

# DISAGGREGATING NATIONWIDE INJUNCTIONS

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# DISAGGREGATING NATIONWIDE INJUNCTIONS

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*Nationwide injunctions have become a focus of heated judicial, academic, and even public debate. Much of this analysis treats nationwide injunctions as a unitary concept, referring to a particular type of court order. In fact, the term may apply to five different categories of orders of national applicability, each of which raises very different constitutional, fairness, rule-based, structural, prudential, and other concerns.*

*This Article presents a taxonomy of the five types of nationwide injunctions and the proper judicial treatment of each. Rather than focusing on the geographic applicability and scope of a court order, injunctions should instead be categorized based on the entities whose rights they seek to enforce and whether the case is a class action. Based on these considerations, the proposed taxonomy distinguishes among “nationwide plaintiff-oriented injunctions,” “nationwide plaintiff-class injunctions,” “nationwide associational injunctions,” “nationwide defendant-oriented injunctions,” and “nationwide private enforcement injunctions.”*

*After presenting this new framework for determining the validity of nationwide injunctions, this Article goes on to demonstrate that stare decisis, rather than nationwide defendant-oriented injunctions or even class certification under Federal Rule of Civil Procedure Rule 23(b)(2), is the most appropriate means of protecting the rights of third parties who are not personally involved in litigation. Affording district- or circuit-wide stare decisis effect to district court rulings allows members of the public to benefit from them and reduces the need for wasteful relitigation. At the same time, this approach recognizes the limited authority of lower court judges in our decentralized, hierarchical judiciary; mitigates the effects of extreme forum shopping; and ensures some degree of percolation of important constitutional issues.*

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## INTRODUCTION

What exactly does it mean for a court to “strike down” an unconstitutional legal provision? Judicial review, as described and applied in *Marbury v. Madison*,<sup>1</sup> originated as a procedure for resolving certain conflict-of-laws problems that arise in the course of adjudicating a case: “[I]f a law be in opposition to the constitution . . . the court must determine which of these conflicting rules governs the case. . . . [Because] the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.”<sup>2</sup> In other words, a court would simply ignore any laws it determined violated the Constitution.

Likewise, when a court determined that a government official acted unconstitutionally, it would decline to recognize that official’s legal authorization or governmental status as an affirmative defense in common law suits for damages against that official.<sup>3</sup> Thus, for approximately the first century of American history, the primary remedy for a constitutional violation was courts’ refusal to give effect to a statute or government action in the case before it.<sup>4</sup> A case was generally not brought as a constitutional challenge; rather, constitutional questions would arise in the course of other, nonconstitutional litigation, including federal criminal prosecutions, or tort or property suits involving government officers.<sup>5</sup>

Both the nature of constitutional adjudication and the implications of “striking down” a law have fundamentally changed. In the modern era, the judiciary’s role in enforcing the Constitution has expanded to prospectively ensuring the constitutionality of government conduct by affirmatively preventing constitutional violations from occurring *ex ante* and terminating ongoing ones. Congress facilitated this shift by enacting the Civil Rights Act of 1871, which authorized plaintiffs to sue local and county officials for injunctive relief against constitutional violations,<sup>6</sup> even when those officials’ actions did not give rise to a claim for relief at common law. Such litigation provided a model for analogous claims against state<sup>7</sup> and federal officials.<sup>8</sup> The Administrative Procedure Act

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

2. *Id.* at 178.

3. Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 146–47 (2012).

4. See *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring); MICHAEL L. WELLS & THOMAS A. EATON, CONSTITUTIONAL REMEDIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 11–12 (Jack Stark ed., 2002).

5. See, e.g., *Osborn v. President, Dirs. & Co. of Bank*, 22 U.S. (9 Wheat.) 738, 836–37 (1824); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804).

6. Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (2012)).

7. See, e.g., *Ex parte Young*, 209 U.S. 123, 150–60 (1908).

8. See, e.g., *United States v. Lee*, 106 U.S. 196, 220–21 (1882); cf. *Shields v. Utah Idaho Cent. R.R. Co.*, 305 U.S. 177, 183–84 (1938) (holding that a litigant properly invoked a federal court’s equity jurisdiction to attempt to enjoin the U.S. Attorney from prosecuting it under an allegedly inapplicable statute).

(APA) likewise invites courts to grant injunctions against federal agencies that act arbitrarily, capriciously, or contrary to law.<sup>9</sup>

The proliferation of positive federal rights, resulting from both the rise of the welfare state and various Warren Court-era rulings,<sup>10</sup> bolstered the need for more assertive forms of judicial relief to enforce constitutional restrictions and requirements. Historically, injunctive relief had been treated as an “extraordinary” remedy.<sup>11</sup> As institutional reform litigation, particularly school desegregation suits, became more frequent, injunctions became commonplace, developing into the expected remedy in constitutional cases.<sup>12</sup> Scholars such as Owen Fiss and Abram Chayes hailed courts’ growing use of injunctions as a means of enforcing social values.<sup>13</sup>

Armed with this new approach to enforcing constitutional limits on governmental action, courts have also become increasingly willing to issue various types of “nationwide injunctions,” including sweeping orders that completely prohibit a government agency or official from enforcing a challenged statute, regulation, or policy against anyone, anywhere in the nation. As recently as the 1980s, nationwide injunctions against government actors were discussed in only a handful of opinions. Their frequency picked up somewhat beginning in the 1990s, reaching a peak in the first year of the Administration of President Donald J. Trump.<sup>14</sup>

Over the past few years, federal district courts have entered a series of nationwide injunctions against many of the President’s signature policy initiatives,

9. 5 U.S.C. § 706 (2012).

10. See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976) (Eighth Amendment right to medical care for prisoners); *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970) (procedural due process right to predeprivation hearing prior to termination of welfare benefits); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (Fourteenth Amendment right to vote regardless of membership in the armed services); *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963) (Sixth Amendment right to counsel in noncapital felony prosecutions); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (Fourteenth Amendment right to desegregated schools).

11. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

12. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 13 (1978).

13. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1283–88 (1976); Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 18–29 (1979).

14. See Att’y Gen. Jeff Sessions, Remarks Announcing New Memo on National Injunctions (Sept. 13, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-announcing-new-memo-nationwide-injunctions> (“Since President Trump took office less than two years ago, he has been hit with 25 of these nationwide orders.”).

including the travel ban,<sup>15</sup> restrictions on transgender people serving in the military,<sup>16</sup> and the prohibition on federal funds for sanctuary cities.<sup>17</sup> Conservative litigants likewise obtained similar injunctions against some of President Barack Obama's major policies during his Administration, including his Deferred Action for Parents of Aliens (DAPA) program and expansion of his Deferred Action for Children of Aliens (DACA) program,<sup>18</sup> as well as U.S. Department of Education guidelines concerning transgender students' bathroom usage in

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15. See *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1160–61 (D. Haw. 2017) (granting a nationwide temporary restraining order against the third executive order), *partial stay granted*, No. 17-17168, 2017 U.S. App. LEXIS 22725, at \*4–5 (9th Cir. Nov. 13, 2017), *stay granted*, 138 S. Ct. 542 (2017) (mem.), *aff'd in part, rev'd in part*, 878 F.3d 662, 702 (9th Cir. 2017), *rev'd*, 138 S. Ct. 2392, 2423 (2018) (holding that plaintiffs were unlikely to succeed in challenging the constitutionality of the executive order); *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 631–33 (D. Md. 2017) (granting a nationwide preliminary injunction against the third executive order), *bearing en banc granted*, No. 17-2231 (L), 2017 U.S. App. LEXIS 22168 (4th Cir. Nov. 6, 2017) (en banc), *stay granted*, 138 S. Ct. 542 (2017) (mem.), *aff'd and stay granted*, 883 F.3d 233 (4th Cir. 2018) (en banc), *cert. granted, judgment vacated, and remanded*, 138 S. Ct. 2710 (2018) (remanding for reconsideration based on *Hawaii*), *remanded*, 905 F.3d 287 (4th Cir. 2018), *dismissed in part*, 373 F. Supp. 3d 650 (D. Md. 2019); *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 565–66 (D. Md. 2017) (granting a nationwide preliminary injunction against the second executive order), *aff'd in part, vacated in part*, 857 F.3d 554, 605–06 (4th Cir. 2017) (en banc), *cert. granted and injunction stayed in part*, 137 S. Ct. 2080, 2089 (2017) (per curiam), *vacated and remanded as moot*, 138 S. Ct. 353 (2017) (holding the dispute was moot because the second order expired); *Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1140 (D. Haw. 2017) (granting a nationwide temporary restraining order against the second executive order), *converted to preliminary injunction*, 245 F. Supp. 3d 1227, 1239 (D. Haw. 2017) (granting a nationwide preliminary injunction against the second executive order), *aff'd in part, vacated in part*, 859 F.3d 741, 787–89 (9th Cir. 2017) (per curiam) (affirming nationwide scope), *injunction stayed in part and modified, and cert. granted sub nom. Trump v. Int'l Refugee Assistance Proj.*, 137 S. Ct. 2080, 2089 (2017) (per curiam), *vacated and remanded*, 138 S. Ct. 377 (2017) (holding the dispute was moot because the second order expired); *Washington v. Trump*, Case No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012, at \*7–8 (W.D. Wash. Feb. 3, 2017) (granting a nationwide temporary restraining order against the first executive order), *stay denied*, 847 F.3d 1151, 1169 (9th Cir. 2017), *reh'g en banc denied*, 858 F.3d 1168, 1168 (9th Cir. 2017) (en banc) (amended order), *cert. denied*, 138 S. Ct. 448 (2017).

16. See *Stone v. Trump*, 280 F. Supp. 3d 747, 772 (D. Md. 2017), *stay denied*, No. MJG-17-2459, 2017 U.S. Dist. LEXIS 212556 (D. Md. Dec. 28, 2017), *dissolved*, No. GLR-17-2459, 2019 U.S. Dist. LEXIS 141269, at \*19 (D. Md. Aug. 20, 2019); *Doe v. Trump*, 275 F. Supp. 3d 167, 217 (D.D.C. 2017), *rev'd and injunction vacated sub nom. Doe v. Shanahan*, 755 F. App'x 19, 25 (D.C. Cir. 2019).

17. See *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 951–52 (N.D. Ill. 2017) (issuing nationwide preliminary injunction against sanctuary city order as applied to Byrne grants), *stay denied*, No. 17 C 5720, 2017 U.S. Dist. LEXIS 169518, at \*18 (N.D. Ill. Oct. 13, 2017) (affirming decision to issue nationwide injunction), *aff'd*, 888 F.3d 272, 293 (7th Cir. 2018), *reh'g en banc granted*, No. 17-2991, 2018 U.S. App. LEXIS 21801, at \*3–4 (7th Cir. June 4, 2018), *vacated*, Nos. 17-2991 & 18-2649, 2018 U.S. App. LEXIS 25694, at \*8–9 (7th Cir. Aug. 10, 2018) (en banc); *permanent injunction entered*, 321 F. Supp. 3d 855 (N.D. Ill. 2018) (entering nationwide permanent injunction against sanctuary city order as applied to Byrne grants, but staying its effects outside Illinois), *appeal docketed sub nom. City of Chicago v. Barr*, No. 18-2885 (7th Cir. Aug. 28, 2018); *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) (granting nationwide preliminary injunction against sanctuary city order), *reconsideration denied*, 267 F. Supp. 3d 1201, 1214 (N.D. Cal. 2017), *permanent injunction entered*, 275 F. Supp. 3d 1196, 1219 (N.D. Cal. 2017) (issuing nationwide permanent injunction against sanctuary city order), *aff'd in part, vacated in part sub nom. City & County of San Francisco v. Trump*, 897 F.3d 1225, 1243–45 (9th Cir. 2018) (affirming injunction but narrowing it to apply only within the State of California); cf. *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 659 (E.D. Pa. 2017) (issuing preliminary injunction only requiring the government to pay Byrne grants to the City of Philadelphia), *aff'd sub nom. City of Philadelphia v. Att'y Gen. of the United States*, 916 F.3d 276, 293 (3d Cir. 2019).

18. *Texas v. United States*, 86 F. Supp. 3d 591, 677–78 & n.111 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016), *and reh'g denied* 137 S. Ct. 285 (2016).

schools<sup>19</sup> and parts of the Affordable Care Act.<sup>20</sup> In late 2018, then-Attorney General Jeff Sessions issued a memorandum declaring that the U.S. Department of Justice would oppose the issuance of nationwide injunctions against federal legal provisions.<sup>21</sup> The propriety of nationwide injunctions is truly a nonpartisan issue; laws, regulations, and policies favored by either major party may be completely invalidated, at least for a time, by a single district judge hand-picked by plaintiffs, anywhere in the nation.

A substantial amount of recent scholarship has focused on nationwide injunctions. Most of the literature has cautioned against their use,<sup>22</sup> though a few scholars have defended them.<sup>23</sup> This first wave of scholarship concerning nationwide injunctions builds upon earlier work examining class actions against

19. *Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016), *appeal dismissed*, 679 F. App'x 320 (5th Cir. 2017).

20. *Halbig v. Burwell*, 758 F.3d 390, 393–94 (D.C. Cir. 2014), *vacated, reh'g en banc granted*, No. 14-5018, 2014 U.S. App. LEXIS 17099, at \*5–6 (D.C. Cir. Sept. 4, 2014) (per curiam), *appeal dismissed*, No. 14-5018, 2015 U.S. App. LEXIS 16286, at \*7 (D.C. Cir. July 9, 2015).

21. See generally Memorandum from Att'y Gen. Jeff Sessions to Heads of Civil Litigating Components and U.S. Attorneys, Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions (Sept. 13, 2018); see also Att'y Gen. Sessions, *supra* note 14.

22. See, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 418 (2017) (arguing that nationwide injunctions are not supported by either the traditional equitable principles of the English Court of Chancery or the historical practice of American courts); 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) [hereinafter Morley, *De Facto Class Actions?*] (arguing that courts in public law cases should generally tailor injunctions to enforcing the rights of the plaintiffs before them, rather than completely prohibiting the government defendants from enforcing the challenged legal provisions against anyone); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017) [hereinafter Morley, *Nationwide Injunctions*] (arguing that courts should not certify nationwide classes under Rule 23(b)(2) in challenges concerning the validity or proper interpretation of legal provisions); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017) (arguing that nationwide injunctions are inappropriate because relief should be tailored to enforcing the rights of the plaintiffs before the court); Howard M. Wasserman, "Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335 (2018) (arguing that nationwide injunctions violate Article III and raise forum-shopping concerns, and that many nationwide injunctions issued against President Trump's initiatives were inappropriate); Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1093–104 (2017) (arguing that, although nationwide injunctions are lawful, they are inconsistent with the structure of the federal court system and courts should issue circuit-wide injunctions instead); Katherine B. Wheeler, Comment, *Why There Should Be a Presumption Against Nationwide Injunctions*, 96 N.C. L. REV. 200 (2017) (arguing that courts should presumptively decline to issue nationwide injunctions and apply special procedural precautions when such relief is necessary).

23. See generally, e.g., Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018) (identifying circumstances under which nationwide injunctions are most appropriate); Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J.F. 242 (2017) (arguing that nationwide injunctions are preferable to the alternative of allowing wealthy plaintiffs to take advantage of venue rules to have their cases governed by more favorable bodies of precedent); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 56 (2017) ("Although national injunctions are imperfect and crude forms of justice, they are better than no justice at all—which for some actions, may be the alternative.")

the government<sup>24</sup> and the rise of aggregate claims in nonclass litigation,<sup>25</sup> as well as the substantial body of literature debating agency nonacquiescence in circuit court decisions.<sup>26</sup>

Scholars and courts have debated the proper terminology for nationwide injunctions, either defending that label<sup>27</sup> or suggesting alternatives such as “national injunction,”<sup>28</sup> “defendant-oriented injunction,”<sup>29</sup> “universal injunction,”<sup>30</sup> and even “cosmic injunction.”<sup>31</sup> Beyond this squabble over terminology, however, is a critical point that has been largely overlooked: the concept of nationwide injunctions as a *they*, not an *it*. Several importantly different types of orders have been deemed, or reasonably may be considered, nationwide injunctions. Each raises a range of distinct concerns and warrants categorically different treatment by courts. Failing to distinguish among the various categories of nationwide injunctions not only leads to confusion but also causes reformers to fail to recognize the full scope of the problem and various permutations in which it appears.

This Article offers four main contributions to the literature. First, it disaggregates the concept of *nationwide injunction* by presenting a taxonomy of the different types of orders to which it may refer, exploring the proper judicial response to each. This discussion also draws attention to a type of nationwide injunction that has previously gone virtually unrecognized: the “nationwide private enforcement injunction.” Readers may use this taxonomy as a framework for distinguishing among the different types of nationwide injunctions, even if

24. See, e.g., Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 364 (1988); Timothy Wilton, *The Class Action in Social Reform Litigation: In Whose Interest?*, 63 B.U. L. REV. 597, 597–600 (1983).

25. See, e.g., Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2035 (2015); Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 632 (2012); Arthur S. Miller, *Constitutional Decisions as De Facto Class Actions: A Comment on the Implications of Cooper v. Aaron*, 58 U. DET. J. URB. L. 573, 574, 577, 580 (1981); Daniel J. Walker, Note, *Administrative Injunctions: Assessing the Propriety of Non-Class Collective Relief*, 90 CORNELL L. REV. 1119, 1123–24, 1145–49 (2005).

26. Numerous commentators have opposed “intracircuit nonacquiescence,” arguing that federal agencies should follow a circuit court’s precedents within that court’s geographic boundaries, regardless of whether an injunction has been issued ordering the agency to do so. See generally, e.g., Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. 1339, 1347 (1991); Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801, 821–28 (1990). Some scholars, in contrast, argue that intracircuit nonacquiescence can be appropriate. Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 735 (1989); see also Deborah Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471, 537 (1986).

27. Frost, *supra* note 23, at 1071.

28. Bray, *supra* note 22, at 419 n.5.

29. Morley, *De Facto Class Actions?*, *supra* note 22, at 490.

30. *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 n.1 (2018) (Thomas, J., concurring); Wasserman, *supra* note 22, at 349.

31. Transcript of Oral Argument at 72, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965); see also Josh Blackman, *Dueling Cosmic Injunctions, D.A.C.A. and Departmentalism*, LAWFARE (May 22, 2018, 8:20 AM), <https://www.lawfareblog.com/dueling-cosmic-injunctions-daca-and-departmentalism>.

they disagree with its normative recommendations concerning the proper treatment of each one.

Second, this Article contends that the most appropriate mechanism for allowing third-party nonlitigants to be protected by lower courts' constitutional adjudications is *stare decisis*, rather than any type of nationwide injunction. *Stare decisis* is the vehicle through which U.S. Supreme Court rulings are implemented throughout the nation. District court rulings can similarly be given district- or circuit-wide *stare decisis* effect to protect third parties while respecting both the bounds of Article III and geographic limitations on the scope of lower courts' authority.

Third, this Article is the first to respond to the recent defenses of nationwide injunctions by scholars such as Amanda Frost.<sup>32</sup> Finally, this piece goes beyond existing critiques of nationwide injunctions by offering a comprehensive analysis of the various ancillary rules and doctrines that must be reformed to fully implement any restrictions on such orders.

Part I of this Article begins by presenting a taxonomy of the five different types of nationwide injunctions: (i) nationwide plaintiff-oriented injunctions, (ii) nationwide plaintiff-class injunctions, (iii) nationwide associational injunctions, (iv) nationwide defendant-oriented injunctions, and (v) nationwide private enforcement injunctions. Most importantly, this taxonomy suggests that, in non-class cases, courts should tailor injunctions to enforce only the rights of the plaintiffs before the court, and not third-party nonlitigants, as well. In class actions, courts should certify district- or circuit-wide classes, rather than nationwide classes requiring nationwide relief. Because of the problems posed by Rule 23(b)(2) classes, however, courts should rely primarily on *stare decisis* rather than such class actions to give third-party nonlitigants the benefit of their constitutional and other public law rulings. And courts should ensure that plaintiff entities do not use associational standing to bring *de facto* class actions outside the context of Rule 23 to obtain backdoor nationwide injunctions.

