*, AliKhan, *supra* note 8, at 10 ("[I]t seems prudent to await guidance from the Supreme Court before undertaking any legislative action.").

[324] Sohoni, *supra* note 170, at 1191 ("[A]n unambiguous declaration from the Court that section 706 of the APA *does* authorize universal vacatur ... would have the benefit of making it clear to the executive branch, Congress, and other interested observers that the remedy that lower federal courts have been offering is, in fact, *not* lawless, as has so often (and so groundlessly) been lately asserted. Such a holding would likewise establish that the ball is in the political branches' court to amend existing law, if they wish to take those powers away.").

[325] As the Supreme Court has stated, "[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts." Hanna v. Plumer, 380 U.S. 460, 472 (1965).

[326] *E.g.*, Bray, *supra* note 7, at 9 ("My hope is that the Supreme Court will end the national injunction. Or that Congress will. The justices have the constitutional power and duty to ensure that the lower courts follow the Constitution. You also have that constitutional power and duty."); *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 117th Cong. 7 (2021) (statement of Michael T. Morley, Professor, Florida State University College of Law) (advocating that nationwide injunctions be "curtailed—whether through a clear Supreme Court precedent directly on point, a federal statute, or an amendment to the Federal Rules of Civil Procedure").

[327] For discussion of proposed amendments to the APA outside the context of nationwide injunctions, see CRS Legal Sidebar LSB10523, *Administrative Law Reform Legislation in the 116th Congress*, by Daniel J. Sheffner.

[328] The executive branch could also act to gather information and develop proposals on the issue of nationwide injunctions. *See, e.g.*, Press Release, Harry M. Seidman, Chief Financial & Operations Officer, Admin. Conf. of the United States, ACUS to Co-Host Forum on "Nationwide Injunctions and Federal Regulatory Programs" (Jan. 31, 2020), https://www.acus.gov/newsroom/news/acus-co-host-forum-"nationwide-injunctions-and-federal-regulatory-programs" (last visited Sept. 7, 2021. As a related example, on April 9, 2021, President Biden signed an executive order creating the Presidential Commission on the Supreme Court of the United States, a bipartisan group tasked with exploring possible structural reforms to the Supreme Court. *See* Press Release, White House, President Biden to Sign Executive Order Creating the Presidential Commission on the Supreme Court of the United States (April 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/09/president-biden-to-sign-executive-order-creating-the-presidential-commission-on-the-supreme-court-of-the-united-states/ (last visited Sept. 7, 2021).

[329] *See supra* note 30.

[330] Some commentators contend that the phrase "nationwide injunction" may refer to multiple types of injunctive relief

steps to ensure that such legislation precisely captures the category of injunctions that Congress seeks to regulate.

Recent legislative proposals have taken differing approaches to defining the scope of nationwide injunction regulations. A proposal from the 117th Congress, the Court Shopping Deterrence Act would define a "nationwide injunction" as "an order issued by a Federal court that purports to restrain the enforcement of a Federal statute, regulation, order, or similar authority against a non-party, unless the non-party is represented by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure."[331] A proposal from the 116th Congress, the Nationwide Injunction Abuse Prevention Act of 2019, would instead have prohibited district courts from issuing "any order providing for injunctive relief, except in the case of such an order that is applicable only to—(1) the parties to the case before such district court; or (2) in the Federal district in which the order is issued."[332]

Questions Congress may consider when defining "nationwide injunction" by statute include

- whether to define the term based on the geographic scope of the injunction, its effect on parties and non-parties to the litigation, or both;
- whether to include only nationwide injunctions against the federal government, or also to regulate other federal court injunctions that may benefit non-parties, including injunctions fully prohibiting enforcement of a state law or policy;
- whether to include or exclude class action suits certified under Federal Rule of Civil Procedure 23;
- whether to regulate only nationwide injunctions issued by district courts, or whether to include injunctions issued by the federal appellate courts; and
- how a definition of nationwide injunctions would affect or interact with other authorities that courts may have, such as the power to declare government action unconstitutional or to "set aside" agency action under the APA.

Beyond these general considerations, particular legislative proposals may raise more specific questions around the definition of nationwide injunctions. For instance, legislative text allowing injunctive relief only if "applicable" to the parties to the case might not effectively limit the issuance of nationwide injunctions: An order enjoining the defendant from acting may *benefit* non-parties, but it arguably *applies* only to the defendant whose actions are restrained.[333] Furthermore, some plaintiff organizations represent members located across the country, so in some cases, relief applicable to the plaintiffs might also reach nationwide. Similarly, legislation allowing relief for non-parties only if they are "represented by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure" may not clearly identify which non-parties qualify.[334]

---

and that those different types of relief may raise distinct legal issues. *See* Pedro, *supra* note 30, at 867-70; Morley, *supra* note 35, at 9-10.

