Nationwide Injunctions’ Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure

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"New Normals?" The Trump Administration, the Courts, and the Administrative State

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Abstract

Nationwide injunctions—injunctions extending beyond the immediate parties to litigation and beyond the geographic bounds of the issuing court’s mandate—increasingly are used by lower federal courts to stop, alter, or condition the operation of national government policies. This typically occurs at the request of politically-invested officials and groups and targets politically consequential initiatives.

While a small number of suits present matters and settings for which nationwide injunctive relief is appropriate, federal district court judges have issued nationwide injunctions in situations far beyond that set. Expanded use of nationwide injunctions—especially broad injunctions against the United States—undermines rule-of-law values, threatens the operation of courts as impartial arbiters of disputes over legal rights, erodes the Constitution’s careful separation of functions among the branches of government, and is at odds with basic aspects of the federal judiciary’s design, including its geographic divisions.

Understanding the limited place for nationwide injunctions—where they are appropriate and why, along with what distinguishes the cases where they are not appropriate or even constitutionally permissible—is critical to regulating a practice that portends significant damage to law-making and law-implementing structures and to the carefully cabined role of the federal courts.

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I. Introduction

Scholars have focused extraordinary attention on issues surrounding the availability and terms of judicial review for legislative and administrative actions—what reader of law journals hasn’t seen plenty about *Marbury*¹ and *Chevron*²—but the

¹. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Marbury).
academy has paid far less attention to the choice of remedies for actions found to be unlawful. Yet remedies also can have dramatic implications for issues associated with debates over judicial review.

This is plainly true for the increasingly common practice of lower federal courts issuing “nationwide injunctions” that stop, alter, or condition the operation of national government policies. These injunctions (sometimes referred to as “national” or “universal” injunctions) address government actions, extend beyond the geographic bounds of the issuing court’s mandate, and directly control action respecting persons and entities beyond the immediate

(1984). Marbury and Chevron are among the most written-about cases in American law, singled out for special attention as well as serving as the focal point for broader concerns. On the place of Marbury in American legal scholarship, see, e.g., Akhil Reed Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443 (1989); Henry P. Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1 (1983). On the scope of attention given to Chevron, see, e.g., Jack M. Beermann, End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled, 42 Conn. L. Rev. 779, 782 (2010); Thomas W. Merrill, Justice Stevens and the Chevron Puzzle, 106 Nw. U. L. Rev. 551, 552–53 (2012). These are important cases for many reasons, but generally are springboards for discourses on matters other than remedy.

3. Though only a rough approximation of the disparity, searching on Google Scholar for articles on “judicial review” yielded more than a million entries, while searching for “injunctions” yielded fewer than one-eighth that number. There are, to be sure, notable exceptions to the focus on availability and terms of review rather than to remedies’ nature, conditions, and effects. See, e.g., Owen Fiss & Doug Rendleman, Injunctions (Foundation Press, 2d ed. 1984); Douglas Laycock, Modern American Remedies (Wolters Kluwer/Aspen, 4th ed. 2010) (Remedies); Andrew Kull, Restitution as a Remedy for Breach of Contract, 67 S. Cal. L. Rev. 1465 (1994); Doug Rendleman, Remedies: A Guide for the Perplexed, 57 St. Louis U. L.J. 567 (2013). And recently, several administrative law scholars also have turned to questions of remedy. See, e.g., Nicholas Bagley, Remedial Restraint in Administrative Law, 117 Colum. L. Rev. 253 (2017); Kent Barnett, To the Victor Goes the Toils—Remedies for Regulated Parties in Separation-of-Powers Litigation, 92 N.C. L. Rev. 481 (2014); Christopher Walker, Against Remedial Restraint in Administrative Law, 117 Colum. L. Rev. Online 106 (April 6, 2017), available at https://columbialawreview.org/content/against-remedial-restraint-in-administrative-law/ (Against Restraint); Christopher Walker, The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue, 82 Geo. Wash. L. Rev. 1533 (2014) (Ordinary Rule). These writings, however, remain a small part of the administrative law scholarly corpus.
parties to the litigation giving rise to the injunctions. In these respects, nationwide injunctions stand in sharp contrast to the geographic divisions among federal courts and also to long-respected restrictions on the parties to whom (and in whose favor) legal remedies apply. While a small number of suits present matters and settings for which nationwide injunctive relief is appropriate, federal district court judges have begun using these injunctions in situations far beyond that set. High-profile litigation over immigration issues in particular has focused attention on this remedy.4

Both the reasons for seeking these injunctions and the bases for concern over them should be evident. The remedy’s attraction to opponents of government policy is its capacity to halt implementation of a policy (or specific objectionable features) everywhere, not just against a limited set of parties and not just in the locale where the opponents reside or work or where the officials responsible for its adoption are found. Those features of nationwide injunctions do not make the injunctions inappropriate in all circumstances.5 Yet, expanded use of nationwide injunctions in a wide array of settings—indeed, the vast majority of settings in which argument over their propriety has been joined—undermines rule-of-law values, threatens the operation of courts as impartial arbiters of disputes over legal rights, and erodes the Constitution’s careful separation of functions among the branches of government.

Given the problems associated with nationwide injunctions— which are serious and endemic to this remedy’s expanding use—courts should reassess the grounds needed to justify them. Recognizing and reversing the trend toward routine use of nationwide injunctions in disputes outside the special cases for which they are at least arguably proper is critical to preserving the constitutional order, respecting the structure of the federal courts,

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4. The highest profile attention came in Justice Clarence Thomas’ concurring opinion in Trump v. Hawaii, no. 17-956, slip op. at 5–10 (Jun. 26, 2018) (Thomas, J., concurring) (Trump v. Hawaii), in which he both objected to the practice of expansive (“universal”) injunctions and observed that the Supreme Court at some point would be “dutybound to adjudicate” courts’ authority to issue them.

5. See text at notes 104–108, infra.
and sustaining long-accepted practices respecting equitable remedies.

II. Federal Structure and Traditional Limits on Remedies

Analyzing the use of nationwide injunctions should begin with the legal (and especially the constitutional) framework within which judicial review of legislative mandates and administrative decisions takes place. This framework marks out important sources of constraint that inform parameters of both sorts of limitations on ordinary judicial remedies and that have supported traditionally modest scope for federal courts' injunctions.

A. Constitutional Structure: Separation and Constraint

The original understanding of American governance was that basic policy decisions are made by Congress—through a process designed to assure both deliberation and broad acceptance of those choices—and implemented by the Executive branch (that is, the President and officials working under his direction). Courts, which make retrospective decisions applying law to particular facts, were deliberately insulated from political influence.

Critical parts of judges' mandate were assuring predictability and legitimacy. Judges were expected to assure that legal rules are not matters of surprise, turning on peculiar applications by particular interpreters, because everyone should be able to live by rules known or knowable in advance. Judges were expected to address issues of constitutionality and other questions of legality in order to assure that the rules that bind citizens—the rules that courts apply to the particular cases before them—are properly adopted and applied, coming from legitimate sources of binding authority and conforming to superior sources of law. Judges, thus, wield the power to declare administrative actions illegal and even to declare laws unconstitutional; they possess this power, however,

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7. See, e.g., THE FEDERALIST NO. 78 (Hamilton).
8. See, e.g., id.
only as an incident of deciding concrete cases brought to them by individual parties whose own legal rights are at stake.\textsuperscript{10}  

Reflecting on what he had seen in his travels in America, Alexis de Tocqueville contrasted the problems observed in France from a too-political magistracy with his view of the American model:

The Americans have retained all the ordinary characteristics of judicial authority and have carefully restricted its action to the ordinary circle of its functions. …

Whenever a law which the judge holds to be unconstitutional is argued in a tribunal of the United States, he may refuse to admit it as a rule … [A]s soon as a judge has refused to apply any given law in a case, that law loses a portion of its moral cogency. Those to whom it is prejudicial learn that means exist of overcoming its authority, and similar suits are multiplied until it becomes powerless. … If the judge had been empowered to contest the law on the ground of theoretical generalities, if he were able to take the initiative and to censure the legislator, he would play a prominent political part; and as the champion or the antagonist of a party, he would have brought the hostile passions of the nation into the conflict. But when a judge contests a law in an obscure debate on some particular case, the importance of his attack is concealed from public notice: his decision bears upon the interest of an individual, and if the law is slighted, it is only collaterally.\textsuperscript{11}

As de Tocqueville notes, the power given to judges was not a roving commission to supervise and correct the acts of other governmental officers. Instead, it was the power to recognize the priority of legal rules and to decide not to apply rules in a given case if those rules violated higher laws, those deemed supreme by the document that governed our legal order.\textsuperscript{12} It was not a general power to pass on the legality of laws, only a power to determine the law applicable to a particular case; and because each judge was

\textsuperscript{10} This was understood both from discussions around the framing and ratification and from early observation of the way American courts worked. \textit{See}, \textit{e.g.}, Marbury v. Madison, \textit{supra} note 1, 5 U.S. at 177; \textbf{THE FEDERALIST} NO. 78 (Hamilton); \textit{ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA} 100–06 (Henry Reeve, ed.; Schocken Books 1961) (1835).

\textsuperscript{11} DE TOCQUEVILLE, \textit{supra} note 10, vol. 1 at 101–05 (emphasis added).

\textsuperscript{12} \textit{See}, \textit{e.g.}, Marbury v. Madison, \textit{supra} note 10, 5 U.S., at 177.
limited to deciding only that case, other individuals in similar situations would need to ask other judges to reach the same conclusion in cases specifically addressing their own particular claims.\footnote{For a careful analysis of the reasons behind such limited scope for declarations of statutes’ unconstitutionality and expressions supportive of—or at least linguistically consistent with—broader powers of judicial invalidation of legislative enactments, see Jonathan F. Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. (forthcoming 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3158038.} While the first-deciding judge’s ruling may set a pattern for later decisions, the initial decision would not bind others. The authority to declare a law unconstitutional, thus, was both powerful and limited.

The explicit precept behind this arrangement was that judges would interpret and apply legal rules in neutral fashion but would not intrude into the realm of policy-making reserved to the political branches (and reserved as well to decision by constitutionally prescribed means). Despite apprehensions of some Anti-Federalists, who were especially fearful of potential exercise of equitable power by a federal judiciary,\footnote{See, e.g., Essays of Brutus, No. XI (Jan. 31, 1788), in The Anti-Federalist Papers and the Constitutional Convention Debates 293–98 (Mentor/New American Lib. 1986) (Essays of Brutus XI).} those who framed the Constitution and were party to its early implementation were confident that judges—because of their insulation from direct application of political forces, of the requirements of reasoned explanation and of grounding decisions in text and precedent, and of the limited focus and specific setting for which their interpretations of law applied—would not pose a threat to the operation of the other branches of government.\footnote{See, e.g., Marbury v. Madison, supra note 10, 5 U.S., at 177; The Federalist No. 78 (Hamilton); Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 459–63 (W.W. Norton 1969). See also Ronald A. Cass, Judging: Norms and Incentives of Retrospective Decision-Making, 75 B.U. L. Rev. 941 (1995) (Norms and Incentives) (describing balance between power of retrospective adjudication and structural limits on that power and the officials who exercise it); Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978) (special nature of adjudication and reasons for particular features of traditional adjudication).}
B. Federal Equitable Remedies: Limited Focus, Limited Reach

Those limitations on the operation of the federal judiciary generally have functioned in the manner supposed by the founding generation. Though frequently criticized for particular decisions, the federal court system has been characterized—certainly for the first century and a half of its existence—by relative modesty in exercising its remedial powers. That tradition obtained both in suits at law, where the role of the judge was narrowly defined, and in causes sounding in equity, where judges had a different scope of remedies at their disposal, most notably the power to issue injunctions expressly mandating or forbidding specific conduct.