Part II delves into the range of other doctrines that must be reconsidered or modified to fully implement the necessary restrictions on nationwide injunctions. In particular, federal agencies should adopt a policy of intracircuit acquiescence—giving legal effect in administrative proceedings to courts of appeals' rulings in matters subject to judicial review within their respective circuits. In addition, federal courts must abandon the “necessity doctrine,” which allows them to deny requests for class certification in public law cases on the ground that certification would not affect the scope of available relief. Federal courts should likewise reject the “one good plaintiff” rule, which allows a court to adjudicate a public law case after confirming that only a single plaintiff has standing, rather than assessing the standing of each plaintiff. Finally, Congress

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32. See Frost, *supra* note 23.



must reassess federal venue statutes to determine the circumstances under which plaintiffs from across the nation should be able to file constitutional and other public law cases in the U.S. District Court for the District of Columbia, potentially allowing that court and the D.C. Circuit to give their rulings the force of law across the entire nation (as they already do in many administrative law matters). Part III briefly concludes.

### I. A TAXONOMY OF NATIONWIDE INJUNCTIONS

The term *nationwide injunction* is not defined in the U.S. Code, the Federal Rules of Civil Procedure, or Supreme Court precedent. As mentioned earlier, commentators cannot even agree that nationwide injunction is the proper terminology for the orders they wish to discuss.<sup>33</sup>

Nationwide injunction is best understood as referring not to a single type of order, but rather a family of different types of orders with nationwide applicability. As the following taxonomy demonstrates, even that definition of nationwide injunction is misleading because many of these orders may apply even beyond the nation's geographic boundaries, around the world. The main distinguishing characteristic among the different categories of nationwide injunctions are the particular people or entities whose rights they are tailored to enforce and the nature of the plaintiff or plaintiffs bringing the case. Each category of nationwide injunctions raises different constitutional, fairness-related, rule-based, structural, and prudential concerns, and, accordingly, should be treated differently by the courts.

The concept of nationwide injunction encompasses the following five distinct categories of orders, which this Part discusses in turn:

**(i) Nationwide Plaintiff-Oriented Injunction**—an order in a nonclass case prohibiting the defendant<sup>34</sup> from enforcing a challenged statute, regulation, order, policy, or other issuance (collectively, “legal provision”) against the plaintiff or plaintiffs before the court—either individuals, or entities asserting organizational standing<sup>35</sup>—regardless of where in the nation (or potentially even the world) such violations occur. Plaintiff-oriented injunctions are presumptively the proper type of injunctive relief; nationwide plaintiff-oriented injunctions are

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33. See *supra* text accompanying notes 27–31.

34. Throughout this Article, unless context dictates otherwise, “defendant” should be understood as referring not only to the enjoined party itself but also its agent and privies, as well as other third-party non-litigants who have received notice of the injunction and are acting in concert with any of those entities. See FED. R. CIV. P. 65(d)(2).

35. An entity asserts organizational standing when it asserts its own rights as an entity, distinct from the rights of its members. See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977).

valid when the plaintiff satisfies the legality, standing, and threat constraints (discussed below).<sup>36</sup>

**(ii) Nationwide Plaintiff-Class Injunction**—an order prohibiting the defendant from enforcing a challenged legal provision against any members of a plaintiff class certified under Rule 23(b)(2) that includes all right holders across the nation (or potentially even the world). Nationwide plaintiff-class injunctions are a valid form of relief when the court has certified a nationwide class, but courts should typically certify only district- or circuit-wide classes in challenges to federal legal provisions. More broadly, courts should rely on stare decisis rather than plaintiff-class injunctions under Rule 23(b)(2) as their primary mechanism for ensuring that rulings in constitutional and other public law cases protect right holders other than the named plaintiffs in a case.

**(iii) Nationwide Associational Injunction**—an order in a case brought by a plaintiff entity asserting associational standing on behalf of its members that prohibits the defendant from enforcing a challenged legal provision against anyone, anywhere in the nation (or potentially even the world). Courts should not issue nationwide associational injunctions. When an entity asserts associational standing to enforce its members' rights, those members (as of the date of judgment) are the real parties in interest, and the court should enter a plaintiff-oriented injunction in favor of those individuals.

**(iv) Nationwide Defendant-Oriented Injunction**—an order in a non-class case brought by individuals or entities asserting organizational standing that prohibits the defendant from enforcing a challenged legal provision against anyone, anywhere in the nation (or potentially even the world), including third-party nonlitigants. Courts should not issue nationwide defendant-oriented injunctions. When a case involves indivisible rights, in which it is impossible to enforce the rights of the plaintiff before the court without thereby also enforcing others' rights as well, a valid plaintiff-oriented injunction will resemble a nationwide defendant-oriented injunction.

**(v) Nationwide Private Enforcement Injunction**—an order attempting to prohibit all potential plaintiffs throughout the nation (or potentially even the world) from bringing a private right of action under a federal legal provision against a particular person or entity. Nationwide private enforcement injunctions are likely precluded under current law. Courts should consider developing some mechanism to allow an individual or entity to bring an effective pre-enforcement challenge against federal legal provisions that create private rights of action.

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36. See *infra* Part I.A.

This Part discusses each of these categories of nationwide injunction in turn.

### A. Plaintiff-Oriented Injunctions

A plaintiff-oriented injunction is an order tailored to enforcing the rights of the particular plaintiff or plaintiffs before the court, without unnecessarily extending it further to protect the rights of third-party nonlitigants, as well.<sup>37</sup> Plaintiff-oriented injunctions are the presumptively proper form of relief in nonclass cases.<sup>38</sup> As discussed below, the geographic breadth of a plaintiff-oriented injunction is determined by the scope of the plaintiff's rights. The court may restrict the defendant's behavior—as well as the behavior of third parties acting in concert with the defendant who receive notice of the injunction<sup>39</sup>—anywhere in the nation, including outside the court's territorial jurisdiction, as needed to protect the plaintiff's rights.<sup>40</sup> When a court enters a plaintiff-oriented injunction in a constitutional challenge or other public law case, the government defendants generally may continue enforcing the challenged legal provision against other people.

Occasionally, the right at issue in a lawsuit will be indivisible; the nature of the dispute makes it impossible for the government to enforce just the plaintiff's rights without simultaneously enforcing third-party nonlitigants' rights as well.<sup>41</sup> For example, the Supreme Court has held that the Establishment Clause

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37. An injunction may be “prohibitory” or “mandatory.” A prohibitory injunction bars the defendant from engaging in certain specified acts, while a mandatory injunction compels the defendant to affirmatively perform certain acts. *Developments in the Law: Injunctions*, 78 HARV. L. REV. 994, 1061 (1965). Semantically, most injunctions may be written in either mandatory or prohibitory terms. See *Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995).

38. See DAN B. DOBBS & CAPRICE L. ROBERTS, *LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* 167 (3d ed. 2018); David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 694 (1988); see also Bray, *supra* note 22, at 469; Siddique, *supra* note 22, at 2100–01 (“[T]he geographic scope of an injunction often is, and always should be, limited to only what is ‘necessary to provide complete relief to the plaintiffs.’” (footnotes omitted) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979))).

39. FED. R. CIV. P. 65(d)(2); *In re Lennon*, 166 U.S. 548, 554 (1897).

40. *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451 (1932) (holding that an injunction binds the respondent personally and may “operate[] continuously and perpetually upon the respondent in relation to the prohibited conduct . . . throughout the United States” and not just within the judicial district in which it was issued); see, e.g., *Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985) (“The mandate of an injunction issued by a federal district court runs nationwide . . . A court may therefore hold an enjoined party in contempt, regardless of the state in which the person violates the court’s orders.” (citation omitted)).

41. See PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.04(b) (AM. LAW INST. 2010) (“Indivisible remedies are those such that the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants.”); see also *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (defining indivisibility as “the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them” (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009))).

forbids the government from directly subsidizing sectarian educational activities.<sup>42</sup> When a law or regulation violates the Establishment Clause by impermissibly subsidizing religious education, courts have approved nationwide injunctions completely prohibiting the government from implementing those provisions.<sup>43</sup> In one such case, the court refused to certify a plaintiff class on the grounds that, “[b]y its very nature[,] the relief ordered will benefit the proposed class, whether or not it is certified as such.”<sup>44</sup> Because the rights at issue were indivisible, enforcing the plaintiffs’ rights under the Establishment Clause unavoidably enforced third parties’ rights, as well.

The proper geographic scope of a plaintiff-oriented injunction depends on three related factors: the legality constraint, the standing constraint, and the threat constraint. First, the legality constraint permits a court to extend an injunction only to geographic regions where the enjoined conduct would violate, or facilitate violation of, the plaintiff’s rights. For example, a court will generally enjoin a defendant from using a plaintiff’s descriptive trademark only in geographic regions in which the mark has acquired secondary meaning.<sup>45</sup> Likewise, a plaintiff may not enjoin competitors from using a registered mark in places where those competitors had continuously used the mark prior to its registration.<sup>46</sup> In such cases, nationwide injunctions completely prohibiting a defendant from using the marks at issue are generally deemed inappropriate.

The legality constraint plays a particularly important role in federal diversity cases arising under state law because the conduct at issue may be illegal in some states yet permitted in others. Laws such as Illinois’s antidilution statute<sup>47</sup> prohibit conduct that other states allow, or at least refrain from regulating. A nationwide injunction against violating such state statutes—even when the statute

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42. See *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 798 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 607 (1971).

43. See, e.g., *Decker v. U.S. Dep’t of Labor*, 473 F. Supp. 770, 772, 774, 779 (E.D. Wis. 1980) (entering a nationwide preliminary injunction prohibiting the U.S. Department of Labor from awarding grants or contracts under Title II of the Comprehensive Employment Training Act of 1973, 29 U.S.C. §§ 841–45 (repealed 1982), “to religious institutions for the employment of teachers and other staff for parochial schools”), *reconsideration denied*, 485 F. Supp. 837 (E.D. Wis. 1980), *aff’d sub nom. Decker v. O’Donnell*, 661 F.2d 598, 618 (7th Cir. 1980) (affirming nationwide scope of injunction because the court’s analysis “relied primarily on the statute and regulation” rather than evidence about particular grant recipients).

44. *Decker*, 485 F. Supp. at 844; see *infra* Part II.D.2.

45. *Int’l Breweries, Inc. v. Anheuser-Busch, Inc.*, 230 F. Supp. 662, 665 (M.D. Fla. 1964); see also *Conan Props. v. Conans Pizza, Inc.*, 752 F.2d 145, 155 (5th Cir. 1985); *cf. Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105, 1116 (9th Cir. 2012) (affirming district court’s decision to “limit[] the scope of the injunction to Arizona” rather than granting nationwide relief because “[c]ourts should not enjoin conduct that has not been found to violate any law. Injunctive relief under the Lanham Act must be narrowly tailored to the scope of the issues tried in the case.” (citations omitted)).

46. *Nat. Footwear, Ltd. v. Hart, Schaffner & Marx*, 760 F.2d 1383, 1397, 1403 (3d Cir. 1985); see also *What-A-Burger of Va., Inc. v. Whataburger, Inc.*, 357 F.3d 441, 446–47 (4th Cir. 2004) (citing 15 U.S.C. § 1115(b)(5)).

47. 765 ILL. COMP. STAT. § 1036/65 (2017).

itself purports to authorize such relief—is problematic.<sup>48</sup> Of course, the legality constraint does not require that the enjoined conduct actually be illegal. Courts may issue prophylactic injunctions that bar defendants from engaging in otherwise permissible conduct when reasonably necessary to fully enforce a plaintiff's rights.<sup>49</sup> A state generally may not prohibit a defendant from engaging in conduct outside its borders, however, simply to bolster the efficacy of its internal regulations<sup>50</sup> or even protect its residents when they travel to, or do business in, other states.<sup>51</sup>

Second, the standing constraint focuses on the plaintiff's conduct. It permits a court to extend an injunction to any region in which the plaintiff engages in activity that places it at some risk of harm from the defendant. A court generally will not extend an injunction to areas in which a plaintiff is not present and has no connection, such as by traveling, doing business, engaging in advertising, or owning property there.<sup>52</sup>

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48. See *Hyatt Corp. v. Hyatt Legal Servs.*, 610 F. Supp. 381, 382–83 (N.D. Ill. 1985) (issuing a nationwide injunction prohibiting the defendant from violating Illinois's antidilution statute but staying its applicability to conduct in other states); see also *Deere & Co. v. MTD Prods.*, No. 94 Civ. 2322 (DLC), 1995 U.S. Dist. LEXIS 2278, at \*18–19 (S.D.N.Y. Feb. 27, 1995) (issuing a permanent injunction “limited to the confines of New York State” prohibiting the defendant from violating New York's antidilution statute); cf. *Instructional Sys. v. Comput. Curriculum Corp.*, 826 F. Supp. 831, 852 (D.N.J. 1993) (refusing to issue nationwide injunction under New Jersey's Franchise Practices Act), *aff'd in part, rev'd in part*, 35 F.3d 813 (3d Cir. 1994). Enforcing a state statute against conduct beyond that state's borders may violate the Dormant Commerce Clause as well. *Hyatt*, 610 F. Supp. at 383 (“[T]he court believes there to be a conflict between an interpretation of the anti-dilution law which allows for a nationwide injunction and the commerce clause of the United States Constitution.”); see also *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion); cf. *Shearson Lehman Bros. v. Greenberg*, No. 93-55535, 1995 U.S. App. LEXIS 17313, at \*6–7 (9th Cir. July 3, 1995) (holding that it would be unconstitutional to “use a state statute to impose a nationwide permanent injunction . . . to directly regulate interstate commerce”).

49. See Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 101, 115 (2004).

50. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) (“A State cannot punish a defendant for conduct that may have been lawful where it occurred.”); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (“[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.”); *Nielsen v. Oregon*, 212 U.S. 315, 321 (1909) (“[O]ne State cannot enforce its opinion against that of the other . . . as to an act done within the limits of that other State.”); *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) (“Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States.”); see also *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (“[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature.”); *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 302 (1960) (noting “the impediments, contingencies, and doubts which constitutional limitations might create as to Nebraska's power to regulate any given aspect of extraterritorial activity”).

51. See *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) (“A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.”).

52. See, e.g., *Three Blind Mice Designs Co. v. Cyrk, Inc.*, 892 F. Supp. 303, 314 (D. Mass. 1995) (denying a nationwide injunction because “plaintiff has not established that it has significantly promoted its marks in any market other than in Massachusetts”); *Allan J. Richardson & Assocs., Inc. v. Andrews*, 718 S.W.2d 833,

This standing constraint may arise from three different sources: the Constitution, the underlying statute (in statutory causes of action), and traditional equitable principles. Most basically, a plaintiff lacks standing under Article III of the Constitution to seek an injunction restricting a defendant's conduct—including illegal conduct—in geographic areas in which such conduct would not harm it.<sup>53</sup> Some statutes further limit the scope of injunctive relief a court may issue. For example, the Clayton Act permits a plaintiff to seek an injunction “against threatened loss or damage by a violation of the antitrust laws.”<sup>54</sup> Its plain text permits a court to enjoin only conduct that poses a risk of inflicting “loss or damage” on the plaintiff.<sup>55</sup> If a plaintiff neither does business nor has concrete plans to do business in a particular state or part of the country, then a defendant's anticompetitive behavior in those regions generally would not cause a risk of loss to the plaintiff and may not be enjoined. Finally, traditional equitable principles counsel that a court should tailor each remedy to the scope of the violation at issue.<sup>56</sup>

In an unfair competition case, for example, a plaintiff that “enjoys a nationwide reputation” fulfills the standing constraint for seeking a nationwide injunction against the defendant.<sup>57</sup> Likewise, when the government obtains an injunction prohibiting private parties from violating the law, it also generally has standing to seek nationwide relief.<sup>58</sup> *Advance Business Systems & Supply Co. v. SCM Corp.* is a clear example of the standing constraint in action.<sup>59</sup> The district court held that the plaintiff was entitled to an injunction against the defendant's antitrust violations.<sup>60</sup> Although the plaintiff had sought a nationwide injunction, the court entered an order prohibiting the defendant from entering into illegal tying agreements only in the state of Maryland.<sup>61</sup> That was “the only state where plaintiff [was] franchised to sell [competing] paper, where almost all of its sales [were] made, and the only state where it [had] suffered or [was] threatened with

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835–36 (Tex. App. 1986) (affirming a preliminary injunction enforcing a covenant not to compete only within the five states in which the former employee's office actually did business).

53. See *infra* notes 149–51.

54. 15 U.S.C. § 26 (2012).

55. *Id.*

56. See *supra* note 38.

57. *Accu Pers., Inc. v. Accustaff, Inc.*, 823 F. Supp. 1161, 1172 (D. Del. 1993) (“As plaintiff seeks an injunction national in scope, it must demonstrate market penetration of a national scope.”); *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 630 (S.D.N.Y. 1985); see also *Cesare v. Work*, 520 N.E.2d 586, 597 (Ohio Ct. App. 1987) (“National advertising is arguably sufficient to support a nationwide injunction even in the absence of the junior user's bad faith.”).

58. See, e.g., *United States v. Capitol Serv., Inc.*, 756 F.2d 502, 507 (7th Cir. 1985).

59. 287 F. Supp. 143 (D. Md. 1968).

60. *Id.* at 159.

61. *Id.* at 159–60.

loss or damage by [the defendant's] violation of the antitrust laws."<sup>62</sup> The plaintiff's lack of paper sales outside of Maryland precluded it from asserting standing to enjoin the defendant's anticompetitive behavior elsewhere.<sup>63</sup>

Finally, the threat constraint focuses on the geographic extent of the defendant's behavior. It counsels courts to extend injunctions only to geographic areas in which a defendant's past or likely future conduct poses a risk of violating the plaintiff's rights.<sup>64</sup> A court generally may not extend an injunction to a particular region as a purely prophylactic matter, prohibiting a defendant from acting illegally in areas where there is no reason to believe it has violated, or is reasonably likely to violate, the law.<sup>65</sup>

The threat constraint is simply a corollary of the broader equitable principle that a court may only "restrain acts [that] are of the same type or class" as the defendant was found to have committed or is likely to commit.<sup>66</sup> The fact that the defendant has violated a statute in a particular place or manner "does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged."<sup>67</sup> Under the threat constraint, a nationwide plaintiff-oriented injunction is permissible only where a defendant has engaged, or is likely to engage, in illegal action on a nationwide basis.<sup>68</sup>

The threat constraint frequently plays an important role in limiting the scope of injunctive relief when a company operates retail stores across the nation and a court finds that practices at a particular store violate the law. While a court will enjoin the company from violating the underlying statute at the location at issue in the future, it generally will not extend the injunction nationwide to other states and locations in which the company has not been found to have acted illegally.<sup>69</sup> When a company's operations are primarily controlled

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62. *Id.* at 159.

63. *Id.*

64. *Five Platters, Inc. v. Purdie*, 419 F. Supp. 372, 384 (D. Md. 1976) ("In view of the peripatetic nature of the two singing groups involved, the injunction should be nationwide in scope.").

65. *See, e.g., United States v. Prof'l Air Traffic Controllers Org.*, 524 F. Supp. 160, 163 (D.D.C. 1981) ("Plaintiffs' showing falls far short of the irreparable injury necessary to support a nationwide injunction of the kind requested here."); *cf. Thomas*, *supra* note 49, at 131.

66. *NLRB v. Express Publ'g Co.*, 312 U.S. 426, 435 (1941).

67. *Id.* at 435–36.

68. *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 630 (S.D.N.Y. 1985) ("[D]efendants advertised a nationally franchised business through a national magazine. The harm sought to be prevented is clearly not limited to the New York area, and the injunction must therefore be national in scope."); *Ross v. Smith (In re Gavin)*, 181 B.R. 814, 825 (Bankr. E.D. Pa. 1995) (imposing a nationwide injunction because, while the fraudulent bankruptcy preparer "intends to terminate its Philadelphia operations . . . it has no intention of discontinuing its bankruptcy operations in California or possibly elsewhere").

69. *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 734–35 (5th Cir. 1977) (holding that where an ADEA violation arose from the behavior of a single employee in a single store and there was no evidence of a "discriminatory company policy," the district court erred in "enjoining appellant nationwide"); *Hodgson v. Corning Glass Works*, 474 F.2d 226, 236 (2d Cir. 1973) ("[A]bsent a showing of a policy of

from its main headquarters, in contrast, courts are more willing to find a threat of future violations throughout all of its locations and are accordingly more willing to grant nationwide injunctions.<sup>70</sup>

Thus, courts adjudicating nonclass cases should issue plaintiff-oriented injunctions aimed at enforcing and preventing violations of the plaintiffs' rights. The proper geographic scope of a plaintiff-oriented injunction is a function of three considerations: the legality constraint, the standing constraint, and the threat constraint. When these requirements are satisfied, a court may enter an injunction prohibiting the defendant from violating the plaintiffs' rights anywhere in the nation or even the world.