[331] The Court Shopping Deterrence Act would provide that the appeal from a district court order granting a nationwide injunction shall lie to the Supreme Court. H.R. 893 (117th Cong. 2021); *see also* Injunctive Authority Clarification Act of 2021, H.R. 43 (117th Cong. 2021) (prohibiting any "order that purports to restrain the enforcement against a non-party of any statute, regulation, order, or similar authority, unless the non-party is represented by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure").

[332] H.R. 4292, S. 2464 (116th Cong. 2019) (internal quotes omitted).

[333] *Cf. supra* "Relief for Non-Parties."

[334] Morley, *supra* note 35, at 51. Professor Morley also suggests that the Injunctive Authority Clarification Act, from

Substantive Regulations

A final key question related to regulating nationwide injunctions is what substantive regulations to impose. Multiple commentators have called for a total or near-total ban on nationwide injunctions,[335] and some recent legislative proposals have sought to implement such a ban. For example, the Injunctive Authority Clarification Act of 2021 would provide:

> No court of the United States ... shall issue an order that purports to restrain the enforcement against a non-party of any statute, regulation, order, or similar authority, unless the non-party is represented by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure.[336]

The Supreme Court could also sharply curtail or ban the issuance of nationwide injunctions if, for instance, the Court found that many or all such injunctions violated Article III standing requirements.[337]

A full ban on nationwide injunctions might reduce the ability of federal courts to provide complete relief to the parties before them. As discussed above, multiple courts and legal commentators, including some critics of nationwide injunctions, agree that in some circumstances a nationwide injunction is the only means to provide complete relief to existing parties.[338] Such purely plaintiff-protective nationwide injunctions are much less controversial than injunctions that reach more broadly than is needed to protect existing parties.[339] Congress or the Court could include an exception to a ban on nationwide injunctions, allowing such injunctions to issue only when required to provide complete relief to the parties. However, some courts currently consider the principle of complete relief in deciding whether to issue nationwide injunctions, and courts may interpret that principle so broadly that it imposes little meaningful limitation on their injunctive authority.[340] Accordingly, some commentators advocate for a strict ban on nationwide injunctions even if such a ban would limit courts' ability to provide complete relief in some cases.[341]

As an alternative to banning nationwide injunctions, Congress or the Supreme Court could impose additional substantive requirements on top of the usual tests courts apply when considering requests for injunctive relief. Some commentators favor creating a presumption against granting nationwide injunctions, or a rule against granting such injunctions unless certain special circumstances exist.[342] One commentator suggests modifying how courts consider the

---

which the quoted text is drawn, may be underinclusive because it does not address associational standing and may not reach all types of nationwide injunctions, "such as injunctions requiring government defendants to affirmatively enforce certain legal authorities, to construe or enforce legal authorities in a particular manner, or to refrain from giving legal effect to other types of official action." *Id.*

[335] *E.g.*, Bray, *supra* note 4, at 469; Wasserman, *supra* note 62, at 353.

[336] H.R. 43 (117th Cong. 2021); *see also* Nationwide Injunction Abuse Prevention Act of 2019, H.R. 4292, S. 2464 (116th Cong. 2019) (limiting injunctive relief issued by district courts to either "the parties to the case before such district court" or "the Federal district in which the order is issued.").

[337] *See supra* "Constitutional Considerations."

[338] Examples include desegregations cases and challenges to electoral districts. *See supra* note 111; *cf.* Califano v. Yamasaki, 442 U.S. 682, 702 (1979).

[339] *Id.*

[340] *E.g.*, Bray, *supra* note 4, at 466-68 (arguing that the "complete relief" principle is not clearly defined and not an effective limit on nationwide injunctions); Cass, *supra* note 37, at 62-64.

[341] *E.g.*, Bray, *supra* note 4, at 481.

[342] *E.g.*, Morley, *supra* note 35, at 11 ("Plaintiff-oriented injunctions are the presumptively proper form of relief in nonclass cases."); Katherine B. Wheeler, Comment, *Why There Should Be a Presumption Against Nationwide*

public interest when evaluating requests for nationwide injunctions.[343] Ordinarily, a court considering a request for injunctive relief considers how the public interest weighs for and against granting an injunction.[344] This commentator instead recommends that, when evaluating requests for nationwide injunctions, courts should consider the public interest only to the extent it weighs *against* granting such relief.[345]

Changing or clarifying the legal standards that apply to nationwide injunctions could effectively limit the number of such injunctions, and could also bring greater uniformity to the lower courts' approach to injunctive relief. As with the complete relief test discussed above, however, many potential changes to the standards may leave individual courts substantial discretion over whether to grant nationwide injunctions. Those who oppose most or all nationwide injunctions might argue that this does not sufficiently limit the practice. On the other hand, those who believe that nationwide injunctions are appropriate in some cases might welcome the opportunity for courts to tailor remedies and award far-reaching relief on a case-by-case basis.