Federal courts historically have understood injunctions as limited, focused remedies for violations of rights not addressable through standard legal remedies such as compensatory damages.\(^\text{16}\) Although there have been exceptions,\(^\text{17}\) Supreme Court decisions continue to emphasize the need for caution in framing and issuing injunctions.\(^\text{18}\)

1. Equitable Relief in Private Suits: Geography and Identity

For private suits, the test for injunctive relief traditionally has looked at a balance of harms (from granting or withholding relief), inadequacy of standard legal remedies, and potential public interest effects.\(^\text{19}\) Injunctions were limited to the specific parties before the court, although class actions were permitted to address conduct that affected unnamed class members who participated only via representation that in theory protected their interest, even if this


\(^{19}\) See, e.g., Leubsdorf, *supra* note 16.
protection often was more fictional than meaningful.\textsuperscript{20}

While the parties had to be before the court and have the requisite connection to the place in which suit was joined, the conduct enjoined might take place outside the court’s geographic locus—so long as the court had jurisdiction over the matter and the parties (which required activity that brought the parties within the court’s reach), the injunction could address actions that might take place elsewhere.\textsuperscript{21} This sort of “long-arm” authority was expressly contemplated in actions under the bankruptcy law.\textsuperscript{22}

Typically, however, courts’ remedies were limited geographically as well as operating with respect only to specific parties. Enforcement outside the issuing court’s jurisdiction depended on accord from other courts.\textsuperscript{23}

Still, courts asked to enforce injunctions rarely looked at the injunctions’ substantive justifications. Courts generally regarded injunctions as \textit{prima facie} entitled to enforcement, and courts also generally treated violations of injunctions as grounds for findings of

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\text{\textsuperscript{20} See, e.g., FED. R. CIV. PRO. 45(c) (limiting enforcement through subpoenas to compel appearance within 100 miles of the issuing court).}
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\text{\textsuperscript{22} See, e.g., 28 U.S.C. §1334(e)(1) (giving relevant bankruptcy court exclusive in rem jurisdiction over debtor’s property, wherever located); Tennessee Students’ Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004) (same).}
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contempt.24

2. Equitable Remedies Against the United States

Suits against the United States—against the government—implicate special concerns. First, the government enjoys a presumption of immunity from unconsented suits.25 This bar to litigation often was avoided by bringing actions against individual government officers, a practice that raised other concerns about the intrusion of judicial scrutiny into the functions of other, coequal branches.26 The Administrative Procedure Act of 1946 (APA) provided broad opportunity for challenges to administrative actions, waiving immunity with respect to most suits seeking declaratory or injunctive relief, though still not providing an open door to litigation against the United States.27

Second, even where the government acquiesced to suits, it did not abandon pre-existing doctrines intended to prevent litigation from becoming a substitute for constitutionally prescribed decisional processes.28 So, for example, the APA carried forward


requirements that parties bringing suit against the government have a personal stake and contest a legal right personal to them or within the umbrella of protection granted to a class of people by the relevant law.\footnote{See 5 U.S.C. §702 (2012); Summers v. Earth Island Inst., 555 U.S. 488 (2009); Steel Co. v. Citizens for a Better Envt, 523 U.S. 83 (1998); Lujan v. Defenders of Wildlife, 504 U. S. 555 (1992).} An important component of standing, increasingly emphasized in Supreme Court decisions over the past 30 years, is the requirement that courts be able to grant plaintiffs a remedy for the asserted harm, often referred to as “redressability.”\footnote{See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560—61, 568—71 (1992).} That requirement plays an important role in assuring that litigation resolves narrowly-focused controversies, rather than simply eliciting judges’ views on general policy disputes.\footnote{See, e.g., Maxwell L. Stearns, Spokeo, Inc. v. Robins and the Constitutional Foundations of Statutory Standing, 68 VAND. L. REV. EN BANC 221, 230—31 (2015), available at https://www.vanderbiltlawreview.org/wp-content/uploads/sites/89/2015/11/Spokeo-Inc.-v.-Robins-and-the-Constitutional-Foundations-of-Statutory-Standing.pdf (explaining role of standing features, including redressability, in preserving constitutionally separate roles for the three branches, but critiquing aspects of evolving standing law as inconsistent with better understandings of what rules best accomplish that goal).} While it would be fatuous to suggest that decisions on matters such as standing have been wholly consistent—or consistently attentive to fundamental concerns over judicial review’s potential tensions with basic constitutional structures—judicial decisions generally respect doctrines designed to protect constitutionally-anchored structures.\footnote{Compare, e.g., Massachusetts v. EPA, 549 U.S. 497 (2007); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000), with Summers v. Earth Island Inst., 555 U.S. 488 (2009); Steel Co. v. Citizens For a Better Envt, 523 U.S. 83 (1998); Lujan v. Defenders of Wildlife, 504 U. S. 555 (1992). For discussion of this point through the lens of Justice Antonin Scalia’s engagement with concerns over structure, see Ronald A. Cass, Administrative Law in Nino’s Wake: The Scalia Effect on Method and Doctrine, 32 J. L. & Pol. 277, 281—84 (2017).}

Third, when government was found to have acted unlawfully, judicial remedies traditionally were of limited scope. Individuals who brought actions before a court could (under certain conditions) secure a declaration respecting the conduct at issue and, where

\textit{NATIONWIDE INJUNCTIONS’ GOVERNANCE PROBLEMS:} [Nov.]
appropriate, an injunction preventing the relevant officials or agencies from engaging in conduct found to be unlawful.\textsuperscript{33} Courts, however, generally did not enjoin \textit{all} conduct that took place \textit{anywhere} with respect to \textit{any party} potentially having similar legal claims. Instead, injunctive relief generally was restricted both with respect to the parties covered\textsuperscript{34} and with respect to the injunction’s geographic reach.\textsuperscript{35} As discussed further below, although some language in the APA might have supported a different, broader construction of courts’ remedial authority or responsibility, the law was not initially understood as altering traditional rules.\textsuperscript{36}

\textbf{III. Recent Developments: Nationwide Judging}

If the federal courts’ tradition has been one of remedial modesty, the last few years—and especially the short time since President Donald Trump’s election—have been a marked departure. Federal judges in this era (at least \textit{some} federal judges) have shown far greater willingness to issue nationwide injunctions and have offered explanations for their use that depart from past understandings of

\begin{itemize}
\item \textsuperscript{33} In fact, historically, most suits seeking injunctions against assertedly unlawful government acts asked courts to enjoin anticipated actions against the specific party before the court. \textit{See, e.g.}, Samuel L. Bray, \textit{Multiple Chancellors: Reforming the National Injunction}, 131 Harv. L. Rev. 417, 449 (2017) (Multiple Chancellors). \textit{See also} John Harrison, \textit{Ex Parte Young}, 60 Stan. L. Rev. 989 (2008); Alfred Hill, \textit{Some Realism About Facial Invalidation of Statutes}, 30 Hofstra L. Rev. 647, 682 (2002).
\item \textsuperscript{34} \textit{See, e.g.}, Bray, \textit{Multiple Chancellors}, supra, note 33. The Federal Rules of Civil Procedure generally provide that injunctive relief binds only parties before the court and those who are “in active concert or participation with” them, Fed. R. Civ. Pko. 65(d)(2). As discussed \textit{infra}, text at notes 148–149, this rule grants less protection for the government than for other parties. Questions respecting injunctions in cases involving the government are not apt to be whether injunctions sought by government can bind non-parties but whether injunctions \textit{against} the government can bind \textit{it} with respect to rights of non-parties and what risks affect assertion of degrees of freedom from injunctions. \textit{See} note 149, \textit{infra}. Those questions are not directly answered by Rule 65(d)(2).
\item \textsuperscript{36} \textit{See} text at notes 163–176, \textit{infra}.
\end{itemize}
federal remedies’ limitations and purposes. Consider, for example, litigation challenging executive actions respecting immigration, which has given rise to many of the most discussed and debated injunctions.

A. Immigration Programs and Nationwide Injunctions

President Barack Obama directed officials in his administration to implement programs labeled “Deferred Action for Childhood Arrivals” (DACA) and “Deferred Action for Parents of Americans” (DAPA), conferring presumptive non-removal status on two classes of immigrants who had entered the country illegally.37 Suits against these programs objected that they constituted bold revisions of immigration law under the guise of merely setting enforcement priorities, and one suit, Texas v. United States, resulted in a nationwide injunction barring DAPA’s continued implementation.38

President Trump issued a series of executive orders restricting immigration from nations deemed to have insufficiently dependable screening procedures to guard against potential threats to U.S. security. Plaintiffs sought, and obtained, nationwide injunctions against each of these orders.39 After a review by the Department of


38. Texas v. United States, civ. no. B-14-254 (S.D. Tex. 2015), aff’d, United States v. Texas, 787 F.3d 733 (5th Cir. 2015), aff’d by an equally divided Court, 136 S. Ct. 2271 (2016) (mem.).

Justice (which found the DACA program’s creation constitutionally defective), President Trump’s administration announced its intention to cease accepting applications for deferred deportations under DACA and to cease accepting renewal applications to extend deportation deferrals under DACA beyond a period of six months. Those actions, too, were halted by a nationwide injunction.40

B. Bases for Nationwide Injunctions

The explanations for issuing or upholding nationwide injunctions vary across these cases, with some—perhaps all—stretching the bounds of courts’ understood remedial power.

1. Relief to Specified Litigants

The U.S. Court of Appeals for the Fifth Circuit affirmed the injunction against deferring deportations under DAPA based on the deferrals’ effects on the state of Texas and other plaintiff states.41 Defending the decision to use a nationwide injunction, the majority opinion noted the “substantial likelihood that a geographically-limited injunction would be ineffective because DAPA beneficiaries would be free to move between the states.”42 States cannot constitutionally bar migration from within the United States, so a remedy preventing the government from deferring deportation of current illegal-immigrant-residents in a specific plaintiff state (such as Texas) would not prevent other illegal-immigrants from taking up residence in Texas, just as a remedy preventing direct migration into Texas from outside the United States would not protect Texas’ interests.

The point was not that a nationwide injunction would be more beneficial to the interests asserted by Texas and the other plaintiff

as the Department of Homeland Security, however, can be challenged under the APA.


41. Claims asserted by 26 states were joined in the suit. See United States v. Texas, supra note 38.

42. United States v. Texas, 787 F.3d 733, 769 (5th Cir. 2015).
states. Rather, it was that a traditional, geographically-restricted injunction well might provide *no meaningful relief* at all. Whatever one thinks of the particular (much criticized) application, the 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.43

2. Relief for Others and Doctrinal Concerns

In contrast to the Fifth Circuit’s emphasis in *Texas* on the injunction’s impact on *specific interests* of parties before the court, some explanations for nationwide injunctions—particularly injunctions against *restrictions* on entry of potential immigrants into the United States—focus on general, abstract interests in *legal doctrine* or related interests of broad groups of individuals not directly participating in the litigation.