In a challenge concerning the validity or meaning of a federal legal provision, a court may issue a nationwide injunction prohibiting the government defendants from violating the rights of the plaintiffs before it anywhere in the nation when those plaintiffs face a more-than-speculative possibility of harm on a nationwide basis. The threat constraint will almost always be satisfied in such cases since the federal government operates on a national basis.

Similarly, the legality constraint will also almost always be satisfied nationally since the U.S. Constitution and federal laws generally apply equally across the nation. One might object that the Supreme Court has recognized the prerogative of each circuit to adopt varying interpretations of the Constitution and federal laws (subject to the Court's ultimate review).<sup>71</sup> Once a federal court has adjudicated a constitutional or legal issue between a plaintiff and the government, however, that ruling is generally binding on both parties as a matter of *res judicata* and collateral estoppel in all other courts throughout the nation, including jurisdictions that otherwise might have resolved the issue differently.<sup>72</sup>

The primary obstacle to a nationwide plaintiff-oriented injunction against the government in a public law case will typically be the standing constraint. If a plaintiff does not face a realistic likelihood of living, working, or traveling beyond a certain geographic area, a court generally may not issue a prophylactic nationwide injunction regulating the government's conduct throughout the rest

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discrimination which extends beyond the plants at issue here, there is no basis for a nationwide injunction."); *Marshall v. J. C. Penney Co.*, 464 F. Supp. 1166, 1195 (N.D. Ohio 1979) ("The Court cannot entertain a request for a nationwide injunction without evidence first, that similar wage differentials exist between males and females within the same job classification in other Penney stores . . ."), *amended by* No. C73-530, 1979 U.S. Dist. LEXIS 13512 (N.D. Ohio Mar. 26, 1979); *Brennan v. Sears, Roebuck & Co.*, 410 F. Supp. 84, 101 (N.D. Iowa 1976) (rejecting plaintiff's attempt to "have the Court infer present and future nationwide violations of the Equal Pay Act from the existence of present and future violations in Fort Dodge").

70. See *Brennan v. J. M. Fields, Inc.*, 488 F.2d 443, 449-50 (5th Cir. 1973).

71. See *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488-89 (1900).

72. See *Montana v. United States*, 440 U.S. 147, 152-53 (1979) ("Because we find that the constitutional question presented by this appeal was determined adversely to the United States in a prior state proceeding, we reverse on grounds of collateral estoppel without reaching the merits."). The Supreme Court has generally prohibited third-party nonlitigants from invoking nonmutual offensive collateral estoppel against the government, however. See *United States v. Mendoza*, 464 U.S. 154, 162 (1984).



of the nation. Courts seldom expressly consider the geographic applicability of plaintiff-oriented injunctions, however, and instead simply prohibit the government from applying the challenged legal provision to the plaintiffs without specifying any geographic constraints or restrictions.<sup>73</sup> Even when a court limits an injunction's geographic applicability, if a plaintiff's circumstances change and it starts facing a risk of harm in a different part of the country, it can always petition the court to modify the injunction.<sup>74</sup> Thus, when necessary to protect a plaintiff's rights, a court may issue a nationwide plaintiff-oriented injunction prohibiting the government from enforcing a challenged legal provision against the plaintiff or plaintiffs in the case before it, anywhere in the nation.

### B. Plaintiff-Class Injunctions and Rule 23(b)(2)

A second type of nationwide injunction is the nationwide plaintiff-class injunction. Such an order prohibits the government from applying a challenged legal provision against any members of a nationwide plaintiff class certified under Federal Rule of Civil Procedure 23(b)(2).<sup>75</sup> Rule 23(b)(2) permits a court to certify a class whenever the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief" for the class is "appropriate."<sup>76</sup>

As discussed above, traditional equitable principles dictate that a court should tailor injunctive relief to enforce the rights of the plaintiff or plaintiffs before it.<sup>77</sup> Under this principle, when a court certifies a plaintiff class, any injunction should be tailored to enforce the rights of those class members. Accordingly, when a court certifies a nationwide class of all right holders adversely affected by a challenged legal provision, the appropriate remedy is a nationwide plaintiff-class injunction prohibiting the government from enforcing that provision against any class member, anywhere in the nation. The main issue in such cases is not the appropriate scope of injunctive relief, but rather the proper scope of the underlying class.<sup>78</sup>

Approximately a half-century ago, in *Califano v. Yakisaki*, the Supreme Court held that district courts may certify nationwide classes in lawsuits against agency officials concerning federal legal provisions.<sup>79</sup> The Court's analysis was

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73. See Morley, *De Facto Class Actions?*, *supra* note 22, at 510–14 (collecting cases).

74. See Sys. Fed'n No. 91 Ry. Emps.' Dep't v. Wright, 364 U.S. 642, 647 (1961) ("[A] sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen."); see also FED. R. CIV. P. 60(b)(5) (authorizing a court to modify a judgment when "applying it prospectively is no longer equitable").

75. FED. R. CIV. P. 23(b)(2).

76. *Id.*

77. See *supra* note 38 (citing sources).

78. See Morley, *Nationwide Injunctions*, *supra* note 22, at 646–47.

79. 442 U.S. at 702.

brief. It explained that neither Rule 23 nor “principles of equity jurisprudence” limit “the geographical scope of a class action.”<sup>80</sup> The proper scope of a class, and therefore injunctive relief, “is dictated by the extent of the violation established, not by [its] geographical extent.”<sup>81</sup>

Notwithstanding *Califano*, courts should generally certify only district- and circuit-wide classes rather than nationwide classes under Rule 23(b)(2) in constitutional and other public law cases against government defendants, thereby obviating the need to issue nationwide plaintiff-class injunctions. A few years after *Califano*, the Supreme Court issued *United States v. Mendoza*, in which it generally prohibited plaintiffs from asserting offensive nonmutual collateral estoppel against the government.<sup>82</sup> In other words, after one plaintiff receives a favorable district court ruling on a legal issue, an unrelated plaintiff may not claim the benefit of that ruling in unrelated litigation. Rather, the government is free to relitigate the same issue in other cases against other plaintiffs.<sup>83</sup> A nationwide class under *Califano* precludes relitigation of important legal issues to the same extent as the offensive collateral estoppel prohibited by *Mendoza*. *Mendoza*’s rejection of offensive nonmutual collateral estoppel against the government undermines *Califano*’s endorsement of nationwide plaintiff classes against the government.<sup>84</sup>

Additionally, rejecting nationwide classes allows important issues to percolate in the lower courts, giving the Supreme Court the opportunity to assess the consequences of different circuits’ competing approaches.<sup>85</sup> Likewise, if a nationwide injunction completely nullifying a federal legal provision is affirmed by a circuit court, the Supreme Court is essentially compelled to hear the case.<sup>86</sup> It becomes much more difficult for the Court to exercise its passive virtues by allowing controversial issues to further develop, become less politically charged, or get resolved through political means.<sup>87</sup> Moreover, the Court must adjudicate the issue based on the fact pattern of the case in which the nationwide injunction was granted, rather than waiting and granting certiorari when the issue is presented in a cleaner context facilitating easier and more accurate adjudication.

Finally, and perhaps most importantly, nationwide plaintiff classes and the resulting nationwide plaintiff-class injunctions are inconsistent with the structure of the federal judicial system.<sup>88</sup> Congress structured the federal judiciary in

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80. *Id.*

81. *Id.*

82. 464 U.S. 154, 155 (1984).

83. *Id.* at 162 (“[N]onmutual offensive collateral estoppel simply does not apply against the Government in such a way as to preclude relitigation of issues such as those involved in this case.” (citations omitted)).

84. See Morley, *Nationwide Injunctions*, *supra* note 22, at 637–43.

85. *Id.* at 643; cf. Bray, *supra* note 22, at 461–62.

86. Bray, *supra* note 22, at 461–62; Morley, *Nationwide Injunctions*, *supra* note 22, at 639–43.

87. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 116, 176 (2d ed. 1986).

88. Bray, *supra* note 22, at 465; Morley, *Nationwide Injunctions*, *supra* note 22, at 647–53.

a decentralized, hierarchical manner, designating limited geographic regions in which lower courts may exercise jurisdiction over people<sup>89</sup> and in which their legal opinions have the force of law.<sup>90</sup> Allowing district courts to certify nationwide classes in constitutional and other public law challenges against the government allows them to impose their view of the law throughout the nation. They may apply their conclusions to right holders outside their geographic jurisdiction, whose claims would otherwise be governed by other circuits' precedent.

Putting aside the proper scope of a class, Rule 23(b)(2) is a poor mechanism for determining whether a court's rulings should protect right holders other than the named plaintiffs in a case, for three main reasons. First, the Supreme Court, in arguable dicta—along with some commentators—has asserted that Rule 23(b)(2) allows for class certification only to protect indivisible rights. As explained earlier, a right is indivisible if it is impossible to protect that right for only a particular plaintiff without also thereby enforcing the rights of third parties.<sup>91</sup> The classic example is legislative redistricting. If a court concludes that a particular legislative district is unconstitutionally or illegally drawn, it must order a new district for all voters. It cannot mandate a new district just for the plaintiff in the case while retaining the previous district for all other voters in the area.

In arguable dicta in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court, quoting Professor Richard Nagareda, stated that “[t]he key to the (b)(2) class is ‘the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.’”<sup>92</sup> The Court elaborated, “Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction.”<sup>93</sup> The Court later cited *Wal-Mart* in the 2018 case *Jennings v. Rodriguez* as its basis for directing the court of appeals to reconsider the propriety of certifying a Rule 23(b)(2) class to challenge the constitutionality of laws authorizing detention of undocumented immigrants.<sup>94</sup> Professor Maureen Carroll, accepting *Wal-Mart*'s indivisibility requirement, has suggested ways of attempting to understand and apply it.<sup>95</sup>

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89. *Cf.* *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838) (“The Judiciary Act has divided the United States into judicial districts. . . . The circuit court of each district sits within and for that district, and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property, it can only be exercised within the limits of the district.”).

90. *See Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488–89 (1900) (stating that one circuit's legal conclusions are not binding on other circuits).

91. *See supra* note 41 (citing sources).

92. 564 U.S. 338, 360 (2011) (quoting Nagareda, *supra* note 41, at 131).

93. *Id.*

94. 138 S. Ct. 830, 851–52 (2018).

95. *See generally* Maureen Carroll, *Class Actions, Indivisibility, and Rule 23(b)(2)*, 99 B.U. L. REV. 59 (2019).

It is far from certain whether the *Wal-Mart* Court was correct in inferring that Rule 23(b)(2) classes are permissible only in cases involving indivisible rights. It is similarly unclear how broadly any such requirement applies and what exactly it demands. The text of Rule 23(b)(2) contains no such “indivisibility” requirement.<sup>96</sup> The rule was adopted to facilitate civil rights litigation in which numerous people suffer from the same type of discrimination.<sup>97</sup> Incorporating an indivisibility requirement could seriously frustrate these goals in many contexts.

Moreover, the plaintiffs in *Wal-Mart* wished to certify a Rule 23(b)(2) class to seek backpay, which would have required individualized monetary payments to each class member.<sup>98</sup> As the Court emphasized, “individualized monetary claims belong in Rule 23(b)(3),” which contains additional procedural protections for class members that do not apply in the Rule 23(b)(2) context.<sup>99</sup> The Court might be more accepting of a prohibitory injunction ordering a defendant to cease discriminating against (or otherwise violating the rights of) a class of plaintiffs. Unlike with claims for monetary relief, there is no alternate provision within Rule 23 that would provide a superior vehicle for litigating such claims on a class-wide basis.

Additionally, the *Wal-Mart* Court held that class certification is appropriate under Rule 23(b)(2) when an injunction could “provide relief to each member of the class” without requiring each member to receive “a different injunction.”<sup>100</sup> When a legal provision violates multiple plaintiffs’ rights, a single injunction prohibiting the defendant agency or official from enforcing that provision against any class member can remedy the harm. Even if the class members’ rights are divisible, and it would be conceptually possible to enforce only the named plaintiffs’ rights without necessarily enforcing others’ rights as well, an injunction completely barring enforcement of the challenged provision would provide class-wide relief.

*Wal-Mart* also may be read as incorporating an unusually broad definition of indivisibility.<sup>101</sup> Generally, a right is deemed divisible if it is possible to en-

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96. FED. R. CIV. P. 23(b)(2).

97. FED. R. CIV. P. 23(b)(2) advisory committee’s note to 1964 amendment; *see also* 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1776, at 83–84 (3d ed. 2005) (“[S]ubdivision (b)(2) was added to Rule 23 in 1966 in part to make it clear that civil-rights suits for injunctive or declaratory relief can be brought as class actions. . . . [T]he class suit is a uniquely appropriate procedure in civil-rights cases . . .”).

98. *Wal-Mart*, 564 U.S. at 360 (“We also conclude that respondents’ claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2).”).

99. *Id.* at 362. As discussed below, Rule 23(b)(2) does not require members of a putative class to be afforded either notice of the lawsuit or an opportunity to opt out. FED. R. CIV. P. 23(c).

100. *Wal-Mart*, 564 U.S. at 360 (emphasis omitted).

101. *Cf.* Carroll, *supra* note 95, at 63–64.

force it for some right holders and not others, and indivisible if it can be enforced only on an all-or-nothing, everyone-or-no-one basis.<sup>102</sup> The *Wal-Mart* Court, however, may have been using the term in a different, broader sense. At several points, the Court explained that Rule 23(b)(2) authorizes class certification where an injunction could “provide relief to each member of the class”<sup>103</sup> and the relief would “affect the entire class at once, . . . benefiting all its members at once.”<sup>104</sup> An injunction prohibiting the government from enforcing a challenged legal provision against members of a plaintiff class would satisfy that requirement, benefiting each class member without requiring further individualized treatment such as monetary payments.<sup>105</sup>

Thus, it is reasonably debatable whether Rule 23(b)(2) actually contains a broad, generally applicable indivisibility requirement. *Wal-Mart* may be read as imposing such a requirement only for classes seeking injunctions ordering monetary relief.<sup>106</sup> Moreover, the *Wal-Mart* Court may have adopted an unusually broad definition of indivisibility, preserving the availability of Rule 23(b)(2) classes in most constitutional and other public law challenges against the government. Nevertheless, several circuits have invoked *Wal-Mart* to reject Rule 23(b)(2) classes on indivisibility grounds even when the plaintiffs did not seek monetary relief,<sup>107</sup> calling into question the availability of such classes as a means of protecting divisible rights.

A second major reason why Rule 23(b)(2) classes are problematic as a means of protecting rights on a class-wide basis is that class members might not be bound by unfavorable rulings. One of the main functions of a class action is to bind class members to the court’s judgment as a matter of *res judicata* and collateral estoppel. In a challenge to the validity or meaning of a legal provision, if the plaintiffs win, all class members receive the benefit of the court’s judgment and any resulting injunction.<sup>108</sup> Conversely, if the government prevails,

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102. See *supra* note 41 (citing sources).

103. *Wal-Mart*, 564 U.S. at 360.

104. *Id.* at 362.

105. See, e.g., *Yates v. Collier*, 868 F.3d 354, 367–68 (5th Cir. 2017) (affirming certification of Rule 23(b)(2) class where “the same action/inaction by Defendants is the source of any injury for the entire General Class”); *Parsons v. Ryan*, 754 F.3d 657, 687–88 (9th Cir. 2014) (holding, post-*Wal-Mart*, that Rule 23(b)(2)’s “requirements are unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole”).

106. Courts have already applied *Wal-Mart* to reject Rule 23(b)(2) classes for monetary damages. See, e.g., *W. Morgan-E. Lawrence Water & Sewer Auth. v. 3M Co.*, 737 F. App’x 457, 469 (11th Cir. 2018) (*per curiam*).

107. See, e.g., *Lakeland Reg’l Med. Ctr., Inc. v. Astrellas U.S., LLC*, 763 F.3d 1280, 1291–92 (11th Cir. 2014); *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 498–99 (7th Cir. 2012).

108. See *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) (citing *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921)).

res judicata should preclude any class member from relitigating the same issue in any other court.<sup>109</sup>

The Supreme Court has held, however, that at least in the context of claims for monetary damages, res judicata and collateral estoppel do not apply to class members unless they receive notice of the action, affording them an opportunity to attempt to participate in the case or opt out.<sup>110</sup> The Fifth and Fourteenth Amendments' Due Process Clauses preclude courts from adjudicating class members' claims for monetary relief in the absence of those minimal procedural protections.<sup>111</sup> The Court has not yet addressed, however, whether notice and opt-out requirements apply to members of Rule 23(b)(2) classes.<sup>112</sup>

The Federal Rules of Civil Procedure provide that members of Rule 23(b)(2) classes are not necessarily entitled to receive either notice of the lawsuit or an opportunity to opt out.<sup>113</sup> And lower courts have held that the difficulty or even impossibility of ascertaining, much less contacting, members of a Rule 23(b)(2) class does not preclude class certification.<sup>114</sup> Even if district courts wished to require class representatives to provide notice and an opportunity to opt out to members of putative Rule 23(b)(2) classes, it would often be impracticable or impossible to do so. In challenges to legal provisions, courts typically define Rule 23(b)(2) classes in terms of all people who are, or at some point in

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109. *Id.*; see also *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974) (recognizing that it would be “unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one”).

110. *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

111. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 349 (2011) (“For a class-action money judgment to bind absentees in litigation, . . . absent [class] members must be afforded notice, an opportunity to be heard, and a right to opt out of the class.”); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (holding, in a case involving a Rule 23(b)(1)(B) class, that “mandatory class actions aggregating damages claims” are subject to the due process restriction “that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process” (quoting *Hansberry*, 311 U.S. at 40)); see also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (“[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an ‘opt out’ or ‘request for exclusion’ form to the court.”).

112. *Shutts*, 472 U.S. at 811 n.3 (limiting notice and opt-out requirements to “class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments,” and “intimat[ing] no view concerning other types of class actions, such as those seeking equitable relief”).

113. FED. R. CIV. P. 23(c)(2)(A); cf. FED. R. CIV. P. 23(c)(2)(B)(v) (authorizing members of classes certified under Rule 23(b)(3) to “request[] exclusion” from the lawsuit); see also *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) (“The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action.”).

114. See, e.g., *Shelton v. Bledsoe*, 775 F.3d 554, 563 (3d Cir. 2015) (“The nature of Rule 23(b)(2) actions, the Advisory Committee’s note on (b)(2) actions, and the practice of many . . . other federal courts all lead us to conclude that ascertainability is not a requirement for certification of [a Rule 23(b)(2)] class seeking only injunctive and declaratory relief. . . .”); *Shook v. El Paso County*, 386 F.3d 963, 972 (10th Cir. 2004); *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972); *DL v. District of Columbia*, 302 F.R.D. 1, 17 (D.D.C. 2013) (“[T]he rationale for precise ascertainability is inapposite in the [Rule] 23(b)(2) context . . . .”); *Floyd v. City of New York*, 283 F.R.D. 153, 172 (S.D.N.Y. 2012).

the future will be, adversely affected by those provisions. This includes individuals who currently lack standing, whose claims are not yet ripe, and who may not even exist yet.

For example, in *Brown v. Plata*, classes of prisoners with “serious mental disorders” and “serious medical conditions” challenged prison overcrowding in California.<sup>115</sup> The Supreme Court held that the relief had to include both current and potential future class members and could not be limited only to current prisoners.<sup>116</sup> Likewise, in a case challenging racial profiling, a district court certified a Rule 23(b)(2) class consisting of “all individuals who travel or will travel I-95” through a certain town.<sup>117</sup> In challenges to the constitutionality of an abortion statute, the plaintiff class often will not just include pregnant women who are seeking an abortion in violation of the statute’s restrictions, but also any women who may become pregnant and be burdened by the statute at some point in the future.<sup>118</sup>

The inclusion of class members who will be subject to a challenged legal provision at some future time—meaning they lack independently justiciable claims at the time of the lawsuit—conflicts with Professor Nagareda’s conception of class actions as purely procedural devices that allow numerous claims to be tried together without affecting the substantive law that otherwise applies to them.<sup>119</sup> A court’s exercise of jurisdiction over claims of class members who presently lack standing or whose claims are unripe also raises serious questions under Article III that the Supreme Court has not yet directly addressed. And since absent class members are entitled to neither notice nor an opportunity to opt out, due process concerns may frustrate attempts to bind them to the court’s judgment.<sup>120</sup> If absent class members are not subject to *res judicata* and

115. 563 U.S. 493, 500 (2011).

