

PRESERVING THE NATIONWIDE NATIONAL GOVERNMENT INJUNCTION TO STOP ILLEGAL EXECUTIVE BRANCH ACTIVITY

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*And some things that should not have been forgotten were lost.
History became legend. Legend became myth.*

—Lord of the Rings¹

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INTRODUCTION

When someone successfully sues a federal executive branch official for violating federal law, the federal court's remedy, which can be a nationwide national government injunction, thrusts the court into controversial territory. Critics maintain that courts grant too many broad nationwide injunctions against the executive branch. They state a myriad of reasons to oppose nationwide injunctions: The federal court, they write, lacks authority, power, or jurisdiction to grant a national government injunction. National government injunctions, they continue, encourage plaintiffs to forum shop. Moreover, multiple lawsuits create a risk that different courts will grant conflicting injunctions. They politicize the judiciary and prevent issues from percolating in the federal courts. The injunctions distort the operation of precedent. Critics maintain that a national government injunction creates asymmetry. National government injunctions, critics argue, benefit nonparties—people who are not plaintiffs. Finally, critics protest that one trial judge

should not grant an injunction that halts the whole federal executive branch of the United States government.

This Article disagrees with critics of national government injunctions. It presents reasons for broad injunctions and favors a federal judge's ability to grant a nationwide national government injunction if needed to protect plaintiffs' rights and to suppress defendants' lawbreaking. This Article is based on a professional critique of courts and judges that aspires for neutral judicial decisions grounded on established principles; it is qualified by the realism of partisan judicial appointments, coupled with plaintiffs' wide choices of forum. This Article maintains that critics' arguments are incorrect, unconvincing, overstated, or true only some of the time.

Examining the breadth of the federal courts' injunctions against unlawful executive activity will lead this Article through complex and uncertain territory. After this Introduction, Part I examines the constitutional framework for national government injunctions. Constitutional issues include separation of powers and judicial review. Part II discusses the procedure and remedies that are involved in a national government injunction. It is followed by Part III, which discusses the threats President Trump poses to separation of powers and judicial review.

Part IV examines and answers critics' arguments against the nationwide national government injunction. It analyzes federal court authority under the headings of subject matter jurisdiction and equitable jurisdiction. It concludes that a federal district judge has authority and subject matter jurisdiction to grant plaintiffs an injunction that bars the federal executive from implementing an unconstitutional or illegal federal government program anywhere in the United States. The judge also has equitable jurisdiction to choose an injunction and equitable discretion to shape it.

Critics have not examined the federal courts' procedure carefully enough. Part V discusses federal courts' regular procedure, including filtering techniques, checks against possible mistakes, and grants of complete relief to victims of improper executive branch measures. Federal litigation procedures include principles of confinement and injunction drafting that should check abuses.

When this Article says that national government injunction lawsuits will be litigated in the regular way, it does not mean that courts will follow ordinary procedures. Deference to the ex-

executive branch defendant requires special judicial handling: something between ordinary and extraordinary treatment. When the federal courts apply the procedural techniques they have been using, and perhaps others suggested below, the procedure is satisfactory to support a nationwide injunction against a lawbreaking executive branch defendant. No other limitations are needed or appropriate.

This Article concludes that if the federal courts develop, apply, and mold important procedure, equitable filters, and principles of confinement, a federal court may protect plaintiffs' rights by granting a nationwide national government injunction against an executive branch defendant's improper activity.

This Article expresses a sense of urgency about the federal courts' role in curbing the Trump Administration's improper measures. It combines opposition to the incumbent President with respect for the federal courts.

Trump v. Hawaii concerned complex litigation about the Trump Administration's third ban on Muslim immigration.² The district court judge disapproved the ban and granted plaintiffs a preliminary injunction with nationwide effect. The Supreme Court majority decided that plaintiffs had not demonstrated a likelihood of success on the merits, reversed the preliminary injunction, and remanded "for further proceedings consistent with this opinion."³ The majority wrote: "Our disposition of the case [reversing the lower court's preliminary injunction] makes it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court."⁴

Both Justice Sotomayor and Justice Thomas set up the open issues that this Article examines: the breadth and scope of the injunction that might have followed plaintiffs' success. In her dissent, Justice Sotomayor took the position on the injunction's scope that this Article supports:

Because the majority concludes that plaintiffs have failed to show a likelihood of success on the merits, it takes no position on the propriety of the nationwide scope of the injunction issued by the District Court. The District Court did not abuse its discretion by granting nationwide relief. Given the nature of the Establishment Clause violation and

2. 138 S. Ct. 2392, 2423 (2018).

3. *Id.*

4. *Id.*

the unique circumstances of this case, the imposition of a nationwide injunction was necessary to provide complete relief to the plaintiffs.⁵

Justice Thomas disagreed. His concurring opinion took the position that this Article seeks to refute:

Merits aside, I write separately to address the remedy that the plaintiffs sought and obtained in this case. . . .

I am skeptical that district courts have the authority to enter universal injunctions.

. . . .

. . . [R]ecently, they have exploded in popularity.

. . . .

In sum, universal injunctions are legally and historically dubious. If federal courts continue to issue them, this court is duty bound to adjudicate their authority to do so.⁶

In late January 2020, Justice Gorsuch agreed with Justice Thomas. In *Department of Homeland Security v. New York*, the Court, in a five to four decision, stayed a preliminary injunction that forbade enforcement of the Trump Administration’s “public charge” rule on immigration.⁷ Justice Gorsuch’s concurring opinion turned to the nationwide national government injunction:

When a district court orders the government not to enforce a rule against the plaintiffs in the case before it, the court redresses the injury that gives rise to its jurisdiction in the first place. But when a court goes further than that, ordering the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the

5. *Id.* at 2446 n.13 (Sotomayor, J., dissenting) (quoting *id.* at 2423 (majority opinion); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994)) (internal quotation marks omitted).

6. *Id.* at 2424–29 (Thomas, J., concurring).

7. 140 S. Ct. 599 (2020).

court could still be acting in the judicial role of resolving cases and controversies.⁸

The reasons Justice Gorsuch gave align with critics' arguments.

As the Justices' contrasting opinions reveal, when a federal court strikes down a federal executive branch initiative, the court's authority to grant a national government injunction and the size and breadth of that injunction are controversial. The controversy stems from the remedial technique the federal courts use to stop or limit executive officials from continuing statutory and constitutional violations. The dispute focuses more narrowly on injunctions federal courts have granted in the past and continue to grant on more recent injunctions aimed at curbing the Trump Administration's excessive exercises of executive power.

The injunction we are examining has several names, including "nationwide injunction" and "universal injunction."⁹ Justice Thomas, as quoted above, and scholar-critic Howard Wasserman say "universal,"¹⁰ a designation not yet tested against a NASA astronaut in the International Space Station. The term this Article uses is "national government injunction," sometimes "nationwide national government injunction": nationwide defines the injunction's breadth and the defendant is the national government.

Judges and professors have opposed broad injunctions.¹¹ The Attorney General has instructed United States attorneys to

8. *Id.* at 600 (Gorsuch, J., concurring). Justice Thomas joined the concurring opinion.

9. Professor Amanda Frost and others use the term "nationwide injunction." See Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1071 (2018) ("This Article uses the term 'nationwide injunction' to refer to an injunction at any stage of the litigation that bars the defendant from taking action against individuals who are not parties to the lawsuit in a case that is not brought as a class action."); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67 (2019).

10. See *Trump*, 138 S. Ct. at 2425 (Thomas, J., concurring); Howard M. Wasserman, "Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335, 338 (2018).

11. Scholarly opposition began right away. The first skeptical article was Michael T. Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 620 (2017), which was followed by Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017). Other critical and skeptical articles followed. See, e.g., Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. (forthcoming 2020); Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV.

oppose nationwide injunctions.¹² In *Make the Road New York v. McAleenan*, Judge Ketanji Brown Jackson criticized the Trump Administration’s arguments to restrict national government injunctions: “[I]t reeks of bad faith, demonstrates contempt for the authority that the Constitution’s Framers have vested in the judicial branch, and, ultimately, deprives successful plaintiffs of the full measure of the remedy to which they are entitled.”¹³ In addition, Professor Suzette Malveaux, Professor Amanda Frost, and others are not opposed to broad injunctions.¹⁴ This Article takes a more traditional, yet more activist, position in agreeing with those professors’ general position.

I. THE CONSTITUTIONAL FRAMEWORK FOR THE NATIONAL GOVERNMENT INJUNCTION

A. *Judicial Review*

Our treatment of the nationwide national government injunction and United States constitutional law begins with *Marbury v. Madison* and judicial review.¹⁵ This includes review of state and federal statutes and federal executive branch measures.

In Federalist No. 33, Alexander Hamilton maintained that acts of Congress “which are not pursuant to its constitutional powers” will not “become the supreme law of the land. These will

1 (2019); Zayne Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017); Wasserman, *supra* note 10; Russell L. Weaver, *Nationwide Injunctions*, 14 F.I.U. L. REV. (forthcoming 2020); Katherine B. Wheeler, Comment, *Why There Should Be a Presumption Against Nationwide Preliminary Injunctions*, 96 N.C. L. REV. 200 (2017).

12. Memorandum from Jefferson B. Sessions III, Att’y Gen., to Heads of Civil Litigating Components U.S. Att’ys, Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions (Sept. 13, 2018), <https://www.justice.gov/opa/press-release/file/1093881/download> [<https://perma.cc/B64W-EQHH>] [hereinafter Sessions Memorandum on Nationwide Injunctions].

13. 405 F. Supp. 3d 1, 66 (D.D.C. 2019).

14. See Spencer E. Amdur & David Hausman, Response, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49 (2017); Frost, *supra* note 9; Suzette Malveaux, Response, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56 (2017); see also Clopton, *supra* note 11; Trammell, *supra* note 9.

15. 5 U.S. (1 Cranch) 137 (1803).

be merely acts of usurpation, and will deserve to be treated as such.”¹⁶

Article III of the Constitution states that the Supreme Court possesses the “judicial Power of the United States.”¹⁷ In 1803, in *Marbury v. Madison*, Chief Justice John Marshall operationalized judicial review in the U.S. constitutional system. The Court held that “the judicial power” included power to interpret the Constitution and decide whether an act of Congress was unconstitutional: “It is emphatically the province and duty of the judicial department to say what the law is.”¹⁸ The Court reviewed the legality of executive branch action and held that courts cannot be bound by a federal statute that is contrary to the Constitution.¹⁹ “Thus,” Professor Gordon Wood wrote, “the source of judicial review lay not in the idea of fundamental law or in written constitutions, but in the transformation of this written fundamental law into the kind of law that could be expounded and construed in the ordinary court system.”²⁰ To interpret and implement the Constitution, federal trial and appellate courts may need broad injunctions.

B. Separation of Powers

“When the legislative and executive powers are united in the same person, or in the same body of magistrates,” the Enlightenment philosopher Montesquieu wrote, “there can be no liberty.”²¹ Judicial review implements separation of powers by negating Congress’s and the President’s overreaching measures.

Separation of powers developed slowly and unevenly. After *Marbury v. Madison*, the Supreme Court did not declare another federal statute unconstitutional for over fifty years. In the 1857 *Dred Scott*²² decision (one of the Court’s most regressive decisions), the Court declared the Missouri Compromise unconstitu-

16. THE FEDERALIST NO. 33, at 208 (Alexander Hamilton) (Carl Van Doren ed., 1973).

17. U.S. CONST. art. III, § 1.

18. *Marbury*, 5 U.S. (1 Cranch) at 177.

19. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW 12–21 (2000); GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 433–59 (2009).

20. WOOD, *supra* note 19, at 448.

21. BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 151 (Hafner Library of Classics ed., 1959) (1748).

22. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

tional—giving the technique an unsavory and disreputable quality.

In the meantime, President Jackson thought that Supreme Court decisions only bound lower courts and that the President and Congress could decide constitutional issues in ways that disagreed with the federal courts' decisions.²³ After *Worcester v. Georgia*²⁴ disapproved Cherokee removal in 1832, an angry Jackson said, "John Marshall has made his decision. Now let him enforce it."²⁵

C. *Judicial Review in Action to Curb Executive Branch Excesses*

Distinctions within judicial review are between state and federal measures and, within federal measures, between statutes and executive orders. After touching on state measures and federal statutes, this Article focuses on federal executive measures.

Earlier constitutional defendants were mostly state and local authorities, not the federal government. The courts' orders were limited to voiding the unconstitutional state and local government actions. During the *Lochner* era, the Supreme Court struck down state statutes on substantive due process grounds,²⁶ creating another unsavory odor in liberal nostrils. In the Civil Rights era, the Court voided state-mandated segregation and Jim Crow statutes. These controversial decisions led to Massive Resistance and jurisdiction-stripping bills.²⁷ One reaction to federal courts striking down state statutes was the three-judge district court with a direct appeal to the Supreme Court.²⁸

When the federal government is involved, the Supreme Court sometimes steps in to void unconstitutional acts of Con-

23. H. W. BRANDS, *HEIRS OF THE FOUNDERS: THE EPIC RIVALRY OF HENRY CLAY, JOHN CALHOUN, AND DANIEL WEBSTER, THE SECOND GENERATION OF AMERICAN GIANTS* 306–11 (2018).

24. 31 U.S. 515 (1832).

25. DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 412 (2007); *see also* BREYER, *supra* note 19, at 22–31.

26. STEPHEN BUDIANSKY, *OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW, AND IDEAS* 291–95, 409–23 (2019).

27. Caprice Roberts, *Jurisdiction Stripping in Three Acts: A Three-String Serenade*, 51 VILL. L. REV. 593, 603 n.31 (2006).

28. The remaining three-judge federal district court handles state reapportionment.

gress. Two representative decisions that struck down federal statutes are *United States v. Davis* and *United States v. Lopez*. In *United States v. Davis*, the Court struck down the residual clause of a federal statute that allowed an enhanced sentence when the defendant used, carried, or possessed a firearm while committing a crime of violence.²⁹ The statute's residual clause defined a "crime of violence" as a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."³⁰ The Court struck this clause down as unconstitutionally vague.³¹ In *United States v. Lopez*, the Court considered the federal Gun-Free School Zones Act, which criminalized possession of a gun in a school zone.³² The Supreme Court ruled that the Act exceeded the scope of Congress's enumerated powers.³³

Judicial review has also been used to curb executive actions, although historically the President did not possess the amount of unilateral authority we see today. Except during the Civil War and Reconstruction, the President occupied a smaller office than today. With characters like Henry Clay, Daniel Webster, and John Calhoun, Congress debated and shaped legislative discussions about tariffs, western expansion, and slavery. Theodore Roosevelt began to transform the presidency into a "bully pulpit." Later Presidents, including Woodrow Wilson and activist Presidents Franklin Roosevelt and Lyndon Johnson, expanded the powers of the President and the executive with the New Deal and the Great Society. Congress delegated policy initiatives and power to the executive and administrative agencies.³⁴

Divided government exists when the President's party does not control one or both houses of Congress. Coupled with divided government, intense partisanship has embittered and clogged the legislative process. This leads to unilateral executive detours around Congress. For example:

Treasury Secretary Steven Mnuchin told the New York Times in an interview that he was reviewing whether to move

29. 139 S. Ct. 2319 (2019).

30. 18 U.S.C. § 924(c)(3)(B) (2018).

31. *Davis*, 139 S. Ct. at 2336.

32. *United States v. Lopez*, 514 U.S. 549 (1995).

33. *Id.*

34. DORIS KEARNS GOODWIN, LEADERSHIP: IN TURBULENT TIMES 280–343 (2018); ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT VOLUME II: THE COMING OF THE NEW DEAL, 1933–1935, at 1–27 (2003).

ahead [with an inflation change that the Justice Department had earlier rejected] if Congress doesn't act on its own.

"If it can't get done through a legislation process, we will look at what tools at Treasury we have to do it on our own and we'll consider that," Mnuchin told the New York Times.³⁵

The Trump Administration, with its fixed views about stricter immigration, has abandoned the legislative process. It seeks to control immigration through executive branch measures.³⁶ New immigration regulations and executive orders will lead to more litigation, probably followed by more nationwide national government injunctions.

National government injunctions respond to a paralyzed Congress as well as the federal executive's practice of issuing executive orders and administrative regulations to make major unilateral policy changes that bypass the legislative process. Separation of powers and judicial review together enable courts to prevent the executive's improper and arbitrary exercise of power. As Justice Brandeis wrote in his dissenting opinion in *Myers v. United States*:

The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.³⁷

In 1952, the Supreme Court decided its most important case regarding executive branch overreach. In *Youngstown Sheet & Tube v. Sawyer*, the Court struck down the President's executive order taking over the steel industry to avert a strike.³⁸ After an

35. Damian Paletta, *Trump Administration Considers Tax Cut for the Wealthy*, WASH. POST (July 30, 2018, 6:21 PM), <https://www.washingtonpost.com/business/economy/trump-administration-considers-tax-cut-for-the-wealthy/2018/07/30/1dbaaafbc-9442-11e8-810c-5fa705927d54> [<https://perma.cc/8WD5-PQ2V>].

36. Nick Miroff & Josh Dawsey, *The Adviser Who Scripts Trump's Border Policy*, WASH. POST (Aug. 17, 2019), <https://www.washingtonpost.com/graphics/2019/politics/stephen-miller-trump-immigration/> [<https://perma.cc/B9B7-EKPN>].

37. 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

38. 343 U.S. 579 (1952).

accelerated appeal, the Court affirmed the district court's preliminary injunction overturning the executive order. Treated as the Court's majority opinion in subsequent decisions, Justice Jackson's concurrence rejected inherent executive authority and vindicated both Congress's power to create law and courts' power to analyze its constitutionality: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."³⁹

Youngstown strengthened the Court's resolve in future disputes about executive power. For example, in *Correctional Services Corp. v. Malesko*, the Court stated, "[I]njunctive relief 'has long been recognized as the proper means for preventing entities from acting unconstitutionally.'"⁴⁰ Before that, in *Nixon v. Fitzgerald*, the Court said that "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States."⁴¹ "[W]e have long held," the Court said in *Clinton v. Jones*, "that when the President takes official action, the Court has the authority to determine whether he has acted within the law."⁴² "[T]he Executive is bound to comply with the rule of law," the Court concluded in *Hamdan v. Rumsfeld*.⁴³

Federal courts use national government injunctions as remedies to stop improper measures from the two political branches and to protect citizens' constitutional and other substantive rights. A nationwide national government injunction may be the only way to extend complete relief to plaintiffs, protect their entitlements, and to avoid illegal or unconstitutional government policies that harm thousands of others. An independent federal judiciary needs to be able to grant a national government injunction when appropriate to curb an improper executive initiative. A nationwide national government injunction leads to national

39. *Id.* at 655. For background and context, see NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES (2010) and MELVIN UROFSKY, DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE 251–56 (2015).

40. 534 U.S. 61, 74 (2001).

41. 457 U.S. 731, 753–54 (1982).

42. 520 U.S. 681, 703 (1997); *see also* *Bond v. United States*, 564 U.S. 211, 225–26 (2011); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (discussing injunctions to protect constitutional rights).

43. 548 U.S. 557, 635 (2006).

uniformity. Sometimes, anything short of a nationwide injunction is impossible to administer and treats similarly situated victims unequally.⁴⁴

Why do federal courts need effective national government injunctions as remedies to stop improper executive initiatives? The long-term answer is complete relief for successful plaintiffs, suppression of lawbreaking, separation of powers, the importance of the courts' role in enforcing the Constitution, judicial independence, and judicial review. Developments include the expansion of presidential power, the desiccation of congressional power, extreme partisanship in Congress, and the federal government's division between political parties.⁴⁵ The short, contemporary answer, which will be developed below, is the peril the Trump presidency poses to democratic values.

The Court of Appeals for the Seventh Circuit responded to the government's argument against a national government injunction by emphasizing the role of the trial judge (the initial decision-maker):

Although the pursuit of nationwide injunctions may be influenced by shifting political motivations, that neither means that nationwide injunctions themselves are inherently evil, nor that such injunctions should never be issued. Instead, courts in determining the proper scope of injunctive relief, must be cognizant of the potential for such injunctions to have a profound impact on national policy.⁴⁶

The legal subject of the national government injunction was essentially unstudied until 2015. Professional interest began when conservative state attorneys general sued to void Obama-era executive branch initiatives. These plaintiffs filed their lawsuits in carefully selected Texas judicial districts where

44. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1789 (1991) (observing that constitutional remedies provide relief to victims and avoid governmental breaches of the law, the latter of which is, "if not the more fundamental, at least the more unyielding").

45. KEVIN M. KRUSE & JULIAN E. ZELIZER, *FAULT LINES: A HISTORY OF THE UNITED STATES SINCE 1974*, at 170–71, 202, 296, 301–02, 310–11, 313, 350–52, 357–58 (2019).

46. See *City of Chicago v. Sessions*, 888 F.3d 272, 288 (7th Cir. 2018), *vacated in part*, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, Nos. 17-2991 & 18-2649, 2018 WL 4268814 (7th Cir. Aug. 10, 2018), *stay denied*, No. 17-2991, 2018 WL 1963679 (7th Cir. Apr. 24, 2018).

“friendly” conservative judges were predisposed to oppose Obama’s measures. Several of the handpicked judges agreed and granted injunctions against the Administration that forbade it from implementing Deferred Action for Childhood Arrivals (DACA), guidelines for treatment of transgender individuals, and minimum wage thresholds anywhere in the United States.⁴⁷ Hence, these national government injunctions had nationwide effect.

After Trump became President, the national government injunction initiative shifted from conservative to liberal. Plaintiffs, state attorneys general, often alongside membership organizations such as the American Civil Liberties Union and the Southern Poverty Law Center, sued to void Trump Administration measures and initiatives. The remedies in these lawsuits included injunctions against the Muslim ban, family separation, and withholding federal funds from sanctuary cities.⁴⁸

Litigants’ views of national government injunctions usually depend on their views of the substantive merits in the lawsuit and whether they are a winning plaintiff or a losing defendant. Because politicians are on both winning and losing sides of lawsuits, the national government injunction is bipartisan. Justice Thomas and former Attorney General Jeff Sessions had previously favored (or not disfavored) national government injunc-

47. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016) (granting a nationwide preliminary injunction of a regulation enacted pursuant to the Patient Protection and Affordable Care Act); *Nevada v. U.S. Dep’t of Labor*, 218 F. Supp. 3d 520, 533–34 (E.D. Tex. 2016) (granting a nationwide preliminary injunction of a minimum wage regulation); *Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016) (granting a nationwide preliminary injunction of federal guidelines allowing individuals to use restrooms, showers, and locker rooms based on their gender identity as opposed to their biological sex); *Nat’l Fed’n of Indep. Bus. v. Perez*, No. 5:16-cv-00066-C, 2016 WL 3766121, at *46 (N.D. Tex. June 27, 2016) (granting a nationwide preliminary injunction of the U.S. Department of Labor’s Persuader Advice Exemption Rule); *Texas v. United States*, 86 F. Supp. 3d 591, 606, 677–78 (S.D. Tex. 2015), *aff’d*, 809 F.3d 134 (5th Cir. 2015) (issuing preliminary injunction against enforcement of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)).