For example, affirming a district court injunction against implementation of the third Executive Order from President Trump restricting immigration from specified nations—an injunction that was both *nationwide* and *unlimited* as to its beneficiaries—the U.S. Court of Appeals for the Fourth Circuit declared, “because we find that the Proclamation was issued in violation of the Constitution, enjoining it only as to Plaintiffs would not cure its deficiencies.”44 Extraordinary relief based on an imperative to prevent government action the court deemed unconstitutional—encompassing any application of the challenged policy anyone, anywhere—seemed self-evidently justified to the judges in that case. It is difficult, however, to believe that the judges would so easily have embraced the same view in *every* case of a government action found to be

43. Although the Fifth Circuit decision often is portrayed as equivalent to later decisions on challenges to immigration orders reaching different legal conclusions and similarly resulting in nationwide injunctions (and rightly seen as a product of the same sort of forum-shopping discussed below), see, e.g., Berger, *supra* note 35; Bray, *Multiple Chancellors*, *supra* note 33, at 457–63; Siddique, *supra* note 35, at 2125–26, 2145–47, the decision on remedy in *United States v. Texas*, *supra* note 42, it is manifestly different in its focus and justification respecting injunctive relief.

44. *Int’l Refugee Assistance Project v. Trump*, no. 17-2231, slip. op. at 60 (Feb. 15, 2018).
unconstitutional without other supporting reasons.

The U.S. Court of Appeals for the Ninth Circuit, in addition to invoking similar doctrinal considerations in its opinion upholding a nationwide injunction against immigration restrictions in Hawai‘i v. Trump, seemed to invoke considerations mirroring the Fifth Circuit’s concerns with the effects of interstate travel. It stated that “the Government did not provide a workable framework for narrowing the geographic scope of the injunction.”45 Quoting the district court’s decision, the court of appeals remonstrated, “the Government has not proposed a workable alternative form of the [injunction] that accounts for the nation’s multiple ports of entry and interconnected transit system and that would protect the proprietary interests of the States at issue here while nevertheless applying only within the States’ borders.”46

The problem identified by the Fifth Circuit, however, was the impracticality of excluding illegal immigrants from one state if they gained entry through another state (or continued residence in another state)—as it noted, freedom of travel among the states would make a geographically-limited exclusion order (or its equivalent) ineffective respecting the narrow, particularized claims of the states before the court. There is no parallel problem for protecting interests in the admission of immigrants. Freedom of travel once immigrants are admitted does not make state interests in admission to the particular jurisdiction before the court any weightier or diminish the utility of providing specifically for admission to the state or states before the court. In the end, then, to justify the scope of the Hawai‘i district court’s injunction, the Ninth Circuit needed to rely on its concerns for uniform nationwide application of the rules it thought were legally proper.47

Because the Supreme Court reversed the Ninth Circuit’s decision on the merits, it did not reach questions about the propriety of the remedy.48 Justice Thomas’ sharply critical concurring opinion,

46. Id., 859 F.3d, at 787—88.
47. Id., 859 F.3d, at 787.
however, noted both the importance of addressing the increasing frequency of what he termed “universal injunctions” and some tensions between such injunctions and constitutional structure.49

Concerns about those tensions are particularly connected to the grounds on which injunctions are based. The concerns over nationwide injunctions raised by Justice Thomas, among others, are addressed in the following sections.

IV. Forum-Shopping and Its Discontents

Expanding the scope of federal injunctive relief—especially in the sorts of cases that have been making news and on the particular bases relied on for many of these injunctions—has several unfortunate consequences. Chief among these: it encourages forum-shopping, increases entanglement of the judiciary in the political domain, and undermines important aspects of our constitutional structure. Those effects, which encompass both practical-policy consequences and legal consequences, are the focus of the next parts of this paper.

A. Forum Shopping: Looking for Mr. Goodbench

The first, and most obvious, consequence of enabling individual district judges to issue nationwide injunctions is the creation of incredibly strong incentives for plaintiffs to rush to file suit in jurisdictions thought most likely to provide a sympathetic forum for their claims.50 The first judge to decide a matter frequently has an outsized impact on the development of the law with respect to that specific issue.51 But the degree to which that effect obtains and

49. Id., slip op. at 2–10.
50. See, e.g., Berger, supra note 35, at 1091–93; Bray, Multiple Chancellors, supra note 33, at 457–61.
51. That is true as well with novel interpretations of law that break with received doctrine. See, e.g., David G. Owen, The Evolution of Products Liability Law, 26 REV. LITIG. 955, 966–74 (2007); Warren A. Seavey, Mr. Justice Cardozo and the Law of Torts, 48 YALE L.J. 390 (1939). While it long has been understood that judicial reasoning generally relies on prior authorities even when not formally constrained by them, scholars also have found this process at work across international boundaries. See, e.g., Anne-Marie Slaughter, A Typology of Transnational Communication, 29 U. RICH. L. REV. 99 (1994). That finding
endures is tempered by the ability of other judges to reach different, even contrary, determinations.

In general, a judge’s decision at most constitutes precedent that only binds other judges within that judicial district (for a panel of the Court of Appeals, a decision binds other judges only within the particular circuit). Further, for ordinary injunctions, the decision will not provide relief to a large group because it will command the defendant only to take action respecting the parties before the court and perhaps similarly situated parties within the geographic reach of the court. Thus, both the decision’s direct effect and its power as precedent will be limited.

This is most emphatically true for suits against the United States government, which is commonly permitted to decide not to follow judicial declarations respecting an action’s or rule’s legality outside the issuing court’s designated geographic region. This underscores the “first-mover advantage” of initial judicial decisions.


53 While the binding effect of a circuit precedent on district courts within the circuit is clear, several courts have refused to recognize any binding effect (or similar precedential effect, apart from than whatever persuasive effect it may have) for a district court decision, even within the same district. See, e.g., Camreta v. Greene, U.S. 563 U.S. 692, 709 n.7 (2011); Threadgill v. Armstrong World Indus., Inc., 928 F.2d 1366, 1371 (3d Cir. 1991); United States v. Articles of Drug Consisting of 203 Paper Bags, 818 F.2d 569, 572 (7th Cir. 1987); Colby v. J.C. Penney Co., 811 F.2d 1119, 1124 (7th Cir. 1987); Bray, Multiple Chancellors, supra note 33, at 465; Richard H. Fallon, Jr., Commentary: As-Applied and Facial Challenges and Third Party Standing, 113 Harv. L. Rev. 1321, 1390 (2000). But see Kerr v. Hurd, no. 3:07-cv-297, slip. op. at 32 (S.D. Ohio Mar. 15, 2010), available at http://ia801407.us.archive.org/3/items/gov.uscourts.ohsd.117364/gov.uscourts.ohsd.117364.117.0.pdf; United States v. Hirschhorn, 21 F.2d 758, 759 (S.D.N.Y. 1927), both cited in Eugene Volokh, District Court Opinions Precedential Within the Same District?, Volokh Conspiracy, May 25, 2010, available at http://volokh.com/2010/05/25/district-court-opinions-precedential-within-the-same-district/.

practice evinces respect for constitutional and legislative commitments of authority to executive officers and to limitations on the authority reposed in any one judicial officer. In the ordinary case, then, even if litigants always prefer a friendlier forum to a more hostile one, there is relatively little to be gained by rushing to put a case before the most friendly possible set of potential judges. Simply put, the less sweeping the potential remedy, the lower the benefit from raising the odds of obtaining it.

The situation changes dramatically when a court effectively can bind the entire nation with an injunction that constrains behavior with respect to an unlimited range of persons and to conduct occurring in (and having effects in) an equally unlimited array of places. As one commentary put it, “nationwide injunctions ... incentivize[] an extreme race to courthouses more inclined to issue nationwide injunctions and more sympathetic to the plaintiff’s position.”55 Professor Samuel Bray adds:

> 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.56

The enticement to rush to a friendly forum is increased where the stakes are the nature of government policy, rather than more concrete returns to litigants. This flows partly from the asymmetry of the stakes—given usual rules of estoppel, 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.57 This asymmetry does not necessarily represent the best rule—while it is easy to justify refusal

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56. Bray, Multiple Chancellors, supra note 33, at 460.
to bind future litigants who were not party to a decision that disadvantages them, one-way “offensive estoppel” also can be problematic.\(^{58}\) A nationwide injunction, exacerbates difficulties with estoppel rules, essentially ending the prospect for litigation in other courts, which might take a different view of the law. The benefits of preserving potential for other courts to consider similar questions are discussed further below: the point here is simply that nationwide injunctions and offensive collateral estoppel together virtually eliminate that option.

### B. Forum-Shopping’s Rule-of-Law Problems

Forum-shopping, however, does more than reduce opportunities for consideration of particular legal issues by other courts. Notably, forum-shopping both reflects and expands a particular tension with rule-of-law values.

In marked contrast to structural features of federal court practice such as the creation of “diversity” jurisdiction (which was intended to, and probably does, limit biases of “home court” advantage for plaintiffs from one state facing off against defendants from another),\(^{59}\) forum-shopping seeks to exploit biases beyond those naturally associated with affinity for one’s local compatriots. In fact, it seeks out biases that contradict fundamental features of a system that embodies the rule of law.

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1. Forum-Shopping vs. Principled Predictability

(a) Principled Predictability and the Rule of Law

The rule of law, at its core, demands that legal rules are predictable based on principles knowable in advance.\textsuperscript{60} Predictability of the law is essential to knowing how you can live your life without risking penalties imposed against your will by government. Yet, the rule of law requires more than just the ability to predict. Principled predictability is essential to law’s legitimacy; it assures that laws apply the same way to everyone and that the laws are applied the same way by each official charged with their enforcement.\textsuperscript{61}

If judges, within the confines of what is necessary to decide disputes properly before them, are supposed to interpret and apply law impartially, the rule of law ideal is that litigants need not know the identity of the person who will judge their claims in order to predict the outcome. Accepting the analogy of judges to baseball umpires,\textsuperscript{62} the ideal is that each umpire applies the rules of baseball the same way as other umpires and that each applies the rules the same way to all players and all teams.


\textsuperscript{62} See, e.g., CASS, RULE OF LAW, supra note 60, at 7; Brett M. Kavanaugh, The Judge as Umpire: Ten Principles, 65 CATH. U.L. REV. 683 (2016). The most publicly-noted use of the baseball umpire analogy was by now-Chief Justice John Roberts, during his confirmation hearing before the U.S. Senate. See, e.g., CONFIRMATION HEARING ON THE NOMINATION OF JOHN G. ROBERTS, JR., TO BE CHIEF JUSTICE OF THE UNITED STATES, HEARING BEFORE THE COMM. ON THE JUDICIARY, UNITED STATES SENATE, 119TH CONG., 1ST SESS., at 55 (Sep. 12, 2005) (Statement of John G. Roberts, Jr.).
(b) Judge-as-Referee and Decisional Vibration

There are serious arguments about how far attaining this ideal is possible.63 Certainly there are difficult judgment calls in law and sports alike, times when people of good conscience and great skill who agree on the task and endeavor to reach the right result under shared views of the rules can differ on nuances of their meaning or on the particulars of their application.64 In fact, there are times when the judgment or perception required for a given decision makes application of governing rules so difficult that the same judge or referee might reach different outcomes if the matter could be replayed repeatedly (with the judge or referee making a new, independent judgment each time). This weak form of outcome difference might be termed decisional vibration. It is easy to accept this form of difference as consistent with an overall picture of decisional consistency and adherence to the rule of law.