116. *Id.* at 531–32 (stating that “[r]elief targeted only at present members of the plaintiff classes may . . . fail to adequately protect future class members who will develop serious physical or mental illness”).

117. *Wilson v. Tincicum Twp.*, No. 92-6617, 1993 U.S. Dist. LEXIS 9971, at \*21–22 (E.D. Pa. July 20, 1993).

118. *See, e.g., Garza v. Hargan*, 304 F. Supp. 3d 145, 150 (D.D.C. 2018) (certifying Rule 23(b)(2) class of “all pregnant [unaccompanied, undocumented immigrant minors] who are or will be in federal custody and, accordingly, are or will be subject to [the government’s] policies or practices”); *Planned Parenthood Ark. & E. Okla. v. Gillespie*, No. 4:15-cv-00566-KGB, 2016 WL 8928315, at \*2 (E.D. Ark. Sept. 29, 2016) (certifying Rule 23(b)(2) class of all “patients who seek to obtain, or desire to obtain, health care services in Arkansas at [Planned Parenthood] through the Medicaid program”); *Nat’l Org. for Women, Inc. v. Scheidler*, 172 F.R.D. 351, 363 (N.D. Ill. 1997).

119. *See* Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1874 (2006); *id.* at 1877–78 (“The affording or withholding of aggregate treatment is most problematic from an institutional standpoint when it operates as a backdoor vehicle to restructure the remedial scheme in applicable substantive law.”).

120. Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 652 (2015) (“[D]ivisible, mandatory class actions certified under Rule 23(b)(2) thus present the same risk that nonconsenting class members will be erroneously deprived of their control entitlement as is present in the case of mandatory class actions seeking only money damages.”); Weber, *supra* note 24, at 387 (arguing that Rule 23(b)(2) “violates due process” because “the minimum due process requirements of notice and the opportunity to opt out are conspicuously absent”).

collateral estoppel and may relitigate an unsuccessful challenge to a legal provision, they should not be permitted to benefit from a favorable ruling.<sup>121</sup>

Finally, in challenges to the validity or proper interpretation of legal provisions, the process for certifying a Rule 23(b)(2) class appears to be a largely empty, hollow formality that does not yield any benefit to the litigants themselves, the court, or even putative class members. In facial challenges to statutes, as well as as-applied challenges that are based on broadly applicable legal arguments rather than particular plaintiffs' unusual factual circumstances, Rule 23(a)'s numerosity, commonality, and typicality requirements will invariably be met, virtually as a matter of law, since all members would be asserting the same claim based on the same analysis.<sup>122</sup> The putative class members themselves are frequently not notified or afforded an opportunity to participate in the case or opt out.<sup>123</sup> And both the parties and the court are often unaware of the identities of most class members; indeed, the classes are often defined in sweeping terms that include future right holders as well.<sup>124</sup> Despite the lack of practical benefits to the Rule 23(b)(2) certification process, the Supreme Court nevertheless places great emphasis on whether plaintiffs have satisfied that formality.<sup>125</sup>

As some courts acknowledge frankly, the main goal of many Rule 23(b)(2) classes, particularly in challenges to the validity of legal provisions or other government actions, is not to adjudicate the rights of the party litigants, but rather to bind the government defendant against the "world at large."<sup>126</sup> Class actions are not the proper tool for that task. Stare decisis is a much more appropriate

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121. See *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974). The need for mutuality in Rule 23(b)(2) class actions against the government is especially important since the Supreme Court has generally prohibited plaintiffs from asserting offensive nonmutual collateral estoppel against the government. *United States v. Mendoza*, 464 U.S. 154, 158 (1984).

122. FED. R. CIV. P. 23(a); see, e.g., *W.A.O. v. Cuccinelli*, No. 2:19-CV-11696, 2019 U.S. Dist. LEXIS 159922, at \*6–7 (D.N.J. Sept. 17, 2019) ("Certification under Fed. R. Civ. P. 23(b)(2) is appropriate in this case because Plaintiffs allege that Defendants' Policy defeats [Special Immigrant Juvenile] classification for all members of the putative class and because an injunction requiring Defendants to suspend that alleged Policy would provide relief to the class as a whole."); *Wagafe v. Trump*, No. C17-0094-RAJ, 2017 U.S. Dist. LEXIS 95887, at \*46 (W.D. Wash. June 21, 2017) ("Plaintiffs allege that CARRP is unlawful and ask the Court to enjoin the Government from submitting putative class members' immigration applications to CARRP. A single ruling would therefore provide relief to each member of the class. Accordingly, Rule 23(b)(2) is satisfied.").

123. See *supra* note 113 and accompanying text.

124. See *supra* notes 114–18 and accompanying text.

125. Compare *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1538–39 (2018) (holding that a case where individual plaintiffs had sought effectively class-wide relief was nonjusticiable after the plaintiffs' claims became moot because it had not been brought or certified as a class action), with *Gerstein v. Pugh*, 420 U.S. 103, 111 n.11 (1975) (holding that a putative class action suit that had not yet been certified remained justiciable even after the named plaintiffs' claims became moot).

126. *Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994) (quoting *Weiss v. York Hosp.*, 745 F.2d 786, 811 (3d Cir. 1984)); *Daniels v. City of New York*, 198 F.R.D. 409, 414 (S.D.N.Y. 2001) (quoting *Weiss*, 745 F.2d at 811); see also *In re Packaged Ice Antitrust Litig.*, No. 08-MD-1952, 2017 U.S. Dist. LEXIS 135232, at \*58–59 (E.D. Mich. Aug. 23, 2017).



mechanism for ensuring that right holders within a court's geographic jurisdiction are protected by its rulings. Stare decisis does not raise the due process concerns of class certification in the Rule 23(b)(2) context. Moreover, by its very nature, stare decisis is inherently consistent with geographic and other limitations on the power of lower courts in a way that nationwide classes are not.

Thus, the Supreme Court should resolve the tension between *Califano's* embrace of nationwide classes against the government and *Mendoza's* rejection of offensive nonmutual collateral estoppel against the government. It should permit district courts to certify only district- or circuit-wide classes under Rule 23(b)(2) in cases concerning the validity or proper construction of federal legal provisions or other government actions. And, perhaps most importantly, it should rely on stare decisis, rather than Rule 23(b)(2) classes, as the primary vehicle for extending the benefits of lower courts' constitutional and other public law rulings to third-party right holders.

### C. Associational Injunctions and Informal Plaintiff Classes

When plaintiff entities assert associational standing in challenges to the validity or proper interpretation of a legal provision, courts sometimes issue a type of backdoor nationwide injunction<sup>127</sup> that may be called a nationwide associational injunction. A proper associational injunction is tailored to enforcing the rights of the plaintiff entity's members. Instead, orders in associational plaintiff cases often prohibit the government from enforcing the challenged provision against anyone, anywhere in the nation, or require the government to construe or apply the provision in a particular way.<sup>128</sup>

Cases based on associational standing are effectively informal class actions in which the plaintiffs need not satisfy the requirements of Rule 23. The Supreme Court has held that a membership organization may sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."<sup>129</sup>

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127. Morley, *De Facto Class Actions?*, *supra* note 22, at 339, 544–45.

128. See, e.g., *Casa de Md., Inc. v. Trump*, No. PWG-19-2715, 2019 U.S. Dist. LEXIS 177797, at \*51 (D. Md. Oct. 14, 2019) ("[A] nationwide injunction is appropriate to provide complete relief to CASA. CASA has over 100,000 members located in Maryland, Virginia, D.C., and Pennsylvania."); *Saget v. Trump*, 375 F. Supp. 3d 280, 378–79 (E.D.N.Y. 2019) ("Here, a national injunction is warranted in this case. Plaintiffs not only include residents of New York but also individuals and a nonprofit entity based in Florida. Limiting a preliminary injunction to the parties would not adequately protect the interests of all stakeholders.")

129. *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553 (1996) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

An entity asserting associational standing acts as a stand-in for its members, asserting those members' rights on their behalf.<sup>130</sup> When the plaintiff association prevails, the proper relief is a plaintiff-oriented injunction tailored to preventing the government from enforcing the challenged legal provision against the organization's members at the time of judgment. A plaintiff group asserting associational standing should not be permitted to seek broader relief than its members could have received had they sued in their own right. The procedural vehicle of associational standing should not affect the underlying substantive rights of the real parties in interest or relief the court may order. In particular, a court should not issue a nationwide defendant-oriented injunction,<sup>131</sup> completely prohibiting the government defendant from enforcing the challenged provision against anyone, regardless of whether they are affiliated with the organization.<sup>132</sup>

The First Circuit's ruling in *Conservation Law Foundation of New England, Inc. v. Reilly* shows the appropriate approach to crafting injunctive relief in associational standing cases.<sup>133</sup> Several plaintiff environmental groups sued, alleging that the Environmental Protection Agency (EPA) had "failed to assess and evaluate federal facilities for hazardous waste" as required by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.<sup>134</sup> They sought a nationwide injunction to compel the EPA to conduct a statutorily required "preliminary assessment" of every potential hazardous waste site across the nation identified in its Federal Agency Hazardous Waste Compliance Docket.<sup>135</sup> The plaintiff groups alleged that some of their members lived near some of the facilities on the Docket that the EPA had not yet evaluated and that at least some of the facilities on the Docket contained unremediated hazardous waste.<sup>136</sup>

The district court held that, because some of the plaintiff groups' members faced a risk of harm from certain sites, the groups could "pursue the legal rights of the general public and request a remedy for all of the national sites for which the [EPA] is responsible."<sup>137</sup> It later ordered the EPA to "conduct a preliminary assessment of each facility on the Docket" within eighteen months.<sup>138</sup> The First

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130. See *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 24 (2000) ("The Council speaks only on behalf of its member institutions, and thus has standing only because of the injury those members allegedly suffer.").

131. See *infra* Part I.D.

132. For examples of such orders, see *supra* note 128.

133. 950 F.2d 38 (1st Cir. 1991).

134. *Conserv. Law Found. of New England, Inc. v. Reilly*, 743 F. Supp. 933, 934 (D. Mass. 1990), *rev'd*, 950 F.2d 38 (1st Cir. 1991).

135. *Id.* at 935, 943.

136. *Id.* at 937.

137. *Id.* at 940.

138. *Conservation Law Found. of New Eng., Inc. v. Reilly*, 755 F. Supp. 475, 481 (D. Mass. 1991), *rev'd*, 950 F.2d 38 (1st Cir. 1991).

Circuit reversed, holding that each “individual member[]” for whom the plaintiff groups had introduced evidence possessed standing “with respect to the individual federal facilities that threaten to or actually harm them.”<sup>139</sup> Those allegations, however, were “insufficient to warrant the type of nationwide relief” the court awarded.<sup>140</sup> The court added, “[P]laintiffs seek relief far beyond any injury they have established. . . . Because plaintiffs have ties to only a few federal facilities, they have failed to carry their burden of showing injury-in-fact sufficient to grant them standing to obtain nationwide injunctive relief.”<sup>141</sup> *Conservation Law Foundation* shows how courts can appropriately tailor the scope of their injunctions in associational standing cases.

More broadly, it may be appropriate to assess the continued need for associational standing. An associational plaintiff acts as a premade class comprised of the right holders whose interests will be litigated in the case. Associational standing is simply a way of allowing a plaintiff entity to shape its own plaintiff class without satisfying Rule 23’s procedures and restrictions. The Court’s persistent formalistic emphasis on Rule 23<sup>142</sup> suggests that plaintiffs should not be able to circumvent it by collectively pursuing their claims through a private organization.

Moreover, Rule 17 provides, “An action must be prosecuted in the name of the real party in interest.”<sup>143</sup> Associational standing seems to violate this rule, since the real parties in interest are not the association itself but rather its members. Requiring members of the association to litigate directly as either party litigants or class members would not prejudice them. The association would still be able to represent them and conduct the litigation, and a case could proceed along almost the same route whether the plaintiff is the association itself, a class of the association’s members certified under Rule 23, or simply individual members of the association.

While future scholarship should reassess the benefits of, and need for, associational standing, the Court need not go so far as to abolish it. Rather, courts should simply recognize that when entities assert associational standing, they are acting as prefabricated classes litigating on behalf of their members. Accordingly, injunctive relief should be tailored to enforcing the rights of those members as if they had litigated individually or through a formal class action.

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139. *Conservation Law Found.*, 950 F.2d at 41.

140. *Id.*

141. *Id.* at 43.

142. *See, e.g.*, *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1538 (2018); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975); *Sosna v. Iowa*, 419 U.S. 393, 399–402, 402 n.11 (1975).

143. FED. R. CIV. P. 17(a).

### D. Defendant-Oriented Injunctions

Nationwide defendant-oriented injunctions are what most commentators refer to when discussing nationwide injunctions, whether by that name or their preferred alternate terminology.<sup>144</sup> A nationwide defendant-oriented injunction is an order prohibiting a government agency or official from enforcing a challenged legal provision against anyone, anywhere in the nation. Similarly, statewide defendant-oriented injunctions may be entered against state legal provisions. These orders are “defendant-oriented” because the court’s goal is completely prohibiting the defendant from enforcing the challenged provision, rather than enforcing the rights of the particular plaintiffs before it.<sup>145</sup>

#### 1. Rationales for Rejecting

The arguments against nationwide defendant-oriented injunctions have been laid out in greater depth in other sources<sup>146</sup> and will only be briefly sketched out here. First, as I have argued elsewhere,<sup>147</sup> such orders violate Article III. Article III requires a plaintiff to establish standing to seek the particular relief it is requesting from the court.<sup>148</sup> A plaintiff generally lacks standing to seek relief on behalf of third-party nonlitigants,<sup>149</sup> and a federal court correspondingly lacks jurisdiction to exceed the boundaries of the case or controversy before it by unnecessarily enforcing the rights of third-party nonlitigants.<sup>150</sup> Thus, when a court determines that a legal provision is

144. See *supra* text accompanying notes 27–31.

145. See Morley, *De Facto Class Actions?*, *supra* note 22, at 500.

146. *Id.* at 522–23. See generally Bray, *supra* note 22; Siddique, *supra* note 22; Wasserman, *supra* note 22.

147. Morley, *De Facto Class Actions?*, *supra* note 22, at 523–27.

148. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (holding that a plaintiff “bears the burden of showing that he has standing for each type of relief sought”); see also *Camreta v. Greene*, 563 U.S. 692, 723 (2011) (Kennedy, J., dissenting) (“Plaintiffs must establish standing as to each form of relief they request . . . .”); see, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (holding that a plaintiff’s standing to seek damages from the defendant did not automatically confer standing to seek injunctive relief, as well).

149. *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (“To have standing, a litigant must seek relief for an injury that affects him in a ‘personal and individual way.’” (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992))); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (“Standing doctrine embraces . . . the general prohibition on a litigant’s raising another person’s legal rights . . . .”).

150. *Salazar v. Buono*, 559 U.S. 700, 734 (2010) (Scalia, J., concurring) (holding that Article III forbids federal courts from issuing orders that “cover additional actions that produce no concrete harm to the original plaintiff”); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (“[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” (emphasis added)); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (“[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs . . . .”); see also *Baxter v. Palmigiano*, 425 U.S. 308, 310 n.1 (1976) (holding that if a district court did not certify a class, “the action is not properly a class action” and cannot be treated as such); see, e.g., *U.S. Dep’t of Def. v. Meinhold*, 510 U.S. 939, 939 (1993) (mem.) (staying a lower court injunction insofar as it prohibited the military from applying the challenged regulation to anyone other than the individual plaintiff); *Perkens v. Lukens Steel Co.*, 310 U.S. 113, 123 (1940) (declaring that the D.C. Circuit’s nationwide defendant-oriented

unconstitutional, the plaintiff may not seek, and a court may not grant, an injunction that unnecessarily extends beyond protecting that plaintiff's rights. As the Supreme Court recently reaffirmed in *Gill v. Whitford*, “[S]tanding is not dispensed in gross’: A plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury.”<sup>151</sup>

Second, nationwide defendant-oriented injunctions violate Rule 23 by giving effectively class-wide relief to all right holders without following the process or satisfying the criteria set forth in that rule for certifying a class action.<sup>152</sup> Only last year, in *United States v. Sanchez-Gomez*, the Supreme Court rejected the Ninth Circuit’s attempt to treat a nonclass case brought by individual plaintiffs whose claims subsequently became moot as a “functional class action.”<sup>153</sup> The *Sanchez-Gomez* Court expressly declared, “[C]ourts may not ‘recognize . . . a common-law kind of class action’ or ‘create *de facto* class actions at will.’”<sup>154</sup> Nationwide defendant-oriented injunctions impermissibly treat lawsuits by individual plaintiffs as *de facto* class actions.

Third, such orders have unfairly asymmetric preclusion consequences.<sup>155</sup> No matter how many times the government prevails at the district court level in defending a legal provision, other plaintiffs remain free to bring identical challenges, either in the same or different circuits. District court rulings generally lack any *stare decisis* effect, and legal rulings against one plaintiff generally do not bind other similarly situated right holders as a matter of *res judicata* or collateral estoppel.<sup>156</sup> In contrast, if the government loses even a single case and the court issues a nationwide defendant-oriented injunction, it constitutes a victory for all right holders throughout the nation. The government is completely prevented from enforcing the challenged provision against anyone—potentially even right holders who previously challenged the provision and lost, as well as right holders in circuits that have interpreted the Constitution or challenged provision differently.

Fourth, nationwide defendant-oriented injunctions raise the same concerns about the structure of the federal judicial system as nationwide plaintiff-class injunctions.<sup>157</sup> By enacting the Evarts Act,<sup>158</sup> Congress made a deliberate deci-

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injunction against the Secretary of Labor “goes beyond any controversy that might have existed between the complaining companies and the Government officials”); see also Wasserman, *supra* note 22, at 359–63.

151. 138 S. Ct. 1916, 1934 (2018) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006)).

152. Morley, *De Facto Class Actions?*, *supra* note 22, at 534–35; see also Bray, *supra* note 22, at 464.

153. 138 S. Ct. 1532, 1540 (2018) (quoting *United States v. Sanchez-Gomez*, 859 F.3d 649, 657–58 (9th Cir. 2017)).

154. *Id.* at 1539 (quoting *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008)).

155. Bray, *supra* note 22, at 464; Morley, *De Facto Class Actions?*, *supra* note 22, at 531–34.

156. See *Taylor*, 553 U.S. at 906.

157. See *supra* notes 88–90 and accompanying text.

158. Judiciary Act of 1891, ch. 517, 26 Stat. 826.

sion to limit the consequences of lower courts' rulings, including in constitutional cases.<sup>159</sup> It established neither a centralized intermediate court of appeals nor an integrated system of intermediate appellate courts that act as a single unified circuit. Rather, it separated the courts of appeals into numerous regional circuits,<sup>160</sup> each able to develop its own body of law.<sup>161</sup>

Congress further enhanced the importance of regional courts of appeals in constitutional litigation in the mid-1970s. In 1937, Congress had enacted a statute requiring plaintiffs seeking injunctions against federal laws on the grounds they were unconstitutional to pursue their claims before a three-judge panel of a federal district court, with direct appeal as of right to the U.S. Supreme Court.<sup>162</sup> The Senate Judiciary Committee report accompanying the bill, in language echoing the defenders of nationwide injunctions, explained:

A Federal statute is held legal by one judge in one district; it is simultaneously held illegal by another judge in another district. An act valid in one judicial circuit is invalid in another judicial circuit. Thus rights fully accorded to one group of citizens may be denied to others. As a practical matter this means that for periods running as long as 1 year or 2 years or 3 years—until final determination can be made by the Supreme Court—the law loses its most indispensable element—equality.

. . . [D]uring these long processes the normal operations of society and government are handicapped in many cases by differing and divided opinions in the lower courts and by the lack of any clear guide for the dispatch of business. Thereby our legal system is fast losing another essential of justice—certainty.<sup>163</sup>

Thus, throughout the mid-twentieth century, constitutional challenges to federal laws bypassed the regional courts of appeals to reach the Supreme Court more quickly. Congress gave the Court jurisdiction to impose uniform constitutional rules across the nation more quickly, protecting all right holders equally.

In 1976, however, Congress abandoned this approach, subjecting virtually all constitutional litigation to the same appellate process as other cases.<sup>164</sup> The Department of Justice supported the amendment in large part because it believed that both the requirement for three-judge district court panels, as well as

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159. Cf. Frost, *supra* note 23, at 1111–12.

160. Judiciary Act of 1891, ch. 517, § 2, 26 Stat. 826, 826.

161. Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900).