48. *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1160–61 (D. Haw. 2017), *aff’d in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *rev’d*, 138 S. Ct. 2392 (2018); *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 632–33 (D. Md. 2017), *aff’d*, 883 F.3d 233 (4th Cir.), *vacated*, 138 S. Ct. 2710 (2018); *Hawaii v. Trump*, 245 F. Supp. 3d 1227, 1239 (D. Haw. 2017), *aff’d in part, vacated in part*, 859 F.3d 741 (9th Cir.), *vacated as moot*, 138 S. Ct. 377 (2017); *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md. 2017), *aff’d in part, vacated in part*, 857 F.3d 554 (4th Cir.), *vacated as moot*, 138 S. Ct. 353 (2017); *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017).

tions—yet later they opposed them.⁴⁹ When Obama was President and Republicans sued to strike down his policies, Democratic state attorneys general opposed nationwide national government injunctions; now that Trump is President and Democratic attorneys general are suing to strike down his policies, they argue for nationwide national government injunctions. If the 2020 election puts a Democrat in the White House and Democratic majorities in the House and Senate, we can expect Republican attorneys general to once again favor the national government injunction.

II. PROCEDURE AND REMEDIES FOR A NATIONAL GOVERNMENT INJUNCTION

This Part traces a hypothetical plaintiff's federal lawsuit that challenges an executive branch defendant's policy, executive order, regulation, activity, or practice as violating the Constitution or a federal statute.

The plaintiff's complaint alleges that the executive branch defendant broke a substantive law. It ends with a demand for a remedy to stop the allegedly unlawful activity. The judge finds for the plaintiff on liability, holding that the government activity is illegal. The executive branch of the government is a lawbreaker basing its illegal activity on a violation of the Constitution or a statute. After the executive branch defendant loses on the substantive merits, it opposes the plaintiff's remedy.

The judge has four possible remedies. First, a declaratory judgment that tells the parties what the law says about their dispute. If the defendants ignore a declaratory judgment, the judge cannot hold them in contempt.⁵⁰ The judge's second possible remedy is this Article's focus: an injunction. An injunction is an in personam order that forbids a defendant's defined misconduct or orders defined conduct. This Article focuses more on the "forbid," or prohibitory injunction, than the mandatory injunction. The judge's remedy is to grant the successful plaintiff a

49. See *City of Chicago*, 888 F.3d at 288 (7th Cir. 2018); see also Linda Greenhouse, *Is Clarence Thomas the Supreme Court's Future?*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/opinion/contributors/clarence-thomas-supreme-court-conservative.html> [<https://perma.cc/C62L-MZ6X>].

50. Doug Rendleman, *Prospective Remedies in Constitutional Adjudication*, 78 W. VA. L. REV. 155, 162 (1976).

national government injunction that forbids the executive branch defendant's illegal activity.

The national government injunction's critics pass over the plaintiff's lawsuit and the judge's merits decision for the plaintiff against the executive branch defendant. The critics enter only at the remedies stage, when the court grants an injunction against the executive's illegal conduct. The critics argue against the shape and breadth of the judge's national government injunction.

The third and fourth possible remedies are closely related to the national government injunction: the Administrative Procedure Act (APA) remedies of vacatur⁵¹ and statutory mandamus.⁵² Under the APA's remedy section, a reviewing court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁵³ Vacatur, which means setting aside, may affect people who are not plaintiffs:

In some cases, the "agency action" will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain "programmatic" relief that affects the rights of parties not before the court.⁵⁴

Although a reviewing court will usually vacate an illegal measure, it has discretion to remand without vacatur.⁵⁵

Courts have not established the relationship between vacatur and a national government injunction. In *Regents of the*

51. See 5 U.S.C. § 706(2)(A) (2018); see also Amdur & Hausman, *supra* note 14; Frost, *supra* note 9.

52. See 28 U.S.C. § 1361 (2018) (noting that mandamus empowers federal courts to compel certain government officials and agencies "to perform a duty owed to the plaintiff").

53. 5 U.S.C. § 706(2)(A); *Mereck & Co. v. U.S. Dep't of Health & Human Servs.*, 385 F. Supp. 3d 81 (D.D.C. 2019) (vacating rule in excess of statutory authority).

54. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting)), *granting cert.*, 139 S. Ct. 2779 (2019).

55. *Nat'l Women's Law Ctr. v. Off. of Mgmt. & Budget*, 358 F. Supp. 3d 66, 92–93 (D.D.C. 2019); Ronald M. Levin, "Vacation" at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003).

University of California v. U.S. Department of Homeland Security, the court of appeals gave nationwide relief under vacatur as a reason to approve a nationwide injunction.⁵⁶ In *O.A. v. Trump*, plaintiffs sought a national government injunction.⁵⁷ The government argued that an injunction should benefit only individual plaintiffs. The judge granted vacatur but no injunction; however, he refused to vacate only in favor of plaintiffs. He determined that the whole government must obey.⁵⁸ On the other hand, in *East Bay Sanctuary Covenant v. Trump* (a case about Trump's limitation of asylum on the Mexican border) the judge granted a nationwide temporary restraining order (TRO) based on the APA section that provided for vacatur.⁵⁹

Like a declaratory judgment, vacatur will not support contempt if the defendant violates it. If the defendant obeys, which the federal government does, then vacatur extirpates the agency action and has the same practical effect as a national government injunction. Courts favoring vacatur over an injunction have emphasized that an injunction is “extraordinary.”⁶⁰

Mandamus under the federal statute allows a federal judge to compel a government agency or official “to perform a duty owed to the plaintiff.”⁶¹ Some plaintiffs have sought statutory mandamus.⁶² Mandamus under statute is a narrow and technical remedy: “Mandamus relief is appropriate only where ‘(1) the plaintiffs have a right to have the act performed, (2) the defendant is under a clear nondiscretionary duty to perform the act requested, and (3) plaintiff has exhausted all other avenues

56. 908 F.3d at 511.

57. 404 F. Supp. 3d (D.D.C. 2019).

58. *Id.* at 116–17.

59. 349 F. Supp. 3d 838, 866–67 (N.D. Cal. 2018); Council of Parent Att'ys & Advocates, Inc. v. DeVos, 365 F. Supp. 3d 28 (D.D.C. 2019), *appeal dismissed*, No. 19-5137, 2019 WL 4565514 (D.C. Cir. Sept. 18, 2019) (vacating where plaintiffs also sought an injunction).

60. *O.A.*, 404 F. Supp. 3d at 116–18.

61. 28 U.S.C. § 1361 (2018). Mandamus is also an extraordinary writ used to seek an interlocutory appeal. *See* FED. R. APP. P. 21. That will be examined below. Rule 81(b) of the Federal Rules of Civil Procedure abolishes mandamus, along with *scire facias*. Mandamus's funeral was premature. Congress passed § 1361 in 1962. Action to Compel an Officer of the United States to Perform His Duty, Pub. L. No. 87-748, 76 Stat. 744; *see* 12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3134 (3d ed. 2019). Mandamus survived. The Supreme Court's treatment of mandamus shows its confusion in *Mertens v. Hewitt Associates* that mandamus is an equitable, not a legal, remedy. 508 U.S. 248, 256 (1993).

62. M.M.M. *ex rel.* J.M.A. v. Sessions, 319 F. Supp. 3d 290 (D.D.C. 2018) (approving 28 U.S.C. § 1404 transfer where family separation plaintiffs sought mandamus).

of relief.”⁶³ In sanctuary city lawsuits, courts have granted mandamus where they have also granted injunctions, but stayed or denied nationwide injunctive relief.⁶⁴

An injunction is the plaintiff’s superior remedy because it will support contempt if the defendant violates it. Plaintiffs should also consider seeking a declaratory judgment, APA vacatur, and statutory mandamus as alternative remedies or in addition to a national government injunction.

The judge’s injunction will have two principal parts: The first part details the improper conduct and forbids it. The second part defines those required to obey the injunction. This Article de-emphasizes the first part to discuss the second part of the injunction in greater detail. The federal government is an entity created by law that acts through agents. Federal Rule of Civil Procedure 65(d)(2) contains the limiting principle: it adjures obedience to an injunction only by the defendant, the defendant’s agents, and others “in active concert or participation.”⁶⁵ This Article focuses on the requirement that a named defendant’s agents must obey an injunction against their supervisor. The second part of a national government injunction will order the named executive branch defendant and his agents to obey. Agents must obey an injunction against their principal because they do the principal’s bidding, and the principal will represent their interest along with his own.⁶⁶ The government’s vigorous and skillful defense in national government injunction lawsuits assures that the named defendant’s subordinates in the federal bureaucracy are ably and well represented. The national government injunction’s critics pass over the requirement that the executive branch defendant’s subordinate agents are obliged by the federal rule to obey.

The named defendant’s successor in office inherits the injunction along with the job.⁶⁷ Although an “agent,” the named executive branch defendant is, in effect, more of an office than a

63. *New York v. U.S. Dep’t of Justice*, 343 F. Supp. 3d 213, 241 (S.D.N.Y. 2018) (quoting *City of New York v. Heckler*, 742 F.2d 729, 739 (2d Cir. 1984)).

64. *City & County of San Francisco v. Sessions*, 372 F. Supp. 3d 928, 953–54 (N.D. Cal. 2019); *County of San Francisco v. Sessions*, 349 F. Supp. 3d 924 (N.D. Cal. 2018), *judgment entered sub nom. California ex rel. Becerra v. Sessions*, No. 3:17-CV-04701-WHO, 2018 WL 6069940 (N.D. Cal. Nov. 20, 2018); *New York v. U.S. Dep’t of Justice*, 343 F. Supp. 3d at 242–43.

65. FED. R. CIV. P. 65(d)(2); Doug Rendleman, *Beyond Contempt: Obligors to Injunctions*, 53 TEX. L. REV. 873 (1975).

66. Rendleman, *supra* note 65, at 894.

67. FED. R. CIV. P. 25(d).

person. Courts that have issued national government injunctions have applied the principle of in personam jurisdiction.⁶⁸ “A district court, pursuant to its powers in equity, ‘may command persons properly before it to cease or perform acts outside its territorial jurisdiction.’”⁶⁹ Generally, under the basic equitable principle of in personam jurisdiction, an injunction orders the defendant and its agents to obey wherever they are. The injunction operates worldwide if necessary. A judge with equity power in a lawsuit with personal jurisdiction over the defendant may order or forbid the defendant’s improper conduct everywhere.⁷⁰

The defendant’s agents must comply with an injunction everywhere those agents are. The federal government is ubiquitous in the United States. Because the government is everywhere, the injunction is also ubiquitous. The national government injunction’s critics detour around the requirement of obedience and emphasize one of the injunction’s effects: they argue, among other things, that an injunction should not “benefit” people who are not parties to the lawsuit.⁷¹ This Article emphasizes who must obey an injunction more than how an injunction affects nonparties.

Most people comply with court decisions because it is the right thing to do. If a judge grants a plaintiff an injunction, the defendant’s agents have a duty to obey because the injunction applies to the defendant plus its agents, and it is the apparent law.

If a judge grants a plaintiff an injunction that forbids or commands the defendant’s conduct, it requires the defendant to obey everywhere. A national business must be ordered to obey nationwide. Consider a patent infringement injunction against a national retail chain; the injunction bans the defendant and its agent-employees from continuing to infringe upon sales anywhere. Statutes facilitate the plaintiff’s contempt enforcement of

68. *City & County of San Francisco*, 349 F. Supp. 3d at 970; *Becerra*, 2018 WL 6069940.

69. *City & County of San Francisco*, 349 F. Supp. 3d at 970 (quoting *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) (citing *United States v. Oregon*, 657 F.2d 1009, 1016 n.17 (9th Cir. 1981) (“When a district court has jurisdiction over all parties involved, it may enjoin commission of acts outside of its district.”))).

70. See *Massie v. Watts*, 10 U.S. (6 Cranch) 148 (1810); *Koehler v. Bank of Berm. Ltd.*, 101 F.3d 863 (2d Cir. 1996); Michael Douglas, *Extraterritorial Injunctions Affecting the Internet*, 12 J. EQUITY 34, 35 n.5 (2018).

71. See Sessions Memorandum on Nationwide Injunctions, *supra* note 12; Bray, *supra* note 11; Cass, *supra* note 11; Morley, *supra* note 11, at 616; Wasserman, *supra* note 10, at 356.

trademark and copyright injunctions in other federal courts.⁷² The forum court may punish a defendant's violation of an injunction in another jurisdiction as forum contempt.⁷³

Under rule of law and traditional equitable principles, the defendant who is an executive branch official also should obey the judge's injunction. Why might the government ask for different treatment?

III. TRUMP CHALLENGES JUDICIAL REVIEW AND SEPARATION OF POWERS

The national government injunction is one important tool among several to reduce the damage the Trump Administration has inflicted and is likely to continue to inflict. "Experience over the last two years," Professor Steve Burbank write, "has reminded us that, in times of aspiring authoritarianism in the executive branch and serial subservience in the legislative branch, independent and accountable courts are the bulwark of our freedoms."⁷⁴ "This nation," the Supreme Court wrote in *Ex parte Milligan*, "has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln."⁷⁵

Trump challenges the basic principles of separation of powers and judicial review: Trump once remarked, "I have an Article II, where I have the right to do whatever I want as president."⁷⁶

The desiccation of Congress at the expense of the President set the stage for President Trump's executive activity. Trump is taking advantage of past Congresses' excessive delegations of power to the executive branch to implement his autocratic and authoritarian views. His measures threaten democratic institu-

72. See 15 U.S.C. § 1116(a), (b) (2018); 17 U.S.C. § 502(b) (2018).

73. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 237 (1998).

74. Stephen B. Burbank, *Reconsidering Judicial Independence: Forty-Five Years in the Trenches and in the Tower*, 168 U. PA. L. REV. ONLINE 18, 34 (2019).

75. 71 U.S. (4 Wall.) 2, 125 (1866).

76. Michael Brice-Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him 'the Right to Do Whatever I Want'*, WASH. POST (July 23, 2019, 7:46 PM), <https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-to-whatever-i-want/> [https://perma.cc/KSZ6-EXNH].

tions. The Republican party has been unwilling to challenge Trump's measures. History provides no guidance.⁷⁷

Trump's executive orders challenge the rule of law: the principle that "every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals" and is responsible for "every act done without legal justification."⁷⁸ Professor Driesen examined the executive orders and concluded that Trump's "collection of decrees poses an unprecedented challenge to our constitutional democracy as a system."⁷⁹ Judge Gertner wrote, "[A]ll of this may look different with new Trump appointees emboldened . . . on an explicit mission to transform the decisional law. Their goal may be to change the prevailing assumptions of the past thirty years—about civil rights, the rights of criminal defendants, checks and balances, etc."⁸⁰

For example, the Trump Administration's immigration policy of "zero-tolerance," its separation of children from their parents, and its begrudging obedience to court orders to reunite the families are unique in their overreach and long-term harm to the children.⁸¹ The Trump Administration's contempt for and disregard of separation of powers and the rule of law differs in kind from the preceding administration's approach. The Obama and Trump Administrations should not be equated.⁸²

77. Katie Shepherd, *Trump Violates All Recognized Democratic Norms, Federal Judge Says in Biting Speech on Judicial Independence*, WASH. POST (Nov. 8, 2019, 4:41 AM), <https://www.washingtonpost.com/nation/2019/11/08/judge-says-trump-violates-democratic-norms-judiciary-speech/> [https://perma.cc/B9SF-MRVC].

78. A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 189 (6th ed. 1902).

79. David M. Driesen, *President Trump's Executive Orders and the Rule of Law*, 87 UMKC L. REV. 489, 490 (2019).

80. Nancy Gertner, *The "Lower" Federal Courts: Judging in a Time of Trump*, 93 N.Y.U. L. REV. ONLINE 7, 13 (2018).

81. Maria Sacchetti, *ACLU Says 1,500 More Migrant Children Were Taken from Parents by the Trump Administration*, WASH. POST (Oct. 24, 2019, 7:28 PM), <https://www.washingtonpost.com/immigration/aclu-says-1500-more-migrant-children-were-taken-from-parents-by-trump-administration/2019/10/24/d014f818-f6aa-11e9-a285-882a8e386a96> [https://perma.cc/MM4R-B9MH]; Maria Sacchetti, *ACLU: U.S. Has Taken Nearly 1,000 Child Migrants from Their Parents Since Judge Ordered Stop to Border Separations*, WASH. POST (July 30, 2019, 2:03 PM), <https://www.washingtonpost.com/immigration/aclu-us-has-taken-nearly-1000-child-migrants-from-their-parents-since-judge-ordered-stop-to-border-separations/07/30/bde452d8-b2d5-11e9-8949-5f36ff92706e> [https://perma.cc/3LW7-3ETY].

82. See Driesen, *supra* note 79, at 518–24.

Federal judges have ruled against the Trump administration at least 63 times over the past two years, an extraordinary record of legal defeat that has stymied large parts of the president's agenda on the environment, immigration and other matters. . . .

. . . .

. . . [T]he rulings so far paint a remarkable portrait of a government rushing to implement far-reaching changes in policy without regard for long-standing rules against arbitrary and capricious behavior.⁸³

Trump is the President our forefathers warned us against.⁸⁴ Madison and Hamilton feared concentrated power. As the Seventh Circuit noted in *City of Chicago v. Sessions*:

The founders of our country well understood that the concentration of power threatens individual liberty and established a bulwark against such tyranny by creating a separation of powers among the branches of government. If the Executive Branch can determine policy, and then use the power of the purse to mandate compliance with that policy by the state and local governments, all without the authorization or even acquiescence of elected legislators, the check against tyranny is forsaken.⁸⁵

83. Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration Is Constantly Losing in Court*, WASH. POST (Mar. 19, 2019, 10:05 AM), <https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9> [https://perma.cc/MCY5-SLBE]; see also Fred Barbash, *Trump's Immigration Policies Fail Time and Again When Faced with Scrutiny from the Federal Courts*, WASH. POST (Apr. 11, 2019, 5:07 PM), <https://www.washingtonpost.com/world/national-security/trumps-immigration-policies-fail-time-and-again-when-faced-with-scrutiny-from-the-federal-courts/2019/04/11/e2bfcc5a-5bb3-11e9-9625-01d48d50ef75> [https://perma.cc/L83B-22QX] (reporting twenty-five Trump losses in immigration cases).

84. Ron Chernow, *Hamilton Pushed for Impeachment Powers. Trump Is What He Had in Mind*, WASH. POST (Oct. 18, 2019), <https://www.washingtonpost.com/outlook/2019/10/18/hamilton-pushed-impeachment-powers-trump-is-what-he-had-in-mind/> [https://perma.cc/X8FL-Q9NC].

85. *City of Chicago v. Sessions*, 888 F.3d 272, 277 (7th Cir. 2018), *stay denied*, 2018 WL 1963679 (7th Cir. Apr. 24, 2018), *reh'g en banc granted in part, opinion*

Former federal District Judge Nancy Gertner concluded that the “challenges to checks and balances, to the separation of powers, even to elementary notions of federalism, are not abstract but concrete; not aberrant but systemic.”⁸⁶

Trump’s excesses are not the reason for the national government injunction, but they illustrate why courts need the national government injunction as an available judicial remedy. Trump’s disregard for the integrity of democratic institutions, norms, processes, and rules threatens our constitutional order and the rule of law. His authoritarian, unilateralist approach to government threatens government by decree. His impulsive disrespect for the traditional limits on his office has opened a new frontier in executive overreach.⁸⁷ Will the constitutional system of separation of powers, an independent judiciary, federalism, and freedom of speech provide accountability?⁸⁸

In 2019, Trump’s complete opposition to congressional oversight subpoenas opened a new chapter in the question of continuing obedience to court orders.⁸⁹ Trump’s refusal to cooperate with the House of Representatives’ inquiry seeking testimony and documents as part of the impeachment process raised questions about the executive branch’s willingness to obey court orders and injunctions. In response to one refusal, Judge Ketanji Brown Jackson wrote:

[B]latant defiance of Congress’ centuries-old power to compel the performance of witnesses is not an abstract injury, nor is it a mere banal insult to our democracy. It is an affront to the mechanism for curbing abuses of power that the Framers carefully crafted for our protection, and, thereby, recalcitrant

vacated in part, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018).

86. Gertner, *supra* note 80, at 85.

87. Shepherd, *supra* note 77.

88. See Gertner, *supra* note 80 (outlining no appreciation of constitutional checks and balances, no sense of the limits of his own authority).

89. See Jennifer Rubin, *If the Administration Defied a Court Order, All Bets Are Off*, WASH. POST (June 2, 2019, 10:00 AM), <https://www.washingtonpost.com/opinions/2019/06/02/if-administration-defied-court-order-all-bets-are-off/> [https://perma.cc/T6A3-WJP6]; Steve Vladeck, *Trump Isn’t Just Defying Congress. He’s Rejecting the Whole Idea of Oversight.*, WASH. POST (Apr. 26, 2019, 11:53 AM), https://www.washingtonpost.com/outlook/trump-isnt-just-defying-congress-hes-rejecting-the-whole-idea-of-oversight/2019/04/26/acf0a00a-67c9-11e9-a1b6-b29b90efa879_story.html [https://perma.cc/XMP8-JK3V].

witnesses actually undermine the broader interests of the People of the United States.⁹⁰

If it occurs, disobedience will undermine the integrity of the law and the public's respect for it.⁹¹

Does the executive branch accept a powerful and independent judiciary? The Trump Administration has thus far complied with every national government injunction against it.⁹² Professor Parrillo is less optimistic about obedience. Parrillo wrote that contempt's shaming power

depends on how deeply and exclusively the defendant official is committed to the group(s) that hold dear the norm.

....