The debate over the extent to which limits of language or perception or reason inevitably produce differences (how far they move rule-application from merely cases of decisional vibration to more serious types of divergence) should be taken seriously.65 Yet,

64. See, e.g., Cass, Rule of Law, supra note 60, at 74–85 (analogizing judicial decisions based on text to translation); Kavanaugh, supra note 62 (analog to work of umpires). See also Cass, Rule of Law, supra note 60, at 86–97 (describing special case of the Supreme Court). But see generally James Boyd White, Justice as Translation: An Essay on In Cultural and Legal Criticism (Univ. of Chicago Press 1990) (using translation heuristic as incorporating far greater degrees of freedom); Lawrence Lessig, Fidelity as Translation, 65 Fordham L. Rev. 1365 (1997) (same).
65. Arguments based on claims about such limitations are at the heart of a number of well-known critiques of efforts to reach neutral, predictable results in legal decision-making. See, e.g., Duncan Kennedy, Legal Formalism, 2 J. Legal Stud. 351 (1973); Singer, supra note 63; Tushnet, supra note 63. But see Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decisionmaking in Law and in Life 191–96 (Clarendon Press 1991) (providing a careful analysis of the degree to which linguistic indeterminacy affects operation of rules that constrain legal and other decision-making); Ken Kress, Legal Indeterminacy, 77 Calif. L. Rev. 283 (1989); Lawrence B. Solum, On the Indeterminacy Crisis: Critiquing Critical Dogma, 54 U. Chi. L. Rev. 462 (1987).
in a real sense, it should also be seen as more of a footnote than a central consideration on the core issue respecting the judicial function. What matters far more is the existence of very broad agreement—cutting across time and divergent perspectives on many aspects of legal reasoning and judicial action—that judges should endeavor to do their job in a way that is consistent with the goal of principled predictability, including its components of neutrality, generality, and externality, notwithstanding potential limitations on effectuation of that aspiration.66

(c) Forum-Shopping and Decisional Divergence

The predicates for (and goals of) forum-shopping, however, are the antithesis of this rule-of-law vision. Forum-shopping embraces the understanding that particular judges will decide a given matter in divergent ways—not because of random differences in perception of the sort that would lead to different calls by a referee in the repeat-play hypothetical but because of disparate views of how laws should be interpreted and what extrinsic information should come into play (what could be termed decisional divergence).67 The differences that are essential to forum-shopping are the sorts of differences that lend themselves to predictions on expected outcomes that vary for particular decision-makers, while the variances incorporated in the repeat-play hypothetical and common


67. See, e.g., Davies, supra note 54, at 112.
versions of the judge-as-umpire metaphor do not.\textsuperscript{68}

Moreover, forum-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.\textsuperscript{69} If that were not true, there would be no need to seek out a forum whose judges are expected to be especially favorable to the party picking the forum—random selection among the relevant set of judges in the class of potentially available courts would be good enough.

The fact that litigants in a number of high-profile cases obviously \textit{do} engage in forum-shopping underscores the widely shared perception that judges—at least some judges—can be expected to make decisions that are heavily influenced by personal inclinations (that is, by something apart from generally accepted principles of decision).\textsuperscript{70}

Recognizing this fact does not, of itself, constitute a condemnation of the federal judiciary. It does, however, reflect a common understanding about differences among federal judges—both of the existence and the limits of these differences. The nearly 700 federal district judges and roughly 180 circuit judges currently serving could be arrayed on a curve representing likely approaches to a given issue—products of the overlay of judicial views, approaches, ideological or methodological commitments on judges’

\textsuperscript{68} Compare, e.g., Ward Farnsworth, Dustin F. Gusior & Anup Malani, \textit{Ambiguity about Ambiguity: An Empirical Inquiry into Legal Interpretation}, 2 J. LEGAL ANALYSIS 257 (2010) (experimental work supporting conclusions respecting personal viewpoints’ effects on legal decisions) \textit{with} Kavanaugh, supra note 62 (judge-as-umpire incompatible with consideration of personal views); Scalia, \textit{Originalism}, supra note 66 (originalism and textualism defended as constraining inappropriate intrusion of judges’ personal views).

\textsuperscript{69} The fact that so many of the cases that seek nationwide injunctive relief are connected to claims integrally related to active political conflicts underscores the difference between the sort of forum-shopping at issue here and the variance that is unpredictable and inevitable. \textit{See text infra} at notes 78–97; \textit{see also} Berger, supra note 35, at 1090–91; Bray, \textit{Multiple Chancellors}, supra note 33, at 460–61; Morley, \textit{De Facto Class Actions}, supra note 57, at 494.

\textsuperscript{70} See, e.g., Farnsworth, Gusior & Malani, \textit{supra} note 68.
decisions. The broad middle part of the curve, reflecting the central standard deviations from a decisional norm, covers the vast bulk of the judiciary. In a normal curve, for example, 95 percent of outcomes will fall within two standard deviations of the mid-point and 99.7 percent within three standard deviations.\(^\text{71}\) The tails of the distribution represent true outliers.

For most sorts of cases and most sorts of claims, there is limited opportunity for forum-shopping, for seeking out the tails of the distribution. Plaintiffs generally have few options on where to file their cases. Where broader opportunity for selecting a forum has existed, the Supreme Court self-consciously has begun cutting back on forum-shopping options, as it did with respect to patent litigation recently in *TC Heartland LLC v. Kraft Food Group Brands LLC*.\(^\text{72}\) Yet, where nationwide injunctive relief is possible, plaintiffs are able to seek out the outermost tails of the entire distribution of judges—marking an extreme form of the forum-shopping problem.

2. *Forum-Shopping and Sources of Judicial Divergence*

In one sense, the nature or source of these divergent inclinations is irrelevant. Whatever methodological commitments or personal views of right outcomes cause departures from normally expected decisions that are sufficiently pronounced to support litigants’ investment in getting a case before a particular “deviating” judge or court, the evidence of diverging expected outcomes for specific judges or courts in itself suggests a gap between current reality and important rule-of-law ideals.

From the first vantage, the nature of the views or commitments that cause the divergence does not matter to this judgment so much as the fact that some judges and courts consistently stand apart from others, that they reason differently or reach different conclusions due to factors not common (not generally or randomly distributed) across the broad sweep of judges who might hear and

\(^\text{71}\) See, e.g., HOWELL E. JACKSON, LOUIS KAPLOW, STEVEN M. SHAVELL, W. KIP VISCUSI & DAVID COPE, ANALYTICAL METHODS FOR LAWYERS 494–95 (Foundation Press 2003). While this is not the only sort of distribution of outcomes, it is a common—perhaps the most common—result in randomly distributed attributes or outcomes (hence the name “normal distribution”).

\(^\text{72}\) 137 S. Ct. 1514 (2017).
decide similar issues. The harm to rule-of-law values is the reduction in principled predictability—in individuals’ ability to assess how the law will treat their behavior without needing to know who will decide. Because the actual decision-maker is not knowable in advance of actions that may be subject to judgment, significant deviations from principled predictability seriously threaten a core attribute of the rule of law.

In another sense, though, the reason that a particular judge or court is in demand does matter. If litigants rush to get their claims before a court that is known for flaunting established rules and finding creative (or simply unlawful) ways around precedent, that signals a sense that the overall system is fairly law-bound.

Paradoxically, a more charitable view of some departures from current dominant norms—and of some investments in forum-shopping in response—is more damning of the legal system. If litigants are willing to invest significant amounts of time, energy,
and financial resources in seeking out a court or judge that stands out as especially likely to base decisions on approaches that are consistent with law as written and contemporaneously understood (with decision approaches that are defended as most constraining and most consistent with principled predictability),\(^7\) that implies a larger and more widespread departure from principled predictability on the part of other courts and judges.

V. Politicizing the Courts: Incentives and Effects

A second problem with the expanding use of nationwide injunctions, linked to the rule-of-law problems from forum-shopping, is the increasing politicization of the courts. This is the cause and consequence of forum-shopping for the cases that are most publicly notable and of most concern.

A. Politically-Motivated Litigation: Quagmire in the Making

1. Concerns of Fair Decision-Making: Reasons and Problems

As discussed above, any systemic differences in predicted outcomes (significant variations between the decisions expected from one specific court or judge and those expected from a different court or judge) are problematic.\(^8\) While generally discussed in rule-of-law terms, the point has more general application across a range of activities and decisions.

Think, for instance, of a typical setting in which variation among

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\(^7\) For sympathetic explanations of such methodologies, see, e.g., Scalia, Interpretation, supra note 66, at 14–41; Lawson, supra note 66; Prakash, supra note 66; Scalia, Originalism, supra note 66; Lawrence B. Solum, Originalist Methodology, 94 U. Chi. L. Rev. 269 (2017).

\(^8\) See, e.g., Cass, Rule of Law, supra note 60, at 7–12 (on importance of principled predictability); Dorf, supra note 61 (same). Just that sort of concern based on disparities in rates at which claims for Social Security disability benefits were granted by different administrators led the Social Security Administration to adopt a grid to guide (and to inform review of) lower level decisions. For discussion of considerations relevant to these decisions, see, e.g., Jerry L. Mashaw, Bureaucratic Justice: Managing Social Security Disability Claims 149–68 (Yale Univ. Press 1983); Jon C. Dubin, Overcoming Gridlock: “Campbell” After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration’s Disability Program, 62 Admin. L. Rev. 937 (2010).
decision-makers is encountered. Having one group of teachers in a school known to be remarkably easy graders and another group with well-earned reputations as astoundingly hard graders undermines the notion of grades across the curriculum being a fair basis for comparing student performance.

Tension with the notion of fair comparison is far higher when assignment of students to classes is a matter of choice rather than chance—and infinitely more if the choice respecting which students get the hard graders and which the easy ones is based on what widely would be seen as illegitimate factors, such as a student’s race, religion, or political affiliation. The unfairness of the grading comparisons is not necessarily any greater in those instances than where the distribution of students and teachers is random, but the sense of unfairness—of students being penalized for reasons that should not be part of the considerations that affect their grades—is stronger and more visceral when decisions are based on criteria that are suspect in many settings.

2. Politically-Tinged Decisions

The difficulty of squaring a system that has this kind of distortion with widely-accepted notions of fairness is obvious in the school-grading example. It should be obvious as well in the setting discussed here, as this is the direction that expanding use of nationwide injunctions takes the judicial system.

While any inducement to forum-shopping and increased divergence among potential decisions from different federal courts is problematic, the critical exacerbating factor for disputes about nationwide injunctions plainly is the underlying cases’ connection to political issues. Notable cases where nationwide injunctions are sought—such as the immigration-related cases discussed above—have had obvious political overtones, as especially polarizing programs can be stopped or dramatically slowed with an injunction that has broad scope and wide reach.

Further, plaintiffs strongly identified with political causes—politically active interest groups and political officials (largely state attorneys general, a class of officials who are politically connected, politically selected, and often interested in higher political office)—frequently have been the moving parties in cases where nationwide
injunctions are sought.\textsuperscript{79} Indeed, the 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.\textsuperscript{80} Reflecting the same pattern seen in the actual political arena, Republicans from “red states” opposed President Obama’s administration on matters related to health care, environmental and public land regulation, and immigration, while Democrats from “blue states” have opposed President Trump’s administration on the same issues.\textsuperscript{81}


Inserting the judiciary into quintessentially political fights, even when there is a substantial legal issue to be decided on recognizably legal grounds, plainly risks the perception that judges base decisions on political preferences or at least are affected by those preferences. That perception is far likelier, and better grounded, warriors against presidential administrations" and especially “Blue-state attorneys general” suits against Trump administration); Nolette, supra note 80 (recounting evolution from more standard litigation to partisan tool, “stable coalitions of AGs have organized largely by party”).

when the judicial decision-makers are selected by one side of a political contest precisely because of their expected prejudices.