162. Act of Aug. 24, 1937, Pub. L. No. 75-352, ch. 754, § 3, 50 Stat. 751, 752–53.

163. S. REP. NO. 75-711, at 27–28 (1937).

164. See Act of Aug. 12, 1976, Pub. L. No. 94-381, §§ 1–3, 90 Stat. 1119, 1119.

a right of appellate review in the Supreme Court, unnecessarily “waste[d] valuable federal judicial resources.”<sup>165</sup> Thus, Congress made a specific, conscious decision to reintegrate regional courts of appeals back into the appellate structure for constitutional cases. It made a deliberate trade-off, sacrificing speedier Supreme Court review and national uniformity for the perceived benefits of the regional appellate structure.

Allowing lower court judges to exercise sweeping nationwide authority to completely invalidate federal statutes, executive orders, regulations, and other legal provisions is inconsistent with the decentralized, hierarchical structure of the federal judiciary.<sup>166</sup> Defendant-oriented injunctions permit a single district judge of ostensibly limited geographic jurisdiction to give his or her legal determinations the force of law throughout the nation, including for third-party non-litigants in other jurisdictions whose claims would otherwise be governed by the law of other circuits.

Such injunctions also prevent the government from being able to relitigate important constitutional issues in various districts and circuits. As noted earlier, in *United States v. Mendoza*, the Supreme Court generally prohibited plaintiffs from asserting offensive nonmutual collateral estoppel against the government, specifically to preserve the government’s ability to relitigate such issues.<sup>167</sup> Nationwide defendant-oriented injunctions are flatly inconsistent with *Mendoza*.<sup>168</sup> They treat an adverse district court ruling as binding against the government throughout the nation. Indeed, such orders go even further than the type of offensive collateral estoppel the *Mendoza* Court rejected, since other right holders are not even required to file their own lawsuits to be protected by a favorable court ruling.

Fifth, injunctions are a form of equitable relief governed by traditional equitable principles dating back to the English Court of Chancery.<sup>169</sup> As Professor

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165. *Hearing before the House Judiciary Comm., Subcomm. on Courts, Civil Liberties, and the Administration of Justice*, 94th Cong., 1st Sess., H.R. 6150: Improvement of Judicial Machinery, 8 (June 20, 1975) (statement of Deputy Attorney General Harold R. Tyler, Jr.).

166. See Berger, *supra* note 22 (reiterating how the decentralized structure of the federal judiciary, with district courts of limited geographic jurisdiction and circuits with distinct bodies of precedent, strongly counsels against nationwide injunctions); Morley, *De Facto Class Actions?*, *supra* note 22, at 535–38.

167. 464 U.S. 154, 162–63 (1984).

168. Professor Zachary Clopton has argued that *Mendoza* was wrongly decided and that the preclusion principles set forth in *Parkland Hosiery, Inc. v. Shore*, 439 U.S. 322, 331 (1979), should apply to the government as well. Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 5, 29 (2019). Professor Alan M. Trammell likewise rejects *Mendoza*, suggesting that district courts should decide on a case-by-case basis whether the government is precluded from relitigating particular issues based on whether relitigation would increase the likelihood of reaching an accurate outcome. Alan M. Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565, 615–16 (2017). However, the structure of the federal judicial system—particularly in light of Congress’s intentional reintegration of regional courts of appeals into the appellate process for constitutional cases—seems to counsel strongly in favor of allowing relitigation and percolation of important public law issues in various circuits. See *supra* notes 157–66 and accompanying text.

169. Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 238 (2018).

Samuel L. Bray demonstrated in great detail, English Chancery Courts historically did not grant nationwide defendant-oriented injunctions,<sup>170</sup> and American courts seldom did so before the mid-twentieth century.<sup>171</sup>

A range of pragmatic considerations further bolster the case against nationwide defendant-oriented injunctions. Professors Bray and Howard Wasserman point out that such orders exacerbate the incentives for, and consequences of, forum shopping.<sup>172</sup> When a public interest group brings a constitutional challenge or other public law case, a right holder can typically be found in just about any judicial district to act as a plaintiff and establish proper venue.<sup>173</sup> The group will generally select the district and division where the judges are most likely to be ideologically predisposed to rule in their favor.

This means that controversial constitutional and other challenges will tend to be adjudicated by ideological outliers toward the extremes of the political spectrum, depending on the nature of the case, rather than a more representative cross section of the federal judiciary.<sup>174</sup> Lower court adjudications will disproportionately reflect such ideologically skewed judicial views,<sup>175</sup> rather than those of the median judge. And nationwide defendant-oriented injunctions allow these judicial outliers to impose their potentially idiosyncratic views throughout the nation, even if only temporarily.

Although appellate review is available, circuits exhibit comparable variation in the ideological and methodological preferences of their judges. Moreover, a district court's factual findings and discretionary judgment calls can influence and even cabin the appellate court's conclusions.<sup>176</sup> Thus, allowing ideologically outlying district courts to determine the validity of federal legal provisions for

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170. Bray, *supra* note 22, at 425–27; *see also* *Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring).

171. Bray, *supra* note 22, 428–37; *see also* *Trump*, 138 S. Ct. at 2427. Professor Mila Sohani offers a few examples of courts sporadically issuing nationwide and statewide defendant-oriented injunctions in the early and mid-twentieth century, though the issue was not actively litigated in most of these cases. Mila Sohani, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. (forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3457701](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3457701).

172. Bray, *supra* note 22, at 457–61; Wasserman, *supra* note 22, at 363–64. *But see* Malveaux, *supra* note 23, at 57.

173. 28 U.S.C. § 1391(e)(1)(C) (2012).

174. *See* Matthew Erickson, Note, *Who, What and Where: A Case for Multifactor Balancing as a Solution to Abuse of Nationwide Injunctions*, 113 NW. U. L. REV. 331, 338 n.39 (2018).

175. *See* Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 352 (2004) (“No reasonable person seriously doubts that ideology, understood as normative commitments of various sorts, helps to explain judicial votes.”).

176. *See* *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (plurality opinion) (“In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow.” (citing *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 27 n.10 (1971))); John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 124 (2008) (noting that appellate courts “generally defer to lower courts’ findings of adjudicative fact in all constitutional cases except defamation cases covered by the First Amendment” and “sometimes suggest” that “social fact-finding of lower courts . . . deserve[s] deference” as well (emphasis omitted)).



the entire nation, even if only in the first instance, can skew the development of the law.

Additionally, the attorneys and groups crafting constitutional challenges will generally try to select the most sympathetic plaintiffs with the most compelling factual contexts for invalidating the provision at issue.<sup>177</sup> Controversial, cutting-edge constitutional issues will be presented through handpicked, carefully curated, quite possibly unrepresentative fact patterns. And when a lower court issues a nationwide defendant-oriented injunction, the government is compelled to appeal that particular case to prevent the challenged provision from being completely nullified.<sup>178</sup> Thus, constitutional law will systematically be created in the most compelling and sympathetic cases for invalidation, rather than a more representative cross-section of cases in which an issue may arise.

Another largely overlooked consequence of nationwide defendant-oriented injunctions is that they repeatedly trigger emergency litigation, often involving the Supreme Court. Lower courts' increased willingness to issue or approve such orders has led to repeated requests for stays and other types of extraordinary relief from the Court<sup>179</sup> to prevent federal statutes, regulations, or executive orders from being completely nullified throughout the nation based on the ruling of a single lower court judge or panel.<sup>180</sup> The rights of millions of Americans throughout the nation are repeatedly flicked on and off like a light switch as injunctions are stayed, and those stays, in turn, are vacated or reimposed by the motions and merits panels of courts of appeals, en banc courts, and the Supreme Court itself. Highly controversial, unsettled constitutional issues are briefed and considered in a matter of days. The prevalence of nationwide defendant-oriented injunctions has routinized extraordinary emergency litigation procedures that are ill-suited for politically charged, cutting-edge constitutional issues that lie squarely in the public eye. Thus, for a variety of constitutional, rule-based, fairness-based, structural, historical, and pragmatic reasons, courts

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177. See Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987–88) (explaining that public-interest lawyers often choose clients strategically, based on how the court will view the client's "story"); see, e.g., William C. Duncan, *The Role of Litigation in Gay Rights: The Marriage Experience*, 24 ST. LOUIS U. PUB. L. REV. 113, 115 (2005) (explaining how gay rights advocates "carefully selected" the plaintiffs in their challenge to Massachusetts's same-sex marriage ban "after an interview process to ensure they would provide a sympathetic face for the legal claims"); Mark V. Tushnet, *Litigation Campaigns and the Search for Constitutional Rules*, 6 J. APP. PRAC. & PROCESS 101, 109 (2004) (discussing conservative groups' strategic selection of plaintiffs in challenges to affirmative action).

178. Cf. *United States v. Mendoza*, 464 U.S. 154, 161 (1984) ("The application of nonmutual estoppel against the Government would force the Solicitor General to abandon those prudential concerns and to appeal every adverse decision in order to avoid foreclosing further review.").

179. See Steve I. Vladeck, Comment, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. (forthcoming Nov. 2019) (draft at 13–22), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3420221](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420221).

180. See, e.g., *Barr v. E. Bay Sanctuary Covenant*, No. 19A230, 2019 U.S. LEXIS 4619 (Sept. 11, 2019) (staying nationwide injunction against rule requiring refugees to seek asylum in the first safe country they enter); *Trump v. Karnoski*, 139 S. Ct. 950 (2019) (mem.) (staying nationwide injunction against prohibition on transgender military service); *Trump v. Stockman*, 139 S. Ct. 950 (2019) (mem.) (same).

should decline to issue any type of defendant-oriented injunction—especially on a nationwide basis.

## 2. *Responding to the Main Defenses*

Lower courts that have entered or approved nationwide defendant-oriented injunctions typically rely on a few recurring arguments. Many emphasize the fact that the challenged legal provision applies on a nationwide basis and a narrower, plaintiff-oriented injunction would leave some right holders unprotected.<sup>181</sup> Courts particularly stress the need for uniformity when granting relief in the immigration context.<sup>182</sup> These rulings tend to overlook the fact that one of the distinguishing characteristics of the Article III “judicial power” is that it operates upon the litigants involved in the case or controversy before the court, rather than the general public.<sup>183</sup>

The propriety of limiting relief to the particular plaintiffs involved in a case is abundantly clear in the context of a damages suit. When a mass tort such as a train wreck occurs, if certain passengers bring a nonclass suit and prevail, they may obtain damages only for themselves, not on behalf of other similarly situated passengers. This principle is likewise apparent in the context of a suit for equitable relief against a private defendant. If a company such as Apple sues Samsung for patent infringement, it may seek an injunction prohibiting Samsung from infringing its patent in the future.<sup>184</sup> Apple could not go further, however, to enjoin Samsung from violating other companies’ patents. These same restrictions apply with equal force when litigants seek injunctions against government policies.

181. *See, e.g.,* *Saget v. Trump*, 375 F. Supp. 3d 280, 379 (E.D.N.Y. 2019) (granting a nationwide injunction against the termination of temporary protected status for Haiti in part because “this action does not involve case-by-case enforcement of a particular policy or statute,” but rather “concerns a single decision on a nationwide policy”); *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 677–78 (S.D.N.Y. 2019) (“[T]hese cases . . . concern a single decision about a single questionnaire, to be used on a single census throughout the nation.”), *aff’d in part, rev’d in part*, 139 S. Ct. 2551 (2019); *see also* *Karnoski v. Trump*, No. C17-1297-MJP, 2018 U.S. Dist. LEXIS 100789, at \*10 (W.D. Wash. June 15, 2018) (“The Ban, like the Constitution, would apply nationwide. Accordingly, a nationwide injunction is appropriate.”), *stayed pending appeal*, 139 S. Ct. 950 (2019), *stayed and remanded*, 926 F.3d 1180, 1207 (9th Cir. 2019).

182. *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018) (“A final principle is also relevant: the need for uniformity in immigration policy.”), *cert. granted*, 139 S. Ct. 2779 (2019); *Casa de Md., Inc. v. Trump*, No. PWG-19-2715, 2019 U.S. Dist. LEXIS 177797, at \*53–54 (D. Md. Oct. 14, 2019) (“A limited geographical injunction could create a patchwork of immigration policies applied across the nation. . . . [P]reserving . . . the vigorous and uniform enforcement of immigration laws weighs in favor of a nationwide injunction . . . .” (quotation marks omitted)).

183. *See* *Richardson v. Ramirez*, 418 U.S. 24, 36 (1974) (“While the Supreme Court of California may choose to adjudicate a controversy simply because of its public importance, and the desirability of a statewide decision, we are limited by the case-or-controversy requirement of Art. III to adjudication of actual disputes between adverse parties.”); *see also* *Trump v. Hawaii*, 138 S. Ct. 2392, 2428 (2018) (Thomas, J., concurring); *see infra* note 219.

184. 35 U.S.C. § 283 (2012).

Courts have also declared that a nationwide injunction is the only appropriate relief when a legal provision is found to be facially unconstitutional or invalid.<sup>185</sup> The distinction between facial and as-applied challenges is a matter of substantive doctrine, however, that governs the showing a plaintiff must make to prevail on the merits.<sup>186</sup> A determination of facial unconstitutionality is made in the context of a particular case between certain litigants by a lower court of limited authority within the federal judicial structure. The fact that the court rests its judgment on a facial, rather than as-applied, theory does not authorize it to ignore the boundaries of the case or controversy before it to enforce the rights of third-party nonlitigants, especially those in other districts and circuits.

Many courts insist that nationwide defendant-oriented injunctions are generally the proper form of relief in challenges under the APA,<sup>187</sup> which permits courts to “hold unlawful and set aside” agency action under various circumstances.<sup>188</sup> A court may “hold unlawful and set aside” agency action within the context of a particular case, however, without necessarily invalidating the challenged provision as applied to third-party nonlitigants throughout the nation.<sup>189</sup> Moreover, to the extent the APA purports to authorize a federal court to award plaintiffs relief that they lack Article III standing to seek or to go beyond the bounds of the case or controversy before it by enforcing the rights of third-party nonlitigants, the provision may very well be unconstitutional as applied. Nevertheless, even if one concludes that the APA validly empowers federal courts to issue nationwide defendant-oriented injunctions in certain types of cases, then, at a minimum, courts should not claim such sweeping authority for themselves in cases where Congress has not expressly authorized it.

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185. See, e.g., *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) (“[W]here a law is unconstitutional on its face, and not simply in its application to certain plaintiffs, a nationwide injunction is appropriate.” (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)), *reconsid. den’d*, 267 F. Supp. 3d 1201 (N.D. Cal. 2017)).

186. See, e.g., *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 449–50 (2008) (explaining requirements for facial challenges).

187. See, e.g., *NAACP v. Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018) (“[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.” (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)), *reconsid. den’d*, 315 F. Supp. 3d 457 (D.D.C. 2018), *stayed in part pending appeal*, 321 F. Supp. 3d 143 (D.D.C. 2018) (staying injunction as to new DACA applicants), *cert. before judgment granted*, 139 S. Ct. 2779 (2019); *accord Nat’l Fed’n of Indep. Bus. v. Perez*, No. 5:16-cv-00066-C, 2016 U.S. Dist. LEXIS 89694, at \*128 (N.D. Tex. June 27, 2016).

188. 5 U.S.C. § 706(2) (2012).

189. See, e.g., *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 665 (9th Cir. 2011) (“[T]he national injunction was too broad. An order declaring the hospice cap regulation invalid, enjoining further enforcement against [the plaintiff], and requiring the Secretary to recalculate its liability in conformity with the hospice cap statute, would have afforded the plaintiff complete relief.”); *Va. Soc’y for Human Life v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (overturning a nationwide defendant-oriented injunction because “[p]reventing the FEC from enforcing 11 C.F.R. § 100.22(b) against other parties in other circuits does not provide any additional relief to [the plaintiff]”).

Following the first generation of scholarship identifying the problems with nationwide defendant-oriented injunctions, defenders also rose in response. Most of the academic arguments in favor of such orders center around their utility for third-party nonlitigants, who often are not in a position to quickly and effectively enforce their own rights. Professor Suzette Malveaux, for example, argues that these nationwide injunctions are necessary as “an important check on the executive branch of government”<sup>190</sup> because “[m]any of the current administration’s executive orders target the most vulnerable populations in our society—including various minorities, immigrants, and children.”<sup>191</sup> Such practical considerations do not allow courts to ignore jurisdictional, rule-based, and other limitations on their authority, however.

Professor Amanda Frost has offered an especially compelling and comprehensive defense of nationwide defendant-oriented injunctions, but her arguments ultimately do not provide a sufficient basis for them.<sup>192</sup> First, Professor Frost contends the English judiciary’s “bill of peace” constitutes a historical antecedent for such orders that Article III’s judicial power should be interpreted to include.<sup>193</sup> Bills of peace allowed English courts to adjudicate the rights of members of broadly dispersed groups without formally joining them to a lawsuit through the usual procedures.<sup>194</sup> They do not provide a justification for nationwide defendant-oriented injunctions, however, because courts’ rulings in such cases were equally binding on all parties, including all of the potential right holders or claimants, regardless of whether they won or lost.<sup>195</sup>

With nationwide defendant-oriented injunctions, in contrast, the government faces asymmetric preclusion. A single victory by any plaintiff can result in an order running in favor of all other similarly situated right holders throughout the nation.<sup>196</sup> If a plaintiff loses, however, that ruling does not preclude other right holders from bringing identical claims, whether in the same circuit or more

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190. Malveaux, *supra* note 23, at 62.

191. *Id.* at 64.

192. Frost, *supra* note 23.

193. *Id.* at 1080–81.

194. 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 251 (San Francisco, A. L. Bancroft & Co. 1881).

195. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 172 (Boston, Hilliard, Gray & Co. 1836); *see also* 1 NEWBERG ON CLASS ACTIONS § 1.10 (5th ed. 2018); 7A WRIGHT ET AL., *supra* note 97, § 1751; Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 877 (1977); Note, *Shareholder Derivative Suits; Are They Class Actions?*, 42 IOWA L. REV. 568, 569 (1957); *cf.* Zechariah Chafee, Jr., Note, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1298–99 (1932).

196. Indeed, such injunctions may even protect people who previously litigated the same claims against the government and lost or who live in circuits that have construed the Constitution or federal law in a materially different manner.

favorable jurisdictions.<sup>197</sup> In actuality, the bill of peace is the historical antecedent to the Rule 23(b)(2) class action device<sup>198</sup>—to the extent such orders may bind third parties<sup>199</sup>—not nationwide defendant-oriented injunctions.

Bills of peace are further distinguishable from both nationwide defendant-oriented injunctions and modern class actions because the members of the plaintiff group (the “multitude”) usually had some preexisting relationship or commonality with each other apart from the alleged injury giving rise to the lawsuit.<sup>200</sup> The Chancery Court relied on that preexisting relationship as part of its justification for binding members of the multitude to its ruling. The Chancery “felt reasonably confident about the fairness of adjudicating rights of absentees where the absentees belonged to a preexisting group and some members of the group were before the court as litigants.”<sup>201</sup> Thus, the bill of peace does not establish that nationwide defendant-oriented injunctions are consistent with traditional equitable practices.

Professor Frost also contends that Article III allows federal courts to issue nationwide defendant-oriented injunctions, but she does not explain how that conclusion is consistent with cases such as *Califano v. Yamasaki*,<sup>202</sup> *Doran v. Salem Inn, Inc.*,<sup>203</sup> and other precedents discussed above,<sup>204</sup> which provide otherwise. She points to exceptions to Article III’s justiciability requirements, such as the capable-of-repetition-yet-evading-review exception to the mootness doctrine<sup>205</sup> and allowances for third-party standing,<sup>206</sup> but those are just that: exceptions. Attempting to justify nationwide defendant-oriented injunctions as an exception to general Article III principles is a tacit admission that they violate those generally applicable rules.

Moreover, there is no need to create an exception to Article III’s generally applicable justiciability requirements for nationwide defendant-oriented injunctions. Rule 23(b)(2) class actions and district- or circuit-wide stare decisis for lower court opinions are available alternatives that fit much more comfortably

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197. See *supra* notes 155–56 and accompanying text.

198. See Susanna M. Kim, *Conflicting Ideologies of Group Litigation: Who May Challenge Settlements in Class Actions and Derivative Suits?*, 66 TENN. L. REV. 81, 88 (1998) (“[T]he English bill of peace served as the precursor to the class action . . . .”); Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 749 (2002) (“The modern class action counts among its forebears the seventeenth-century ‘bill of peace.’”). See generally Thomas D. Rowe, Jr., *A Distant Mirror: The Bill of Peace in Early American Mass Torts and Its Implications for Modern Class Actions*, 39 ARIZ. L. REV. 711 (1997).