... Rising partisan polarization could, ultimately, diminish the shaming power of contempt findings if people affiliated with a political party come to dismiss any contempt finding that goes against officials of their party.⁹³

Whether that prediction describes the present state of the Trump Administration's recalcitrance and polarization remains to be seen.

Then-Attorney General Jeff Sessions did not realize he was supporting this Article's concern about Trump's improper activity when he said of national government injunctions that "[t]his kind of judicial activism did not happen a single time in our first 175 years as a nation, but it has become common in recent years.

90. Comm. on Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 191 (D.D.C. 2019), *vacated and remanded sub nom.* Comm. on Judiciary v. McGahn, 951 F.3d 510 (D.C. Cir. 2020), *reh'g en banc granted, opinion vacated sub nom.* U.S. House of Representatives v. Mnuchin, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020)

91. Steve Vladeck, *What Would Happen if Trump Ignored a Divided Supreme Court Ruling Against Him?*, WASH. POST (Oct. 14, 2019, 4:00 AM), <https://www.washingtonpost.com/outlook/2019/10/14/what-would-happen-if-trump-ignored-divided-supreme-court-ruling-against-him/> [https://perma.cc/A5MC-YGRC].

92. Tara Leigh Grove, *Foreword: Some Puzzles of State Standing*, 94 NOTRE DAME L. REV. 1883 (2019).

93. Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 791–93 (2018).

It has happened to the Trump administration 25 times in less than two years.”⁹⁴ This Article was written in 2018 and 2019 in the hope that, after the 2020 election, much of it will have become obsolete because the United States will have returned to a “normal” level of executive lawbreaking, with the federal court’s injunction remedy intact.⁹⁵

This Article’s central idea is that Trump’s threat to the Constitution and basic liberties needs to be curbed. The nationwide national government injunction is one part of that effort. As King Henry cried in Shakespeare’s *Henry V*: “Once more unto the breach, dear friends, once more.”⁹⁶

IV. REPLY TO CRITICS OF THE NATIONWIDE NATIONAL GOVERNMENT INJUNCTION

What do critics think is improper about a national government injunction? Critics of national government injunctions articulate several reasons to oppose them: The federal court lacks authority, power, or jurisdiction to grant a national government injunction. National government injunctions encourage forum shopping. They create a risk of conflicting injunctions. They politicize the judiciary.

National government injunctions, critics also argue, erode the percolation of issues in the federal courts. They distort the usual operation of precedent. An argument that critics empha-

94. Press Release, U.S. Dep’t of Justice, Attorney General Sessions Releases Memorandum on Litigation Guidelines for Nationwide Injunctions Cases (Sept. 13, 2018), <https://www.justice.gov/opa/pr/attorney-general-sessions-releases-memorandum-litigation-guidelines-nationwide-injunctions> [https://perma.cc/XJM4-EDWM].

95. Another indirect confirmation of the Trump Administration’s differences in kind comes from observing big-firm lawyers. Republicans have found it difficult to find and pay lawyers to challenge measures from the Obama Administration; the lawyers discovered that the work was unpopular in their firms. But skilled lawyers who are excited to oppose Trump Administration measures are working pro bono, without fees. “There’s a whole range of stuff that Republican administrations engage in all the time, and you don’t see the law firms challenging it,” former Acting Solicitor General and current Hogan Lovells partner Neal Katyal said. “But what’s going on here, like the census case, is so beyond the pale. That’s why you’re seeing lawyers stand up and do this.” Jacqueline Thomsen, *Big Law Billed Republicans Millions to Sue Obama. Against Trump, Firms Are Working for Free*, LAW.COM (Aug. 22, 2019, 3:00 PM), <https://www.law.com/nationallawjournal/2019/08/22/big-law-billed-republicans-millions-to-sue-obama-against-trump-firms-are-working-for-free/> [https://perma.cc/F95F-3FHY] (explaining that House Republicans struggled to find lawyers willing to work on their challenges to the Obama Administration due to the unpopularity of the stances).

96. WILLIAM SHAKESPEARE, *HENRY V* act 3, sc. 1.

size is that national government injunctions benefit nonparties. Critics also maintain that a national government injunction creates asymmetry. Finally, critics' best argument is that a national government injunction allows a single trial judge to stop the whole federal executive branch of the United States government.

This Article disagrees with the national government injunction's critics. It favors a judge's ability to grant a nationwide national government injunction. Its position is that a federal district judge has jurisdiction and authority to grant an injunction that bars the federal executive from implementing an unconstitutional or illegal federal government program anywhere in the United States.

This Article responds to the critics' arguments. It maintains that their arguments are unconvincing, incorrect, overstated, or only true some of the time. It rephrases the critics' final argument as contesting the role of a federal court in halting illegal federal executive overreach. It concludes that if the federal courts develop, apply, and mold important procedural and equitable filters and principles of confinement, a federal court may grant a plaintiff a nationwide national government injunction against an executive branch defendant's improper activity.

Critics' opposition to national government injunctions resembles arguments for tort reform. In this context, large-scale tortfeasors, who are unlikely underdogs, take their arguments to appellate courts and legislatures. They posit mistrust for the judges and juries who made the initial decisions, and they oppose what they view as excessive remedies. Similarly, in opposing a national government injunction, executive branch defendants, who have already lost on the merits, seek to circumscribe the winner's remedy. The national government injunction's opponents have sought relief in both legislatures and courts. A damages cap is a typical tort reform goal.⁹⁷ Opponents here similarly seek to "cap" or reduce the size or breadth of the injunction that the trial judge may grant.

Injunction reform has taken legislative form. This Article will mention only the high points of earlier legislative injunction reform. The granddaddy is the Norris-LaGuardia Act, which

97. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); see also AM. TORT REFORM ASS'N, <https://www.atra.org> (last visited Nov. 26, 2019) [<https://perma.cc/BUK2-8LG4>].

curbs a federal court's ability to enjoin a strike.⁹⁸ The Prison Litigation Reform Act⁹⁹ also legislated another injunction reform against structural condition injunctions in prisons.

Grandstanding members of Congress have introduced “jurisdiction-stripping” bills and constitutional amendments, for example, to end federal judges’ busing injunctions to desegregate schools.¹⁰⁰ Legislative injunction reform bills have been introduced in both the 115th and 116th Congresses to forbid nonparty national government injunctions (except in class actions) and to limit attacks on federal measures to the District of Columbia district courts.¹⁰¹

Before the 2018 election, when the Republicans controlled the House of Representatives, a House subcommittee held a hearing on legislation that would limit national government injunctions to the District of Columbia federal courts.¹⁰² Following the 2018 election, the new Democratic majority in the House seems unlikely to renew interest in legislation that reduces federal courts’ ability to curb illegal Trump Administration measures. All of the bills’ sponsors have been Republicans. Although my calls to committee staff lawyers were not returned, a likely conclusion is that the House bills are dead on arrival in the Democratic House, and if the Senate takes any action on the Senate bills, they are dead on arrival in the House.

98. See 29 U.S.C. §§ 101–110 (2018).

99. See 18 U.S.C. § 3626 (2018).

100. Roberts, *supra* note 27, at 628 n.146.

101. Nationwide Injunction Abuse Prevention Act of 2019, S. 2464, 116th Cong. (2019); Nationwide Injunction Abuse Prevention Act of 2019, H.R. 4292, 116th Cong. (2019); Injunctive Authority Clarification Act of 2019, H.R. 77, 116th Cong. (2019); Injunctive Authority Clarification Act of 2018, H.R. 6730, 115th Cong. (2018); Assigning Proper Placement of Executive Action Lawsuits Act (APPEAL Act), H.R. 2660, 115th Cong (2017).

102. *The Role and Impact of Nationwide Injunctions by District Courts: Hearing Before Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 115th Cong. (Nov. 30, 2017); H.R. 2660; see also H.R. 6730, 115th Cong. (2018) (directing that no federal court may issue “an order that purports to restrain the enforcement against a non-party of any statute, regulation, order, or similar authority”). In February 2020, a Senate committee held a hearing on one of the injunction reform bills. The senators appeared to conclude that the courts should decide how to handle nationwide injunctions. Jacqueline Thomsen, *Lawmakers, Stuck in Political Deadlock, Look to Supreme Court to Fix National Injunctions*, LAW.COM: NAT'L L.J. (Feb. 25, 2020, 1:31 PM) <https://www.law.com/nationallawjournal/2020/02/25/lawmakers-stuck-in-political-deadlock-look-to-supreme-court-to-fix-national-injunctions/> [https://perma.cc/DJ2E-KTCH].

One of this Article's goals is to show that neither judicial nor legislative injunction reform of nationwide national government injunctions is needed.

A. *The Federal Courts' Jurisdiction and Authority*

This Article will next discuss the federal courts' authority under the technical subject of jurisdiction. This lengthy treatment establishes the federal courts' authority and jurisdiction and articulates the federal courts' posture toward the national government injunction.

Critics question the federal courts' ability, authority, or jurisdiction to grant a national government injunction.¹⁰³ The constitutional argument against nationwide injunctions is difficult to figure out. The argument that federal judges lack the authority or jurisdiction to grant national government injunctions is both underdeveloped and understated. Justice Thomas and other critics seem to assert that the nationwide injunction is not included in the federal courts' Article III "judicial Power" or "Equity" power.¹⁰⁴ They appear to base this assertion on the argument that the nationwide injunction only recently emerged as a remedy. Justice Thomas seeks to limit the courts' remedial power and to return the federal courts' remedial power to an imagined past. Careful scholarship has uncovered nonparty injunctions and precursors of the nationwide injunction far earlier than critics assert. The federal courts' Article III power to decide cases in "Equity" extends jurisdiction to all levels of the United States courts to grant an injunction. Jurisdiction in equity includes jurisdiction to grant a plaintiff a broad injunction as relief for a defendant's wrong. The constitutional argument against the national government injunction fails.¹⁰⁵

This Article will develop the federal courts' authority¹⁰⁶ and jurisdiction.¹⁰⁷ This discussion is based on traditional equitable

103. See Bray, *supra* note 11; Morley, *supra* note 11, at 616; Wasserman, *supra* note 10.

104. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–29 (Thomas, J., concurring).

105. See Brief of Amici Curiae Legal Historians in Support of Plaintiff and Appellee the City of Chicago at 26–28, *City of Chicago v. Whitaker*, No. 18-2885 (7th Cir. Nov. 15, 2018); Trammell, *supra* note 9; Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020); James E. Pfander & Jacob Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. (forthcoming 2020) (manuscript at 4 n.13).

106. *Trump v. Hawaii*, 138 S. Ct. at 2424–29 (Thomas, J., concurring).

107. See Bray, *supra* note 11; Wasserman, *supra* note 10.

analysis of subject matter jurisdiction and equitable jurisdiction. It is based on and follows the late Harvard Professor Zechariah Chafee's 1950 analysis in *Some Problems of Equity*.¹⁰⁸ It distinguishes the two. It identifies the courts' subject matter jurisdiction to grant a nationwide national government injunction. It classifies decisions about a national government injunction under equity jurisdiction, and it analyzes the consequences of that classification.

1. Subject Matter Jurisdiction

A court's jurisdiction falls under two major headings. First is its personal jurisdiction over the defendant. This Article's discussion of the national government injunction takes the federal courts' personal jurisdiction over the defendant for granted. Second, is our topic: subject matter jurisdiction.

A court has subject matter jurisdiction when the Constitution or statute says that this court can decide this kind of dispute.¹⁰⁹ An opponent of a judgment has an incentive to characterize it as based on a lack of jurisdiction and void, rather than erroneous. The opponent seeks to obtain the benefit of lack of jurisdiction: voidness instead of error.

A court's decision that subject matter jurisdiction is absent differs from its conclusion that an earlier decision is substantively incorrect. A decision by a court without subject matter jurisdiction is void; it is vulnerable to collateral attack in a later lawsuit. A void judgment is not entitled to preclusive *res judicata* effect or to full faith and credit. There are no time limits on collateral attack. One benefit is that a timing rule that defines subject matter jurisdiction may be raised at any time, or *sua sponte* by the judge, because the proceeding is void. On the other hand, if a filing requirement is not jurisdictional, the defendant must raise it in a timely manner or else it will be waived.¹¹⁰ A second benefit for the defendant is that a void injunction will not support criminal contempt but, because of the collateral bar rule, an incorrect injunction will.¹¹¹

A decision by a court with subject matter jurisdiction that is substantively incorrect is erroneous. It is entitled to preclusive

108. ZECHARIAH CHAFEE, JR., *SOME PROBLEMS IN EQUITY* 302 (1950).

109. *Id.*

110. *Fort Bend County v. Davis*, 139 S. Ct. 1843 (2019).

111. *Walker v. City of Birmingham*, 388 U.S. 307, 321 (1967).

res judicata effect or to full faith and credit in a collateral attack. An opponent's direct attack must occur within time limits. A substantively incorrect injunction will support the defendant's criminal contempt.

For a court of general jurisdiction, the test for subject matter jurisdiction is straightforward: do the Constitution and statutes give this court the power to decide this kind of lawsuit?¹¹² Federal courts' subject matter jurisdiction is more complex because federal district courts are courts of limited jurisdiction with two principal heads: diversity of citizenship and litigation "arising under" the federal Constitution or laws.¹¹³ This Article discusses the second form of federal jurisdiction. The federal question lawsuits we are studying "arise under" because the plaintiffs sue federal executive branch defendants who, plaintiffs allege, are violating the federal Constitution, statutes, or policy.

Article III grants the federal courts subject matter jurisdiction over "all Cases, in Law and Equity."¹¹⁴ This grant includes the federal courts' power to issue the equitable remedy of an injunction.¹¹⁵ This Article analyzes the type of injunction the federal court may grant.

A court's subject matter jurisdiction does not depend on the merits of the lawsuit.¹¹⁶ A decision of a court without subject matter jurisdiction is void without referring to whether the decision is "correct" under substantive law.¹¹⁷ "The test of jurisdiction is not [the court's] right decision, but the [court's] right to enter upon the inquiry and make some decision."¹¹⁸

Professor Chafee supported his points about a court's subject matter jurisdiction with two policies. First is the "bright line" policy: "The boundary between judicial power and nullity should . . . if possible, be a bright line, so that very little thought is required to enable judges to keep inside it."¹¹⁹ A judge should be able to decide on subject matter jurisdiction—whether this

112. See CHAFEE, *supra* note 108, at 302 ("If th[e] requisites are satisfied, . . . we can say that a federal district court almost always has jurisdiction over the subject matter.").

113. U.S. CONST. art. III; 28 U.S.C. § 1331 (2018).

114. U.S. CONST. art. III, § 2.

115. The Judiciary Act of 1789 section 11 was not carried into the 1948 revision.

116. See CHAFEE, *supra* note 108, at 297.

117. See *id.* at 308.

118. *Id.* (quoting *United States v. Ness*, 230 F. 950, 953 (8th Cir. 1916), *rev'd*, 245 U.S. 319 (1917)).

119. *Id.* at 312.

lawsuit belongs in this court—by applying a “bright line” or simple, straightforward rule about the court. Neither the merits of the litigation nor the relief the plaintiff seeks are relevant to subject matter jurisdiction.

Second, is the “first things first” policy: “Most well-recognized limitations on judicial power are of such a nature that a trial court can dispose of them rapidly in a preliminary proceeding before going into the merits at all.”¹²⁰ The judge should decide on the court’s subject matter jurisdiction before reaching the more complex decision on the lawsuit’s substantive merits and remedy. In brief, a court should decide lack of jurisdiction at the outset of a lawsuit by applying straightforward rules. An example that first-year civil procedure students study is the requirement that a defendant must raise lack of personal jurisdiction right away, at peril of waiving it.¹²¹

In addition to the court’s subject matter jurisdiction, a judge must heed the principles of correct substantive and remedial decision-making. A judge’s decision that is contrary to these principles is wrong. The judgment is erroneous; an appellate court ought to reverse it. But the judgment is valid and entitled to both preclusion and full faith and credit.¹²²

Courts may confuse questions of power or jurisdiction with those of judgment or discretion. Courts have struggled with the distinction between mistaken-but-valid injunctions and void ones. Violations of defective and objectionable injunctions tempt appellate courts to find that the injunction is void to avoid the criminal contempt that the collateral bar rule inevitably produces. “Where concepts like ‘subject matter jurisdiction’ are held out as placing limitations on a court’s authority to decide, the issue may be better understood in terms of the well-developed principles concerning the exercise of jurisdiction.”¹²³

The present Supreme Court appears to favor tight definitions of subject matter jurisdiction as it relates to timing and deadlines. In *Steel Co. v. Citizens for a Better Environment*, the Court defined subject matter jurisdiction as “the courts’ statu-

120. *Id.* at 317.

121. FED. R. CIV. P. 12(g)–(h). A federal court’s subject matter jurisdiction is too important to be waived. *See* FED. R. CIV. P. 12(h)(3).

122. *Fauntleroy v. Lum*, 210 U.S. 230, 236–37 (1908); RESTATEMENT (SECOND) OF JUDGMENTS § 30 (AM. LAW INST. 1982).

123. Douglas, *supra* note 70, at 41–42, 45 (emphasis omitted).

tory or constitutional power to adjudicate the case.”¹²⁴ The Court’s decision examined filing requirements that defendants have characterized as jurisdictional to avoid deadlines. In 2019, the Court said that it needed “[t]o ward off profligate use of the term” jurisdiction.¹²⁵ In 2010, the Court criticized promiscuous “drive-by jurisdictional rulings.”¹²⁶ Jurisdiction, the Court said, refers to “a court’s adjudicatory authority” and is correctly applied only to “prescriptions delineating the classes of cases” (subject matter jurisdiction) and the persons (personal jurisdiction) implicating that authority.¹²⁷ In *Fort Bend County v. Davis* in 2019, the Court rejected the defendant’s argument that a claim-filing requirement was jurisdictional. The defendant must timely raise the non-jurisdictional claim-processing rule or forfeit it.¹²⁸

The Court’s tight definitions of subject matter jurisdiction appear to implement Chafee’s “bright line” and “first things first” policies. In *Stern v. Marshall*, it said that “[b]ecause ‘[b]randing a rule as going to a court’s subject-matter jurisdiction alters the normal operation of our adversarial system,’ [we are not inclined to interpret statutes as creating a jurisdictional bar] when they are not framed as such.”¹²⁹ “[T]raditional tools of statutory construction,” the Court said in 2015 in *United States v. Kwai Fun Wong*, “must plainly show that Congress imbued a procedural bar with jurisdictional consequences.”¹³⁰

124. 523 U.S. 83, 89 (1998) (emphasis omitted); see also *Fort Bend County v. Davis*, 139 S. Ct. 1843 (2019); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994).

125. *Fort Bend County*, 139 S. Ct. at 1848 (quoting *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145 (2013)). The subject matter jurisdiction issue in 2019 was whether “Title VII’s charge-filing precondition to suit [is] a ‘jurisdictional’ requirement that can be raised at any stage of a proceeding; or is . . . a procedural prescription mandatory if timely raised, but subject to forfeiture if tardily asserted.” *Id.* at 1846.

126. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010) (asserting that the copyright registration prerequisite for suing was not jurisdictional). In 2019, the Court approved the registration prerequisite to sue when a defendant timely moved to dismiss. *Fourth Estate Public Benefit Corp. v. Wall-Street.com, L.L.C.*, 139 S. Ct. 881, 892 (2019).

127. *Fort Bend Cty.*, 139 S. Ct. at 1848 (citing *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)).

128. *Id.* at 1849.

129. 564 U.S. 462, 479–80 (2011) (quoting *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011)).

130. 135 S. Ct. 1625, 1632 (2015).

The federal court has subject matter jurisdiction in equity to grant the equitable remedy of an injunction, which includes a broad, even nationwide, injunction.

2. Equity Jurisdiction

What is equity jurisdiction and how does equity jurisdiction fit with subject matter jurisdiction in determining the difference between void and erroneous judgments? Courts' decisions about equity jurisdiction are decisions about whether to grant an equitable remedy and, if so, what form it should take.

Chafee discussed courts' fuzzy thinking about equity jurisdiction. He began by addressing the limited federal subject matter jurisdiction that exists when the Constitution and statutes grant the courts power because the United States district court has Article III power in "Equity." As a court of equity, the judge has power to grant an injunction. The court, we assume, has personal jurisdiction over the defendant. If so, the judge has subject matter jurisdiction. The judge's subject matter jurisdiction means that the judge's decisions about equity jurisdiction and the judge's injunction decision are valid, not void.¹³¹

Lack of equity jurisdiction, Chafee maintained, means that an injunction is erroneous. It does not mean the injunction is void. Equity jurisdiction is not jurisdictional. "[T]oday, with law and equity merged in a single court, equity jurisdiction . . . is simply a bundle of sound principles of decision concerning particular kinds of relief."¹³²

A court's decision about equity jurisdiction is not a question of power but one of judgment, discretion, and wisdom. Chafee doubted "if there are any truly void decrees from courts with equity powers, except for lack of jurisdiction over the person."¹³³ Courts have jurisdiction to decide both bad claims and good claims. A federal district judge with subject matter jurisdiction in equity to grant an injunction has equitable discretion to grant an injunction that is erroneous. "In cases of doubt, it is wise to let the rule in question operate merely as a principle of right decision like most other judge-made and statutory rules."¹³⁴ Characterizing a valid but erroneous injunction as a void one is,

131. CHAFEE, *supra* note 108, at 304.

132. *Id.*

133. *Id.* at 374.

134. *Id.* at 311.

Chafee wrote, “a clumsy way to get rapid review of [an] especially objectionable decree”¹³⁵

Equity jurisdiction, in Chafee’s better view, does not limit the federal courts’ power to decide. It deals, in Chief Justice Stone’s words, with “whether the case is one for the peculiar type of relief which a court of equity is competent to give.”¹³⁶ If it is the latter, a federal district court judge has subject matter jurisdiction to decide the issues in this lawsuit and to grant this plaintiff relief—a national government injunction—if “the case is one for the peculiar type of relief which a court of equity is competent to give.”¹³⁷

The court’s subject matter jurisdiction to grant an injunction includes the power to grant an incorrect injunction. An erroneous nationwide national government injunction does not show a lack of subject matter jurisdiction or power, but a mistaken use of power: it is incorrect, but it is not void.