The problem is not that politically salient legal challenges (ones that implicate issues of great political significance) inescapably lack other, valid legal bases or that politically-motivated lawsuits (ones brought by or prompted by politically-active plaintiffs for reasons connected to political conflicts) inevitably are without merit. Nor is it that federal courts routinely base decisions on political considerations or that issuance of a nationwide injunction necessarily signals a political basis for decision. In the main, the evidence respecting federal court decisions is at odds with that charge.83

Instead, the problem is that when politically active parties engage courts in challenges to decisions made in the political domain—especially when the parties can select which judges hear the challenge, can take their case to the judges they believe most sympathetic to their views, and can make the decision by those judges conclusive—it is difficult to separate the resulting decisions from an appearance of judicial entanglement with politics. That appearance is far stronger when the judges picked to decide a politically contentious matter are in the outermost tails of the distribution of judges based on their likely approach to that particular decision. Putting an exclamation mark on the matter, the appearance of political entanglement is even more strongly conveyed when only one judge (or only one set of judges) can

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conclusively decide the matter.

B. Politicizing Decisions: The Citizens United Example

Even if a decision is well-reasoned and based in legal principle and precedent, groups who are opposed to the outcome—whether because of personal interest or because of differing analytical approaches—have reasons to portray the decision as politically motivated or as predicated on ideological or other considerations that are associated with political commitments.

Consider an example drawn from a different setting (but one that has enough age and a large enough body of evidence to demonstrate the point): the concerted effort to delegitimize the Supreme Court’s decision in *Citizens United v. Federal Election Commission.*\(^{84}\) The Court’s decision in *Citizens United* was both widely described in boldly misleading terms and repeatedly conflated to on-going political disputes.\(^{85}\) To be sure, there are respectable legal arguments in opposition to the decision, due in large part to a set of quite opaque Supreme Court precedents and muddled principles on election-related speech and finances, but there also is an exceedingly sound basis in law for the decision.\(^{86}\)

\(^{84}\) 558 U.S. 310 (2010) (*Citizens United*).


See also President Barack Obama, *State of the Union Address,* 156 CONG. REC. H414, Jan. 27, 2010 (*State of the Union*).

\(^{86}\) For supporting analysis from various perspectives, see, e.g., Ronald A. Cass, *Weighing Constitutional Anchors:* New York Times Co. v. Sullivan and the
Ironically, despite the intense and widespread criticism from liberal politicians, interest groups, and academics, core principles underlying the \textit{Citizens United} decision were popularized—and celebrated in other contexts—by liberal academics.\footnote{See, e.g., \textit{Misdirection of First Amendment Doctrine}, 12 \textit{First Amend. L. Rev.} 399, 416–20 (2013) (Misdirection); Michael W. McConnell, \textit{Reconsidering Citizens United as a Press Clause Case}, 123 \textit{Yale L.J.} 412 (2013); Seth Tillman, \textit{Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle}, 107 \textit{Nw. U. L. Rev.} 399 (2012).} The change in position on application of these principles speaks to the politicization of questions regarding regulation of election-related speech.

Regardless of the provenance of the legal principles at issue, \textit{Citizens United} was understandably a politically sensitive case. It dealt with speech about a highly visible candidate seeking the nation’s highest office. The effort to constrain private speech about political campaigns for a generation had been the domain of liberal politicians (in marked contrast to the politics of such constraints in earlier generations). The Supreme Court in \textit{Citizens United} divided essentially along what most observers saw as liberal-conservative ideological lines. And the President of the United States made a
point of criticizing the decision in one of the highest-profile speeches any President makes, the State of the Union address.\textsuperscript{88}

C. Today’s Risks with Nationwide Injunction Suits: Political Causes, Political Reactions

The \textit{Citizens United} episode, though drawn from a different context, is instructive on some aspects of the politicization of judging that accompany nationwide injunctions. The connection of (i) political goals, (ii) forum-shopping for sympathetic judges, and (iii) court decisions with nation-wide effects potentially profound impact on politically salient issues almost inevitably draws the courts further into the political domain. Those connections help explain why commentary on these court decisions tilts toward explanations characterizing them as rooted more in politics than in law.

For a small window onto the way these decisions are discussed, consider descriptions of the travel ban decisions in the widely-read website \textit{Above the Law} by its Executive Editor. His posts include titles like “We’ve Finally Achieved a Patina of Legalism to Cover the Bigotry” and references to anyone who supports the President’s position on immigration or opposes nationwide injunctions to halt his administration’s orders as “#MAGA jerkfaces.”\textsuperscript{89}

\textsuperscript{88} See Obama, \textit{State of the Union}, supra note 85, (“[T]he Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities. They should be decided by the American people.”). This observation appeared directly to contradict the Court’s observation that legitimate concerns about foreign expenditures could not save a provision that regulated \textit{domestic} expenditures, see \textit{Citizens United}, supra note 84, 558 U.S. at 356–57, and its further pointed reference to the separate legal provision specifically addressing election contributions and expenditures of foreign nationals, \textit{id}. at 357 (citing 2 U.S.C. §441e).

Rhetoric that seems more the province of political combatants in campaign mode than of lawyers analyzing legal claims and decisions is now common. Much of the commentary on nationwide injunction cases describes both the officials who bring the suits seeking nationwide injunctions and the judges who decide to issue the injunctions in decidedly political terms. Suits seeking nationwide injunctions have been described as “political cudgels” for state attorneys general to brandish against the rival party, as devices used by state attorneys general acting as “partisan warriors” fighting against opposing presidential administrations, as examples of “pure politics,” and as products of “increasingly partisan AG coalitions.” Observers also declare that judges have “turn[ed] to [an] extreme remedy” and “wield” these injunctions as a “major political weapon” in the fight between a President and his opponents. Other commentary notes the obvious, strong ideological leanings of judges in particular districts that invite filings from lawyers seeking to stop policies of the competing party—at times even manipulating rules respecting “related cases” to “steer” specific matters in their direction. In other words, politically motivated lawsuits brought before courts thought likely to share (and act on) the plaintiffs’ political predilections generate legal decisions that are widely viewed through political lenses and often (rightly or wrongly) suspected of being the result of judges’ political leanings.

91. See, e.g., Friedman & Schwartz, supra note 81.
92. See, e.g., Nolette, supra note 80.
93. See, e.g., Friedman & Schwartz, supra note 81.
The increasing political characterization of court decisions not only encourages litigants to seek special advantages in future litigation where potentially broad relief is in play. It also threatens an increasingly political focus on judicial appointments, including appointments at the district court level—a level at which appointments have been relatively insulated from boldly politicized debates. Senatorial input has tended to play a greater role in nominations for district court judges, including input from senators not of the President's own party, and fights over confirmation to district judgeships have been less frequent than fights over circuit judges' confirmations.96

Yet the turn toward using district judges as soldiers in proxy fights over political platforms unsurprisingly increases the likelihood that both incumbent administrations and opposing political parties will seek partisan advantages from these appointments. After all, if the decisions of district judges potentially can disrupt government programs that represent important priorities for elected officials, those officials—on both sides of the political aisle—will take steps to protect what matters to them.97

Expanding partisan fights over judicial selection, in turn, will continue the ratchet of politicizing the courts. Once district judges


are seen as combatants in the fight against partisans of the other political party, instead of referees over trial proceedings that pit legal partisans against one another, it is hard to avoid pressure for more politically-charged considerations in appointments (and, potentially, more politically influenced conduct by those judges). Under these circumstances, even if district court appointments remain closely tied to patronage of home-state Senators, the selections of potential nominees—and the votes of colleagues on the nominees’ confirmation—are apt increasingly to incorporate more politically-aligned considerations.

VI. Constitutional Structure and Federal Judiciary’s Design

A third consequence of the expansion of nationwide injunctions is their role in undermining the division of constitutional responsibilities among the different branches of government. As explained below, this includes intrusion on Congress’ function of writing the laws and in some cases also on properly delegated exercises of discretion over laws’ implementation. It also contradicts the historical commitment of specially-tailored equitable discretion to federal judges and the essence of a system of lower court assignments below the Supreme Court.98

A. Nationwide Judging Versus Constitutional Structure

1. Courts, Law-Making, and Delegated Discretion

Most obviously, the Constitution’s plain commitment of law-making and related policy choices to the Congress and of subordinate exercises of discretion over implementation of the laws to the executive branch cannot be reconciled with routine invocation of judicial power to revisit those branches’ choices. Stated differently, the assignments of authority in Articles I and II of the Constitution cannot be made consistent with granting courts broad power to reverse national policy choices made by the politically-responsible branches.99

98. See, e.g., Trump v. Hawaii, supra note 4, slip op. at 4–10 (Thomas, J., concurring).

99. That was clear from the founding generation’s exposition of the initial constitutional assignments. See, e.g., THE FEDERALIST NOS. 10, 42, 45–51 (Madison),
Courts enjoy authority, in appropriate cases, to say what the law is, how far the Constitution permits Congress to go in its exercise of authority, and how far the law permits executive action to go. But using that authority outside those settings, stretching the contours of judicial authority, risks assertion of a broad supervisory power over those branches’ decisions that manifestly changes the basic constitutional design.

For most of America’s history, Article III was not understood to incorporate any such revisory power, even by the most vigorous champions of federal judicial power. Indeed, fear of intruding in to the proper domain of the political branches, even when a legal issue is presented, explains a wide variety of judicial doctrines encompassing standing doctrine, political question doctrine, related rulings on justiciability, withholding judgment where no remedy

66–77 (Hamilton). It also was an important point in combatting concerns of Anti-Federalists. See, e.g., Trump v. Hawaii, supra note 4, slip op. at 4–7 (Thomas, J., concurring); Essays of Brutus XI, supra note 14.


would be available, and canons of construction that avoid constitutional questions.  

The critical distinction emphasized by de Tocqueville, Hamilton, Madison, and John Marshall was that between, on the one hand, deciding what law to apply to specific parties in a specific case (including whether a given act violated constitutional restraints) and, on the other hand, determining what law can apply on a nationwide basis to anyone anywhere who may share the concerns asserted about a choice made by the politically-chosen branches.  

In contrast, widespread use of nationwide injunctions to shape applicable law on the basis of general, national considerations—especially in cases infected with partisan, political overtones—ignores that risk, effectively replacing the tri-partite constitutional structure with one that puts courts in the position of overall political overseers.

2. Limited Defense of Nationwide Relief

This does not mean that there is no setting in which broad injunctive relief is appropriate. Regulatory initiatives of administrative officials whose discretionary authority stretches (and often breaches) the bounds of constitutionally permissible delegation frequently put individuals and entities in a position where they must either submit to a possibly unlawful demand or risk large penalties for resisting.  

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103 See, e.g., Marbury v. Madison, supra note 10, 5 U.S., at 177; THE FEDERALIST NO. 78 (Hamilton); 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., Yale Univ. Press, rev. ed. 1966) (reporting James Madison's comment respecting the Constitution's limitation of federal courts' authority only to making decisions "of a Judiciary nature"); DE TOCQUEVILLE, supra note 10, vol. 1 at 100–06. See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–62 (1992) (connecting standing requirements to limits on the scope of judicial power recognized by the Constitution's framers); Roberts, supra note 102 (same).

Greve’s descriptions of the saga of the Environmental Protection Agency’s “Mercury and Air Toxics Rule” illustrates the problem. Without an injunction delaying the administrative fiat, there is no real middle ground—investments in compliance (through reconfiguring businesses, purchasing new equipment, and changing aspects of everyday practice that limit exposure to penalties) also deprive judicial review of significance.

Assuming no strong, countervailing need for immediate implementation of the relevant rule, the norm for injunctive relief would be to stay the rule pending judicial review. Unlike ordinary litigation where the appropriate response to this problem undoubtedly would be staying an action solely with respect to the particular litigants, in some instances of federal regulation this option’s impact on other regulated competitors will be serious in its own right but also often will result in serious risk of harm to the parties seeking the stay. 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.


106. See, e.g., Cass, Staying Rules, supra note 104 at 228–29, 254–56. See also Adler, supra note 105: Greve, supra note 105.