199. But see *supra* note 120 and accompanying text.

200. Yeazell, *supra* note 195, at 876–77.

201. Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1865 (1998).

202. 442 U.S. 682, 702 (1979) (“[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”).

203. 422 U.S. 922, 931 (1975) (“[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs . . . .”).

204. See *supra* notes 148–51.

205. Frost, *supra* note 23, at 1083–84 (citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007)).

206. *Id.* at 1084 (citing *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 634 (1980)).

against the backdrop of the federal judicial system. Additionally, the Court's precedents concerning remedial standing do not suggest that any such exception for defendant-oriented injunctions exists.<sup>207</sup>

Much of Professor Frost's analysis centers around injunctions concerning "indivisible rights," in which it is necessary to enforce the rights of third-party nonlitigants in order to fully enforce the rights of the party plaintiffs before the court.<sup>208</sup> Examples include redistricting, school desegregation, and certain kinds of prison-reform cases. Her discussion demonstrates the importance and utility of this Article's proposed taxonomy. Traditional justiciability-related principles confirm that a valid plaintiff-oriented injunction may compel the government to take whatever action is necessary to enforce the rights of the plaintiffs before the court, even if those orders are nationwide in scope and incidentally benefit third parties.<sup>209</sup> They do not provide any basis for nationwide defendant-oriented injunctions concerning divisible rights, however, where it is possible to enforce a plaintiff's rights without simultaneously enforcing those of similarly situated nonlitigants.

Professor Frost's discussion of *Trump v. Hawaii*, the *Travel Ban Case*, confirms the efficacy of plaintiff-oriented injunctions and further shows how this Article's proposed taxonomy can prevent confusion about remedial alternatives in constitutional and other public law cases.<sup>210</sup> She argues that a nationwide defendant-oriented injunction completely enjoining the travel ban was "essential" to protect plaintiff State of Hawaii's interests.<sup>211</sup> The ban impeded the University of Hawaii's "ability to recruit" noncitizens as students or faculty.<sup>212</sup> An injunction limited to the geographic territory of Hawaii would not be effective, Professor Frost reasons, "because the United States does not restrict travel among the fifty states by a noncitizen lawfully residing in one of them."<sup>213</sup>

This analysis exemplifies the confusion that arises from the term *nationwide injunction*, with its focus on an order's geographic reach. Professor Frost implies that the district court's two main options were either an injunction against the travel ban for anyone traveling to the State of Hawaii or a nationwide injunction suspending the ban throughout the nation.<sup>214</sup> The real issue, however, was the identities of the people or entities protected by the injunction.

The State of Hawaii claimed that the travel ban impeded its ability to attract teachers and students to its university. The court could have fully vindicated the

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207. See *supra* notes 148–51.

208. See Frost, *supra* note 23, at 1091–92 (quoting Morley, *De Facto Class Actions?*, *supra* note 22, at 491–92); see also *id.* at 1082–84.

209. See *supra* Part I.A.

210. Frost, *supra* note 23, at 1090–91.

211. *Id.* at 1092.

212. *Id.*

213. *Id.*

214. See *id.* at 1091–92.

State's rights by entering a plaintiff-oriented injunction prohibiting the Government from applying the travel ban to any person with a bona fide relationship with the University of Hawaii traveling to the United States. Either the potential traveler or the University could have been required to submit an affidavit attesting that the traveler is a student, faculty member, potential applicant, or other affiliate of the University to confirm that person's entitlement to an exemption from the ban.<sup>215</sup> The applicability of the travel ban would be based not on the airport into which a person was flying or even the state to which that person was traveling, but rather on the person's relationship to the plaintiff in the case. Far from demonstrating that nationwide defendant-oriented injunctions are necessary to give plaintiffs complete relief, as Professor Frost contends,<sup>216</sup> the *Travel Ban Case* is a perfect example of how plaintiff-oriented injunctions can be used to enforce divisible rights.

Professor Frost goes on to frame the debate over nationwide injunctions in terms of conflicting perceptions over the proper role of federal courts: a dispute over whether their role and powers should be based on a "law declaration" model or "dispute resolution" model.<sup>217</sup> I share this view,<sup>218</sup> with an important caveat: federal courts do not possess law-declaration authority in the abstract, but rather must exercise that power within the confines of a particular case or controversy.<sup>219</sup> When a court—particularly a lower court—adjudicates the validity or meaning of a legal provision, it is not making a freestanding, abstract determination of general applicability. To the contrary, it is taking a step in its process of reaching a judgment concerning the parties before it. The very definition of the Article III judicial power, set forth in terms of the authority to adjudicate cases and controversies,<sup>220</sup> means courts may not unnecessarily go beyond the bounds of the matters before them to impose their view of the law on the world at large.

Professor Frost also emphasizes that nationwide defendant-oriented injunctions are often necessary to protect third-party nonlitigants from irreparable injury.<sup>221</sup> As this Article contends, however, the main mechanisms through

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215. *Cf. Aziz v. Trump*, 234 F. Supp. 3d 724, 739 (E.D. Va. 2017) (entering a plaintiff-oriented injunction prohibiting the Government from enforcing an earlier version of the travel ban "as it relates to Virginia residents, Virginia institutions, and persons connected to those persons and institutions").

216. *See Frost, supra* note 23, at 1092 (calling the nationwide defendant-oriented injunction "essential to protect the plaintiffs' interests").

217. *See id.* at 1087–88.

218. *See Morley, De Facto Class Actions?*, *supra* note 22, at 519–20, 523.

219. *See United States v. Raines*, 362 U.S. 17, 20 (1960) ("The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them."); *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885) (holding that a federal court "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies").

220. *See* U.S. CONST. art. III, § 2.

221. *Frost, supra* note 23, at 1094–95.

which a court's constitutional and other public law rulings protect the general public are class certification under Rule 23(b)(2) and stare decisis, not injunctions. Whereas the political branches may act directly on the general public, courts' actions focus primarily on the parties to the cases and controversies they adjudicate, over whom they have acquired personal jurisdiction.<sup>222</sup> In addition, the decentralized, hierarchical structure of the federal judiciary reflects Congress's deliberate decision to limit the effects of lower courts' rulings rather than maximize protection for third-party nonlitigants.

Finally, Professor Frost contends that nationwide defendant-oriented injunctions are easier to administer than plaintiff-oriented injunctions.<sup>223</sup> Although this is correct, such administrative difficulties typically do not affect the proper scope of relief. A plaintiff-oriented injunction leaves the defendant agency or official free to go further than legally required by completely abstaining from enforcing the challenged legal provision against anyone. Indeed, Congress, the President, or the agency may decide to amend or repeal the challenged provision if it would be too difficult, or undermine important policy objectives, to treat certain plaintiffs differently from everyone else.

A broad nationwide defendant-oriented injunction, in contrast, preempts that choice by flatly prohibiting the agency from even attempting to continue administering the challenged provision against third parties. A court should not restrict the government's enforcement discretion more than necessary to protect the plaintiffs' rights, particularly if it is purportedly doing so out of concern for the government's convenience, costs, or administrative burdens. A defendant agency or official should generally be able to make the policy determination of whether the benefits of implementing as much of an enjoined legal provision as possible outweigh the inconvenience of applying different legal regimes to different groups of people—a burden the government already bears when circuit splits arise. Of course, if the government continues enforcing a challenged provision against third parties and winds up violating the plaintiffs' rights in the process, the court may order broader prophylactic relief by enjoining the provision on a wider scale. Even then, however, the focus is on protecting the rights of the plaintiffs before the court, rather than independently seeking to

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222. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (“Personal jurisdiction, too, is ‘an essential element of the jurisdiction of a district . . . court,’ without which the court is ‘powerless to proceed to an adjudication.’” (omission in original) (quoting *Emp’rs Reins. Corp. v. Bryant*, 299 U.S. 374, 382 (1937))).

223. Frost, *supra* note 23, at 1098–99 (“Nationwide injunctions are sometimes the only practicable method of providing relief and can avoid the cost and confusion of piecemeal injunctions.”); *see also* *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 437–38 (E.D.N.Y. 2018) (entering a nationwide defendant-oriented injunction against the Trump Administration’s attempted termination of the DACA program in part due to the potential “administrative problems for Defendants” in complying with a narrower order), *cert. granted sub nom. McAlennan v. Vidal*, 139 S. Ct. 2773 (2019); *Bassett v. Snyder*, 951 F. Supp. 2d 939, 973 (E.D. Mich. 2013) (entering a nationwide defendant-oriented injunction because “[a]n injunction applicable only to the named plaintiffs would be impractical and difficult to enforce”).



vindicate the rights of third-party nonlitigants.<sup>224</sup> Precisely because prophylactic relief restricts the democratically elected branches of government more than the Constitution actually requires, courts may grant it only when the record demonstrates its necessity.<sup>225</sup> Such relief should seldom, if ever, be a first resort.

In short, Professor Frost presents a thorough, well-crafted, powerfully argued defense of nationwide injunctions. Her analysis confirms the need to distinguish among the different categories of such orders. Beyond that, she has reaffirmed that broad nationwide plaintiff-oriented injunctions, which may incidentally benefit third parties, can be necessary to enforce indivisible rights. Nationwide defendant-oriented injunctions, however, remain improper.

### E. Private Enforcement Injunctions

The final type of nationwide injunction, what may be called a nationwide private enforcement injunction, is an order prohibiting private enforcement of a federal legal provision against a particular entity. It is the least studied because it rarely, if ever, is issued.<sup>226</sup> When a private actor—a corporation, for example—wishes to challenge the validity of a federal law or regulation, it typically sues the federal official charged with enforcing the measure, in his or her official capacity, for an injunction, a declaratory judgment, or both. Many federal statutes—including consumer-protection laws regulating matters such as telemarketing, robocalling, credit reports, debt collection, and the like—may be enforced by private parties, however.<sup>227</sup> And such statutes often provide for remedies such as attorneys’ fees, statutory damages, or punitive damages beyond compensatory damages.<sup>228</sup>

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224. Indeed, at one point, Professor Frost defends nationwide defendant-oriented injunctions by analogizing them to prophylactic relief. Frost, *supra* note 23, at 1083. Even prophylactic injunctions, however, seek to enforce a plaintiff’s rights by mandating certain conduct that is not otherwise required or prohibiting certain conduct that is not otherwise illegal in order to deter violations of those rights, identify hard-to-detect violations, or impose standards to help determine what constitutes a violation. *See generally* Thomas, *supra* note 49. A prophylactic injunction does not allow a court to extend an injunction to third-party nonlitigants when doing so is not related to protecting a plaintiff’s rights.

225. Thomas, *supra* note 49, at 110–11.

226. The nationwide private enforcement injunction is comparable to the famed “fourth box” from Judge Guido Calabresi and Professor A. Douglas Melamed’s famed “cathedral model.” Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1116–24 (1972).

227. *See, e.g.*, 15 U.S.C. §§ 1681n(a)–(b), 1681o(a) (2012) (creating private rights of action for violations of the Fair Credit Reporting Act); 15 U.S.C. § 1692k(a) (creating a private right of action for violations of the Federal Debt Collection Procedures Act); 47 U.S.C. § 227(b)(3), (c)(5) (2012) (creating private rights of action for telemarketing and robocalling).

228. *See, e.g.*, 15 U.S.C. §§ 1681n(a)–(c), 1681o(a)(2), 1692k(a)(2)(A)–(B), (a)(3); 47 U.S.C. § 227(b)(3)(B), (c)(5)(B). The availability of statutory damages to plaintiffs who have not suffered concrete injuries raises Article III standing concerns under *Spokeo, Inc. v. Robins*. 136 S. Ct. 1540 (2016). *See* Michael T. Morley, *Spokeo: The Quasi-Hobfeldian Plaintiff and the Nonfederal Federal Question*, 25 GEO. MASON L. REV. 583, 589–92 (2018).

In such situations, there is no obvious defendant the corporation can sue to obtain complete pre-enforcement protection—particularly if the statute allows exclusively for private enforcement. The corporation could not sue either the United States or Congress to have the law declared invalid because they are protected by sovereign immunity.<sup>229</sup> Even if the corporation sought an injunction or declaratory judgment against the federal official charged with enforcing the measure (assuming one existed), a favorable judgment would neither bind private right holders as a matter of *res judicata* nor otherwise preclude them from suing the corporation for any violations of the statute.<sup>230</sup> And the trial court's ruling would have no precedential effect in any such private litigation, especially in other districts and circuits.<sup>231</sup> Furthermore, if the government declined to appeal, the corporation would have no way of even attempting to obtain a favorable ruling from a court of appeals or the Supreme Court to obtain broader *stare decisis* protection against private lawsuits. And the statutory remedies may be too severe for the corporation to simply violate the law and adjudicate the validity of its conduct after the fact.<sup>232</sup>

Another potential option would be for the corporation to seek either an injunction or declaratory judgment against a right holder protected by the statute who would be able to sue the corporation for any violations. In other words, rather than violating a federal statute and running the risk of being sued for statutory damages, punitive damages, or attorneys' fees, the corporation could seek an advance determination of the statute's validity or proper interpretation by suing a potential future plaintiff.

Even assuming the corporation were able to overcome justiciability restrictions, establish that a live case or controversy exists, and win the case—all substantial hurdles—the resulting judgment would be of little use. Again, under current law, a district court opinion would have no *stare decisis* effect, especially in other jurisdictions.<sup>233</sup> And an injunction<sup>234</sup> or declaratory judgment<sup>235</sup> would not be binding on any other right holders, meaning the corporation would still face potentially substantial liability if it violated the law with regard to anyone

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229. *Lynch v. United States*, 292 U.S. 571, 582 (1934) (“The sovereign’s immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies . . . to those [causes of action] arising from some violation of rights conferred upon the citizen by the Constitution.” (citations omitted)).

230. *See Sam Fox Publ’g Co. v. United States*, 366 U.S. 683, 690 (1961) (“[J]ust as the Government is not bound by private antitrust litigation to which it is a stranger, so private parties, similarly situated, are not bound by government litigation.” (citing *United States v. Gen. Elec. Co.*, 95 F. Supp. 165 (D.N.J. 1950); *United States v. Columbia Gas & Elec. Corp.*, 27 F. Supp. 116 (D. Del. 1939); *United States v. Radio Corp. of Am.*, 3 F. Supp. 23 (D. Del. 1933); *United States v. Bendix Home Appliances, Inc.*, 10 F.R.D. 73 (S.D.N.Y. 1949); *United States v. Loew’s Inc.*, 136 F. Supp. 13 (S.D.N.Y. 1955)).

231. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011).

232. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 134–37 (2007).

233. *Camreta*, 563 U.S. at 709 n.7.

234. *See* FED. R. CIV. P. 65(d)(2) (identifying entities bound by an injunction).

235. *See Taylor v. Sturgell*, 553 U.S. 880, 901 (2008).

else. Moreover, if the corporation prevailed at the district court level, it would have no way to force an appeal to generate a favorable precedent with broader stare decisis effect from higher courts.

To obtain effective protection against an unconstitutional federal legal provision that creates a private right of action, the corporation would need nationwide relief: what we might call a nationwide private enforcement injunction. It appears there are two ways a corporation could presently attempt to seek such relief, but both are highly problematic and unlikely to succeed. First, the company could attempt to bring a pre-enforcement constitutional challenge to the statute against a nationwide defendant class of all similarly situated right holders.<sup>236</sup> Such a nationwide defendant class would raise many of the same concerns as a nationwide plaintiff class. It places a single district court in the position of adjudicating the rights of people throughout the nation, including people outside of its geographic jurisdiction, whose claims would ordinarily be subject to the law of other circuits. The claim would also face serious justiciability concerns because few, if any, members of the putative defendant class will have taken any action or advanced a position adverse to the plaintiff.<sup>237</sup>

It is also unclear whether a plaintiff may certify a defendant class under Rule 23(b)(2) to seek injunctive relief. Rule 23 authorizes courts to certify defendant classes in which one or more named defendants are “sued . . . on behalf of” other similarly situated defendants against whom comparable allegations are raised.<sup>238</sup> Consistent with this provision, the Advisory Committee note accompanying the 2003 amendments to Rule 23 expressly recognizes the possibility of defendant classes.<sup>239</sup> Courts have split, however, on whether a court may certify a defendant class for injunctive relief under Rule 23(b)(2).<sup>240</sup> Several circuits have concluded that only plaintiff classes may be certified under that

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236. The plaintiff would have to notify the Attorney General about the case, FED. R. CIV. P. 5.1(a)(2), and the government would have the right to intervene in the litigation, if it wished, 28 U.S.C. § 2403(a); FED. R. CIV. P. 5.1(c).

237. This issue arises frequently in the patent context. An entity engaged in activity that might infringe another party’s patent cannot seek a declaratory judgment of noninfringement unless the patentee affirmatively takes positions or makes threats that contribute to the controversy. *See* *SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372, 1380–81 (Fed. Cir. 2007) (suggesting that Article III jurisdiction depends on an “affirmative act” by the patentee); *see also* *Innovative Therapies, Inc. v. Kinetic Concepts, Inc.*, 599 F.3d 1377, 1381–84 (Fed. Cir. 2010) (evaluating the patentee’s conduct in determining whether a live controversy existed between the parties that would allow the court to exercise jurisdiction over the declaratory judgment suit against the patentee).

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

239. FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment; *see also* 7A WRIGHT ET AL., *supra* note 97, § 1770, at 473 (“Rule 23 does not differentiate on its face between plaintiff and defendant class actions.”).

240. *See* 5 JAMES W. MOORE, MOORE’S FEDERAL PRACTICE—CIVIL § 23.43[5] & nn.37–38 (citing cases); 7AA WRIGHT ET AL., *supra* note 97, § 1775, at 58 (“Although arguments have been made that certification of defendant class suits under Rule 23(b)(2) would be desirable, as well as consistent with the policies underlying the rule, the fact remains that the language is clear, and the better view is to restrict its applicability to plaintiff classes seeking injunctive relief.” (footnote omitted)); *cf.* Scott Douglas Miller, Note, *Certification of Defendant Classes Under Rule 23(b)(2)*, 84 COLUM. L. REV. 1371 (1984).

provision.<sup>241</sup> For all these reasons, it seems unlikely that an entity can successfully challenge a federal statute creating a private right of action through a lawsuit for injunctive or declaratory relief against a nationwide defendant class of right holders.

A second alternative, which was recently tried unsuccessfully in the Fifth Circuit case *Texas v. U.S. Dep't of Labor*, would be to leverage a favorable judgment in a lawsuit against the government into a cudgel against private plaintiffs.<sup>242</sup> In 2014, twenty-one states and more than fifty-five business groups sued the U.S. Department of Labor (DOL) in the U.S. District Court for the Eastern District of Texas.<sup>243</sup> They argued that the Obama Administration's regulations<sup>244</sup> implementing the Fair Labor Standards Act's overtime provisions<sup>245</sup> were invalid. The court entered a preliminary injunction against the regulations, declaring, "A nationwide injunction is proper in this case. The Final Rule is applicable to all states. Consequently, the scope of the alleged irreparable injury extends nationwide. A nationwide injunction protects both employees and employers from being subject to different . . . exemptions based on location."<sup>246</sup> It later granted summary judgment to the business groups, holding that "the Department's Final Rule . . . is invalid."<sup>247</sup>

While the preliminary injunction was in effect, a New Jersey resident who worked at Chipotle filed a putative class action suit against the company in the U.S. District Court for the District of New Jersey for violating the overtime regulation.<sup>248</sup> Neither the employee nor Chipotle had anything to do with the Texas litigation. Nevertheless, Chipotle moved the Texas court to hold the employee in contempt for violating that court's preliminary injunction against enforcement of the regulation.<sup>249</sup>

The district court granted the motion, holding the employee in contempt.<sup>250</sup> The court noted that the employee knew about the order when he

241. See, e.g., *Tilley v. TJX Cos.*, 345 F.3d 34, 39–40 (1st Cir. 2003) ("[D]efendant classes generally lie outside the contemplation of Rule 23(b)(2)."); *Henson v. East Lincoln Township*, 814 F.2d 410, 414 (7th Cir. 1987) (holding that the "language" and "drafting history" of Rule 23(b)(2) demonstrate that broad defendant classes are impermissible); *Thompson v. Bd. of Educ.*, 709 F.2d 1200, 1204 (6th Cir. 1983) (holding that Rule 23(b)(2) "contemplates certification of a plaintiff class against a single defendant, not the certification of a defendant class"); *Paxman v. Campbell*, 612 F.2d 848, 854–55 (4th Cir. 1980) (en banc).