The legal system, Chafee insisted, needs an avenue for “rapid relief from a very obnoxious kind of injunction.”¹³⁸ This avenue takes the form of stays and accelerated appeals. A defendant who disagrees with an injunction should move to modify or dissolve it, or file an appeal, instead of violating the injunction and arguing against it if charged with criminal contempt. Because he favored respect for the law and the rule of law, Chafee condemned the defendant’s disobedience. “Respect for courts,” he wrote, “will best be promoted by a hard and fast rule that all valid decrees must be obeyed until set aside by a judge.”¹³⁹

If an early analogy vindicates equity jurisdiction for a nationwide national government injunction, the writ of mandamus in *Marbury v. Madison* is an early analogy to the national government injunction. “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”¹⁴⁰ Mandamus, an order to a defendant to do something within the defendant’s

135. *Id.* at 380.

136. *Di Giovanni v. Camden Fire Ins.*, 296 U.S. 64, 69 (1935).

137. *Id.*

138. CHAFEE, *supra* note 108, at 347.

139. *Id.* at 360.

140. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 161 (1803).

duty,¹⁴¹ is a functional mandatory injunction. The mandamus in *Marbury* is a legal remedy by an individual against the federal executive. The legal writs—mandamus and prohibition—provided specific relief against government misconduct and served as precursors of injunctions.¹⁴²

While mandamus withered, the injunction flourished. The injunction became a remedy of choice: the central prospective equitable remedy. Pfander and Wentzel’s careful research shows several crucial points.¹⁴³ Technicalities chipped away at federal mandamus. State courts nevertheless adopted and broadened the legal writs of mandamus, certiorari, and prohibition to suppress improper government measures. When the state courts perceived the legal writs were no longer adequate legal remedies, they turned to equity and the injunction remedy to stop improper government measures and to obviate a multiplicity of suits. After Congress enacted the federal courts’ general federal question jurisdiction in 1875, the federal courts turned to these state equity precedents to wield injunctions against government overreach.¹⁴⁴

Pfander and Wentzel correctly reproach the national government injunction’s critics for equitable originalism, for looking too narrowly for support only on the equity side, and for overlooking the permeability between state and federal courts as well as between legal and equitable remedies. “A jurisprudence of constitutional remedies that measures the legitimate scope of modern federal equity by looking to the practices of the High Court of Chancery, circa 1789, will,” they wrote, “capture only a partial view of the remedies available to suitors in the early republic.”¹⁴⁵

The difficult contemporary decision for equity jurisdiction and subject matter jurisdiction is Justice Scalia’s 1999 majority opinion in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond*

141. See 28 U.S.C. § 1361 (2018) (noting that mandamus empowers federal courts to compel certain government officials and agencies “to perform a duty owed to the plaintiff”).

142. Pfander & Wentzel, *supra* note 105 (manuscript at 4 n.13).

143. *Id.* (manuscript at 33).

144. Pfander and Wentzel use this history to reach *Ex parte Young*, 209 U.S. 123 (1908), where the Supreme Court approved a federal injunction that forbade a state attorney general from enforcing an unconstitutional state statute and contempt for its violation. See generally Pfander & Wentzel, *supra* note 105.

145. Pfander & Wentzel, *supra* note 105 (manuscript at 10–11).

*Fund, Inc.*¹⁴⁶ The Court's divided decision held that in a general creditor's transitory contract action to recover a debt of money damages, the federal district court could not grant the creditor-plaintiff an asset-freezing injunction against its debtor. An asset-freezing injunction is an interlocutory injunction that bars a defendant from thwarting the plaintiff's later efforts to collect a money judgment. A federal district court could grant a plaintiff an asset-freezing injunction only if a statute allowed one or if the plaintiff demanded an equitable remedy but not monetary damages.¹⁴⁷

Justice Scalia's majority opinion sought "an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."¹⁴⁸ It went on to hold that "[b]ecause such a remedy was historically unavailable from a court of equity, we hold that the District Court had no authority to issue a preliminary injunction preventing [defendants] from disposing of their assets pending adjudication of [plaintiffs'] contract claim for money damages."¹⁴⁹

If equity jurisdiction included only those remedies administered by the English Court of Chancery at the time of the separation of the two countries, then this static originalism and plain meaning is classic Scalia. He misses the merger of law and equity as well as the rise of the injunction. He seems, however, to pass over the question of whether equity jurisdiction is jurisdictional. He overlooks the traditional distinction between, on one hand, absence of power or subject matter jurisdiction which leads to voidness and, on the other, equity jurisdiction and mistaken use of power which leads to erroneousness.

Alliance Bond Fund lacks the hallmarks of subject matter jurisdiction. An asset-freezing injunction is not forbidden; it is available when the plaintiff sues for an equitable remedy or un-

146. 527 U.S. 308 (1999). This draws on the treatment in Chapter 7 of DOUG RENDLEMAN, *COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES, AND CONTEMPT* 895 (2010), that emphasizes the decision's international and debtor-creditor features. See also Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291 (2000).

147. See *Alliance Bond Fund*, 527 U.S. at 326–27 (noting that the Judiciary Act of 1789 did not give courts the power to grant the relief sought by respondents).

148. *Id.* at 318 (quoting *Atlas Life Ins. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)).

149. *Id.* at 333.

der a statute. An asset-freezing injunction is a serious innovation. It is usually interlocutory based on incomplete procedure. It is disconnected from the merits—a money judgment. Its closest relative is pre-judgment attachment.

As we will see below, the judge may grant a nationwide national government injunction to an injunction class. This availability of a national government injunction militates against the idea that the court lacks subject matter jurisdiction or equitable jurisdiction to grant one in a non-class action. Chafee's tie-breaker between voidness and error is equity jurisdiction: "In cases of doubt, it is wise to let the rule in question operate merely as a principle of right decision like most other judge-made and statutory rules."¹⁵⁰

In her *Alliance Bond Fund* dissent, Justice Ginsburg was wiser about equity jurisdiction. She wrote that the principles of equity include the more general principle that the Court is able to grant an injunction when the plaintiff's remedy at law is inadequate. "[T]he Court," she wrote, "relies on an unjustifiably static conception of equity jurisdiction."¹⁵¹ Equitable relief may only be limited by statute. Equity is flexible; it evolves over time.¹⁵² The merger of law and equity as well as other developments mean that a contemporary plaintiff may seek an injunction and damages in a single lawsuit. Because equity grows with the changing times, Justice Ginsburg argued, the Court has equity jurisdiction to grant an appropriate plaintiff an asset-freezing injunction.¹⁵³ With respect, Justice Ginsburg's view is better than Justice Scalia's because it is soundly based in history and policy.

Justice Ginsburg is not the only jurist to espouse that idea. "If the law is to survive and flourish," the late Judge Patricia Wald said in a speech,

150. CHAFEE, *supra* note 108, at 311.

151. *Alliance Bond Fund*, 527 U.S. at 336 (Ginsburg, J., dissenting); *see also* Pfander & Wentzel, *supra* note 105 (manuscript at 8) ("More troubling yet, [the critics] may deprive equity of its characteristic ability to adapt to changes in the remedial system as a whole.").

152. *See* Frost, *supra* note 9, at 1084. Frost subscribes to Justice Ginsburg's view of equity jurisdiction but does not footnote Justice Ginsburg's idea that equity evolves to solve new problems.

153. But Justice Ginsburg goes too far in approving the asset-freezing injunction on appeal; the debtor's preference shouldn't be enough to qualify the creditor for an asset-freezing injunction. *See* David Capper, *The Need for Mareva Injunctions Reconsidered*, 73 *FORDHAM L. REV.* 2161, 2172 (2005).

it must change and develop through experience, application to new situations, testing in new circumstances, infusion of new knowledge. Today, it seems, we shy from that philosophy for fear it may draw the stigma of “legal activism.” But labels are deceiving and too often intimidating. The truth is that life does change and the law must adapt to that inevitability.¹⁵⁴

Lack of standing may be a defect in subject matter jurisdiction. Critics of nationwide national government injunctions combine questions about plaintiffs’ standing with jurisdiction.¹⁵⁵ Professor Frost responds correctly, in my view, that standing defines entry—the threshold of litigation—but not remedy. After deciding for the plaintiff on the merits, the appropriate remedy will be determined by the judge.¹⁵⁶ To seek an injunction, a plaintiff must have both “remedial standing” and injury. Remedial standing stems from the Supreme Court’s 1983 decision in *City of Los Angeles v. Lyons*.¹⁵⁷ Lyons sued the City and sought an injunction; he claimed that a police officer’s use of a choke hold on him was unconstitutional misconduct. The Court held that, while Lyons might have standing to recover damages for his past injury, he lacked standing to sue for an injunction to bar the future use of choke holds by L.A. police officers unless he could show that he was threatened with a choke hold in the future.¹⁵⁸

While plaintiffs must, at the beginning of a lawsuit, assert their own interests and have standing to seek an injunction, at the end of the lawsuit the judge has equitable discretion to define the breadth and extent of injunctive relief. In *Martin v.*

154. Adam Bernstein, *Patricia Wald, Pathbreaking Federal Judge Who Became Chief of D.C. Circuit, Dies at 90*, WASH. POST (Jan. 12, 2019, 10:10 AM), <https://www.washingtonpost.com/local/obituaries/patricia-wald-pathbreaking-federal-judge-who-became-chief-of-dc-circuit-dies-at-90/2019/01/12/6ab03904-1688-11e9-803c-4ef28312c8b9> [https://perma.cc/KS3S-8ELH]; see also Capper, *supra* note 153, at 2169–70 (“[Justice Scalia] envisages an inordinately narrow ability for courts of equity to mold the remedies they grant over time to meet changing circumstances.”).

155. Bray, *supra* note 11; Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL’Y 487 (2016); Morley, *supra* note 11.

156. Frost, *supra* note 9, at 1083; see also Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977, 979–84 (2020).

157. 461 U.S. 95 (1983).

158. *Id.* at 111; see also Trammell, *supra* note 156, at 979–84.

Franklin Capital Corp., Chief Justice Roberts wrote: “Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.”¹⁵⁹

At that stage, the judge’s remedial power may extend beyond the plaintiffs’ complete relief without encroaching on Article III’s case or controversy prerequisite. Trammell gives the example of broad, future-oriented structural injunctions.¹⁶⁰ The argument that nonparties lack standing either to seek or to benefit from a nationwide injunction is unsuccessful when plaintiffs have standing at the beginning of their lawsuits.

State attorneys general have been regular proponents of nationwide national government injunctions. Their “standing” has been controversial.¹⁶¹ Scholars have argued in favor of a presumption that the Constitution and statutes protect individual, not state, interests.¹⁶²

To begin, state attorneys general suing to curb federal executive lawbreaking illustrate federalism’s system of checks and balances.¹⁶³ They bring resources, expertise, and depth to oppose formidable federal lawyers.¹⁶⁴ In addition to federal lawbreaking’s effect on the state governments themselves, the attorneys general are in *parens patriae* relationships to their constituents.¹⁶⁵ Professor Crocker said that state government standing is analogous to organizational standing and is even easier to sustain.¹⁶⁶

159. 546 U.S. 132, 139 (2005).

160. Trammell, *supra* note 9, at 84–89, n.108.

161. See Symposium, *Federal Courts, Practice, and Procedure: State Standing*, 94 NOTRE DAME L. REV. 1883 (2019); Grove, *supra* note 92.

162. Ann Woolhandler & Michael G. Collins, *Reining in State Standing*, 94 NOTRE DAME L. REV. 2015 (2019).

163. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955 (2019). Fred Barbash, *Litigation Against Executive Branch by Coalitions of States Grows in Response to Unilateral Actions by President and Gridlocked Congress*, WASH. POST (Aug. 24, 2019, 10:10 AM), <https://www.washingtonpost.com/national-security/litigation-against-executive-branch-by-coalitions-of-states-grows-in-response-to-unilateral-actions-by-president-and-gridlocked-congress/2019/08/24/34267560-c5bf-11e9-b72f-b31dfaa77212> [https://perma.cc/9VFC-ZLXF].

164. F. Andrew Hessick & William P. Marshall, *State Standing to Constrain the President*, 21 CHAP. L. REV. 83, 97 (2018); Mank & Solimine, *supra* note 163.

165. Hessick & Marshall, *supra* note 164, at 105 (arguing to relax injury in fact); Mank & Solimine, *supra* note 163.

166. Katherine Mims Crocker, *An Organizational Account of State Standing*, 94 NOTRE DAME L. REV. 2057 (2019).

The scope of an injunction is a matter of equity jurisdiction, not subject matter jurisdiction; it hinges on the judge's exercise of discretion in light of the principles of sound decision-making. An injunction that is too broad is erroneous, not void.

3. The Rise of the Injunction

When the twentieth century started, the federal courts' injunctions were a conservative tool. These anti-progressive injunctions against state regulation gave the injunction a bad name. In *Ex parte Young*, for example, a federal judge held the Minnesota attorney general in contempt for suing to enforce a Minnesota maximum rate statute.¹⁶⁷ In the late 1930s, the New Deal Court circumscribed the *Lochner*-era decisions that struck down state regulatory statutes on substantive due process grounds.¹⁶⁸ In addition, the federal courts' injunctions against labor strikes were a scandal. Congress passed the Norris-LaGuardia Act to curb federal strike injunctions.¹⁶⁹ The courts' conservatism waned during the first half of the century.

Several developments boosted the injunction to become the courts' major equitable remedy. Law and equity were merged; plaintiffs could seek both legal damages and an equitable injunction in a single lawsuit. Another development was the decline of the maxim that "equity protects only property rights" which, for one thing, circumscribed the Chancellor's ability to protect plaintiffs' personal or constitutional rights.¹⁷⁰ The Massachusetts Supreme Judicial Court made a telling argument against this maxim in *Kenyon v. City of Chicopee*.¹⁷¹ Jehovah's Witnesses sued to enjoin local authorities' harassment through criminal prosecutions. The authorities argued that a court could grant an injunction to protect the plaintiffs' "property rights" to conduct a business, but it could not grant an injunction to protect their "personal rights," such as free speech and free exercise of religion. "We are impressed," the court said, "by the plaintiffs'

167. 209 U.S. 123, 141 (1908).

168. FELDMAN, *supra* note 39, at 103–26; DAVID KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1924–1945, at 334–37 (1999); JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 429–35, 444–56, 518–24 (2010).

169. See 29 U.S.C. §§ 101–110 (2018) (barring federal injunctions against strikes except in limited circumstances).

170. OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 1–9 (1978).

171. 70 N.E.2d 241, 244 (Mass. 1946).

suggestion that if equity would safeguard their right to sell bananas it ought to be at least equally solicitous of their personal liberties guaranteed by the Constitution.”¹⁷² Present-day state and federal courts grant plaintiffs injunctions to protect many kinds of “personal” rights.

The earlier approach was that an equity court would not resolve disputes of a “peculiarly political nature” because they were more properly resolved by legislative or executive action.¹⁷³ But in 1962, the Supreme Court held that apportionment of congressional districts was justiciable.¹⁷⁴ And present-day courts adjudicate many “political” disputes, including nationwide national government injunctions.¹⁷⁵

Two other examples show reclassification of equitable jurisdiction. First, earlier equity courts claimed lack of equitable jurisdiction to award punitive damages. After law and equity merged, the New York Court of Appeals, drawing on the whole body of merged law and equity, approved an injunction alongside punitive damages.¹⁷⁶ Second, other earlier equity courts claimed that equity lacked jurisdiction to enjoin libel. After the merger, the court has jurisdiction which may not be exercised under the maxim that “equity will not enjoin a libel.”¹⁷⁷

The Supreme Court’s decision in *Brown v. Board of Education* struck down legalized school segregation and gave the injunction a special prominence and new moral legitimacy.¹⁷⁸ The decades-long process of federal courts actually issuing injunctions to desegregate public schools developed courts’ self-confidence and expertise.¹⁷⁹

Other parallel changes in the broader world of government and policy fueled the development of the national government injunction. These changes included consolidation of the Presi-

172. *Id.*

173. *Colegrove v. Green*, 328 U.S. 549, 552 (1946).

174. *Baker v. Carr*, 369 U.S. 186 (1962).

175. *But see* *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (holding that partisan gerrymandering is a political question and not justiciable).

176. *I.H.P. Corp. v. 210 Cent. Park S. Corp.*, 189 N.E.2d 812 (N.Y. 1963); *see also* DOUG RENDLEMAN & CAPRICE L. ROBERTS, *REMEDIES: CASES AND MATERIALS* 399–400 (9th ed. 2018).

177. *Organovo Holdings v. Dimitrov*, 162 A.3d 102, 115 (Del. Ch. 2017) (quoting *Am. Malting Co. v. Keitel*, 209 F. 351, 356 (2d Cir. 1913)).

178. 347 U.S. 483 (1954) (*Brown I.*).

179. Doug Rendleman, *Brown II’s “All Deliberate Speed” at Fifty: A Golden Anniversary or a Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?*, 41 *SAN DIEGO L. REV.* 1575 (2004).

dent's power at the expense of Congress and the rise of the activist federal executive. They are examined above in this Article.¹⁸⁰

4. The Structural Injunction and the National Government Injunction

Support for the federal courts' authority to grant national government injunctions is also shown by the widespread use of structural injunctions, which are close relatives of the national government injunction. Comparing the structural injunction to the national government injunction supplies background and perspective.

Structural injunctions are remedies in injunction class actions, usually on behalf of a racial or other minority group. Structural-injunction plaintiffs usually accuse a state or local government defendant of violating the Constitution or a federal statute. A few years ago, when I wrote my article on future remedies in constitutional litigation,¹⁸¹ the defendants in structural injunction litigation were state and local government officials. Although the official is the named defendant, the government institution is the functional defendant. Beginning with schools, mental hospitals, prisons, police departments, and law enforcement, federal judges enjoined state and local officials to bring the institutions into compliance with, usually, the Constitution and federal statutes.¹⁸²

Today, the need to curb illegal and unconstitutional government activity means including the federal government as a defendant and demanding the remedy of a national government injunction instead of a structural injunction. Like a structural injunction, a national government injunction forbids a federal-official defendant from pursuing a policy that violates the Constitution or a federal statute, although under a national government injunction the official defendant is a federal government agent rather than a state government agent.

Plaintiffs differ in structural injunctions and national government injunctions. In contrast to its role as the defendant in national government injunctions, the federal executive has par-

180. KRUSE & ZELIZER, *supra* note 45.

181. Rendleman, *supra* note 50.

182. FISS, *supra* note 170, at 1-9; *see also* Trammell, *supra* note 156, at 988-96 (providing a structural injunction background for nationwide injunctions).

ticipated on the plaintiff side in structural injunction litigation.¹⁸³ In this litigation, the federal executive has managed many negotiations leading to consent decrees.¹⁸⁴

In both structural injunctions and national government injunctions, the plaintiff asks the court to curb or reorganize a government institution to achieve compliance with the law. Both the federal and the state government switch sides in national government injunctions: the federal executive is the defendant and the plaintiffs often include state attorneys general.

The first stage in a structural injunction lawsuit is deciding the defendant's liability by determining whether the defendant is violating the substantive law. In a lawsuit resulting in a national government injunction, the judge's finding that the federal defendant violated the Constitution or a statute is equivalent to the liability stage in a structural injunction.

At the next stage, the judge crafts a remedy that is negative and preventive: the official defendant's violations must stop. The injunction resembles a personalized statute that forbids the defendant's misconduct. A structural injunction then requires the parties and the judge to look to the future to rebuild an institution that has gone legally astray. In Professor Owen Fiss's words, a structural injunction "seeks to effectuate the reorganization of an ongoing social institution."¹⁸⁵ Since structural injunction lawsuits are usually brought against state or local officials, the injunction is not nationwide but statewide or local.

A national government injunction has the same negative, preventive feature; it protects plaintiffs' important statutory or constitutional rights by forbidding the government from pursuing an illegal policy. A national government injunction makes explicit what is implicit in rule of law principles—that the government must follow its own constitutional and statutory rules. Correcting the injustice—cleaning up the mess—to protect plaintiffs' rights and stop the illegal behavior may require a national government injunction to restructure an institution. An

183. See, e.g., *Ayres v. Thompson*, 358 F.3d 356 (5th Cir. 2004).

184. This has included consent decrees with big-city police departments. Attorney General Sessions later withdrew from these consent decrees. See Wesley Lowery & Matt Zapposky, *Democrats Demand Documents on Justice Dept. Police Reform Efforts Under Trump*, WASH. POST (May 14, 2019, 2:55 PM), <https://www.washingtonpost.com/world/national-security/democrats-demand-documents-on-justice-dept-police-reform-efforts-under-trump/2019/05/14/a12f0baa-7654-11e9-b7ae-390de4259661> [<https://perma.cc/K7WF-8LB3>].

185. FISS, *supra* note 170, at 7.

example of this is the judicial efforts to reunite families separated under the Trump Administration's zero-tolerance, family-separation policies which, at this writing, are well into their second year.¹⁸⁶

Two streams of analysis of the structural injunction coexist. One debates the structural injunction's legitimacy; it sets critics' arguments based on federalism and separation of powers against proponents' responses based on plaintiffs' constitutional rights and defendants' obedience to the law.¹⁸⁷ A second stream discusses the injunction class action's technical features, including the idea that, even though a plaintiff class member receives no formal notice of the lawsuit, she will be precluded from relitigating a judgment for the defendant.¹⁸⁸

In the meantime, structural injunction litigation to protect plaintiff classes' constitutional and statutory rights has moved forward, a servile drudge almost oblivious to the debates. First, the structural injunction lost its unitary nature and developed in separate, special substantive categories: education, prisons and jails, mental hospitals, etc. Second, the parties and the judges developed a practice of negotiation, leading to sometimes-complex consent decrees.

Actual structural injunction litigation in trial courts flies under professors' appellate-based radar and ignores the debates over legitimacy and preclusion. It is usually out of sight, except when the parties ask the judge to approve a specialized and detailed negotiated consent decree.¹⁸⁹ Many structural injunctions have lasted for decades.¹⁹⁰ Consent decrees are contested by defendants' motions to modify or dissolve.¹⁹¹

186. See *supra* note 81 and accompanying text.

187. For a collection of the literature, see OWEN M FISS & DOUG RENDLEMAN, *INJUNCTIONS* 827–30 (1984).

188. David Marcus, *Flawed But Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 658 (2011).

189. *National Digest: Judge Agrees to Plan for Court Supervised Changes to Chicago Police*, WASH. POST (Jan. 31, 2019, 4:12 PM), <https://www.washingtonpost.com/national/national-digest-judge-agrees-to-plan-for-court-supervised-changes-to-chicago-police/2019/01/31/71bfbb9c-2057-11e9-8b59-0a28f2191131> [<https://perma.cc/4367-95NF>].