107. See, e.g., Cass, Staying Rules, supra note 104 at 229–30. This factor comes within the set of third-party interests traditionally considered as part of the determination on equitable remedies. See, e.g., eBay Inc. v. MercExchange L.L.C., 547 U.S. 388 (2006): Leubsdorf, supra note 16.

108. See, e.g., Cass, Staying Rules, supra note 104. This exception should not be
3. Politically-Situated Litigation and the Judicial Role

The common setting for suits seeking nationwide injunctive remedies, however, is not one where competitive harm will flow from a limited injunction or where the party in court effectively is deprived of any protection by a more limited injunction. It is not one focused on the effects of a rule on particular parties asserting specific consequences of a rule’s application or of failure to delay application pending review.

Instead, typically the request for an injunctive remedy having nationwide and universal coverage is integrally related to the goal of reversing a politically contested choice made by the legislative or executive branch of government. In that context, unlimited coverage for an injunction makes bigger headlines, bolder claims of having reversed the successes of political opponents, less prospect for judicial determinations seeming like byproducts of ordinary litigation, and greater tension with the original constitutional order.

Bold, simple statements of the division of constitutional authority—and expansive conclusions about what such division means for the roles of courts—must be tempered by recognition that legislative and administrative decisions often are made strategically, taking account of background expectations respecting potential judicial decisions. At times, legislators may, for example, pass laws that a majority (or a critical element of a
majority) of Congress believes are *not* constitutional because they
gain personally from voting in favor of such laws, despite their
expectation that the laws will be found invalid if challenged in
court.112 Similarly, administrative officials may adopt rules or make
other decisions that they do not expect will be sustained as within
statutory authority because they will gain personally from
embracing the positions in those rules or decisions, or, in contrast,
they may make decisions that stretch the limits of their authority
expecting that judges will defer to them.113

More broadly, the relationship among legislative decisions,
administrative decisions, and judicial decisions may implicate
strategic considerations both in courts’ determinations and in other
official actions made in contemplation of courts’ decisions.114
Recognizing that reality 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.

Still, the constitutional pattern of separated authority and
defined basic roles for the different branches of the national
government provides a touchstone that suggests the limited role
courts should play and the boundaries of judicial remedies. First,
courts should not be making rules on important matters of policy,
but giving effect to rules set by others. Second, when called upon to
resolve questions of legal interpretation, courts should employ their

112. *See, e.g.*, Paul A. Diller, *When Congress Passes an Intentionally
281 (2008).

Game of Legislative-Judicial Interaction*, 45 AMER. J. POL. SCI. 84 (2001); Keith E.
Whittington, *Legislative Sanctions and the Strategic Environment of Judicial
Review*, 1 INT’L J. CON. L. 446 (2003); Christopher J. Walker, *Inside Agency

Explanation of Supreme Court Statutory Decisions with Application to Grove City
and State Farm*, 6 J. L. ECON. & ORG. 263 (1990); Landes & Posner, *supra* note 111;
Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast (collectively
“McNollgast”), *Positive Canons: The Role of Legislative Bargains in Statutory
Interpretation*, 80 GEO. L.J. 705 (1992); Rogers, *supra* note 113; Whittington, *supra*
note 113.
remedial authority in ways consistent with their role in resolving concrete legal contests, not in ways tantamount to setting broad national policy.115

4. “Complete Relief”: A Misleading and Incomplete Standard

That is a reason why the standard of “complete relief” to determine how broad an injunction should be—making the injunction as broad as needed to give full protection to the interests asserted by plaintiffs—cannot be the basis for decision.116 Although the standard was framed as restricting courts from issuing injunctions that exceeded the scope needed to provide relief to parties before the court,117 in practice it pushes toward excessively broad injunctions, especially where the focus is not limited to an action’s effect solely on parties before the court.118 Further, in settings where political judgments are integrally related to the assessment of interests involved on both sides (for and against the injunction), the standard of complete relief tilts remedies toward the political forces opposing the government.

While that bias may be justified in certain areas, such as cases involving government restraints on core political speech,119 applying it more broadly—especially in the types of cases commonly seeking sweeping injunctive relief—inevitably embroils courts in on-going political disputes in ways that will not seem even-handed.120 The bias inherent in the complete relief standard exaggerates the bias that is already present in litigation seeking nationwide relief

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116. For additional reasons this is not a sufficient (or, at times, appropriate) standard, see, e.g., Berger, supra note 35, at 1084–91; Bray, Multiple Chancellors, supra note 33, at 466–68. But see Siddique, supra note 35, at 2140–49 (advocating the “complete relief” principle as the key consideration for injunctions’ scope).


118. See, e.g., Bray, Multiple Chancellors, supra note 33, at 466–67.


120. See text, supra at notes 55–82.
because the side asking for the injunction has specifically chosen a court thought likely to favor broader relief in the particular case.\textsuperscript{121} In this sense, it combines an easier venue for the moving party and an easier standard for relief if that party prevails.

Some areas of the law contain rules consciously tilted toward one party or one result. This is the case, for instance, with requirements of unanimous guilty verdicts in criminal trials and of proof of guilt beyond a reasonable doubt; as with other “tilted” rules, these requirements reflect a sense of asymmetric social costs—here, between convicting innocents and releasing guilty parties.\textsuperscript{122} But the tilt in nationwide injunction cases adds bias to what are at their core political debates, which already have moved to courts from the arena in which political disputes are more naturally resolved. Adding cumulative biases to the outcome seems especially unwarranted in this context, where the courts, if they are involved at all, should be neutral arbiters of law.\textsuperscript{123}

Moreover, the issuance of one nationwide injunction (especially where the injunction is permanent, not merely a stay pending

\textsuperscript{121} See, e.g., Berger, supra note 35, at 1091; Bray, Multiple Chancellors, supra note 33, at 460.


review) has the effect of stopping the government. It is a one-sided bar against actions challenging, or providing a basis for challenging, the court’s decision (as discussed earlier and further addressed in the next section), where a more limited injunction allows both the government and affected parties to decide whether to contest that specific judicial judgment in other fora. This effect of nationwide injunctions also raises the political importance of decisions on the grounds for an injunction and judgments on its scope, further removing litigation potentially resulting in nationwide injunctions from ordinary, apolitical legal decision-making of the sort that de Tocqueville lauded and our Constitution’s framers expected.

B. Nationwide Judging’s Contrast with Federal Judiciary Design

Two types of limitations have been offered as the principal means for avoiding the problems associated with nationwide injunctions: geographic restrictions on injunctive relief (confining relief to the district or circuit within which the enjoining court sits) and restricting injunctions solely to the parties in court (or, in appropriate cases, a properly certified class). These generally have been presented as alternatives, with debates over which is the more legally sound approach. Both limitations matter, however, constituting complementary protections against judicial determinations that stray into domains reserved to the other branches of government. And both limiting practices are at odds with the issuance of nationwide injunctions.

1. Geography and the Organization of Federal Courts

The first traditional limitation on injunctive relief in federal

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124. Note, in this regard, that the Califano case, most heavily relied on to support expansive injunctive relief, addressed temporary relief and the importance of providing equitable remedies to forestall irreparable harm in that context. Califano v. Yamasaki, 442 U.S. 682, 705–06 (1979). See also Cass, Staying Rules, supra note 104 (further addressing the problem of irreparable harm in the context of ongoing judicial review).

125. See, e.g., Berger, supra note 35, at 1090–91; Bray, Multiple Chancellors, supra note 33, at 460–61; Morley, De Facto Class Actions, supra note 57, at 494. See also text supra at notes 57–58.

126. See, e.g., Berger, supra note 35, at 1085–88, 1090–93, 1096–1100; Bray, Multiple Chancellors, supra note 33, at 460, 466–68; Wasserman, supra note 110.

127. See, e.g., Bray, Multiple Chancellors, supra note 33; Siddique, supra, note 35.
courts is geographic. The design of the federal judiciary, from its inception, was for there to be one Supreme Court with national supervisory authority and a number of lower courts responsible for particular regions of the nation. Starting with the Judiciary Act of 1789, the federal courts have included district courts and circuit courts, with the circuit courts beginning primarily as trial courts for more serious matters but evolving into intermediate appellate courts. While the details of the courts’ jurisdiction and composition have changed over time, the overall pattern of geographically divided judicial authority has remained constant throughout the past 239 years.

(a) Geographic Divisions’ Limited Powers

One aspect of divided authority has been the limitation on lower courts’ powers. Each lower court is geographically limited as to what matters can come before it. So, for example, authority over suits initially must be anchored in the involvement (as claimant or defendant or subject) of persons resident and property located within the relevant district and to claims arising within the particular district, but generally not to matters, persons, and property outside the district. The same limitation arises for circuits of the U.S. Court of Appeals, which hear appeals from districts located within each circuit’s assigned region—thus, the Second Circuit hears cases arising in or concerning entities located in New York while the Seventh Circuit hears matters from Chicago, and so on. Geography historically restricted the scope of jurisdiction and authority for all courts, at least for those exercising temporal power necessarily restricted by the extent of the sovereign’s control.

The same limitation seemed entirely natural to those who set the template for the federal judiciary, despite the broader reach of national power. That limitation is reflected, among other things, in the original residence requirements for judges (who, starting with

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131. See, e.g., WHEELER & HARRISON, supra note 129, at 4, 7.
the 1789 Act, were required to live in the assigned district),\textsuperscript{132} allocation of jurisdiction to each district and circuit, and—most important for understanding the proper limitations on injunctive relief—restrictions on the effect of the courts’ rulings.

The practice long has been that courts in one circuit are not bound to follow decisions of those in another circuit.\textsuperscript{133} While there are different views on the historical bases for the practice’s development, the Supreme Court has clearly accepted it and Congress has left it in place.\textsuperscript{134}

Limited scope for lower court decisions has obvious benefits. It provides opportunity for other courts (including those whose judges may reflect other regional values and perspectives) to look at the same issues and to consider them in other settings and from other vantages. This both respects the positions of other courts (the comity argument for limited effect of federal court decisions) and provides a better foundation for Supreme Court consideration in the event that circuits reach divergent conclusions about the law (the percolation argument for limited scope).\textsuperscript{135}

Moreover, the practice is clearly in keeping with the design of a system that has lower courts as well as a Supreme Court. After all, if a lower court decision were binding on other courts—if a decision from one circuit of the U.S. Court of Appeals bound all of the courts in all of the other circuits—each lower court exercising that power would in effect enjoy the power of the Supreme Court.

That power would not be entirely on a par with the Supreme Court’s: the Supreme Court still could exercise its prerogative to review and reverse the decision of the circuit. But, especially given

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\item \textsuperscript{132} Judiciary Act, supra note 128, at §3.
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the enormous difference between the caseload of the Supreme Court and the circuits of the court of appeals, for a great many matters—truly, for the vast bulk of broadly-framed legal questions that come before the federal courts—the first circuit to rule on a matter would attain powers consciously allocated to the Supreme Court. Wholly apart from its implications for forum-shopping, this realignment of authority is clearly at odds with the long-accepted structure of and constitutional design for the federal judiciary.136

(b) Limited Scope: Government Non-Acquiescence

The existence of regional courts and the deeply embedded practice of rejecting binding inter-circuit precedent also fits judicial recognition of government agencies’ freedom to decide whether to accede to a decision of one circuit in activities taking place in (or having effect in) other circuits (the practice of inter-circuit non-acquiescence).137 This permits more politically-responsive government officials to determine what weight to give a court’s decision outside the court’s assigned jurisdiction, a determination that encompasses the policy-based assessments of the value of national uniformity, the strength of the government’s position, the benefits of contesting an issue in other jurisdictions, and even strategic questions respecting the support the agency might receive from politicians and from the public.138

The value of any of these practices may be debated, but it should not be open to debate that the structure of the federal judiciary—its separation into geographically distinct circuits and districts—cannot easily be reconciled with the use of nationwide injunctions outside extraordinary circumstances. The structure that supports rejection of binding effect for decisions outside the deciding circuit,

136. See, e.g., Berger, supra note 35, at 1093–1104; Dobbins, supra note 133. See also Estreicher & Revesz, supra note 54.