One way to change the requirements related to nationwide injunctions would be for Congress or the Supreme Court to change the Federal Rules of Civil Procedure. Such amendments could impose substantive limitations on the courts' ability to grant nationwide injunctions, procedural requirements for seeking one, or both. For instance, Professor Morley proposes a new Rule 65(g), which would provide:

> The court may issue an injunction or similar form of relief to protect or enforce a person's rights only if that person is a party to, or real party in interest in, the case under [Federal Rule of Civil Procedure] 14, 17, 19-20, or 22-25, and that person moves under this Rule for injunctive relief. Any injunction or similar form of relief shall be tailored to enforcing the rights of the moving party.[346]

Another commentator recommends amending Rule 65 to require any order granting an injunction to "state why the geographic scope extends no further than necessary to provide complete relief to the party seeking the injunction."[347] He explains that this amendment is intended to codify the "complete relief" principle discussed above.[348]

Professor Bray proposes amending Rule 65 to provide that "[e]very order granting an injunction and every restraining order must accord with the historical practice in federal courts in acting only for the protection of parties to the litigation and not otherwise enjoining or restraining conduct by the persons bound with respect to nonparties."[349] Given the significant scholarly debate over the history of nationwide injunctions discussed above, such an amendment might not provide clear guidance to courts considering requests for injunctive relief.[350]

Injunctions, 96 N. C. L. REV. 200 (2017); *cf.* Mank & Solimine, *supra* note 232, at 1967-72 (discussing special considerations that apply when states seek nationwide injunctions).

[343] Smith, *supra* note 111, at 2037-38.

[344] *See supra* note 24 and accompanying text.

[345] Smith, *supra* note 111, at 2037-38.

[346] Morley, *supra* note 35, at 49.

[347] Siddique, *supra* note 3, at 2141-42.

[348] *Id.* at 2142 (citing Califano v. Yamasaki, 442 U.S. 682, 702 (1979)).

[349] Letter from Samuel L. Bray, Prof. of Law, to Advisory Committee on Rules of Civil Procedure (Mar. 1, 2017) https://www.uscourts.gov/sites/default/files/17-cv-e-suggestion_bray_0.pdf.

[350] *See supra* "The Disputed History of Nationwide Injunctions."

If Congress acted to impose limits on nationwide injunctions, it might also opt to amend Federal Rule of Civil Procedure 23. That rule governs class actions in federal courts, a procedural mechanism that some plaintiffs may choose to obtain effectively nationwide relief. Professor Morley recommends amending Rule 23 to provide that in any class action challenging a federal law or policy, "the class shall be comprised only of members who reside within the federal circuit in which the court sits, or who would allegedly suffer adverse consequences from the challenged legal provisions, activities, events, conduct, or transactions within that circuit."[351] He asserts that this amendment would "prevent courts from circumventing restrictions on nationwide defendant-oriented injunctions; ensure percolation ... ; and reinforce both the decentralized, hierarchical structure of the federal judiciary, as well as geographic limitations on the legal applicability of lower courts' rulings."[352] In addition to the proposed rules amendment, Professor Morley argues that "[c]ourts should presumptively avoid certifying nationwide classes under Rule 23(b)(2) when plaintiffs challenge the constitutionality or proper interpretation of a federal legal provision."[353]

Other proposals would implement procedural changes by statute. For example, some commentators propose to mitigate forum shopping by requiring all suits seeking nationwide injunctions to be brought in a particular forum, such as the District Court for the District of Columbia.[354] Such a requirement could also allow the chosen forum to build expertise on nationwide injunctions and develop robust precedents that would govern nationwide injunction cases.[355] On the other hand, commentators also argue that centralizing review of nationwide injunctions in the District of Columbia could also have negative consequences, including impeding percolation and increasing politicization of the D.C. federal courts.[356]

Some commentators call for district courts to conduct separate hearings on the appropriate scope of injunctive relief in cases seeking nationwide injunctions.[357] One commentator asserts that "[i]t would help if the parties were directed to brief the appropriate scope of the injunction *after* the court has issued its substantive decision."[358] He explains that this would give the government "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" and allow the court to "give full consideration to the costs and benefits of enjoining the federal government from enforcing or implementing a particular policy writ large" and "fully explain its reasoning regarding the scope of the injunction in writing."[359] This proposal could be accomplished either through a change in judicial practice or an amendment to the Federal Rules, although any such change might also need to account for the expedited posture of many nationwide injunction requests.

Another proposal would require a three-judge district court to hear any request for a nationwide injunction.[360] Most cases filed in federal district court are heard in the first instance by a single

---

[351] Morley, *supra* note 35, at 53.