190. See *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 372–74 (1992); *Spallone v. United States*, 493 U.S. 265, 268–69 (1990); *Ayres v. Thompson*, 358 F.3d 356, 359–61 (5th Cir. 2004).

191. See *Lewis v. Casey*, 518 U.S. 343 (1996); *Inmates of Suffolk County Jail*, 502 U.S. at 381–82.

The structural injunction has faced criticism on two major grounds: federalism and separation of powers. Critics charge that federal judges use injunctions to order state and local governments around. A judge formulating, drafting, and implementing a structural injunction is performing legislative and executive functions in developing a government program.

A national government injunction—granted by a federal judge against a federal executive defendant—avoids the federalism concerns found in structural injunctions. But the national government injunction makes up for the lack of federalism concerns with increased tension from its strain on separation of powers. Stalwart defenders of legislative and executive power are offended by federal judges' orders bringing federal institutions into compliance.

Like a structural injunction, a national government injunction is complex and can take a long time to implement. The judge may fall back on gradualism, incremental implementation of the plaintiffs' rights, *Brown II*'s "all deliberate speed," and trusting the local authorities.¹⁹²

Although controversial, national government injunctions and structural injunctions are necessary remedial tools for courts to grant plaintiffs relief and to curb illegal, perhaps unconstitutional, federal and state government activity.

5. Enforcement, Including Contempt

This Article continues to compare structural injunctions and national government injunctions with a discussion of enforcement.

Like structural injunctions, "severe sanctions are unlikely" in national government injunctions.¹⁹³ The national government injunction, like the structural injunction, goes easy on the defendant. In addition to the direct expense of compliance, the defendant's costs of structural litigation are the opprobrium of being sued for violating plaintiffs' rights and being required to defend.

In an ideal world, an injunction would be unnecessary. Rule of law principles, precedent, or a declaratory judgment would suffice to bring the defendant into compliance. If precedent suf-

192. Rendleman, *supra* note 179, at 1585–87.

193. FISS, *supra* note 170, at 13.

fices, there is no need for a class action or an injunction.¹⁹⁴ “Where a question of law is decisive . . . the concept of *stare decisis* furnishes almost the same advantages as a class action. . . . [A] decision on the law effectively binds non-parties without upsetting our assurance that due process has been done”¹⁹⁵ The government would obey the apparent law as stated by the judge, an official with power to decide. However, the nation’s experience with Massive Resistance to school desegregation proves that “faith in precedent as a remedy is touching but perhaps naive.”¹⁹⁶

A declaratory judgment is a court’s judgment that articulates the law and tells the parties what their rights and obligations are.¹⁹⁷ Because a declaratory judgment is not an order, defendants cannot be held in contempt for violating it. The injunction, which can be enforced through contempt proceedings, is the more effective remedy in most serious lawsuits. But as this Article will examine, judges do not employ harsh contempt sanctions in lawsuits against the federal executive.

Rule of law principles depend on defendants’ obedience to court orders and acceptance of judicial legitimacy.¹⁹⁸ In early civil rights actions against state and local officials “a single generalization emerge[d]: courts hesitate to use contempt against government officials.”¹⁹⁹ Sometimes defendants’ disobedience made contempt possible, but the disobedience was overlooked.²⁰⁰ Both civil and criminal contempt occurred.²⁰¹ Apart from contempt, a federal military presence accompanied desegregation of Ole Miss and the Little Rock schools.²⁰² The single recent contempt finding against a local official was the Kentucky

194. Rendleman, *supra* note 50, at 156 n.2.

195. Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 446 (1960).

196. Rendleman, *supra* note 50, at 160; *see also* Rendleman, *supra* note 179, at 1609.

197. Rendleman, *supra* note 50, at 161–62. *Roe v. Wade*, one of the Supreme Court’s most contentious and controversial decisions, was a declaratory judgment. 410 U.S. 113, 166 (1973).

198. Driesen, *supra* note 79, at 515.

199. Rendleman, *supra* note 50, at 169; *see also* Parrillo, *supra* note 93, at 702.

200. Rendleman, *supra* note 50, at 168 n.81.

201. *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 363 F.2d 206 (4th Cir. 1966); *In re Herndon*, 325 F. Supp. 779 (M.D. Ala. 1971); *Halderman v. Pennhurst State Sch. & Hosp.*, 526 F. Supp. 423, 427 (E.D. Pa. 1981).

202. JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974*, at 414–16, 477–78 (1996); Parrillo, *supra* note 93, at 741.

judge's jailing of Kim Davis to coerce her to issue a marriage license to a same-sex couple.²⁰³

The federal courts are easier on disobedient federal defendants than they are on state defendants.²⁰⁴ And, normally, federal defendants obey court orders,²⁰⁵ in part because the Justice Department's credibility with the federal courts depends on the government's obedience to court orders.²⁰⁶

Professor Parrillo's complex and nuanced study of federal courts' enforcement of injunctions against federal defendants concludes:

First, the federal judiciary is willing to issue contempt findings against federal agencies and officials. Second, while several individual federal judges believe they can (and have tried to) attach sanctions to these findings, the judiciary as an institution—particularly the higher courts—has exhibited a virtually complete unwillingness to allow sanctions, at times intervening dramatically to block imprisonment or budget-straining fines at the eleventh hour. Third, the higher courts, even as they unfailingly halt sanctions in all but a few minor instances, have bent over backward to avoid making authoritative pronouncements that sanctions are categorically unavailable, thus keeping the sanctions issue in a state of low salience and at least nominal legal uncertainty. Fourth, even though contempt findings are practically devoid of sanctions, they nonetheless have a shaming effect that gives them substantial if imperfect deterrent power. The efficacy of judicial review of agency action rests primarily on a strong norm, shared in the overlapping communities that agency officials inhabit, that officials comply with court orders. Shame-inducing contempt findings by judges are the means to weaponize that norm.²⁰⁷

203. Parrillo, *supra* note 93, at 741.

204. *Id.* at 702.

205. Grove, *supra* note 92 (noting that compliance norm grew out of the civil rights experience).

206. *Id.*

207. Parrillo, *supra* note 93, at 697. Compliance issues and measures after judicial voiding of federal agency measures include negotiations, drafting injunctions, scheduling compliance, defendants' claims of difficulty and requests for delay, discovery to gather information (including depositions), proceedings to test agency good faith and agency reputational concerns, and finally, appellate courts' reluctance to approve stern measures and contempt. *See* Nicholas R. Parrillo,

Federal court experience with contempt for violation of a national government injunction is limited. In *Grace v. Sessions*, when the government deported a likely beneficiary of the national government injunction, Judge Sullivan threatened contempt: return Carmen or show cause against contempt.²⁰⁸

As the editing process for this Article was in its final stages, federal Magistrate Judge Kim held the Secretary of Education, Betsy DeVos, in contempt for violating a preliminary injunction that required the Department of Education to stop collecting student loans from defrauded students who had borrowed to attend a defunct, for-profit “college.” Magistrate Judge Kim’s \$100,000 compensatory contempt sanction will be used to repay the defrauded students for loan-servicing companies’ wage garnishment and tax refund interceptions in violation of the order.²⁰⁹ This use of compensatory contempt shows that federal courts know how to deal with a cabinet official’s violation of an order. That a magistrate judge without life tenure or salary protection sanctioned a breaching cabinet officer in contempt should inform executive branch officials that the judicial branch means business and has the last word.

In January 2020, in *Baez-Sanchez v. Barr*, Judge Frank Easterbrook of the Seventh Circuit reprobated the Justice Department for ignoring the earlier remand order and referring to the earlier panel order as incorrect: “What happened next beggars belief.”²¹⁰ Judge Easterbrook continued:

We have never before encountered defiance of a remand order, and we hope never to see it again. Members of the Board must count themselves lucky that Baez-Sanchez has not asked us to hold them in contempt, with all the consequences that possibility entails.

Negotiating the Federal Government’s Compliance with Court Orders: An Initial Exploration, 97 N.C. L. REV. 899 (2019).

207. 28 U.S.C. § 1407 (2018).

208. No. 18-cv-1853 (EGS), 2018 WL 3812445, at *1 (D.D.C. Aug. 9, 2018) (internal quotations omitted).

209. Danielle Douglas-Gabriel, *Federal Judge Holds DeVos in Contempt in Loan Case, Slaps Education Department with \$100,000 Fine*, WASH. POST (Oct. 24, 2019, 9:16 PM), <https://www.washingtonpost.com/education/2019/10/24/federal-judge-holds-devos-contempt-loan-case-slaps-education-dept-with/> [https://perma.cc/DGB9-P7BS].

210. 947 F.3d 1033, 1035 (7th Cir. 2020).

The Board seemed to think that we had issued an advisory opinion, and that faced with a conflict between our views and those of the Attorney General it should follow the latter.²¹¹

The panel upheld the immigration judge's order and directed the government to obey.²¹² The Seventh Circuit's strong resolve and explicit language shows the judiciary's commitment to compliance, even by the federal government.

Similarly, a Kentucky federal district judge's willingness to jail local government official Kim Davis for refusing to comply with an order to issue a marriage license to a same-sex couple also demonstrates federal courts' resolve to implement the Constitution and to ensure compliance with court orders.²¹³

Although the contempt litigation in *Nevada v. United States Department of Labor* is complex, lengthy, and cryptic, it may be an important precedent for holding the federal government in contempt for violating nationwide injunctions.²¹⁴ States sued the U.S. Department of Labor in Texas to enjoin an Obama Administration overtime rule. The Texas federal district judge granted a nationwide national government injunction forbidding implementation of the rule.²¹⁵ A private plaintiff, Alvarez, filed a separate lawsuit in New Jersey for overtime under the rule. The Texas judge—using the “privity” concept from preclusion, not Federal Rule of Civil Procedure 65(d)(2)—found privity between the New Jersey plaintiff, Alvarez, and the Texas defendants; based on that finding, the court held Alvarez in contempt.²¹⁶ The Fifth Circuit reversed Alvarez's nonparty contempt; the court held that there was neither privity nor Rule 65(d)(2) active concert or participation between Alvarez and the defendant government department.²¹⁷ Although the Fifth Circuit would have been wiser to decide the case under Rule 65(d)(2) without mentioning privity, its decision is important because the trial judge's contempt order against a nonparty almost converted

211. *Id.* at 1035–36.

212. *Id.* at 1035–37.

213. *Miller v. Davis*, 123 F. Supp. 3d 924, 929, 944 (E.D. Ky. 2015), *appeal dismissed and remanded*, 2015 WL 9460311, at *2 (E.D. Ky. Sept. 23, 2015).

214. *Nevada v. United States Dep't of Labor*, 275 F. Supp. 3d 795 (E.D. Tex. 2017); *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016).

215. *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d at 534; *Nevada v. United States Dep't of Labor*, 275 F. Supp. 3d 795.

216. *Nevada v. U.S. Dep't of Labor*, 321 F. Supp. 3d 709, 724 (E.D. Tex. 2018), *rev'd sub nom. Texas v. U.S. Dep't of Labor*, 929 F.3d 205 (5th Cir. 2019).

217. *Texas v. U.S. Dep't of Labor*, 929 F.3d at 214.

the injunction against the federal government into a statute that affected everyone in the United States. The Fifth Circuit's correct decision limits contempt of a nationwide national injunction to the named defendant, agents, and others who are nonparties in active concert or participation with them.²¹⁸

In litigation against a state or federal government program with an uncooperative defendant, judges seldom resort to coercive or punitive contempt techniques, but they keep these enforcement techniques in reserve to threaten, brandish, or employ only as a last resort.

6. Equitable Jurisdiction and Judicial Discretion

"O, it is excellent / to have a giant's strength; but it is tyrannous / To use it like a giant,"²¹⁹ Isabella says in *Measure for Measure*. Following that advice, a court with jurisdiction should not always exercise it. The judge with broad subject matter jurisdiction to grant an injunction should exercise self-restraint and be careful about when and how to exercise that power.²²⁰

The national government injunction falls under equitable jurisdiction and principles of judicial decision-making, equitable discretion, and action. What are those principles?

Whether to grant a nationwide national government injunction is not a choice between remedies;²²¹ it is a choice of scope of remedy. Whether a judge should grant a nationwide injunction or a more limited injunction is within the judge's equitable discretion about how to draft and measure the remedy chosen, specifically the narrowness or breadth of the injunction. The judge who has already found that the government broke the law and that some kind of injunction is warranted will decide between issuing an injunction against only the federal official involved in the case or a broader injunction against all officials nationwide. Measurement-of-remedy decisions are more contextual and discretionary than choice-of-remedy decisions.²²²

218. Rendleman, *supra* note 65, at 878–80 (criticizing privity); RESTATEMENT (SECOND) OF JUDGMENTS § 63 (AM. LAW INST. 1982) (discussing preclusion-res judicata and obedience to an injunction).

219. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 2, sc. 2.

220. Douglas, *supra* note 70, at 34–35, 54–56.

221. *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 873 (N.Y. 1970).

222. Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1426–31, 1434–38 (2015).

Professor Chafee discussed disfavored forms of relief. He used the example of an appellate court's decision to deny equity jurisdiction to hold that a trial judge's temporary, mandatory injunction that shifted possession was void. Such an injunction, Chafee argued, may be erroneous, but it is not void.²²³ An incorrect national government injunction is a form of relief that falls under Chafee's classification of a decision that is erroneous but not void. Equitable jurisdiction is not truly jurisdictional: federal courts have subject matter jurisdiction to grant a winning plaintiff a broad, nationwide national government injunction. Granting such an injunction involves principles of correct decision-making, balancing, and weighing.

The Trump Administration seeks to end the nationwide national government injunctions that have enjoined many of the President's policies.²²⁴ These efforts have so far failed. Even courts that are skeptical of nationwide national government injunctions have rejected the government's "anti-nationwide injunctions" argument. For example, in limiting a nationwide injunction to its circuit, the Ninth Circuit in *East Bay Sanctuary Covenant* noted: "We have upheld nationwide injunctions where such breadth was necessary to remedy a plaintiff's harm."²²⁵ The policy of providing relief to successful plaintiffs has prevailed over arguments against broad injunctions.

Having established the federal courts' authority or equitable jurisdiction to grant a nationwide national government injunction under principles of confinement, this Article next responds to critics' other reasons to oppose national government injunctions.

B. Forum Shopping

Critics claim that nationwide national government injunctions encourage forum shopping.²²⁶ Forum shopping occurs when a plaintiff chooses to sue in one court instead of another and hopes that the selected court will treat its case more favorably than the rejected court would have. Whether forum

223. CHAFEE, *supra* note 108, at 349.

224. See Sessions Memorandum on Nationwide Injunctions, *supra* note 12.

225. *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) (citing *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018)).

226. See Bray, *supra* note 11; Cass, *supra* note 11; Morley, *supra* note 11; Wasserman, *supra* note 10, at 616; Sessions Memorandum on Nationwide Injunctions, *supra* note 12.

shopping is an abuse or an integral part of the adversary system is a controversial issue.

The Supreme Court wrote that “[j]urisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose among several forums.”²²⁷ In addition to the jurisdiction-venue system, a lawyer has a duty to her client to select a beneficial forum. The choice of forum is often one of the plaintiff’s most important tactical decisions in a lawsuit.²²⁸

The law gives litigants vertical and horizontal choices of forum. For a vertical example, a plaintiff suing a defendant from a different state may choose between state court general jurisdiction and federal court diversity jurisdiction. Federal diversity jurisdiction is based on forum shopping. A litigant who considers a federal court to be a more hospitable forum can choose that court.²²⁹ An out-of-state defendant in a state court may choose federal jurisdiction by removal.²³⁰

A plaintiff has horizontal choices among states because personal jurisdiction and venue over the defendant are possible in several states. The broad federal venue statute means that a plaintiff can sue a federal executive official or the President almost anywhere in the United States.²³¹ The plaintiff’s forum choice is entitled to paramount consideration.²³²

There are arguments for discouraging litigant forum shopping. Personal jurisdiction may be limited.²³³ Venue statutes, state long-arm statutes, and the *forum non conveniens* doctrine may also circumscribe plaintiffs’ choices.²³⁴ But within those broad limits, plaintiffs deciding where to file their lawsuits enjoy many options.²³⁵

A lot of federal law is under the concurrent jurisdiction of state and federal courts, but national government injunction litigation “arises under” federal law. Plaintiffs sue in federal court

227. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250 (1981).

228. Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, 583 (2016).

229. U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. §§ 1332(a), 1441 (2018).

230. 28 U.S.C. § 1441 (2018).

231. 28 U.S.C. § 1391(e)(1) (2018); 28 U.S.C. § 1442 (permitting a federal officer sued in state court to remove to federal court); Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J. F. 242 (2017).

232. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250 (1981).

233. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1780 (2017).

234. STEPHEN YEAZELL & JOANNA SCHWARTZ, CIVIL PROCEDURE 177–202 (10th ed. 2019).

235. *Id.* at 266.

because of federal question jurisdiction and the removal statute. Plaintiffs have a broad choice of federal venue. A plaintiff suing a federal executive defendant and seeking a national government injunction cannot change the federal substantive law or federal procedure, but the plaintiff can select the district, division, and, sometimes, the district court judge. In volatile and controversial national government injunction litigation, the judge makes a difference.

Plaintiffs suing to upset an improper federal policy by seeking a national government injunction will choose as favorable a forum as they can.²³⁶ A wide selection of states, and perhaps judges, is possible if several state attorneys general band together as plaintiffs.

This reality of modern jurisdiction and venue rules is not a reason to forbid judges from granting a national government injunction. A plaintiff's selection of a favorable trial judge may, however, militate against the idea that the judge will take precautions against disfavoring the defendant.

C. *Conflicting Injunctions*

Professor Lon Fuller argued that courts cannot handle amorphous “polycentric” disputes.²³⁷ If this argument was ever persuasive, however, time has since passed it by. In addition to resolving individual disputes, courts also refine, develop, and create law.²³⁸ The minimalist view of litigation as merely dispute resolution has been subordinated to the historically and theoretically correct view that courts articulate public values and advance public goals in public law litigation.²³⁹ The late

236. See, e.g., Manny Fernandez, *In Weaponized Courts, Judge Who Halted Affordable Care Act Is a Conservative Favorite*, N.Y. TIMES (Dec. 15, 2018), <https://www.nytimes.com/2018/12/15/us/judge-obamacare-reed-oconnor.html> [https://perma.cc/HPR2-6E2Y].

237. Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978).

238. PAUL D. CARRINGTON, DANIEL J. MEADOR, & MAURICE ROSENBERG, *JUSTICE ON APPEAL* 2–3 (1976); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); see also MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 5–6 (1988).

239. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1283–84 (1976); Owen Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 3 (1979); Trammell, *supra* note 156, at 986 (dispute-resolution model of adjudication fails).

Professor Abram Chayes observed that “the dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies.”²⁴⁰ School desegregation, prison conditions litigation, class actions for injunctions and damages, and multidistrict litigation show courts handling complex polycentric disputes.

Duplicative, confusing litigation occurs when several plaintiffs file multiple lawsuits against the same federal policy in several federal courts. Such litigation furrows critics’ brows.²⁴¹ The federal court system cannot coordinate multiple plaintiffs seeking relief from improper executive measures. Several lawsuits are likely. State attorneys general joining together in one lawsuit brings a measure of cooperation and uniformity to numerous lawsuits.

Domestic litigation does not have a rule like the international doctrine of *lis alibi pendens* that prefers the first to file. *Lis alibi pendens*, which is based in international comity, allows a court to refuse to exercise jurisdiction when parallel litigation is pending in another jurisdiction.²⁴² In the federal system, consolidation²⁴³ and multidistrict litigation²⁴⁴ are the only possibilities. Multidistrict litigation is not a well-suited technique to consolidate fast-paced national government injunction lawsuits against a defendant pursued by different plaintiffs in related actions.²⁴⁵

This reality creates a risk of conflicting injunctions, or an injunction in one lawsuit and a decision for the government in a second lawsuit. This risk is not a reason to abolish national gov-

240. Chayes, *supra* note 239 at 1284.

241. See Bray, *supra* note 11; Cass, *supra* note 11; Morley, *supra* note 11, at 616; Wasserman, *supra* note 10; Sessions Memorandum on Nationwide Injunctions, *supra* note 12.

242. MofOluwawo OluwaPelumi MojolaOluwa, *Private International Law and the Doctrine of Lis Alibi Pendens* (2017) (unpublished manuscript).

243. FED. R. CIV. P. 42.

244. 28 U.S.C. § 1407 (2018).

245. Parallel litigation between the same parties is easier. A federal court may defer to an earlier lawsuit between the same parties on the same transaction or event in another district. The first court may enjoin the second lawsuit. The second court may stay its later-filed lawsuit. Either court may consolidate and transfer, usually to the first. CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 3854, at 15 (4th ed. 2019); Andrew J. Fuller, *A “Procedural Nightmare”: Dueling Courts and the Application of the First-Filed Rule*, 69 FLA. L. REV. 657 (2017).

ernment injunctions. Rather, it is a reason to trust federal judges' professionalism. Careful and observant judges will exercise respect and comity for the parallel litigation.

Litigation about antisuit injunctions provides an example of the system dealing with complexity and conflict.²⁴⁶ Complexity and parallel litigation have also emerged in national government injunction litigation. The injunctions surrounding the Trump Administration's policy to bar Central Americans and other migrants from requesting asylum at the southern border is one example of courts successfully muddling through multiple lawsuits and conflicting orders.

A federal district court judge in Washington, D.C., Judge Timothy J. Kelly, declined to block the policy.²⁴⁷ Shortly thereafter, Judge Jon Tigar in San Francisco temporarily blocked the policy, setting up conflicting orders and a potential race to federal appellate courts. In his decision, Judge Tigar noted that the federal government's frustrations with rising border crossings did not justify "shortcutting the law" and, in reference to the opposite finding in the Washington litigation, said each judge must render his or her own decision: "We have the appellate courts to sort this out for us."²⁴⁸

Judge Tigar's order prevented the policy from being carried out until the legal issues could be fully debated. He based his decision on Ninth Circuit precedent, which he said "consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis."²⁴⁹ He further stated that "[w]hile the government disagrees with that ruling, it provides no contrary authority from the immigration context and 'no grounds on which to distinguish this case from [the Ninth Circuit's] uncon-

246. *James v. Grand Trunk W. R.R.*, 152 N.E.2d 858, 867 (1958); see also Frost, *supra* note 9, at 1105 n.173; Scott Graham, *Skilled in the Art: My Injunction Can Beat Your Injunction + FTC Says Competition is Good for 5G + My, What Copyrightable Claws You Have*, LAW.COM (July 19, 2019, 4:07 PM), <https://www.law.com/2019/07/19/skilled-in-the-art-my-injunction-can-beat-your-injunction-ftc-says-competition-is-good-for-5g-my-what-copyrightable-claws-you-have/> [https://perma.cc/EQF6-MZGB].