137. See, e.g., Davies, supra note 54, at 71–75 (defending intercircuit nonacquiescence despite doctrine’s costs); Estreicher & Revesz, supra note 54, at 735–41 (explaining reasons for intercircuit nonacquiescence). See also id., at 736 n.275 (declaring that, while intercircuit nonacquiescence is even more soundly grounded than the related rejection of intercircuit stare decisis, “the absence of intercircuit stare decisis is now firmly embedded in the legal landscape”).

138. See, e.g., Davies, supra note 54, at 71–75; Estreicher & Revesz, supra note 54, at 735–41; Rogers, supra note 113; Whittington, supra note 113.
both for courts and for government agencies, is at odds with virtually all aspects of nationwide judging at the lower court level.

(c) Special Cases: Exclusive Jurisdiction

To be sure, there may be special cases (or, more accurately, categories of cases) for which uniformity in determinations respecting a matter is prized over the benefits of regionally limited decisions, including the benefit of allowing consideration of the critical issues to be informed by a larger number of judges from different perspectives making judgments in circumstances framed by different factual settings. For example, some issues, such as the legality of a Federal Communications Commission allocation scheme for broadcast stations, have enough interconnections among various subparts that it may make sense to concentrate authority in one court, rather than having each part of the scheme contestable in the venue where a given station is allocated (or where allocation to another place blocks a station assignment).139

For these special cases, Congress can choose to assign the sole authority of initial appellate review to a specific court. It has, for example, assigned exclusive jurisdiction over certain patent issues to the Court of Appeals for the Federal Circuit140 and review of various administrative decisions to the D.C. Circuit.141 Making the


D.C. Circuit the exclusive venue for challenges to government actions that almost exclusively take place in Washington, D.C., could fit the broader pattern of geographically-limited assignments of judicial power, but the D.C. Circuit’s exclusive authority plainly precludes suits that could be brought in other venues.142

Statutory assignment of exclusive jurisdiction to one court represents a commitment—made by the constitutionally appropriate body through constitutionally specified means—to entrust nationwide authority over those matters to that entity and, necessarily, to allow some remedies with nationwide effect to issue from that court. So, for example, a decision of the D.C. Circuit respecting the legality of an agency action would have broader effect than a declaratory judgment from another court. If the D.C. Circuit determines that a rule adopted by the Federal Communications Commission exceeds the agency’s authority, that decision almost invariably leads to the court vacating the rule.143

The creation of special courts with exclusive, nationwide authority, however, is exceptional. The general understanding, consistent with the design of geographically-composed courts, is that courts below the Supreme Court do not have—and certainly should not presume to assert—power to impose their view of a given matter of law on other courts across the United States or on government officials operating in and affecting persons in other parts of the United States. This long-accepted understanding of the limitations on lower courts is squarely at odds with the assertions of authority inherent in most nationwide injunctions.

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142 See Fraser, Kessler, Lawrence & Calhoun, supra note 141.
143 See, e.g., Verizon v. Federal Communications Comm’n, 740 F.3d 623 (D.C. Cir. 2014); Comcast Corp. v. Federal Communications Comm’n, 600 F.3d 642 (D.C. Cir. 2010). See also Merrick B. Garland, Deregulation and Judicial Review, 98 Harv. L. Rev. 505, 568 (1985); Ronald M. Levin, “Vacation” at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 Duke L.J. 291, 298 (2003) (agency decisions found to be unlawful “routinely vacated” as part of a practice that was “generally accepted and essentially taken for granted”) (Vacation).
2. **Injunctions Covering Non-Parties: Stretching Equity**

The second restriction is that injunctions historically have been limited to protecting *specific rights of parties before the court*, offering relief deemed necessary to protect those rights when standard legal remedies (such as compensation after the fact) are inadequate.\(^{144}\) Like other equitable remedies, injunctions were originally conceived as remedies to be deployed only in unusual circumstances and restricted to particular settings where courts could examine and balance the harms from granting or withholding that remedy.\(^{145}\) Although the “special” nature of injunctions has diminished (or evaporated),\(^{146}\) courts still understand that the remedy’s capacity to impose different and more daunting constraints on subjects’ behavior (including contempt punishment for their violation) cautions against treating injunctions as matters of course.\(^{147}\)

Even though it has been approved as a remedy in class actions, the whole construct of the remedy is replete with signals that it is intended as a narrow, not a broad, tool—not one designed to cover

\(^{144}\) See, e.g., Leubsdorf, *supra* note 16; Rendleman, *Equity Revisited, supra* note 16. See also Michael T. Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 620–21 (2017) (Lower Courts) (distinguishing cases in which an injunction protecting the parties before the court necessarily covers others because the rights at issue are not divisible, as might be the case where redistricting of an electoral jurisdiction is in issue, from the ordinary case where rights are divisible, in which case an injunction would not typically cover non-parties).


an expansive array of potential actions affecting anyone anywhere whose concerns might prove similar to those of the parties actually before the court. In the same vein, Federal Rule of Civil Procedure 65(d)(2), which makes injunctive relief applicable to non-parties who have actual notice of the injunction and are “in active concert or participation with” parties subject to the injunction, manifestly was designed to prevent circumvention of relief directed to specific persons and settings, not to create a new mechanism for limiting government.

Allowing such remedies in challenges to statutes, regulations, and similar broadly-applicable administrative actions converts the injunction from a narrow mechanism for protecting individual rights in extraordinary circumstances to a tool for judicial control over political decision-making. While a scalpel and a chainsaw both cut, they are vastly different instruments suited to extremely different uses. Arguments for the similar legitimacy of injunctive relief in both settings—narrow use to protect individual litigants’ rights and broad use to intervene in political conflicts on behalf of anyone affected by the currently prevailing legal rules—fail to

\[148\] See, e.g., Fed. R. Civ. Pro. 65(d)(2); Laycock, Remedies, supra note 3, at 275–76; Berger, supra note 35, at 1075–76; Bray, Multiple Chancellors, supra note 33, at 459–60, 469–71; Morley, Lower Courts, supra note 144, at 646–47; Wasserman, supra note 126. See also Int’l Refugee Assistance Project v. Trump, 137 S. Ct. 2080, 2090 (Thomas, J., concurring and dissenting); Woolhandler & Nelson, supra note 20.

\[149\] See, e.g., Regal Knitwear Co. v. Nat’l Labor Relations Bd., 324 U.S. 9, 13–14 (1945); United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1136 (D.C. Cir. 2009). One commentator on this paper noted that judicially imposed requirements that “persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order,” GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 386 (1980) (relying on Walker v. City of Birmingham, 388 U.S. 307, 314–21 (1967)), create special difficulties for government officials, particularly when combined with any ambiguity about the operation of Rule 65(d)(2). These difficulties are multiplied exponentially when the injunction at issue is nationwide and unlimited. Although this is an important issue, exploring the soundness of the rule of Walker v. City of Birmingham is beyond the scope of this article.

\[150\] See, e.g., Morley, Lower Courts, supra note 144, at 652–53.

\[151\] See, e.g., Spencer E. Amdur & David Hausman, Response: Nationwide Injunctions and Nationwide Harm, 131 Harv. L. Rev. Forum 49 (2017); Siddique,
grasp this essential distinction.

Concerns over potential misuse of equitable power, allowing it to be used as a vehicle for broad, discretionary judicial decisions respecting the actions of constitutionally-empowered officials—officials whose positions make them responsive to political inputs either directly or indirectly—have been part of the fabric of constitutional discourse for the past 220 years. These concerns were raised at the outset by Anti-Federalists during debates over ratification of the Constitution. Those concerns remain central today, playing a prominent role, for example, in the objections to broad, nationwide (“universal”) injunctions articulated by Justice Thomas in his concurrence in *Trump v. Hawaii*. Justice Thomas’ opinion expresses his apprehension that permitting broad injunctive remedies directed at government permits courts freedom, unfounded in law, to reshape decisions committed to the political branches. He stresses that this freedom is contrary to the history of equitable remedies and to the long-settled (until recently) understanding of limitations on federal courts.

A similar point was made emphatically by the Supreme Court in *United States v. Mendoza*, which explained differences between government and other entities, including the fact that even basic litigation decisions (such as whether to appeal or accept a lower court’s judgment) for government implicate political-policy determinations. Courts should not adopt remedies that intrude into the political-policy domain, either directly or by facilitating one administration’s or party’s ability to freeze policy determinations going forward. Concerns about judicial overreach—about rules that transfer to judges powers that are constitutionally reserved to other branches of government or that permit judges to exercise influence over political decision-making beyond what is necessary

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152. See, e.g., *Essays of Brutus XI*, supra note 15.
153. See *Trump v. Hawaii*, supra note 4, slip op. at 4–10 (Thomas, J., concurring).
154. See id.
156. See *id.*, at 161–62.
to adjudicate the rights of parties before the court—should be paramount in determining the scope of permissible injunctive authority.

So, too, Justice Antonin Scalia, before moving from the U.S. Court of Appeals for the D.C. Circuit to the Supreme Court, stated that courts should be careful in issuing declaratory judgments respecting limitations on federal officials’ authority. Writing for the court, Judge Scalia remonstrated that “all the bases for nonmonetary relief—including injunction, mandamus and declaratory judgment—are discretionary,”158 then added:

[D]eclaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as injunction or mandamus, since it must be presumed that federal officers will adhere to the law as declared by the court. Such equivalence of effect dictates an equivalence of criteria for issuance.159

Judge Scalia cited an opinion by Justice Hugo Black for the Supreme Court (albeit from a different context, involving intervention in state criminal proceedings) which had asserted that “even if declaratory judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same impact as a formal injunction would”160 and concluded that, consequently, “the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment.”161

The notes of caution sounded by Justice Black, by the Mendoza Court, by Justice Scalia, and by Justice Thomas all point in the same direction: judges should be wary of using equitable remedies in settings where the result inevitably is to expand courts’ reach into decisions more readily situated in the province of executive branch officials.162

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159 Id. at 208 n. 8.
160 Samuels v. Mackell, 401 U.S. 66, 72 (1971). No justice dissented and none of the concurring justices demurred on the point for which this opinions was cited.
161 Id. at 73.
162 Although some scholars reject characterization of declaratory judgments as
3. The APA’s “Set Aside” Provision: Directive as Distraction

The Administrative Procedure Act, however, has language that might be construed to authorize precisely the authority critiqued above for courts to exercise broad control over executive branch decision-making. Section 706 of the APA instructs that in challenges to agency actions, courts:

shall hold unlawful and set aside agency action … found to be—
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right: [or]
(D) without observance of procedure required by law …163

This directive to “hold unlawful and set aside agency action” that fails any of a series of tests for lawfulness could be read as if the required judicial response applicable to most successful challenges to administrative decisions is sweeping invalidation of those decisions’ products.164 On this reading, the further assumption could be made that a nationwide injunction is the proper mechanism for setting aside an administrative action found to contravene one of the listed items in Section 706.165

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164. See, e.g., Amdur & Hausman, supra, note 151, at 54.
165. See, e.g., Earth Island Inst. v. Ruthenbeck, 490 F.3d 687 (9th Cir. 2007), rev’d on other grounds, Summers v. Earth Island Inst., 555 U.S. 488 (2009); Amdur &
This conclusion is contestable on two grounds. Most obviously, the conclusion that a nationwide injunction is the right means for setting aside an agency action in does not follow from the predicate that “set aside” means to hold the agency action globally unenforceable. A number of different remedies could be consistent with exercises of equitable discretion consistent with broad unenforceability, including allowing a declaration of illegality to be enforced by having those targeted for enforcement enter pleas based on the declaration of illegality—that is, providing a basis for resisting enforcement rather than precluding enforcement.