242. *Texas v. U.S. Dep't of Labor*, 929 F.3d 205, 213 (5th Cir. 2019).

243. See *Nevada v. U.S. Dep't of Labor*, 275 F. Supp. 3d 795, 799 (E.D. Tex. 2017) (noting that the lawsuits were consolidated), *appeal docketed*, No. 17-41130 (5th Cir. Nov. 2, 2017).

244. 81 FED. REG. 32,391, 32,549–52 (May 23, 2016) (codified at 29 C.F.R. § 541 (2019)).

245. 29 U.S.C. § 213(a)(1) (2012).

246. *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 534 (E.D. Tex. 2016), *stay den'd*, 227 F. Supp. 3d 696 (E.D. Tex. 2017).

247. *Nevada*, 275 F. Supp. 3d at 808.

248. See *Nevada v. U.S. Dep't of Labor*, 321 F. Supp. 3d 709, 714 (E.D. Tex. 2018), *rev'd sub nom.*, *Texas v. U.S. Dep't of Labor*, 929 F.3d 205 (5th Cir. 2019).

249. *Id.* at 715.

250. *Id.* at 729.

filed the New Jersey lawsuit.<sup>251</sup> Although the preliminary injunction enjoined only DOL from enforcing the overtime rule, injunctions also apply to nonparties who are in privity with an enjoined entity.<sup>252</sup> The Texas court held that DOL had been defending the overtime rule to enforce the rights of people like the employee throughout the nation. Consequently, the employee was in privity with the Department and subject to the injunction.<sup>253</sup> The Texas court commented, “[T]he common knowledge among citizens that the DOL and agencies like it represent the public at large explains the dearth of precedent that factually paralleled this proceeding.”<sup>254</sup>

The Texas court went on to conclude that the employee’s New Jersey lawsuit for Chipotle’s alleged violations of the overtime rule violated the preliminary injunction.<sup>255</sup> It held the employee and his attorneys in contempt, ordering them to withdraw the New Jersey lawsuit and reimburse Chipotle for its attorneys’ fees in connection with the contempt motion.<sup>256</sup> The court stayed its ruling pending appeal,<sup>257</sup> and the U.S. Court of Appeals for the Fifth Circuit reversed it.<sup>258</sup>

The Fifth Circuit correctly declared that, because the employee was “not in privity with the DOL and not otherwise bound by the injunction, the district court erred in granting Chipotle’s motion for contempt.”<sup>259</sup> This case confirms that even a favorable judgment against the government invalidating a legal provision will not preclude private plaintiffs from continuing to sue under it, especially in other jurisdictions. Without some mechanism akin to a nationwide defendant-class injunction, nothing other than a Supreme Court opinion can protect a private party from federal legal provisions that create private rights of action.

Affording district court rulings district- or circuit-wide stare decisis effect would reduce some of the risk to regulated entities but not completely solve the problem. The corporation would still have to find a defendant (i.e., a right holder under the statute) against whom it could assert a ripe, justiciable claim. And it would not be able to operate safely on a nationwide basis without securing victories in multiple jurisdictions.

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251. *Id.* at 716.

252. *Id.* at 720 (citing *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945)).

253. *Id.* at 725–26.

254. *Id.* at 725.

255. *Id.* at 726.

256. *Id.* at 729.

257. *Nevada v. U.S. Dep’t of Labor*, No. 4:16-CV-00731, 2018 U.S. Dist. LEXIS 73790, at \*5 (E.D. Tex. May 1, 2018).

258. *Texas v. U.S. Dep’t of Labor*, 929 F.3d 205, 213 (5th Cir. 2019).

259. *Id.* at 213.

One potentially effective solution, which would require some substantial doctrinal shifts, would be to allow a plaintiff to obtain protection against a federal legal provision (including private causes of action) by bringing a declaratory judgment suit against a designated government official in his or her official capacity, such as the Speaker of the House, Attorney General, or President.<sup>260</sup> Such officials are ultimately responsible, in some sense, for federal legal provisions, including measures they are not empowered to enforce themselves. Although this approach would rest upon a legal fiction, it is comparable to the other fictions upon which much of modern sovereign immunity doctrine, such as *Ex parte Young*, is premised.<sup>261</sup> These suits would also be an easier vehicle for generating precedents that could be afforded stare decisis effect because the plaintiff would not be singling out an unsuspecting right holder—with whom an Article III controversy may not even exist—to sue. Additionally, the federal government is much better equipped to defend the constitutionality or proper interpretation of federal laws and, in any event, is already entitled to intervene in any such challenges brought against private parties.<sup>262</sup>

The Court has recognized the importance of providing opportunities for pre-enforcement review when a law authorizes potentially severe consequences like statutory or punitive damages, attorneys' fees, or injunctive relief.<sup>263</sup> The lack of an effective vehicle for bringing pre-enforcement challenges to the validity or meaning of federal legal provisions that create private rights of action is an underexplored topic that requires further consideration.

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Disaggregating the concept of nationwide injunctions can help courts distinguish the types of orders with nationwide effect that are appropriate for them to issue from those that raise serious constitutional, fairness-related, rule-based, prudential, and structural concerns. This Article's proposed taxonomy seeks to shift the focus from the geographic applicability of an order to (i) the parties whose rights a court seeks to enforce and (ii) whether the case is a class action:

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260. Sovereign immunity would bar a suit against the United States or a federal agency. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994).

261. 209 U.S. 123 (1908); see *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (describing *Ex parte Young* as a "fiction").

262. See *supra* note 236.

263. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 152–53 (1967) ("To require [an entity] to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily."), *superseded on other grounds by statute*, Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721, as recognized in *Califano v. Sanders*, 430 U.S. 99, 105 (1977); cf. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) ("[W]e did not require, as a prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak, by taking the violative action.").

		WHOSE RIGHTS ARE BEING ENFORCED	
		Plaintiff(s) Only	Plaintiff(s) and Third Parties
NATURE OF LAWSUIT	Only Individual Plaintiff(s)	<p><u>Plaintiff-Oriented Injunction</u></p> <p><i>Valid. May apply nationwide when legality, standing, and threat constraints are satisfied.</i></p>	<p><u>Defendant-Oriented Injunction</u></p> <p><i>Invalid.</i></p> <p><i>A valid plaintiff-oriented injunction may resemble a nationwide defendant-oriented injunction when the plaintiff's rights are "indivisible."</i></p>
	Associational Plaintiff(s)	<p><u>Associational Injunction</u></p> <p><i>Valid if the court tailors it to enforcing the rights of the association's members at the time of judgment as the real parties in interest.</i></p>	<p><i>A plaintiff-class injunction will resemble a nationwide defendant-oriented injunction when the court (improperly) certifies a nationwide class.</i></p>
	Class Action	<p><u>Plaintiff-Class Injunction</u></p> <p><i>Valid, but courts should certify only district- and circuit-wide classes and rely primarily on stare decisis to protect third parties.</i></p>	

Private Enforcement Injunction—An entity seeks to preclude all private right holders throughout the nation from enforcing a challenged legal provision against it. *Under current doctrine, there is likely no valid way for a court to issue such orders.*

As this taxonomy demonstrates, not all so-called nationwide injunctions are the same or subject to the same constraints. Orders of nationwide applicability are appropriate only when necessary to protect the rights of the plaintiffs before the court, because either the plaintiffs face potential violations of those rights across the nation, or their rights are indivisible from those of third-party nonlitigants not before the court.

## II. POTENTIAL REFORMS

Both Congress and the courts can prohibit inappropriate nationwide injunctions in public law litigation through a variety of reforms. This Part discusses potential changes to the U.S. Code, Federal Rules of Civil Procedure, and various judicial doctrines that would ensure lower courts tailor their remedies to enforcing the rights of the plaintiffs before them.

*A. Prohibiting Nationwide Defendant-Oriented Injunctions*

Perhaps the most obvious reform is to expressly prohibit courts from issuing nationwide defendant-oriented injunctions for the reasons discussed above.<sup>264</sup> Of the various types of orders that might be classified as nationwide injunctions, these are the most problematic. Such injunctions may be prohibited through any number of mechanisms. Most basically, circuit courts of appeals and, ultimately, the Supreme Court can simply hold that such injunctions are inappropriate under Article III, Rule 23, or traditional equitable principles.<sup>265</sup>

The Court recently had an opportunity to do so in *Trump v. Hawaii*, the *Travel Ban Case*; Justice Clarence Thomas's concurrence forcefully rejected their propriety.<sup>266</sup> This term, the Supreme Court is hearing consolidated appeals<sup>267</sup> from several courts that approved nationwide defendant-oriented injunctions against the Trump Administration's termination of President Obama's DACA program<sup>268</sup>—though the litigation focuses on the legality of the termination, rather than the proper scope of relief.<sup>269</sup> The Seventh Circuit was poised to consider the matter en banc in the sanctuary cities litigation but called off its hearing when the district court replaced its preliminary injunction with a permanent injunction.<sup>270</sup> The propriety of nationwide relief in that case remains at issue as the Department of Justice appeals the permanent injunction.<sup>271</sup> Such suits offer the most obvious and immediate method of limiting the scope of

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264. See *supra* Part I.D.

265. See *supra* notes 148–71 and accompanying text.

266. 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring).

267. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 139 S. Ct. 2779 (2019) (mem.).

268. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511–12 (9th Cir. 2018) (approving a nationwide defendant-oriented injunction against termination of the DACA program), *cert. granted*, 139 S. Ct. 2779 (2019); *NAACP v. Trump*, 298 F. Supp. 3d 209, 243 (D.D.C. 2018) (same), *reconsid. den'd*, 315 F. Supp. 3d 457 (D.D.C. 2018), *stayed in part pending appeal*, 321 F. Supp. 3d 143 (D.D.C. 2018) (granting also the Government's motion to clarify), *cert. before judgment granted*, 139 S. Ct. 2779 (2019); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 437 (E.D.N.Y. 2018), *cert. before judgment granted sub nom. McAleenan v. Vidal*, 139 S. Ct. 2773 (2019).

269. See Brief for the Petitioners at I, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, Nos. 18-587, 18-588, & 18-589 (U.S. filed Aug. 19, 2019).

270. *City of Chicago v. Sessions*, Nos. 17-2991 & 18-2649, 2018 U.S. App. LEXIS 25694, at \*6–7, \*9 (7th Cir. Aug. 10, 2018) (per curiam).

271. Notice of Appeal, *City of Chicago v. Sessions*, No. 17-05720 (N.D. Ill. filed Aug. 28, 2018).



nationwide defendant-oriented injunctions in public law cases. Indeed, the Supreme Court's rejection of nonmutual collateral estoppel against the Government in *United States v. Mendoza* is an important component of the argument against nationwide injunctions;<sup>272</sup> it would be particularly appropriate for the Court itself to address *Mendoza*'s impact.

Alternatively, the judiciary likely could resolve the issue through its rule-making powers. The Rules Enabling Act specifies that rules must be procedural<sup>273</sup> and may not “abridge, enlarge or modify any substantive right.”<sup>274</sup> Federal Rule of Civil Procedure 65 generally governs the procedures through which courts grant injunctive relief. With the exception of the requirement that a plaintiff show “immediate and irreparable injury, loss, or damage” to obtain an ex parte temporary restraining order,<sup>275</sup> Rule 65 does not provide substantive standards governing injunctions.<sup>276</sup>

Consistent with the Rules Enabling Act's restrictions, I propose Rule 65(g):

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

This proposed rule is expressly cast in procedural terms, tying the availability of injunctive relief to a party's involvement in the case as a litigant, whether directly or as a member of a class.<sup>277</sup>

272. 464 U.S. 154 (1984).

273. 28 U.S.C. § 2072(a) (2012).

274. *Id.* § 2072(b).

275. FED. R. CIV. P. 65(b)(1)(A).

276. Morley, *supra* note 169, at 252–55.

277. The proposed rule complements Rule 65(d)(2)(C), which provides that a third-party nonlitigant is bound by an injunction only if it acts “in active concert or participation” with an enjoined party or its agents and receives notice of the order. FED. R. CIV. P. 65(d)(2)(C). To the extent the Supreme Court continues to accept the validity of Rule 65(d)(2)(C), it supports the notion that the Rules Enabling Act allows the promulgation of rules governing an injunction's applicability beyond the immediate parties to a case.

Rule 65(d)(2)(C) raises serious questions under the Rules Enabling Act, however, since the Act authorizes the promulgation of only procedural, and not substantive, rules. 28 U.S.C. § 2072(a)–(b); *see* *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (holding that a federal court may not apply a federal rule of procedure if it “transgresses . . . the terms of the Enabling Act”). The Court has explained, “The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress . . . .” *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). The issue of which third-party nonlitigants are bound by an injunction—particularly entities who neither are in privity with an enjoined party nor had notice and an opportunity to be heard in the underlying proceedings—seems to be a matter of substantive law rather than procedure. The Rule especially appears to regulate substantive rights as applied to prophylactic injunctions, which may prohibit third-party nonlitigants from engaging in acts that are otherwise legal or require them to perform actions that are not otherwise legally mandated. *See* Thomas, *supra* note 49, at 322, 326. Thus, Rule 65(d)(2)(C) may violate the Rules Enabling Act.

Moreover, if the applicability of injunctions to third-party nonlitigants is a matter of substantive law, then a federal court cannot apply the same rule across the board to all cases that come before it. *See* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Rather, federal substantive law would govern the scope of injunctive relief in cases arising under federal law, while state substantive law would apply in cases arising under state

Addressing the issue of nationwide injunctions through the rulemaking process allows broad public participation through the submission of comments to the Civil Rules Advisory Committee.<sup>278</sup> It also establishes a consistent nationwide standard, rather than leaving room for circuit splits, and ensures the rule is crafted outside the context of a particular case, in which the nature of the underlying rights or identities of the litigants may color the Court's consideration of the issue.

Rather than waiting for the judiciary to address the issue, either through precedent or the rulemaking process, Congress itself could simply enact a law regulating or prohibiting nationwide injunctions. The U.S. House Judiciary Committee's Subcommittee on the Courts, Intellectual Property, and the Internet has already held a hearing on the subject<sup>279</sup> and reported a bill, the "Injunctive Authority Clarification Act of 2018," which provides:

No court of the United States (and no district court of the Virgin Islands, Guam, or the Northern Mariana Islands) shall issue an order that purports to restrain the enforcement against a non-party of any statute, regulation, order, or similar authority, unless the non-party is represented by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure.<sup>280</sup>

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law. *Cf.* Morley, *supra* note 169. Although Rule 65(d)(2)(C) would be unenforceable under either of these approaches, very little would actually change. Rule 65(d)(2)(C) codifies the traditional equitable principles that would presumptively govern federal-question cases in its absence. *See* Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945) (holding that the provision presently codified as Rule 65(d) "is derived from the common-law doctrine that . . . defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding"); *see also* Chase Nat'l Bank v. City of Norwalk, 291 U.S. 431, 436–37 (1934). Thus, even without the rule, federal courts adjudicating federal-question cases would continue to presumptively apply injunctions to third parties acting in concert with the defendant or its agents. Likewise, nearly every state in the nation has adopted the same principle as a matter of state law, whether as a rule of procedure, *see, e.g.*, ALA. R. CIV. P. 65(d)(2); statute, *see, e.g.*, GA. CODE ANN. § 9-11-65 (2019); or judicial precedent, *see, e.g.*, Dalton v. Meister, 267 N.W.2d 326, 330–31 (Wis. 1978). Federal courts would therefore continue to apply it in diversity cases and other matters arising under state law, as well. Of course, the choice between federal and state standards could still be significant to the extent that federal and state courts disagree over whether certain interactions between an enjoined party and a third-party nonlitigant rise to the level of acting in concert with each other. *Cf.* Michael T. Morley, *Beyond the Elements: Erie and the Standards for Preliminary and Permanent Injunctions*, 52 AKRON L. REV. 457, 474–80 (2018) (explaining how federal and state courts may interpret and apply principles governing injunctive relief differently).

It does not appear that any Rules Enabling Act challenges have yet been brought against Rule 65(d)(2)(C). Even if Rule 65(d)(2)(C) is vulnerable to such a challenge, however, the proposed Rule 65(g) above governing the scope of injunctive relief does not give rise to comparable concerns. Whereas Rule 65(d)(2)(C) goes beyond the parties before the court to extend an injunction to third-party nonlitigants, the proposed Rule 65(g) instead reinforces other rules of civil procedure by confirming that a court may enforce the rights only of the litigants before it.

278. *See* 1 GUIDE TO JUDICIARY POLICY § 440.20.40(b) (2011).

279. *See The Role and Impact of Nationwide Injunctions by District Courts: Hearing Before the Subcomm. on Courts, Intellectual Prop. and the Internet of the H. Comm. on the Judiciary*, 115th Cong. (2017).

280. H.R. 6730, 115th Cong. § 2 (2018). The bill was reintroduced in the 116th Congress as the Injunctive Authority Clarification Act of 2019, H.R. 77, 116th Cong. (2019), and referred to the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security.

This proposal is a well-crafted solution, though it raises three potential concerns. First, it may be underinclusive because it is tailored only to orders that “restrain the enforcement” of legal authorities such as statutes and regulations.<sup>281</sup> Courts may issue other types of nationwide injunctions, however, such as injunctions requiring government defendants to affirmatively enforce certain legal authorities, to construe or enforce legal authorities in a particular manner, or to refrain from giving legal effect to other types of official action. For example, a nationwide injunction prohibiting the government from complying with President Trump’s attempt to rescind the DACA program<sup>282</sup> may instead be cast as a nationwide injunction affirmatively compelling the government to implement the program. The statute’s phrasing unnecessarily raises questions about its scope and creates the opportunity for motivated lower courts to evade its restrictions.

Second, uncertainty may exist about whether third-party nonlitigants are “represented by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure.”<sup>283</sup> The statute would be more effective if Congress adopted a more concrete, specific standard. Finally, the proposal does not address the issue of public-interest groups using associational standing as a backdoor mechanism for evading limits on nationwide injunctions.<sup>284</sup>

To address these concerns, Congress should instead consider the following language as a starting point:

(a) Unless otherwise required by the U.S. Constitution or some other provision of applicable law, any injunction issued by a U.S. district court shall be tailored to enforce only the rights of the moving parties (including real parties in interest under Rule 17(b) and members of a class certified under Rule 23) and shall not be unnecessarily extended further to enforce the rights of third-party nonlitigants.

(b) In any case in which a plaintiff entity asserts associational standing, the “moving parties” for purposes of Subsection (a) shall be deemed to be that entity’s members who had been harmed, or faced an imminent likelihood of harm, due to the legal provision or provisions at issue as of the time the court issues the injunction.

Regardless of the phrasing of the proposal, however, the legislative process has become so stultified that it seems the least likely route for reform in the foreseeable future.<sup>285</sup>

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281. H.R. 6730 § 2.

282. *See supra* note 268.

283. H.R. 6730 § 2.

284. *See supra* Part I.C.

285. *See* Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609 (1983) (“Congress is a reactive body unable to enact legislation until the problem at hand reaches crisis proportions.”).

B. *Limiting the Geographic Scope of Rule 23(b)(2) Plaintiff Classes*

Any attempt to address the issue of nationwide injunctions must likewise contend with the proper scope of class actions under Rule 23(b)(2). If courts are prevented from issuing nationwide defendant-oriented injunctions in which they nullify legal provisions on behalf of all right holders without formally certifying a plaintiff class, the natural alternative is for district courts to simply certify nationwide classes under Rule 23(b)(2) before issuing such injunctions. As discussed earlier, virtually any facial challenge to a legal provision, as well as any as-applied challenge that relies primarily on generally applicable legal arguments rather than the unusual circumstances of particular litigants, would likely satisfy the requirements for Rule 23(b)(2) class certification as a matter of law.<sup>286</sup> And nothing about the process of certifying a Rule 23(b)(2) class either provides any meaningful benefits to the court, the parties, or the putative class members, or helps identify certain cases that would be especially appropriate for nationwide relief.

Consequently, the Supreme Court should reconsider *Califano v. Yamisaki*, which authorized district courts to certify nationwide classes and grant nationwide relief in challenges relating to federal legal provisions.<sup>287</sup> Indeed, the Court subsequently barred litigants from asserting offensive nonmutual collateral estoppel against the Government in *United States v. Mendoza* to protect the government's power to relitigate important issues in multiple jurisdictions.<sup>288</sup> *Mendoza* also emphasized the limited powers of the lower federal courts, particularly in public law cases, within our hierarchical, decentralized judicial system.<sup>289</sup> *Califano* minimizes these considerations.