247. Maria Sacchetti & Spencer Hsu, *Federal Judge in California Halts Trump's Latest Asylum Ban*, WASH. POST (July 24, 2019, 8:36 PM), <https://www.washingtonpost.com/local/legal-issues/federal-judge-allows-trump-administration-rule-restricting-asylum-access-to-continue/2019/07/24/eec83cfe-adba-11e9-8e77-03b30bc29f64> [https://perma.cc/2K74-94ZX].

248. *Id.*

249. *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019) (quoting *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018)).

troverted line of precedent.”²⁵⁰ “I’m sure [the other judge has] given this matter as much thought as I have,” Judge Tigar added. He later elaborated, “My point is that these are two district courts both trying to do their best work on an issue of national importance.”²⁵¹

In the appeal following Judge Tigar’s order, the Ninth Circuit denied the government’s motion to stay the nationwide preliminary injunction.²⁵² The court stated that the government had not shown that it was likely to prevail on the merits but noted that the trial judge had “failed to discuss whether a nationwide injunction is necessary to remedy Plaintiffs’ alleged harm.”²⁵³ The court stayed the trial judge’s nationwide injunction in states outside the Ninth Circuit and sent the nationwide feature back to the district court for proof and findings of plaintiffs’ nationwide harm.²⁵⁴

The dissent emphasized that national immigration law called for uniformity: “Should asylum law be administered differently in Texas than in California?”²⁵⁵ The majority responded:

[T]he fact that injunctive relief may temporarily cause the Rule to be administered inconsistently in different locations is not a sound reason for imposing relief that is broader than necessary. . . . [O]ur law requires that injunctive relief be narrowly tailored to remedy the plaintiffs’ alleged harm, and it may only be broadened “if such breadth is necessary to give prevailing parties the relief to which they are entitled.”²⁵⁶

On remand, Judge Tigar said that “the Court grants the Organizations’ motion to restore the nationwide scope of the

250. *Id.* (quoting *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d at 1256).

251. Miriam Jordan & Zolan Kanno-Youngs, *Trump’s Latest Attempt to Bar Asylum Seekers Is Blocked After a Day of Dueling Rulings*, N.Y. TIMES (July 24, 2019), <https://www.nytimes.com/2019/07/24/us/asylum-ruling-tro.html> [<https://perma.cc/2L46-2GRU>]; Ross Todd, *SF Judge Again Blocks Trump’s Changes to Asylum Rules*, LAW.COM (July 24, 2019, 7:32 PM), <https://www.law.com/therecorder/2019/07/24/sf-judge-again-blocks-trumps-changes-to-asylum-rules/> [<https://perma.cc/M9BW-T574>].

252. *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028 (9th Cir. 2019).

253. *Id.* at 1029.

254. *Id.* at 1029, 1030–31.

255. *Id.* at 1032 (Tashima, J., dissenting).

256. *Id.* at 1030 n.8 (majority opinion) (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987)) (emphasis omitted).

injunction.”²⁵⁷ Two days later, the Supreme Court stayed the nationwide injunction pending appeal.²⁵⁸

Judge Tigar’s nationwide order in California affected an identical lawsuit in the District of Columbia, where the judge had denied the plaintiffs a temporary restraining order.²⁵⁹ The Supreme Court’s stay resolved the confusion.

Judge Tigar’s points about complexity and conflicting decisions are significant. The professional qualities of a “judicial temperament”—which include emotional detachment, patience, courtesy, respect, and civility—carry over to a judge’s relations with other judges. District court judges trust and rely on other judges’ competence and professionalism.²⁶⁰ In the end, the process, the Courts of Appeals, and the Supreme Court will sort the issues out. Complexity and potential conflict are not reasons to limit injunction remedies.

Another solution to this problem of conflicting orders might have been for Judge Tigar to issue an order that excluded the judicial districts, states, or federal circuits where an inconsistent decision or order already existed. Such an order would achieve one goal at the expense of another, however, for it would contradict the policy of uniformity.

D. Politicized Litigation

In the 1830s, Alexis de Tocqueville observed, “[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one.”²⁶¹ Since then, the courts’ role in United States political matters has expanded.²⁶² Critics

257. *E. Bay Sanctuary Covenant v. Barr*, 391 F. Supp. 3d 974, 985 (N.D. Cal. 2019), *granting stay*, 140 S. Ct. 3 (2019).

258. *Id.* A superseding order from the Court of Appeals that emphasized uniformity in immigration matters and complete relief had reinstated Judge Tigar’s “universal” order. *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779–80 (9th Cir. 2018).

259. *E. Bay Sanctuary Covenant*, 934 F.3d at 1030 n.6.

260. Trammell, *supra* note 9.

261. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J.P. Mayer ed. & George Lawrence trans., Harper & Row 1969) (1848).

262. MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* 209–10 (Alfred Blumstein & David Farrington eds., 1998).

argue that the national government injunction politicizes litigation.²⁶³

A plaintiff's lawsuit against a national or state government program has an inescapable political component because the government established the program.²⁶⁴ If the plaintiff's lawsuit succeeds, the political winners become the lawsuit's losers. When the plaintiff is a state attorney general, the addition of another government actor increases the political quality of the lawsuit seeking a national government injunction. A lawsuit brought by an elected state official against the President to void an executive order strikes the rawest political and partisan nerves. The judge hearing such a case will know that someone powerful and important will be upset by the decision.

The argument that the national government injunction politicizes the judiciary misses the point that a strong argument can be made that the federal judiciary already is politicized and, perhaps, partisan. The Robert Bork and Justice Clarence Thomas hearings and votes were partisan. The *Bush v. Gore* ruling used Republican votes to award the White House to a Republican President.²⁶⁵ The *Citizens United* ruling advantaged Republicans.²⁶⁶ Senate Majority Leader Mitch McConnell refused to hold hearings on President Obama's Supreme Court nominee, Judge Merrick Garland, for a year. McConnell then changed Senate voting procedure to approve President Trump's nominees by a simple majority. Judge Brett Kavanaugh's nomination was a partisan appointment from beginning to end. The Senate hearings for Judge Kavanaugh were partisan political events conducted eight weeks before congressional elections. Finally, Judge Kavanaugh's angry partisan attack on Democrats in his nomination hearing and Trump's partisan screed at Justice Kavanaugh's swearing-in ceremony raise the question whether appointments to the Supreme Court and the Supreme Court itself are not only political but also partisan.²⁶⁷ As a result

263. See Bray, *supra* note 11; Cass, *supra* note 11; Morley, *supra* note 11; Wasserman, *supra* note 10; Sessions Memorandum on Nationwide Injunctions, *supra* note 12.

264. BUDIANSKY, *supra* note 26, at 287–88.

265. 531 U.S. 98 (2000).

266. 558 U.S. 310 (2010).

267. Sheldon Whitehouse, *Sen. Whitehouse: There's a 'Crisis of Credibility' at the U.S. Supreme Court*, LAW.COM (Feb. 15, 2019, 2:50 PM), <https://www.law.com/nationallawjournal/2019/02/15/sen-whitehouse-theres-a-crisis-of-credibility-at-the-u-s-supreme-court/> [<https://perma.cc/HUG4-CX86>].

of Trump's appointment of Justice Kavanaugh to the Supreme Court and the ongoing Republican partisan staffing of the lower federal courts, the Democrats and their allies might lose their ability to sue to upset Trump policies.

The federal district courts and federal courts of appeals are also politicized. Newspapers writing about a judge or court decision usually identify the President who appointed the judge or judges.²⁶⁸ Careful empirical scholarship has demonstrated that the President who appointed a judge has predictive value across a broad spectrum of litigation.²⁶⁹

Trump's criticism of federal judges has drawn courts deeper into the political realm. Trump called Chief Justice Roberts "an absolute disaster."²⁷⁰ He accused a federal judge of bias because of his family's Mexican heritage. Chief Justice Roberts responded: "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. [. . .] What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for."²⁷¹ Trump responded: "Sorry Chief Justice John Roberts, but you do indeed have 'Obama judges,' [. . .] and they have a much different point of view than the people who are charged with the safety of our country."²⁷²

While courts inevitably make political decisions, it is wrong to say that courts make only political decisions. This Article accepts much of Chief Justice Roberts' response. It is based on the idealistic idea that United States judges are detached professionals who are devoted to the neutral rule of law. However, it is tempered by the realism of a partisan judicial-selection process and a system that permits plaintiffs who file where they think they can prevail. The political lawsuit, the forum-shopped judge,

268. Shira A. Scheindlin, *We Should All Defend Judges*, LAW.COM (Nov. 29, 2018, 9:00 AM), <https://www.law.com/newyorklawjournal/2018/11/29/we-should-all-defend-judges/> [<https://perma.cc/2BXX-K287>].

269. Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Class Certification on the U.S. Courts of Appeals*, 119 MICH. L. REV. (forthcoming 2020), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3097&context=faculty_scholarship [<https://perma.cc/L7RZ-P7CG>].

270. Adam Liptak, *Roberts Rebukes Trump for Swipe at 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html> [<https://perma.cc/4LW2-K5PA>].

271. *Id.*

272. *Id.*

and the politicized judiciary mean that a detached and collegial appellate court ought to be available and standing by.

E. Percolation

“Percolation” expresses the idea that it is helpful for Supreme Court justices to have well-developed arguments about the issues in the appeals they decide. This requires decisions by several district court judges and two or three courts of appeals to develop and clarify the issues.²⁷³ The critics insist that one national government injunction by one district judge short-circuits thorough percolation of issues, complaints, briefs, and decisions. Percolation is a useful tool for a Supreme Court that controls its own docket and decides an average of seventy-five cases a year from more than three hundred thousand lawsuits in federal district courts and over fifty thousand appeals in federal courts of appeals.²⁷⁴

In August 2019, the Ninth Circuit limited a district judge’s nationwide injunction to apply only to the states in its circuit.²⁷⁵ In the absence of proof, findings of fact, and conclusions of law demonstrating that the plaintiffs needed nationwide relief, the court emphasized percolation: “To permit such broad injunctions as a general rule, without an articulated connection to a plaintiff’s particular harm, would unnecessarily ‘stymie novel legal challenges and robust debate’ arising in different judicial districts.”²⁷⁶

More important than percolation in the tens of thousands of lawsuits before the federal courts is the courts’ overarching goal—to provide prompt and complete relief for wronged plaintiffs and to check lawbreaking and excesses. As Professor

273. See Bray, *supra* note 11; Cass, *supra* note 11; Morley, *supra* note 11; Wasserman, *supra* note 10; Sessions Memorandum on Nationwide Injunctions, *supra* note 12.

274. In 2018, the United States Supreme Court decided seventy-five lawsuits. Harold J. Spaeth et al., *2019 Supreme Court Database*, SUP. CT. DATABASE, supremecourtdatabase.org/data.php (last visited Nov. 11, 2019) [<https://perma.cc/H4D5-BFXJ>]. In the year ending March 31, 2018, 358,563 lawsuits were filed in United States district courts, 50,970 appeals were filed in the United States courts of appeal. *Judicial Facts and Figures*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/analysis-reports/judicial-facts-and-figures> (last visited Nov. 11, 2019) [<https://perma.cc/Q82R-MAZL>].

275. *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019).

276. *Id.* (quoting *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018)).

Suzette Malveaux noted, “there are occasions when an issue is sufficiently ripe and particularly pressing such that it should be ruled on sooner rather than later.”²⁷⁷ Judge Gregg Costa added, “for challenges to policies that are plainly unlawful, the rule of law would favor speedy and uniform judicial action.”²⁷⁸ If the issues are clearly drawn, judicial economy militates against multiple lawsuits and delayed relief. These points are particularly appropriate when a judge finds that a defendant’s impairment of a plaintiff’s constitutional rights has created irreparable injury that warrants an injunction.

The parties’ complaints and briefs and the judges’ decisions that I read to prepare this Article are uniformly well argued on both sides. Many were brought by state attorneys general, others by specialty organizations, often supported by national law firms. The federal government’s lawyers are good at defending lawsuits. These well-developed lawsuits answer the need for thorough prior consideration of the issues found in national government injunction cases and negate the argument for percolation.

Finally, the federal government itself argues for haste that prevents percolation. The federal government’s vertical forum shopping militates against percolation. As just one example, the Ninth Circuit upheld a lower court’s preliminary injunction blocking the federal government’s rollback of the Deferred Action for Childhood Arrivals (DACA) program.²⁷⁹ The government sought mandamus in the Ninth Circuit and certiorari before the Supreme Court at the discovery stage.²⁸⁰ The Department of Justice sent a letter to the Ninth Circuit imposing a deadline on a ruling and threatening to leapfrog the court of appeals and seek Supreme Court review.²⁸¹

Fostering percolation is not a policy that is persuasive enough to override a judge’s ability to grant a nationwide na-

277. Malveaux, *supra* note 14, at 58.

278. Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), <https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem/> [<https://perma.cc/SVL3-CPTP>].

279. *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018).

280. 28 U.S.C. § 2101(e) (2018).

281. Adam Liptak, *Trump Asks Supreme Court for Fast Appeal for Transgender Military Ban*, N.Y. TIMES (Nov. 24, 2018), <https://www.nytimes.com/2018/11/23/us/politics/trump-transgender-ban-supreme-court.html> [<https://perma.cc/SX2X-9828>].

tional government injunction when circumstances otherwise warrant that relief.

F. Precedent

The critics of national government injunctions additionally argue that a federal district judge's decision lacks force as binding precedent. But a district judge's national government injunction has force all over the United States. Similarly, a court of appeals decision lacks force as binding precedent in the other federal circuits. But once more, a district judge's national government injunction has force all over the United States.²⁸²

The critics' precedent argument is based on the idea that the government wrongdoer ought to be able to ignore the apparent law announced by a distinct or appellate court with power to decide. Rule of law principles that support obedience militate against this precedent argument. Moreover, the critics' argument regarding formal hierarchical rules of binding precedent is weak in practice. It underestimates the persuasive precedential effect that federal district courts' decisions have for other judges, and it downgrades the persuasive force of thoughtful district court opinions. Two examples follow from the national government injunction decisions examined in this Article.

First, the judge in *Damus v. Nielsen* wrote that “[t]his Court agrees with the sound reasoning of Judge Wolford of the Western District of New York.”²⁸³ The judge also noted that the contention at issue in the case “was carefully explained in a recent opinion from the Southern District of California”²⁸⁴ Second, in *City of Philadelphia v. Sessions*, where national government injunction opponents argued that district court decisions are not entitled to binding precedent status, the judge replied that “[t]he most factually apposite cases regarding permanent injunctions against enforcement grant conditions are other district court opinions regarding recent attempts to impose immigration enforcement priorities on localities.”²⁸⁵

282. See Bray, *supra* note 11; Cass, *supra* note 11; Morley, *supra* note 11, at 616; Wasserman, *supra* note 10; Sessions Memorandum on Nationwide Injunctions, *supra* note 12.

283. 313 F. Supp. 3d 317, 333 (D.D.C. 2018).

284. *Id.*

285. 309 F. Supp. 3d 289, 339 (E.D. Pa. 2018).

When the law is developing rapidly in trial courts and there is very little appellate law on the issue, trial judges will (and should) consult their colleagues who are parallel in the judicial hierarchy.²⁸⁶ Although a federal court of appeals decision is not formally binding precedent in other federal circuits, other federal circuits will regard it as persuasive precedent, particularly if binding precedent is lacking.

G. Asymmetry

Asymmetry is a technical variation of critics' other, party-based arguments against the national government injunction.²⁸⁷ If a plaintiff sues the United States and loses, another plaintiff can still sue the United States. But the reverse is not true: if the United States loses in the plaintiff's first lawsuit and the judge grants a nationwide national government injunction, then that ends the disputed issue for the United States. The federal government obeys the injunction without being able to relitigate the issue in a second lawsuit.

The critics add that a plaintiff injunction class cures this asymmetry because preclusion bars members of the plaintiff class from suing again if the United States wins.²⁸⁸ But the government is free from offensive nonmutual issue preclusion; if the federal government sues and loses, a second plaintiff cannot take advantage of the first judgment to preclude the government from relitigating the merits.²⁸⁹ Critics say that a national government injunction is inconsistent because the government has no opportunity to relitigate after the judge grants it.

The critics' asymmetry argument dilutes the force of an injunction. Also, preclusion and injunctions are different and parallel bodies of law. Preclusion rules do not outrank injunction rules. Quite the reverse. Violation of an injunction can lead to the judge punishing a nonparty for criminal contempt. The rules of who must obey an injunction should be narrower than the preclusion rules which lead to only litigative constraint by barring

286. FEELEY & RUBIN, *supra* note 262.

287. See Bray, *supra* note 11; Cass, *supra* note 11; Morley, *supra* note 11, at 616; Wasserman, *supra* note 10; Sessions Memorandum on Nationwide Injunctions, *supra* note 12.

288. See Bray, *supra* note 11; Cass, *supra* note 11; Morley, *supra* note 11, at 616; Wasserman, *supra* note 10; Sessions Memorandum on Nationwide Injunctions, *supra* note 12.

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

relitigation. Preclusion may bind a litigant who should be beyond the reach of contempt.²⁹⁰

H. Nonparty Benefit

One of critics' major arguments against nationwide national government injunctions is that they benefit nonparties.²⁹¹ Even Professor Amanda Frost—who argues that a nationwide injunction ought to be a remedial option for a federal court—used nonparty benefit to define nationwide injunctions. A nationwide injunction, she says, is an interlocutory or permanent injunction that a federal judge grants when that injunction benefits nonparties but is not a plaintiff injunction class action.²⁹²

Some injunctions do not affect anyone but the parties. For a hypothetical example, Tom Trespass trespasses on Owen Owner's land to fish in Owen's creek. The judge grants Owen an injunction that forbids Tom from trespassing. Only Tom and Owen are affected by this injunction.

Most injunctions, however, have direct and indirect effects. Many injunctions directly benefit nonparties. For example, a single plaintiff's injunction against a defendant for feedlot air pollution directly affects and benefits everyone formerly within range of the abated pollution.²⁹³ Whether or not a plaintiff represents a class, ending the harm for one may benefit many: when a single plaintiff persuades a court to abate a defendant's foul feedlot, all of the neighbors breathe fresher air.²⁹⁴

"Benefit" is too narrow because it overlooks injunctions' negative effect on nonparties. An injunction against implementation of the Affordable Care Act would disadvantage millions of people who would lose medical insurance coverage.²⁹⁵ An injunction

290. RESTATEMENT (SECOND) OF JUDGMENTS § 63 (AM. LAW. INST. 1982). "Bind" is ambiguous even when used to refer to those who should obey an injunction because it creates confusion about who must obey an injunction, precedent, and preclusion. Rendleman, *supra* note 65, at 876–77. Taking "bound" out of these categories—to mean that a nonparty who "benefits" from an injunction is "bound" by it—takes the word beyond any sensible meaning.

291. See Bray, *supra* note 11; Cass, *supra* note 11; Morley, *supra* note 11, at 616; Wasserman, *supra* note 10; Sessions Memorandum on Nationwide Injunctions, *supra* note 12.

292. Frost, *supra* note 9, at 1071.

293. Rendleman, *supra* note 50, at 158 n.17.

294. RENDLEMAN, *supra* note 146, at 506; Rendleman, *supra* note 50, at 158 n.16.

295. Texas v. United States, 945 F.3d 355 (5th Cir. 2019).

striking down expanded eligibility for overtime under the minimum wage statute means that employees formerly entitled to overtime pay would not earn more in the future for those eligible hours, although their employers would benefit because they would pay regular cost for overtime hours.

Effect on nonparties can be seen in multiple types of litigation. For example, busing decrees in school desegregation lawsuits affected nonparties, in particular nonparty students who were transported to distant schools. In *Swann v. Charlotte-Mecklenburg Board of Education*, the Court admitted to the effect on nonparties: “The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided”²⁹⁶ Although court-ordered transportation triggered widespread and serious nonparty opposition, judges continued to use busing decrees to desegregate schools.²⁹⁷

Similarly, if the court finds legislative districts unconstitutional and redraws the districts, the new districts will affect territory outside the formerly unconstitutional districts as well as voters in both the old and new districts. Many of these voters were probably satisfied with the old districts.

Nationwide injunctions create indirect and ripple benefits. For example, a comprehensive structural injunction that brings a prison into compliance with the Constitution creates an indirect ripple effect on the nonparty taxpayers’ tax bills.²⁹⁸ “[A] court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court”²⁹⁹ that raises nonparties’ tax bills. Similarly, a plaintiff’s lawsuit that ends with a declaratory judgment that the defendant’s patent is invalid and an injunction forbidding the

296. 402 U.S. 1, 28 (1971).

297. KRUSE & ZELIZER, *supra* note 45, at 58–61; Nikole Hanna-Jones, News Analysis, *It Was Never About Busing: Court-Ordered Desegregation Worked. But White Racism Made It Hard to Accept.*, N.Y. TIMES (July 12, 2019), <https://www.nytimes.com/2019/07/12/opinion/sunday/it-was-never-about-busing.html> [<https://perma.cc/BR3L-EJCF>]; Laura Meckler, *Effective But Never Popular, Court-Ordered Busing Is a Relic Few Would Revive*, WASH. POST (July 7, 2019, 6:10 AM), https://www.washingtonpost.com/national/effective-but-never-popular-court-ordered-busing-is-a-relic-few-would-revive/2019/07/07/dce439c8-9d40-11e9-b27f-ed2942f73d70_story.html [<https://perma.cc/J48A-ADAF>].

298. *Brown v. Plata*, 563 U.S. 493, 511 (2011).

299. *Missouri v. Jenkins*, 495 U.S. 33, 55 (1990).

defendant from enforcing it should encourage competition that lowers prices and indirectly benefits nonparty buyers.