[352] *Id.*

[353] Morley, *supra* note 182, at 654.

[354] Mank & Solimine, *supra* note 232, at 1978 & n.139 (collecting proposals).

[355] *Id.* at 1979.

[356] *Id.* at 1979-80. *See also* Morley, *supra* note 32, at 547-48 ("The substantive and political problems posed by vesting responsibility for all constitutional or election law cases in a particular court seem to far outweigh whatever benefits such an arrangement might offer at the remedial stage of litigation.").

[357] Smith, *supra* note 111, at 2036, Frost, *supra* note 5, at 1116.

[358] Smith, *supra* note 111, at 2036.

[359] *Id.*

[360] Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem (last visited Sept. 7, 2021);

judge.[361] However, federal statutes currently provide for certain matters to be heard by a panel of three judges, including at least one judge from the U.S. Courts of Appeals.[362] A decision of a three-judge panel granting or denying injunctive relief under those statutes is directly appealable to the Supreme Court, which cannot decline to hear the case.[363] One commentator contends that applying these procedures to cases seeking nationwide injunctions could expedite resolution of those cases, increase the legitimacy of the resulting rulings, and decrease litigants' incentive to forum-shop.[364] However, some commentators worry that such a requirement could burden the courts and impede percolation.[365]

The three-judge panel requirement used to apply generally to constitutional challenges to state administrative actions and state and federal statutes.[366] Congress enacted legislation in 1976 removing the three-judge panel requirement in nearly all cases.[367] This change may have reflected a finding by Congress that the procedure imposed too great a burden on the courts.[368] Moreover, mandating immediate Supreme Court review of nationwide injunctions could exacerbate concerns around record development and percolation by removing the usual step of intermediate appellate review and moving cases to the Supreme Court before multiple lower courts have time to consider the issues presented.[369] In evaluating the proposal to revive the three-judge court in the context of nationwide injunctions, Congress might consider whether it would risk overburdening the courts, or whether there may be countervailing benefits to allowing one three-judge court to decide an issue nationally.

In the alternative, Congress could explore reforms that might reduce incentives for litigants to seek nationwide injunctions. For instance, Professor Morley proposes that courts should evaluate cases seeking nationwide injunctions early in the litigation process and should require plaintiffs who cannot obtain complete relief without a nationwide injunction to proceed, if at all, via a

---

see also Rendleman, *supra* note 19, at 961 ("One way for Congress to overcome the single-judge and forum-shopping issues is to pass a new three-judge district court statute.").

[361] 28 U.S.C. § 132(c).

[362] *See, e.g.*, 28 U.S.C. § 2284.

[363] 28 U.S.C. § 1253; Abbot v. Perez, 138 S. Ct. 2305, 2336 (2018) (Sotomayor, J. dissenting) ("Unlike the more typical certiorari process, for cases falling within § 1253, appellate review in this Court is mandatory.").

[364] Costa, *supra* note 360; *see also* Mank & Solimine, *supra* note 232, at 1980; Sohoni, *supra* note 4, at 995-96 (encouraging consideration of this proposal among other targeted reforms to current practice).

[365] *E.g.*, Smith, *supra* note 111, at 2035; Mank & Solimine, *supra* note 232, at 1980-81.

[366] 28 U.S.C. § 2282 (1970) (repealed 1976) ("An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges."); Act of June 18, 1910, ch. 309, § 17, 36 Stat. 539, 557; Act of Feb. 13, 1925, ch. 229, § 238, 43 Stat. 936, 938.

[367] Act of Aug. 12, 1976, P.L. 94-381, 90 Stat. 1119. Federal statutes currently require a three-judge district court in a limited category of cases, including challenges to legislative districts. 28 U.S.C. § 2284. Several other provisions of the U.S. Code provide that certain types of cases shall be tried by a three-judge panel in accordance with Section 2284. *See, e.g.*, 18 U.S.C. § 3626 ("In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28," subject to certain additional requirements.).

[368] *See, e.g.*, Smith, *supra* note 111, at 2036. The Supreme Court generally construes statutes providing for direct appeal to the Supreme Court narrowly to limit its mandatory docket. *See, e.g.*, Gonzalez v. Automatic Emp. Credit Union, 419 U.S. 90, 98 (1974) ("[O]nly a narrow construction [of 28 U.S.C. § 1253] is consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration.").

[369] *See, e.g.*, Smith, *supra* note 111, at 2035-36.

formal class action.[370] Another commentator advocates for changing the procedures related to class actions, aiming to make class actions a more appealing option for plaintiffs who might otherwise file non-class suits seeking broad injunctive relief.[371]

Author Information

Joanna R. Lampe
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

[370] Morley, *supra* note 32, at 553-56.

[371] Carroll, *supra* note 179, at 2075-81.