The less obvious problem lies in the predicate that the set aside language in Section 706 necessarily requires that any agency action that fails one of the tests in that section must be globally invalidated. That reading certainly could be consistent with some pre-APA decisions that arguably treat administrative actions found to be unlawful as conclusively invalid in all instances. And it certainly is consistent with many post-APA decisions. See, e.g., Ronald M. Levin, The National Injunction and the Administrative Procedure Act, REG. REVIEW (Sep. 18, 2018), https://www.theregreview.org/2018/09/18/levin-national-injunction-administrative-procedure-act/ (citing Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407 (1942) (CBS); American Tel. & Tel. Co. v. United States, 299 U.S. 232 (1936) (AT&T)). While not dispositive of the merits of Professor Levin’s claim, the cases cited do not all support his reading of the law. While the CBS case sustains an order that treats a regulation as invalid, the AT&T case found the administrative order at issue valid, providing no support for the set-aside-as-global-invalidity argument (although seemingly assuming that a different conclusion would have provided grounds for invalidating the order at issue, involving accounting rules for ratemaking for communications common carriers). This is both the wrong outcome and, in light of the difference between ratemaking for common carriers—in many instances setting prices for competitors who are required to charge on the same basis for their services—and other matters, the wrong issue to sustain a broader argument on invalidating administrative rules. Given Professor Levin’s standing in the administrative law community and his general care across a range of scholarly endeavors, this illustrates not so much a failing in his research as the complexity of the issue and the supporting materials as well as the difficulty of identifying clear support for the position that “set aside” necessarily means global invalidation in all settings.

See, e.g., Federal Communications Comm’n v. Midwest Video Corp., 440 U.S.
That reading, however, is not the only or even the most natural reading of the APA’s instruction. When the APA was written and enacted, it was generally understood that courts would not apply laws that violated the strictures listed in Section 706 to parties before them.\textsuperscript{168} Although some specific actions of administrative agencies could, indeed, be nullified by reviewing courts, those tended to be in the nature of ratemaking (or similar acts of utility governance) or administrative enforcement orders.\textsuperscript{169}

These sorts of administrative activity—those that initially were subject to “set aside” provisions—essentially involved agencies acting in lieu of judicial process, which historically had been used to implement constraints on common carriers for hire and on business activities in restraint of trade.\textsuperscript{170} In that context, courts’ exercise of the equivalent of judicial supervisory authority over lower court actions could be seen as consistent with traditional approaches to the types of administrative actions being reviewed.\textsuperscript{171} Moreover, some of the types of action subject to these provisions, like ratemaking, lent themselves to global constraints; after all, if a common carriage rate was wrongly set, nondiscrimination considerations (requiring uniform charges for customers, who often competed with one another) could not be accommodated with narrower remedies.\textsuperscript{172}

\textsuperscript{689} (1979); Walker, Ordinary Rule, supra note 3.

\textsuperscript{168} See, e.g., Bray, Multiple Chancellors, supra note 33, at 438 n.121; Levin, Vacation, supra note 143, at 310–15.


\textsuperscript{171} See, e.g., Chicago & Alton R. Co. v. Kirby, 225 U.S. 155 (1912); Wight v. United States, 167 U.S. 512 (1897). For other, early applications of similar approaches to supervision of administrative controls over common carriage regulation, see, e.g., New Orleans G.N.R. Co. v. Railroad Comm’n of Louisiana, (126 La. 1067) 53 So. 322, 323–24 (La. 1910).

\textsuperscript{172} For explication of the economic rationales for, and critiques of, traditional common carriage restrictions on rate differentials, see, e.g., ALFRED E. KAHN, I THE
Beyond that, because the language in the APA also was written at a time when rulemaking was far less common and its characteristic focus far narrower, the litigation that Section 706’s review provisions addressed was expected to involve requests to have specific decisions set aside or to have regulations that would apply to a narrow set of entities or circumstances declared unlawful and therefore not applied to them. These expectations are a far remove from one of broad-based rule invalidation.

The expectations and understandings contemporaneous with the APA’s adoption also explain why the same “hold unlawful and set aside” language also instructs courts on what to do with agency actions based on findings found to be “unsupported by substantial evidence” or “unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.” Those grounds

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for setting aside administrative actions hardly look like a fit with language comprehending—much less mandating—global invalidation of agencies’ policy-based decisions.

As noted above, a court such as the D.C. Circuit, where it enjoys exclusive jurisdiction over review of agency actions, stands in a different position. The impact of a court’s remedies in that setting necessarily will be more global—when it finds an agency action unlawful for reasons unrelated to the specific application of an agency rule, precedent, or practice, that court’s decision not to apply the law has much the same practical effect as a decision to hold the law invalid. Yet, even there, it will not be quite the same as deeming the rule or practice to be devoid of all legal effect. More to the point, that impact is a function of the court’s monopoly over review, not of the APA’s direction on what reviewing courts should do. One last note on the special case of the D.C. Circuit: as authors of a review of its jurisdiction observe, until the 1960s, federal courts located in the District of Columbia were the only courts in the federal system recognized as having authority to issue writs of mandamus, the traditional tool for compelling action by other officers, although equitable remedies (including injunctions) were available through other courts.

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176. See, e.g., Mitchell, supra note 13 (explaining differences between, on the one hand, holding a law invalid in its application in a particular case or declaring it unconstitutional in some respect that bars its application and, on the other hand, deeming it never to have had any legal status or effect).

177. See Fraser, Kessler, Lawrence & Calhoun, supra note 141, at 135.

178. See, e.g., John F. Duffy, Administrative Common Law in Judicial Review, 77 Tex. L. Rev. 113 (1998) (Administrative Common Law); Levin, Vacation, supra note 143, at 143, at 317–18. The background availability of equitable remedies prior to enactment of the APA has given rise to different views of the degree to which the passage of a statute with specific language respecting administrative authority and the role of judicial review should be seen as changing remedial authority. Professor Duffy, for example, emphasizes the importance of grounding law interpretation in the text of the statute, while Professor Levin favors greater reliance on prior administrative common law and the benefits of continued evolution. Compare Duffy, Administrative Common Law, supra at 130–31, with Levin, Vacation, supra note 143, at 309–15, 317–18. See also Jack M. Beermann, Common Law and Statute Law in Administrative Law, 63 Admin. L. Rev. 1 (2011); Gillian E. Metzger, Foreword: Embracing Administrative Common Law, 80 Geo. Wash. L. Rev. 1293
At the end of the day, there is little to support reading the APA as a universal directive for courts to abandon traditional constraints on equitable remedies.179 This does not mean that courts are flatly prohibited from vacating rules found to be unlawful and remanding the matter before the court to an agency to revise (and to cure the defects identified). Yet attention to limits on equitable remedies is consistent with the text and history of the law; the evident understanding contemporaneous with the APA’s adoption was that the APA did not displace ordinary tests for application of equitable remedies.180 The Attorney General’s Manual, regarded as a reasonably authoritative statement of the administration’s contemporaneous reading of the law, makes that point explicit and also plainly states the broader point that the APA’s provisions on scope of review, which contain the “set aside” language relied on to support changing the law, were understood merely to “restate[] the present law as to the scope of judicial review.”181

Cautionary advice cited above for courts to tread lightly when issuing such remedies, injunctions most definitely included—offered over a period of more than 40 years by Justices Black, Rehnquist (for the unanimous Mendoza court), Scalia, and Thomas—is thoughtful, consistent with constitutional structure and also with the principles underlying and circumstances surrounding adoption of the APA. That counsel, which is in keeping with—and certainly not clearly contradicted by—the APA’s text, should be heeded by federal judges today.

179. This conclusion is essentially a middle ground between positions taken by other scholars who have urged that current settings require, if anything, even stricter limits on the exercise of equitable discretion (given the difference between the judicial system of today and the system that traditionally gave equitable discretion to only one officer in any jurisdiction), see, e.g., Bray, Multiple Chancellors, supra note 33, or (harking back to older understandings of equitable discretion) require broader scope for discretion than some courts now grant, see, e.g., Levin, Vacation, supra note 143.


VII. Conclusion

The arguments advanced to support nationwide injunctions—especially broad injunctions against the United States—are at odds with almost every important aspect of our constitutional structure and the design of our federal judiciary. Conscientious performance of judges’ duty to say what the law is in appropriate cases does not require remedies that extend beyond the issuing court’s domain.

The traditionally respected limits on the scope of federal court remedies reinforce de Tocqueville’s reflections on the operation of the American legal system with regard to courts and constitutionally designed law-making authority. His comment—that “[w]henever a ... judge ... in a tribunal of the United States ... has refused to apply any given law in a case, that law loses a portion of its moral cogency ... and similar suits are multiplied until it becomes powerless”¹⁸²—further buttresses his discussion of the way the limited scope of judicial relief (and limited occasions for invoking judicial review) fit broader governance structures for America.¹⁸³ The approach he recognized as peculiarly fitting the restricted role of the courts and the commitment of political decisions to other branches stands as a fundamental contradiction of the use of nationwide injunctions.

Generally, injunctive relief should only bind parties to a proceeding, and courts should tailor remedies with that in mind. A presumption that injunctions against the United States run in favor only of the parties to the proceeding would be consistent with the precepts underlying this approach. Moreover, it would help return judicial review to the scope and function initially understood and long accepted and would restrain some of the more blatantly political aspects of a developing practice of facial invalidation of laws and regulations as a matter of course.

Of course, where appropriately raised, courts should pass on questions respecting the lawfulness of executive actions and the constitutionality of legislation. But the remedy for actions found to

¹⁸² DE TOCQUEVILLE, supra note 10, vol. 1 at 104–05 (emphasis added).
¹⁸³ DE TOCQUEVILLE, supra note 10, vol. 1 at 100–06. See also THE FEDERALIST NO. 78 (Hamilton).
exceed legal authority normally should be restricted to the parties before the court. Where broader reach is required to give practical effect to the court’s decision as to the parties before the court (and is justified by the traditional balance of considerations for granting equitable remedies), legislation should specifically authorize broader relief and courts should ascertain the minimum scope required for injunctive relief.

Similarly, just as declarations of rights by a district court or a circuit do not bind courts outside the district or the circuit, injunctions generally should be limited to the geography that defines an issuing court’s jurisdiction. This general rule does not cover judicial directions to parties violating contract rights or property rights (think of patent infringement) that extend outside the geographic jurisdiction of a court, but it does especially apply to commands to government officials. Special exception should be made for temporary relief in cases where a stay of regulatory action is both well-grounded legally and necessary to avoid irreparable harm to the party bringing the action—not only because of the action’s application to the moving party but because of effects from its application to other competitors subject to the same regime.

The general rule, however, should be that nationwide injunctive relief is beyond the authority of lower courts. Limiting use of this broad tool of judicial control will restrain interference with the constitutionally assigned roles of Congress and the President, reduce incentives for judicial forum-shopping, avoid exacerbating political intrusion into the functions of the courts, improve adherence to rule-of-law values, and enhance respect for our governance institutions, not least our courts.