Professor Chayes wrote that relief in public law structural litigation, usually an injunction, is not “confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.”³⁰⁰ Class action scholars have identified nonparty benefits from injunction classes.³⁰¹

In national government injunction litigation about the rescission of DACA, the Ninth Circuit responded to the government’s request to narrow an injunction affecting nonparties by noting that “[t]here is no general requirement that an injunction affect only the parties in the suit.”³⁰² The court went on to state that “[a]n injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled.”³⁰³

The nationwide injunction’s critics base their view that injunctions benefitting nonparties are illegitimate on what they argue is the order’s recent origins.³⁰⁴ Professor Frost’s justification for national injunctions considers history and the idea of nonparty benefit. She observes that “the existence of the bill of peace, and the absence of a clear prohibition against injunctions affecting nonparties, suggests that there is a credible argument

300. Chayes, *supra* note 239, at 1302.

301. Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1058–59 (2002); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 180 (2003); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 398 (2003).

302. *Regents of the Univ. of Cal. v. Dep’t of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018) (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1987)).

303. *Id.* at 511 (quoting *Bresgal*, 843 F.2d at 1170–71) (emphasis omitted); see also *Price v. City of Stockton*, 390 F.3d 1105, 1117–18 (9th Cir. 2004) (per curiam) (granting injunction that benefitted nonparties where “the breadth of the injunction was necessary” to provide relief for plaintiffs); *Brito v. Zia Co.*, 478 F.2d 1200, 1207 (10th Cir. 1973) (stating that the judge may draft an injunction that “benefits” nonparties); *AFGE v. Cavasos*, 721 F. Supp. 1361, 1371 (D.D.C. 1989), *aff’d in part, vacated in part sub. nom.* *AFGE v. Sanders*, 926 F.2d 1215 (D.C. Cir. 1991) (granting injunction because agency regulations that violate the constitution vacate the rules for all persons, instead of merely preventing the agency from applying the regulations to complainants); Rendleman, *supra* note 50, at 158.

304. Bray, *supra* note 11; Sessions Memorandum on Nationwide Injunctions, *supra* note 12.

that national government injunctions are not a sharp break with pre-1789 practice. . . .”³⁰⁵ She also says that “the historical practice supports the conclusion that courts have always had the authority to issue equitable relief that encompasses nonparties.”³⁰⁶ Frost’s points are correct. The bill of peace was a joinder device that allowed a decision to affect nonparties.³⁰⁷ The nineteenth century Supreme Court seems to have agreed that the Chancery could resolve the whole dispute to prevent a “multiplicity” of actions at law:

Under the principles which in the federal system distinguish cases in law from those in equity, the circuit court of the United States, sitting in equity, can make a comprehensive decree covering the whole ground of controversy, and thus avoid the multiplicity of suits that would inevitably arise under the statute.³⁰⁸

A class action rule was not developed until 1938 and was not effective until amendments in 1966. After the class action rule was amended in 1966 to make it functional and more workable, Professor Kaplan wrote for the advisory committee that “[w]hen numerous persons stood in the same position toward an adversary so that there was potentially a large number of essentially identical lawsuits, equity might in effect allow a consolidation of the expected actions and clear up the entire situation through a bill of peace.”³⁰⁹ Because of the modern class action rule, the bill of peace is obsolete.

Professor James Pfander’s article with Jacob Wentzel and Professor Mila Sohoni’s separate article have applied scrupulous research to refute the national government injunction’s critics’ arguments that the “traditional” view was that an injunction “benefitted” only the party plaintiff and that the national government injunction is a recent innovation.³¹⁰ These scholars

305. Frost, *supra* note 9, at 1081 n.77.

306. *Id.* at 1081.

307. Brief of Amici Curiae Legal Historians in Support of Plaintiff and Appellee the City of Chicago, *supra* note 105, at 8; CHAFEE, *supra* note 108, at 166.

308. *Smyth v. Ames*, 169 U.S. 466, 517 (1898), *aff’d as modified*, 171 U.S. 361 (1898).

309. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 376 (1967).

310. Pfander & Wentzel, *supra* note 105 (manuscript at 10–11); Sohoni, *supra* note 105; *see also* Brief of Amici Curiae Legal Historians in Support of Plaintiff and

found that broad, nonparty injunctions were used much earlier in state and federal courts against both state and federal governments. The government defendants in those cases were primarily concerned about the substantive merits, not the breadth, of injunctions. If a court held a statute or executive measure unconstitutional, it was not enforced at all.³¹¹ The executive branch's defense—trying to circumscribe the court's national government injunction against the executive's illegal measure—is the innovation here, not the broad injunction against it.

The critics' argument that a nonparty benefits from a national government injunction is overstated. If a defendant violates an injunction, a nonparty lacks the legal ability to enforce it; only the plaintiff or the judge can enforce the injunction with civil or criminal contempt.³¹² A nonparty suffering under a defendant's illegal post-injunction policy has two alternatives. First, she can intervene in the original lawsuit.³¹³ Second, she can file a new lawsuit, cite the first judge's decision as precedent, and demand an injunction of her own. The new plaintiff may adduce the previous decision as precedent but she cannot, under present law, use the preclusion doctrines to prevent the government from relitigating.³¹⁴

Appellee the City of Chicago, *supra* note 105, at 15–18; Trammell, *supra* note 156, at 989; Portia Pedro, *Toward Establishing a Pre-extinction Definition of "Nationwide Injunctions,"* 91 U. COLO. L. REV. 847, 873 (2020) (adding "that Bray's historical arguments about equity are not as ironclad as they might first seem to be").

311. Sohoni, *supra* note 105, at 977.

312. *Northside Realty Assocs., Inc. v. United States*, 605 F.2d 1348, 1356 (5th Cir. 1979); *Secor v. Singleton*, 35 F. 376, 378 (C.C.E.D. Mo. 1888); RENDLEMAN, *supra* note 146, at 506; Rendleman, *supra* note 50.

313. FED. R. CIV. P. 24; Rendleman, *supra* note 50, at 159 nn.21–23; Amanda Bronstad, *Duke Pays \$54.5M to Settle 'No Poach' Class Action After DOJ Intervenes*, LAW.COM (May 20, 2019, 7:05 PM), <https://www.law.com/2019/05/20/duke-pays-54-5m-to-settle-no-poach-class-action-after-doj-intervenes/> [<https://perma.cc/ZUN7-FQCY>].

314. *United States v. Mendoza*, 464 U.S. 154 (1984); Clopton, *supra* note 11. Professor Clopton argues persuasively that *Mendoza* is incorrect. He argues that the United States is a skilled litigant that does not need to be protected from offensive nonmutual issue preclusion. Indeed, Justice Gorsuch wrote that the federal government is the most powerful of parties. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019). Clopton's solution to the national government injunction is that a judge may grant an injunction broad enough to protect those nonparties who would be likely candidates for nonmutual preclusion. The judge, he adds, ought to decline to issue a national government injunction when nonparties would be unlikely candidates for nonmutual or nonparty preclusion. But the judge should be skeptical of any wait-and-see plaintiffs and exercise caution when there are

The way a nonparty benefits is that the government defendant ceases its improper behavior and obeys the plaintiff's injunction. Rule of law principles, the rule that requires agents to obey an injunction against their principal,³¹⁵ and the traditional doctrine of in personam jurisdiction support the government's obedience to the apparent law. By calling it a "nationwide injunction," critics mean that the injunction affects everyone in the United States because that is where the U.S. government and its agents are. The critics have not developed the related "who-must-obey" issue. Critics argue that nonparty benefits go too far.³¹⁶ They chastise nonparty benefits based on the unspoken idea that the government will comply.

The supposed beneficiaries of the national government injunction—not the defendant or the injunction's geographic coverage—create the conditions that critics oppose. Focusing on nonparties directs attention to the public and away from the defendant (whom the court has ordered to obey). Emphasis on nonparty benefits downgrades or ignores judicial review, separation of powers, and the basic equitable principles of in personam jurisdiction and agents' obedience to injunctions. The critics also ignore the informal understanding that the government complies with injunctions and ignore the court's role, which is to extend complete relief to victims and to suppress law-breaking. This distraction may erode relief for those harmed by the defendants' illegal conduct.

My view is that when a federal judge drafts relief after the federal executive has broken the law, the identity of the federal executive defendant and the compliance of its agents are more important than how the injunction affects nonparties. Focusing on nonparties distracts from the more important issue of how a court orders the federal executive to obey the law to assure that people retain their constitutional and statutory rights as well as to end the government's illegal conduct. The critics' nonparty argument ought to remind litigants and other observers to

inconsistent prior judgments. Overruling *Mendoza* to allow nonparty preclusion against the United States will, Clopton argues, reduce the need for national government injunctions because second lawsuits against the United States will then be streamlined. *Id.*

315. FED. R. CIV. P. 65(b)(2).

316. See Bray, *supra* note 11; Cass, *supra* note 11; Morley, *supra* note 11, at 616; Wasserman, *supra* note 10; Sessions Memorandum on Nationwide Injunctions, *supra* note 12.

consider an injunction's positive and negative effects on nonparties.

Critics concede that a national government injunction is not inappropriate when the plaintiffs sue on behalf of an injunction class under Federal Rule of Civil Procedure 23(b)(2).³¹⁷ The reasoning is that the judge's certification of the plaintiff injunction class will slow the litigation down, check loose procedure, and protect nonparties.

Accepting a nationwide injunction class is a necessary concession. In litigation about the recapture of benefits overpayments in 1979, the Supreme Court in *Califano v. Yamasaki* approved a nationwide plaintiff injunction class, noting that "class relief is appropriate in civil actions brought in federal court, including those seeking to overturn determinations of the departments of the Executive Branch of the Government in cases where judicial review of such determinations is authorized."³¹⁸

The Court's reasoning was based on the plaintiffs' need for complete relief:

Nor is a nationwide class inconsistent with principles of equity jurisprudence, since the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class. If a class action is otherwise proper, and if jurisdiction lies over the claims of the members of the class, the fact that the class is nationwide in scope does not necessarily mean that the relief afforded the plaintiffs will be more burdensome than necessary to redress the complaining parties.³¹⁹

The Court rejected the government's argument that an injunction in favor of a nationwide plaintiff class prevented the development of issues through percolation in several lower courts: "[A] federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts."³²⁰

317. See Bray, *supra* note 11; Morley, *supra* note 11, at 616.

318. 442 U.S. 682, 700 (1979).

319. *Id.* at 702 (citation omitted).

320. *Id.*

The availability of a national government injunction when the plaintiff sues on behalf of an injunction class shows that the critics' argument against the national government injunction is based on equity jurisdiction, not on subject matter jurisdiction. A judge, who has authority and power to grant a national government injunction in closely related class action litigation, has authority and power to grant a nationwide national government injunction in nonclass litigation.

A plaintiff injunction class differs from the better-known plaintiff damages class. An injunction class member receives no notice of the ongoing litigation and has no right to exit the class by opting out. A damages class member receives notice and an opportunity to opt out. Authorities maintain that in both types of class action, a winning defendant earns preclusion. In other words, the authorities assume that if the defendant wins on the merits, an absentee injunction class member will be precluded from suing the defendant on the same cause of action. Injunction class members remain unbeknownst in the class. They have neither ability to control it nor any day in court.³²¹

Binding a class member who received neither notice nor an opportunity to exit seems unfair. But courts have not developed the preclusion rule because the injunction class litigation has taken another route. It has evolved through class certification, negotiated consent decrees, and motions to modify or dissolve. The injunction class's development has not followed the scenario of litigation to a substantive decision—defendant victories on the substantive law—followed by second suits by injunction class members.³²² The injunction class, which ignores differences within plaintiff injunction classes, “veers toward unconstitutional territory.”³²³

Professor Fiss observed that the plaintiff injunction class is not the foundation of the structural injunction because of the “group character of the underlying substantive claim.”³²⁴ An ab-

321. Marcus, *supra* note 188, at 658. Professor Marcus speculates that there is “no trans-substantive explanation for why injunctive relief class members lack notice and opt-out rights, [the drafting committee] undoubtedly believed that the substantive consequences of class treatment justified *res judicata*, and they understood that interest representation provided the constitutional footing for this preclusive effect.” *Id.* at 716.

322. RENDLEMAN, *supra* note 146, at 527; John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1446–50 (2003).

323. Marcus, *supra* note 188, at 703, 711.

324. FISS, *supra* note 170, at 15.

sent injunction class member who received no notice may be as disassociated from the litigation as a nonparty. Nevertheless, the class-based remedy may affect nonparties: “Whether plaintiff proceeds as an individual or on a class-suit basis, the requested relief generally will benefit not only the claimant but all other persons subject to the practice or the rule under attack.”³²⁵ An injunction class action does not differ much from other civil rights litigation. Nonparty status and absent class membership work out to be about the same.³²⁶

Historically, defendants who have opposed Rule 23(b)(2) certification have not succeeded.³²⁷ The unqualified point in an earlier edition of the popular *Wright & Miller’s Federal Practice and Procedure* treatise was that Rule 23(a)’s prerequisites are liberally applied in certifying (b)(2) discrimination classes that involve civil and constitutional rights.³²⁸ The 2018 edition qualified the liberal application in employment discrimination cases where the plaintiffs asked for an injunction class and also sought to recover money for lost income.³²⁹

It remains to be seen how the narrowed certification of injunction classes in employment discrimination cases affects national government injunction classes not also seeking money damages. Professor Malveaux is not optimistic: “Aggregate litigation is being undermined at the very same time Bray is suggesting greater dependence on it [for nationwide national government injunctions]. But the government cannot have it both ways. As the availability of the class action device goes down, the need for the national injunction goes up.”³³⁰ My own view is less pessimistic than Malveaux’s: the structural injunction, which is entrenched and routine, will not change much.

Moreover, the critics’ argument that the injunction class certification process will prevent improvident remedies and pro-

325. WRIGHT ET AL., *supra* note 245, §§ 1771, 2903.

326. Marcus, *supra* note 188, at 703, 716.

327. DG *ex rel.* Stricklin v. Devaughn, 594 F.3d 1188 (10th Cir. 2010); Shook v. El Paso County, 386 F.3d 963 (10th Cir. 2004); Marcus, *supra* note 188, at 706.

328. 7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1771, at 663 (1972) (commenting on the “liberalized application of the Rule 23(a) prerequisites” in Rule 23(b)(2) cases).

329. *Id.* (narrowed by Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982) and Wal-Mart Stores, Inc. v. Dukes 564 U.S. 338 (2011)); *see also id.* § 2903.

330. Malveaux, *supra* note 14, at 60.

tect nonparties seems to me and to Professor Frost to be overstated.³³¹

There are some differences between an injunction class remedy and an injunction without a plaintiff class. The most important difference is that a class member can raise contempt charges, but a nonparty cannot.³³² Additionally, a class of plaintiffs makes the case more difficult to moot.³³³ Neither of these differences have played much of a practical role in actual litigation.

An injunction class is a good idea and is not exceptionally burdensome. Should a nationwide injunction class be a prerequisite for a nationwide national government injunction? In short, no. The executive may change government policy quickly and improperly in a way that affects dispersed, and possibly transitory, people. A lawsuit for a national government injunction is complex and specialized litigation that requires prompt preparation by specialized plaintiffs' lawyers with depth and resources. The victims of the improper policy may lack the ability to sue individually. State attorneys general and activist membership organizations should be able to sue the wrongdoers for quick relief to protect nonparties from irreparable injury. Seeking a plaintiff injunction class is a salutary but not an indispensable tactic. The judge might, however, certify a provisional injunction class before granting plaintiffs interlocutory relief.³³⁴

I. Single Judge

The critics' final argument is that the national government injunction violates separation of powers principles because a single judge can stop a national executive program.³³⁵ A nationwide national government injunction, they argue, gives too much power to the judiciary at the expense of the executive.

331. Frost, *supra* note 9, at 1071 (writing that national government injunctions do not require class action certification protections for nonparties).

332. Marcus, *supra* note 188, at 701 n.253; Rendleman, *supra* note 50, at 159 nn.21–23.

333. *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992); Rendleman, *supra* note 50, at 159 n.24.

334. See, e.g., *Damus v. Nielsen*, 313 F. Supp. 3d 317, 335 (D.D.C. 2018).

335. See Bray, *supra* note 11, at 420; Cass, *supra* note 11, at 1; Morley, *supra* note 11, at 620; Wasserman, *supra* note 10, at 339; Sessions Memorandum on Nationwide Injunctions, *supra* note 12.

The critics' argument is contrary to core ideas of constitutional law and separation of powers. The judiciary has the final word on what the Constitution means, and it uses judicial review to exercise that final say. Justice Brandeis wrote:

The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.³³⁶

The federal courts keep the federal executive in constitutional line.³³⁷ In a system without the nationwide national government injunction, the federal executive could develop and implement policies and programs that avoid obeying the law.

In *Armstrong v. Exceptional Child Center*, Justice Scalia wrote:

It is true enough that we have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law. But that has been true not only with respect to violations of federal law by state officials, but also with respect to violations of federal law by federal officials. . . . What our cases demonstrate is that, "in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer."

The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity and reflects the long history of judicial review of illegal executive action, tracing back to England.³³⁸

In short, under equitable jurisdiction and established precedent, a plaintiff may sue federal officials in federal court to en-

336. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

337. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

338. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (quoting *Carroll v. Safford*, 44 U.S. 441, 463 (1845)) (citations omitted) (rejecting an injunction in the absence of a private right of action).

join their unconstitutional actions.³³⁹ The federal court may determine whether the President “has acted within the law.”³⁴⁰

The critics take a narrow and anachronistic view of the role of courts and litigation. It is narrow because the judiciary has always had the backup role, first articulated by Chief Justice John Marshall in *Marbury v. Madison*, “to say what the law is.”³⁴¹ It is anachronistic because it neglects the rise of divided government, a too-activist executive, group litigation, and the injunction as a remedial tool to enforce statutory and constitutional rights.

The United States lacks a constitutional court to suppress outlier government decisions, as is found in other nations’ constitutions.³⁴² This work falls on the trial judges in the U.S. district courts as “regular” litigation with the usual appellate processes in the courts of appeals and Supreme Court.³⁴³ The use of three-judge district courts to determine whether statutes are unconstitutional has faded into the sunset.³⁴⁴ One way for Congress to overcome the single-judge and forum-shopping issues is to pass a new three-judge district court statute.

Professor Jeffery Rosen closes his short biography of President Taft by reminding us that “[a]s independent judges represent the last check on unconstitutional encroachments by the president, Congress and the states, conservatives, classical liberals, and progressives alike are converging around a renewed appreciation for judicial independence.”³⁴⁵

Like grading exams for a professor, correcting Congress and the President may not be the best part of a federal judge’s workload. Yet, it is vital. The better approach, as a federal judge, is to grit your teeth and do your job.³⁴⁶

339. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

340. *Clinton v. Jones*, 520 U.S. 681, 703 (1997); see also *Nixon v. Fitzgerald*, 457 U.S. 731, 753–54 (1982).

341. 5 U.S. (1 Cranch) 137, 177 (1803).

342. CONSTITUIÇÃO FEDERAL art. 102–03 (Braz.); GRUNDGESETZ [CONSTITUTION] art. 92–94 (Ger.).

343. WOOD, *supra* note 19, at 448.

344. Pfander & Wentzel, *supra* note 105 (manuscript at 1).

345. JEFFREY ROSEN, WILLIAM HOWARD TAFT 137 (2018); see also Burbank, *supra* note 74, at 22.

346. UROFSKY, *supra* note 39, at 30 (“In any case involving the president or Congress, the Court nearly always repeats the mantra that deference is due to the judgments of the coordinate branches of government. Despite that, the Court has no problem telling the president that he cannot do certain things.”).

V. FILTERS AND PRINCIPLES OF CONFINEMENT

This Article now turns to whether plaintiffs are qualified for an injunction after prevailing on the merits and, if they are qualified, how to draft the injunction's breadth, size, and shape. The judge's equitable discretion to shape the injunction exceeds his discretion to choose the remedy.

National government injunctions enforce the Constitution and federal statutes. They provide complete relief for plaintiffs and protect thousands of victims who may be unable to protect themselves. They avoid piecemeal, duplicative litigation, promote national uniformity, and obviate the administrative difficulties that arise when improper government activity is allowed.

Complete relief places the plaintiff where the defendant's obedience would have, as nearly as a court order can. Through an injunction, the judge stops the defendant from impinging on the plaintiff's ability to exercise a constitutional or statutory right. The defendant's side of the coin is that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."³⁴⁷

Sometimes a group remedy based on interest representation is the only practical solution. An example comes from implementing *Brown v. Board of Education*.³⁴⁸ Earlier decisions granted plaintiffs individual freedom-of-choice injunctions by admitting only the named plaintiffs to formerly segregated schools. Desegregation was making only incremental progress until plaintiffs started seeking injunction class relief: "Individual black students choosing one-by-one to attend white schools, however, would never disassemble the segregation edifice."³⁴⁹ "A student-by-student approach to desegregation litigation posed enormous difficulties and all but nullified *Brown*. To those invested in the success of litigation-driven desegregation, class treatment of claims seemed essential."³⁵⁰

A federal court does not casually void executive branch activity or an act of Congress. Federal judges are deferential to their parallel elected branches. A judge ought to be wary of overturning the decision of an elected branch of government on an

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

348. 347 U.S. 483 (1954).

349. *Marcus*, *supra* note 188, at 688.

350. *Id.* at 680–81; *see also Rendleman*, *supra* note 179, at 1587–93.

important issue.³⁵¹ Commentators have noted that “the justices traditionally are solicitous when a president raises questions concerning the separation of powers.”³⁵² Professor Frost adds:

A single district court judge should not lightly assert control over federal policy for the nation, or take action that would prevent her fellow judges from reaching their own decisions in cases involving different plaintiffs. But when the benefits outweigh the costs, the courts should have this tool at hand.³⁵³

To accept that a judge may grant a nationwide national government injunction that forbids the federal executive’s overreach does not mean that a court will grant a nationwide injunction for all federal executive breaches. One question is whether another order will implement a proper remedy and complete justice, including the suppression of official wrongdoing. A second question is how a nationwide injunction will affect third persons not connected with the lawsuit. Context and implementation details matter. These considerations are part of the judge’s equitable discretion in choosing and tailoring a remedy.

Other possible or actual constraints on the national government injunction are: class certification; the permanent and preliminary injunction standards, including balancing the hardships, the likelihood of success on the merits, the public interest, the effect on third persons, and plaintiffs’ evidence of loss; the judge’s role in drafting the order; motions to modify or dissolve; and prompt appellate review. Other procedural techniques that broaden participation on the plaintiff side are intervention as a party to express supporting claims³⁵⁴ and nonparty’ participation as amici to provide support and differing perspectives.

Once a plaintiff’s complaint surmounts the hurdle of the defendant’s motion to dismiss, the next procedural stage is discov-

351. See, e.g., *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381–82 (2004) (recognizing deference to the executive in deciding whether to entertain mandamus).

352. Robert Barnes, *Supreme Court Will Take up Trump’s Broad Claims of Protection from Investigation*, WASH. POST (Dec. 13, 2019, 5:28 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-will-take-up-trumps-broad-claims-of-protection-from-investigation/2019/12/13/1de84cd6-1d19-11ea-8d58-5ac3600967a1_story.html [<https://perma.cc/HZ5W-CGGS>].

353. Frost, *supra* note 9, at 1116.

354. FED. R. CIV. P. 24; Bronstad, *supra* note 313.

ery. The government's procedural efforts to avoid submitting to discovery are another procedural chapter.³⁵⁵

A. *An Injunction Class Action*

A national government injunction plaintiff is advised to seek an injunction class under Federal Rule of Civil Procedure 23(b)(2). The checklist for the judge's certification of an injunction class has four requirements in Rule 23(a) and one in Rule 23(b)(2). The Rule 23(a) requirements are:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.³⁵⁶

If possible, plaintiffs seeking nationwide injunctions should define and state a nationwide Rule 23(a) plaintiff class with: enough class members, a named plaintiff who has a claim typical of class members' claims, common questions of law and fact, the same injury, capable lawyers, and no internal class conflict. Rule 23(b)(2) requires the defendant's misconduct to apply generally to the plaintiff class and be curable with an injunction or declaratory judgment and acknowledges that separate actions risk inconsistency.³⁵⁷ From my reading of complaints and decisions for this Article, the plaintiffs' adequacy of representation has been assured.

B. *Prerequisites for a Permanent Injunction*

The prerequisites for a permanent injunction and a preliminary injunction are additional hurdles for a national

355. Vladeck, *supra* note 91.

356. FED. R. CIV. P. 23.

357. *See, e.g.,* Damus v. Nielsen, 313 F. Supp. 3d 317, 334–35 (D.D.C. 2018) (provisional class certified).

government injunction plaintiff. In *eBay v. MercExchange*, the Supreme Court said that a plaintiff seeking a final or permanent injunction must demonstrate:

(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.³⁵⁸

Plaintiffs' adequate remedy at law—damages—has not yet come up in national government injunction litigation. The court assumes plaintiffs' irreparable injury from the defendant's constitutional violation.³⁵⁹ Balancing the hardships compares the plaintiffs' benefit from an injunction with defendant's burden from it. Either balancing the hardships or considering the public interest can lead the court to examine an injunction's third-party effects.³⁶⁰ A hypothetical example of third-party effects that would militate against a national government injunction would occur in an Affordable Care Act lawsuit where an injunction holding the program unconstitutional could lead to twenty million people losing health insurance.³⁶¹ Possible substitutes for

358. *eBay, Inc. v. MercExchange*, 547 U.S. 388, 391 (2006).

359. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); Doug Rendleman, *Irreparability Resurrected?: Does a Recalibrated Irreparable Injury Rule Threaten the Warren Court's Establishment Clause Legacy?*, 59 WASH. & LEE L. REV. 1343, 1380–88 (2002).

360. For example, the New York State Court of Appeals' well-known decision in *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 871 (N.Y. 1970), was a private nuisance lawsuit brought because of the defendant's particulate pollution. In approving permanent damages instead of an injunction, the court mentioned both the defendant's investment in its plant and the number of its employees. Balancing the hardships would involve comparing the defendant's hardships from an injunction to the plaintiff's hardships without an injunction, a comparison that apparently considered the defendant's investment and ultimately favored the cement plant. The company's employees were nonparties who would be adversely affected if the plant were shuttered, another factor that apparently militated against an injunction. The majority did not, however, mention another nonparty effect: the particulate pollution's effect on public health. *Id.*

361. In the actual lawsuit, the trial judge granted a declaratory judgment stating that the program was unconstitutional. The court of appeals affirmed that the program violated the constitution but remanded for the trial judge to reconsider severability. *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019). As of late 2019, the court is probably a year from determining a remedy.

an injunction include a declaratory judgment, a delayed injunction, and a stay.

C. Prerequisites for an Interlocutory Injunction

The federal rules permit two forms of interlocutory injunction: the temporary restraining order and the preliminary injunction.³⁶² The judge may grant the plaintiff a temporary restraining order (TRO) without notice to the defendant. The federal government is everywhere in the United States: it is available for formal notice, meaning at least notice by email, fax, or telephone.³⁶³ The reading for this Article did not reveal any *ex parte* orders against the United States. I cannot think of an emergency that clamors for such immediate attention that the judge should grant the plaintiff an *ex parte* TRO against the ubiquitous United States without any notice at all.

Before granting a final injunction, a judge must determine that the plaintiff will prevail on the merits. And that judge decides the interlocutory preliminary injunction before the parties have developed a full record:

The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.³⁶⁴

The standard for a preliminary injunction includes the plaintiff's likelihood of success. A preliminary injunction plaintiff must demonstrate: (1) likelihood of success on the merits, (2) likelihood of suffering irreparable harm without preliminary relief, (3) the balance of equities tips in plaintiff's favor, and (4) a preliminary injunction will be in the public interest.³⁶⁵

Determining the plaintiff's likelihood of success on the merits sometimes revolves around whether to apply a sliding scale. The classic statement of the sliding scale test is:

362. FED. R. CIV. P. 65.

363. See FED. R. CIV. P. 4(i).

364. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

365. *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

[T]hat a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.³⁶⁶

Under the test's second prong, the judge may grant the plaintiff a preliminary injunction when the plaintiff shows "a fair ground for litigation." I respectfully submit that, before enjoining the federal executive, a judge should find that the plaintiff has more than a 50 percent chance of prevailing. The judge should put the "fair ground of litigation" question to one side for a national government preliminary injunction.

The federal rule tells the judge to grant a plaintiff an interlocutory order, a TRO, or a preliminary injunction only after the plaintiff posts an injunction bond to indemnify the defendant if the interlocutory order turns out, on plenary hearing, to have been incorrect.³⁶⁷ Injunction bonds are discretionary in national government injunction lawsuits. The decisions usually do not mention them, although one court discussed and then waived the bond.³⁶⁸ Waiving the bond is the better approach.

Another possible technique is for the judge to combine the preliminary injunction and final injunction hearings, in effect leapfrogging the preliminary injunction.³⁶⁹ The judge will then decide whether to grant the plaintiff a final injunction.

The judge who is deciding an interlocutory injunction will make a written ruling on fact and law, stating reasons and terms.³⁷⁰ Stating the reasoning prompts the trial judge to think through the issues and helps the appellate court understand the lower court's decision.

366. *Sonesta Int'l Hotels Corp. v. Wellington Assoc.*, 483 F.2d 247, 250 (2d Cir. 1973) (emphasis omitted).

367. FED. R. CIV. P. 65(c).

368. *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838 (N.D. Cal. 2018); see also Pedro, *supra* note 310, at 873 ("Bray's historical arguments about equity are not as ironclad as they might first seem to be.")

369. FED. R. CIV. P. 65(a)(2); Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495 (2003).

370. FED. R. CIV. P. 52(a)(1)(2), 65(d)(1).

D. Proof and Findings

The adversarial hearing for a preliminary or final national government injunction will be based on briefing and will include declarations or affidavits, oral evidence if needed, and argument. The judge will base the injunction on the evidence. The plaintiff should adduce nationwide evidence to support a nationwide order. Frost wrote, “The best practice is for a federal district court to establish procedures to ensure that it has all the relevant information about the costs and benefits of the proposed scope of an injunction before issuing it.”³⁷¹

The plaintiff’s proof is crucial. In August 2019, the Ninth Circuit decided against the government’s motion to stay a nationwide preliminary injunction.³⁷² It said that the government had not shown that it was likely to prevail on the merits. The Ninth Circuit refused to stay the entire preliminary injunction, instead staying the injunction only as it applied to states outside the circuit, explaining that “the nationwide scope of the injunction is not supported by the record as it stands.”³⁷³

Also, the trial judge’s findings of fact and conclusions of law must lay the foundation for nationwide relief. In the decision on the stay described in the prior paragraph, the Ninth Circuit added that the trial judge had “failed to discuss whether a nationwide injunction is necessary to remedy Plaintiffs’ alleged harm.”³⁷⁴ In addition to staying the trial judge’s nationwide injunction outside of the Ninth Circuit, the court sent the nationwide feature back to the trial judge for proof and findings of plaintiffs’ nationwide harm.³⁷⁵

“Sanctuary city” litigation is another example of the need for nationwide proof. Local police sometimes decline to implement federal executive orders that facilitate enforcement of federal immigration policies. These localities are called “sanctuary cities.” But the “sanctuary city” is a diverse, nonuniform

371. Frost, *supra* note 9, at 1116.

372. *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026 (9th Cir. 2019).

373. *Id.* at 1028; *see also* *Calvin Klein Indus., Inc. v. BFK H.K., Ltd.*, 714 F. Supp. 78, 78–80 (S.D.N.Y. 1989) (“Accordingly, defendants are preliminarily enjoined from selling the infringing goods in the United States, and in such other markets as Calvin Klein may demonstrate that it has established its presence, through either direct sales or licensees.”).

374. *E. Bay Sanctuary Covenant*, 934 F.3d at 1029.

375. *Id.* at 1031.

concept with many types.³⁷⁶ Judges in sanctuary city lawsuits seem to be correctly deciding not to grant or approve nationwide national government injunctions because local resistance to the federal policy differs from locality to locality.³⁷⁷

Equitable discretion allows the trial judge to evaluate factual nuance and consider the litigation's context: "The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion."³⁷⁸

E. Drafting the Injunction

This Article contends that the major issues in national government injunctions are proof and drafting. The judge must provide the winning plaintiff or plaintiffs with complete relief without forbidding the defendant from engaging in protected activity.

There are two ways to reduce the number of the government's agents who must obey an injunction: amending the related rule of civil procedure and drafting the injunction. Amending the rule is not a good idea. In particular, an amendment to limit federal courts' orders to "accord with the historical practice in federal courts in acting only for the protection of parties to the litigation"³⁷⁹ is inadvisable and wrongheaded. It would limit the courts' remedial power based on the dubious analysis of legal history shown earlier in this Article.³⁸⁰ If nothing else, the history is ambiguous.

The Supreme Court's remedies decision in *Brown v. Board of Education*³⁸¹ contributed two ideas that may carry over to drafting national government injunctions. First is the idea of

376. Christopher N. Lasch et al., *Understanding "Sanctuary Cities"*, 58 B.C. L. REV. 1703 (2018).

377. See *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1244–45 (9th Cir. 2018) (vacating a national government injunction and remanding); Frost, *supra* note 9, at 1102.

378. *eBay, Inc. v. MercExchange*, 547 U.S. 388, 391 (2006).

379. Letter from Samuel L. Bray, Professor of Law, UCLA School of Law, to Advisory Comm. on Rules of Civil Procedure (March 1, 2017), http://www.uscourts.gov/sites/default/files/17-cv-e-suggestion_bray_0.pdf [https://perma.cc/8MRS-SCM4] (proposing an amendment to Rule 65(d) of the Federal Rules of Civil Procedure: "Every order granting an injunction and every restraining order must accord with the historical practice in federal courts in acting only for the protection of parties to the litigation . . .").

380. See Pfander & Wentzel, *supra* note 105; Sohoni, *supra* note 105.

381. 349 U.S. 294 (1955).

possible delay as a result of implementing change in a bureaucracy. The Court referred to that as “all deliberate speed.”³⁸² Second, the Court adjured respect for defendant government officials.³⁸³

Two examples of types of injunctions that are geographically circumscribed show that courts can subject the national government injunction to limiting principles to prevent injunctions that are too broad. These examples are antisuit injunctions and anti-trust divestment injunctions.

An antisuit injunction forbids a litigant from pursuing litigation in another forum. It operates on the defendant—not the foreign court—but it does affect the foreign court’s power to act. This leads to caution, restrictive rules, and possible dueling injunctions. Courts write narrow rules to grant an interstate antisuit injunction. For example, in *Tabor & Co. v. McNall* the court noted that “[t]he trial judge did not cite, nor does the record disclose, any facts to show why an injunction is necessary to avert ‘fraud, gross wrong or oppression’. Consequently, it was error to enjoin the McNalls from proceeding in a foreign court.”³⁸⁴ In *Wells v. Wells*, the court said that the judge’s power to enjoin a suit in another state “is a matter of great delicacy invoked with great restraint in order to avoid distressing conflicts and reciprocal interference with jurisdiction.”³⁸⁵ A court will be likely to deny full faith and credit to an out-of-state antisuit injunction.³⁸⁶

Courts may be even more stingy with international antisuit injunctions. For example, the Eighth Circuit noted that several other circuits have adopted a “conservative approach”

under which a foreign antisuit injunction will issue only if the movant demonstrates (1) an action in a foreign jurisdiction would prevent United States jurisdiction or threaten a vital United States policy, and (2) the domestic interests outweigh concerns of international comity. Under the conservative approach, “[c]omity dictates

382. *Id.* at 301.

383. *Id.* at 299.

384. 333 N.E.2d 562, 564 (Ill. App. Ct. 1975).

385. 343 N.E.2d 215, 217 (Ill. App. Ct. 1976).

386. *Baker by Thomas v. Gen. Motors, Corp.*, 522 U.S. 222, 241 (1998) (no full faith and credit for antisuit injunction).

that foreign antisuit injunctions be issued sparingly and only in the rarest of cases”³⁸⁷

Similarly, judges presiding in antitrust cases must consider the breadth of relief and ask whether an injunction is proper when it requires the losing defendant to divest. If the plaintiff is private, the Department of Justice will weigh in, and the judge will consider several factors for an injunction. The judge may appoint a special master to monitor and implement a divestment injunction.³⁸⁸

Additionally, a court may limit an injunction to a defined territory. One example is an injunction enforcing a former employee’s activity under a noncompetition covenant that specifies a “reasonable” territory.³⁸⁹ Another example is a trademark injunction that protects the plaintiff within a particular area.³⁹⁰

The Ninth Circuit once narrowed a district judge’s nationwide national government injunction, vacating the injunction in nonplaintiff states and cautioning against broad injunctions.³⁹¹ The Fifth Circuit similarly limited an injunction preventing enforcement of a federal program to only one state.³⁹²

Courts can develop limiting principles to apply when granting national government injunctions, and they can draft injunctions that are no broader than needed.

F. Appellate Review

The final constraint on national government injunctions is appellate review—a decision from a more detached, collegial appellate court. National government injunction plaintiffs will

387. *Goss Int’l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 359 (8th Cir. 2007) (quoting *Gua Shan Co. v. Bankers Tr. Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992)) (internal citations omitted).

388. *See Steves & Sons, Inc. v. JELD-WEN, Inc.*, 345 F. Supp. 3d 614, 648–51 (E.D. Va. 2018), *appeal docketed*, No. 19-1397 (4th Cir. Apr. 16, 2019).

389. *E.g.*, *Turnell v. CentiMark Corp.*, 796 F.3d 656, 664–67 (7th Cir. 2015).

390. *E.g.*, *Blue Ribbon Feed Co. v. Farmers Union Cent. Exch., Inc.*, 731 F.2d 415, 422 (7th Cir. 1984).

391. *California v. Azar*, 911 F.3d 558, 575–81 (9th Cir. 2018) (vacating the portion of the injunction barring enforcement of rules in nonplaintiff states). *But see E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1030 (9th Cir. 2019) (declining to extend *Azar* and granting the motion for stay pending appeal insofar as the injunction applies outside the Ninth Circuit).

392. *Texas v. Equal Emp’t Opportunity Comm’n*, 933 F.3d 433 (5th Cir. 2019) (enjoining the United States from enforcing the Guidance in Texas).

seek a trial judge that they think will be predisposed to be sympathetic; as critics put it, they will forum shop. From at least Chafee on, observers have insisted that a defendant's proper course of action for an objectionable injunction is appellate review, not defiance.³⁹³

Appellate courts review injunctions to determine whether there was an abuse of discretion.³⁹⁴ Courts of appeals should review all national government injunctions with a narrower concept of abuse. The trial judge's discretion when issuing national government injunctions should be tempered by stricter standards than for other injunctions.

A losing party has a right to appeal both a preliminary injunction and a final injunction.³⁹⁵ A full federal appeal with briefs, oral argument, and a written decision can take about one year, which is too long for the government to wait for an appellate decision about a nationwide injunction.

The government's lawyers have unleashed a barrage of vertical forum shopping in district courts to secure appellate review from a potentially more friendly and perhaps partisan Supreme Court majority. Professor Vladeck shows how the government has skillfully used appellate procedure to accelerate appellate review of trial judges' nationwide national government injunction decisions that are usually not subject to review.³⁹⁶

The government risks losing credibility through excessive use of emergency appellate techniques.³⁹⁷ It is like the mythical shepherd boy who repeatedly but falsely called "wolf," later to be disbelieved when a wolf actually threatened his flock. Vladeck concludes that the mythical lad is not present because the Su-

393. CHAFEE, *supra* note 108, at 353.

394. *eBay, Inc. v. MercExchange*, 547 U.S. 388, 391 (2006).

395. 28 U.S.C. §§ 1291, 1292(a)(1) (2018).

396. Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019); *see also* 28 U.S.C. § 1292(b); FED. R. APP. P. 8 (interlocutory appeals); *id.* Rule 5 (accelerated appeals and mandamus); *id.* Rule 21 (certiorari before judgment).

397. C. Ryan Barber, 'A Very Difficult Time': Challenges for Career Lawyers at Trump's DOJ, LAW.COM (July 15, 2019, 6:58 PM), <https://www.law.com/nationallawjournal/2019/07/15/a-very-difficult-time-challenges-for-career-lawyers-at-trumps-doj/> [https://perma.cc/4NB7-ZBYC]; Matthew Collette, *Draining the Reservoir: The Steady Erosion of Credibility at the DOJ*, LAW.COM (July 16, 2019, 5:47 PM), <https://www.law.com/nationallawjournal/2019/07/16/draining-the-reservoir-the-steady-erosion-of-credibility-at-the-doj/> [https://perma.cc/L6C9-WR3X].

preme Court has been open to the government's persistent pressure.³⁹⁸

Appellate review of nationwide national government injunctions protects the federal government defendant and advances the public interest in prompt and, we hope, accurate decisions.

CONCLUSION

The national government injunction critics have developed an inaccurate narrative that has been difficult to dislodge. The key to the analysis of nationwide relief is not the people an injunction affects. Instead, it is the defendants and their agents that injunctions require to obey. When an executive branch defendant's agents comply with an injunction, as they should, the injunction may affect nonparties.

One way of understanding the critics national government injunction's narrative is as persons advancing an extreme form of injunction reform aimed at expanding legislative and executive power at the expense of the judiciary. Neither the extreme left nor the extreme right seem to be at work, however, because opposition to nationwide national government injunctions has been bipartisan.

The critics disapprove and seek to circumscribe the federal courts' remedial power to grant broad injunctions against improper executive branch measures. They would dilute the federal courts' traditional judicial review of executive branch misconduct through the regular litigation process. The critics' arguments would limit a federal judge's remedial ability to issue a nationwide national government injunction that grants complete relief to wronged plaintiffs and curbs executive branch defendants' misconduct. They overlook the established rule that a defendant's agents must obey an injunction as well as the in personam doctrine that an injunction is effective against the defendant beyond the issuing court's jurisdiction.

Although these principles apply to other losing defendants, the critics favor liberating government defendants. They would

398. Vladeck, *supra* note 396. Dissenting from the Court's decision to stay a national government injunction in *Wolf v. Cook County*, 140 S. Ct. 681 (2020), Justice Sotomayor chided the majority for excessive deference to the executive: "It is hard to say what is more troubling: that the Government would seek this extraordinary relief seemingly as a matter of course, or that the Court would grant it." *Id.* at 681.

alter the federal government's practice of obeying injunctions. The critics fail to evaluate the principles and filters in equity procedure that reduce error and militate against abuse. These include the prerequisites for an injunction, the hearing and trial process, and the judge's equitable discretion in drafting an injunction.

The critics' arguments are unconvincing. The result of accepting the critics' critiques would be to change constitutional law in two related areas: separation of powers and injunctions. It would increase the executive and legislative branches' power at the expense of the judiciary. And it would decrease the judiciary's power to grant injunctions to halt federal government lawbreaking and misconduct. The critics' emphasis on issues like percolation and nonparty benefit should not distract attention from the result of accepting their arguments.

Other scholars favor nationwide national government injunctions with qualifications. Judges, however, should focus on providing plaintiffs complete relief without overreaching defendants. They should ignore scholars' calls for a presumption against nationwide orders³⁹⁹ or comparisons of injunctions with preclusion and *res judicata* principles.⁴⁰⁰

I will close on a personal note. I have spent a scholarly career correcting courts' blunders, mistakes, and miscues and respectfully suggesting proper paths. This Article, written toward my career's end, however, concludes that the federal district judges are getting it right.⁴⁰¹ Professors and Trump Administration officials are trying to divert judges' attention from the role judicial review provides them in enforcing the separation of powers. That role is to curb unconstitutional and incorrect federal executive branch activity and to accord relief to harmed parties. Rule of law principles mean that the federal government must follow its own Constitution and statutes. The courts have not been diverted by critics' arguments based on lack of authority and nonparty "benefit." The major issues in national government injunction litigation fall under the headings of equitable jurisdiction and equitable discretion. Other important issues are

399. Frost, *supra* note 9, at 1102; Trammell, *supra* note 9.

400. Clopton, *supra* note 11; Trammell, *supra* note 9.

401. See Suzanna Sherry, Response, *A Response to Comments on "Judicial Activism": Liberty's Safety Net*, 16 GREEN BAG 2D 467, 476 (2013) ("I believe that federal judges as a group are among the most ethical, professional, and disinterested decision-makers we have.").

the adequacy of plaintiffs' proof and drafting orders to accomplish complete relief for plaintiffs without completely disadvantaging defendants. If relief requires nationwide coverage, the judge has equitable jurisdiction and equitable discretion to grant and draft that order. Putting the critics' arguments behind us, the federal procedural process includes principles of confinement that, applied with a healthy dose of deference to official defendants, accomplish those goals.