Alternatively, either the Civil Rules Advisory Committee or Congress could tackle the issue through the rulemaking or legislative processes, respectively. Rule 23 authorizes federal courts to certify classes; restrictions on their geographic scope would constitute procedural amendments permitted by the Rules Enabling Act.<sup>290</sup> And federal law already regulates class actions in various respects.<sup>291</sup> I propose the following measure, which could be substantively adopted as either a rule or a statute:

[Rule 23(i) / 28 U.S.C. § 1716]

Unless otherwise required by the U.S. Constitution or some other provision of applicable law, in a lawsuit against a federal agency or a federal official in his or her official capacity, when a district court certifies a class pursuant to

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286. See *supra* note 122 and accompanying text.

287. 442 U.S. 682, 699–703 (1979).

288. 464 U.S. 154, 162 (1984).

289. *Id.*

290. 28 U.S.C. § 2072 (2012).

291. *Id.* §§ 1711–15.

Federal Rule of Civil Procedure 23(b)(2) in which the class representative challenges the validity, proper interpretation, or application of a federal statute, regulation, executive order, policy, agency issuance, or other legal provision, the class shall be comprised only of members who reside within the federal circuit in which the court sits, or who would allegedly suffer adverse consequences from the challenged legal provisions, activities, events, conduct, or transactions within that circuit.

This proposed amendment is expressly limited to public law cases against government defendants concerning the validity, proper construction, or application of federal enactments to ensure it does not have unexpected adverse consequences in purely private disputes. This amendment would resolve the longstanding tension between *Califano* and *Mendoza*; prevent courts from circumventing restrictions on nationwide defendant-oriented injunctions; ensure percolation of important constitutional and statutory issues across different circuits; and reinforce both the decentralized, hierarchical structure of the federal judiciary, as well as geographic limitations on the legal applicability of lower courts' rulings.

### C. *Stare Decisis for District Court Rulings*

The reforms suggested in the previous Parts would greatly limit the power of lower courts, particularly district courts, to grant relief in public law cases. Taken to the extreme, these proposals would require every right holder throughout a state, the nation, or, in some cases, even the world to separately challenge an allegedly invalid legal provision, either personally or as part of a class, to obtain relief. Such an approach raises substantial practical and fairness concerns.

One of the points that defenders of nationwide injunctions typically overlook, however, is that injunctions are not courts' only tools for protecting the rights of third-party nonlitigants. When a court interprets a legal provision or holds it invalid, its judgment and any injunction are typically accompanied by a written opinion. The holdings in such opinions presently have nationwide *stare decisis* effect when issued by the Supreme Court, circuit-wide *stare decisis* effect when issued by a circuit court, and no such effect at all when issued by a district court.<sup>292</sup> In addition to establishing the law that future courts must apply, circuit court and Supreme Court opinions also generally render the law "clearly established" for *Bivens*<sup>293</sup> and § 1983<sup>294</sup> purposes, meaning government officials may be held personally liable for acting contrary to them.<sup>295</sup>

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292. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011).

293. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

294. 42 U.S.C. § 1983 (2012).

295. *See Reichle v. Howards*, 566 U.S. 658, 665–66 (2012) (assuming circuit precedent may render the law clearly established).

The most efficient way to allow third-party nonlitigants to benefit from district court rulings is to accord them some degree of stare decisis effect. At a minimum, a district court's rulings could be afforded stare decisis effect throughout that district. Alternatively, since all district courts within a circuit are engaged in the same activity—attempting to apply the law of the circuit<sup>296</sup>—a district court ruling could instead be given circuit-wide stare decisis effect. With circuit-wide stare decisis, as few as twelve lawsuits—one in each numbered geographic circuit as well as the District of Columbia Circuit—would be needed to adjudicate the rights of everyone throughout the nation, regardless of whether the cases are appealed. Circuit-wide stare decisis for district court rulings would avoid the need to endlessly relitigate the same legal issues and allow substantial numbers of third-party nonlitigants to benefit from district courts' public law rulings. At the same time, the geographic limits of this stare decisis effect would promote a reasonable amount of relitigation of important issues among different circuits and reinforce the limited scope of lower courts' authority.

One might object that affording circuit-wide stare decisis effect to district court rulings would prevent intracircuit percolation. Courts of appeals would be deprived of the opportunity to consider how different district courts have addressed an issue and assess the practical consequences of various approaches. The Supreme Court, however, would retain its ability to watch issues percolate among the circuits and consider the legitimacy and practical effects of various circuits' approaches. Moreover, courts of appeals may not receive the same benefits from a multiplicity of district court rulings that the Supreme Court does from the opportunity to consider multiple appellate rulings. Whereas courts of appeals are institutionally structured to produce thorough, researched opinions on complex questions of law, district courts focus much more on case processing and factual development.<sup>297</sup> Moreover, because litigants generally may appeal to circuit courts as of right<sup>298</sup> they frequently adjudicate important issues even when only a single district court within their jurisdiction has considered it.

Extending circuit-wide stare decisis effect to all district court rulings would carry other, more substantial drawbacks, however. It would substantially increase the amount of case law each district court must treat as binding and may increase the time required to adequately research legal issues, thereby increasing litigation costs. Moreover, allowing a district court's ruling to have the force of

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296. See *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam) (discussing “usual law-of-the-circuit procedures”); see also *Oladeinde v. Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992) (holding that the district courts within each circuit must apply “the law of the circuit”).

297. See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231–32 (1991) (contrasting the relative institutional advantages of district and circuit courts); RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 157–58 (2d ed. 1996).

298. See 28 U.S.C. §§ 1291, 1292(a) (2012).

law outside its geographic jurisdiction may be inconsistent with Congress's decision to separate the country into individual judicial districts. And district courts may not have the time or institutional capacity to ensure that their opinions are researched comprehensively and crafted precisely enough to constitute binding law for other district judges across an entire circuit, particularly when trial counsel perform a cursory job of briefing the issues.<sup>299</sup>

Whether district court rulings are treated as binding on other district judges across the district or circuit, *stare decisis* is a far more appropriate vehicle than injunctions for protecting third-party nonlitigants.<sup>300</sup> Unlike nationwide defendant-oriented injunctions, allowing third parties to take advantage of *stare decisis* does not raise Article III concerns about a plaintiff's standing or the scope of the controversy before the court. And all right holders within the district or circuit would be subject to the court's ruling, regardless of whether the plaintiff wins or loses. Fairness concerns about asymmetric claim preclusion are therefore likewise absent.<sup>301</sup>

*Stare decisis* is even superior to Rule 23(b)(2) class actions as a mechanism for extending the consequences of district court rulings beyond the named parties to a case. By its very nature, *stare decisis* allows all right holders within a court's jurisdiction—known and unknown, present and future—to take advantage of its ruling. Rule 23(b)(2) classes in public law cases are effectively a clumsy, unnecessary, doctrinally problematic means of attempting to achieve the same effect. As discussed earlier, their class definitions are often vague and overbroad, including unknown, unidentifiable, and even future right holders, many of whom lack standing at the time to be included in a federal lawsuit.<sup>302</sup> Neither the court, the named parties, nor the class members obtain any benefit from requiring plaintiffs to go through the formality of Rule 23(b)(2) class certification before a district court's ruling may protect other right holders within its jurisdiction. Granting *stare decisis* effect to district court rulings, together with the *stare decisis* effect already afforded appellate courts' rulings, obviates the need for such procedural machinations.

There are at least two major potential objections to relying on *stare decisis* as a replacement for nationwide defendant-oriented injunctions and nationwide plaintiff-class injunctions. First, most obviously, the effects of a district court's

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299. Similar concerns had led courts of appeal to prohibit citations to their unpublished opinions. See POSNER, *supra* note 297, at 165; Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 184–85 (1999). Litigants are presently permitted to cite unpublished opinions issued after January 1, 2007. FED. R. APP. P. 32.1(a).

300. See Bray, *supra* note 22, at 474 (“Precedent should be the ordinary way one case ripples out to others.”); cf. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 809–10 (2012) (proposing a more elaborate system of *stare decisis* for district courts and examining the rationales and counterarguments).

301. Cf. *supra* notes 155–56 and accompanying text.

302. See *supra* notes 115–18 and accompanying text.

ruling would be limited to the district or circuit in which the court sits. As discussed earlier, however, limiting the effects of lower courts' rulings—particularly in public law cases involving the validity of congressional or presidential action—is consistent with the decentralized, hierarchical structure of the federal judicial system.<sup>303</sup>

Second, and perhaps more importantly, district and circuit court opinions, on their own, provide less protection than temporary restraining orders and preliminary injunctions.<sup>304</sup> Government agencies and officials cannot be held in contempt for acting contrary to a judicial opinion (or even declaratory judgment), even if that opinion is regarded as binding law within the jurisdiction.<sup>305</sup> They are subject to the possibility of civil or criminal contempt only after a district court has entered an injunction against them. Thus, even when a court rules that certain government conduct is unconstitutional or unauthorized, third-party nonlitigants who are not protected by an injunction remain vulnerable to “fast” violations of their rights, in which there is not time to obtain a preventive injunction from a court, and “slow” violations, in which they face lengthy and burdensome administrative exhaustion requirements before being able to go to court to obtain an injunction.<sup>306</sup> To prevent such harms, a court may require a case to proceed as a district- or circuit-wide Rule 23(b)(2) class action (although still not a nationwide class action<sup>307</sup>) when the nature of the right at issue subjects plaintiffs to such risks. Across the wide run of cases, however, stare decisis, rather than injunctive relief, is likely to sufficiently protect third parties' rights without disturbing the surrounding fabric of the law.

#### D. Other Doctrinal Reforms

To fully resolve the issue of nationwide injunctions, several other complementary doctrinal changes are necessary, as well. Most basically, federal agencies should engage in intracircuit acquiescence, applying each circuit's binding precedents to matters that fall within that court's appellate jurisdiction. The Supreme Court, for its part, should reject the “necessity” doctrine, which provides that district courts should generally decline to certify class actions in challenges to governmental policies or issuances. The Court must likewise repudiate the “one good plaintiff” rule, which specifies that so long as any plaintiff in a case has standing, a court need not confirm whether the other plaintiffs have standing, as well. Finally, Congress must be attentive to how venue rules can give

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303. See *supra* notes 88–90 and accompanying text.

304. See Michael T. Morley, *Public Law at the Cathedral: Enjoining the Government*, 35 CARDOZO L. REV. 2453, 2492–93 (2014).

305. See *Steffel v. Thompson*, 415 U.S. 452, 471 (1974) (holding that, in the absence of an injunction, noncompliance with a court's judgment does not subject a party to contempt).

306. Morley, *supra* note 304, at 2458–59.

307. See *supra* Part II.B.



effectively nationwide effect to rulings of the U.S. District Court and U.S. Court of Appeals for the District of Columbia.

1. *Intracircuit Acquiescence*

For stare decisis to function effectively as a vehicle for protecting the rights of third-party nonlitigants, federal agencies and officials must be willing (or required) to engage in “intracircuit acquiescence.” Intracircuit acquiescence is an agency policy of accepting a circuit court’s ruling as binding law within that circuit, or for matters involving right holders within that circuit, even in the absence of an injunction expressly ordering the agency to comply.<sup>308</sup> Nonacquiescence, in contrast, is an agency’s insistence on continuing to apply its own regulations, policies, or interpretations of a federal statute, even after a circuit court has rejected them, to matters appealable to that court. When an agency refuses to acquiesce in a judicial ruling, it typically complies with the court’s judgment and provides the relief the court orders for the parties involved in that case, but declines to apply that precedent to similarly situated third-party nonlitigants.<sup>309</sup>

Some scholars have vigorously defended the prerogative of agencies to engage in intracircuit nonacquiescence to courts of appeals’ rulings.<sup>310</sup> Essentially adopting a strong departmentalist view of constitutional interpretation, these authors argue that federal agencies have a strong interest in applying their policies as uniformly as possible across the nation and maintaining their role as the “primary policymakers” as authorized by Congress.<sup>311</sup> Rejecting this position, others have argued that due process, equal protection, separation-of-powers, and fundamental rule-of-law concerns require federal agencies to abide by a circuit court’s rulings when dealing with people within that court’s geographic jurisdiction.<sup>312</sup>

A compelling argument in support of intracircuit acquiescence arises from, surprisingly, the *Erie* doctrine. *Erie* held that a jurisdiction’s law may be set forth either in statutes or court rulings and is equally valid and binding regardless of the form it takes.<sup>313</sup> When a court reviews an agency action, it is determining whether the agency followed the applicable rules of decision, not changing

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308. See, e.g., Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 TEX. L. REV. 1661, 1681 n.123 (2000).

309. Coenen, *supra* note 26, at 1347–48.

310. See, e.g., Estreicher & Revesz, *supra* note 26, at 683.

311. *Id.* at 759–60.

312. Coenen, *supra* note 26, at 1381–87; Diller & Morawetz, *supra* note 26, at 821–28.

313. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

them.<sup>314</sup> The endeavor presupposes that the agency and the court are applying the same body of law, including binding precedents.

Moreover, since *Erie* recognizes judicial precedents as a vehicle for establishing the law, agencies should not be free to deny claimants' rights under them.<sup>315</sup> Thus, even if the Legislative and Executive Branches of the federal government are free to adopt their own interpretations of the Constitution or statutes for matters exclusively committed to their discretion,<sup>316</sup> they should conform to the relevant judicial constructions of the law when their conduct is subject to judicial review. Adopting a strong norm of intracircuit acquiescence to courts of appeals' rulings would alleviate at least part of the perceived need for nationwide injunctions in public law cases.

## 2. *The Necessity Doctrine*

Circuits that have adopted the “necessity doctrine” should abandon it or, at the very least, limit it to cases involving indivisible rights.<sup>317</sup> The necessity doctrine provides that certifying a Rule 23(b)(2) class is unnecessary where an injunction issued to an individual plaintiff would have the same effect as a class-wide injunction.<sup>318</sup> Numerous circuits, with the notable exception of the Seventh Circuit,<sup>319</sup> have adopted this policy.<sup>320</sup> The Sixth Circuit previously embraced the necessity doctrine<sup>321</sup> but, encouragingly, has more recently expressed skepticism about it.<sup>322</sup> A few circuits grant district courts discretion to apply the

314. See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (holding that, in reviewing agency action, a “court must consider whether the [agency’s] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment”).

315. Cf. *Diller & Morawetz*, *supra* note 26, at 813–15.

316. See 5 U.S.C. § 701(a) (2012); *Baker v. Carr*, 369 U.S. 186, 217 (1962); see, e.g., Andrew Jackson, Veto Message (July 10, 1832), in *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 77–80 (Paul Brest et al. eds., 6th ed. 2015).

317. See Daniel Tenny, Note, *There Is Always a Need: The “Necessity Doctrine” and Class Certification Against Government Agencies*, 103 MICH. L. REV. 1018, 1021, 1040–41 (2005).

318. *Id.* at 1019.

319. *Brown v. Scott*, 602 F.2d 791, 795 (7th Cir. 1979), *aff’d sub nom. Carey v. Brown*, 447 U.S. 455 (1980).

320. See, e.g., *Kan. Health Care Ass’n v. Kan. Dep’t of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1548 (10th Cir. 1994) (citing *Everhart v. Bowen*, 853 F.2d 1532, 1538 n.6 (10th Cir. 1988), *rev’d on other grounds*, 494 U.S. 83 (1990)); *Soto-Lopez v. N.Y.C. Civ. Serv. Comm’n*, 840 F.2d 162, 168–69 (2d Cir. 1988) (citing *Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973)); *Washington v. Finlay*, 664 F.2d 913, 928 (4th Cir. 1981) (“[S]o far as the interests of the putative class members in this type 23(b)(2) class action seeking only injunctive relief are concerned, noncertification as a class action is likely to be of no practical consequence.”); see also *Ihrke v. N. States Power Co.*, 459 F.2d 566, 572 (8th Cir. 1972) (“[T]his action should not be maintained as a class action [because] the determination of the constitutional question can be made by the Court . . . regardless of whether this action is treated as an individual action or as a class action. No useful purpose would be served by permitting this case to proceed as a class action.”), *vacated as moot*, 409 U.S. 815 (2016).

321. *Craft v. Memphis Light, Gas & Water Div.*, 534 F.2d 684, 686 (6th Cir. 1976).

322. *Hill v. Snyder*, 821 F.3d 763, 771 (6th Cir. 2016).

doctrine when they conclude that class certification would serve no useful purpose.<sup>323</sup> Other circuits apply the doctrine only when the plaintiff seeks to enforce an indivisible right, for which it is impossible to enforce one person's rights without simultaneously enforcing those of other right holders.<sup>324</sup>

The Second Circuit is among the jurisdictions that applies the doctrine broadly, holding that class certification is generally unnecessary in constitutional challenges to government enactments.<sup>325</sup> The court explained,

[W]hen it has been held unconstitutional to deny benefits to otherwise qualified persons on the ground that they are members of a certain group, the officials have the obligation to cease denying those benefits not just to the named plaintiffs but also to all other qualified members of the group.<sup>326</sup>

The court added that ordering such broad “injunctive relief is appropriate without the recognition of a formal class,” because “it would be . . . ‘unthinkable’ to permit the officials to ‘insist on other actions being brought.’”<sup>327</sup> The U.S. District Court for the Eastern District of New York implicitly invoked the doctrine in denying the plaintiffs’ motion for class certification as moot after entering a nationwide defendant-oriented injunction against the Trump Administration’s attempt to rescind the Obama-era DACA program.<sup>328</sup>

This analysis perfectly encapsulates the fundamental flaw with the necessity doctrine: it presupposes that district courts may issue nationwide defendant-oriented injunctions in nonclass cases, even if they involve divisible rights. If district courts instead must tailor their relief to the particular plaintiffs in a case, however, then the proper scope of an injunction will almost always depend on whether a case has been brought solely by individual plaintiffs or instead is certified as a class action.<sup>329</sup> Consequently, if a Supreme Court holding, new statute, or new Federal Rule of Civil Procedure bars district courts from issuing

323. See, e.g., *Gayle v. Warden Monmouth Cty. Corr. Inst.*, 838 F.3d 297, 310 (3d Cir. 2016) (“The circumstances in which class-wide relief offers no further benefit [to putative class members], however, will be rare, and courts should exercise great caution before denying class certification on that basis.”).

324. See, e.g., *Hernandez v. Reno*, 91 F.3d 776, 781 & n.17 (5th Cir. 1996).

325. *Soto-Lopez*, 840 F.2d at 168 (“[R]elief of general application . . . is not limited to class actions. When a state statute has been ruled unconstitutional, state actors have an obligation to desist from enforcing that statute.”).

326. *Id.*

327. *Id.* at 168–69 (quoting *Vulcan Soc’y of N.Y.C. Fire Dept., Inc. v. Civ. Serv. Comm’n*, 490 F.2d 387, 399 (2d Cir. 1973)).

328. *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 410 (E.D.N.Y. 2018), *cert. before judgment granted sub nom. McAlennan v. Vidal*, 139 S. Ct. 2773 (2019).

329. A possible exception is when a court issues an injunction to enforce indivisible rights, in which upholding a particular plaintiff’s rights requires the concomitant enforcement of third parties’ rights, as well. Some courts, however, have expressed skepticism over whether third-party nonlitigants—essentially, third-party beneficiaries—may enforce injunctions to which they are not parties. See, e.g., *Wis. Right to Life, Inc. v. Schober*, 366 F.3d 485, 490 (7th Cir. 2004) (holding that an injunction prohibiting enforcement of a state

nationwide defendant-oriented injunctions, they will have to jettison the necessity doctrine as well.

The necessity doctrine also overlooks two other key distinctions between individual suits and class actions. First, class certification affects application of the mootness doctrine. In a nonclass suit, if the plaintiff's claim becomes moot, the court generally must dismiss the case for lack of subject-matter jurisdiction<sup>330</sup> unless an exception to the mootness doctrine applies.<sup>331</sup> If a class is certified, however, the case may proceed even if the plaintiff's claim is mooted.<sup>332</sup> The *Sanchez-Gomez* Court unanimously reaffirmed the importance of such procedural formalities.<sup>333</sup> The Court's attribution of legal significance to class certification, even in constitutional challenges, is inconsistent with the premise underlying the necessity doctrine that class certification is often irrelevant in such cases.<sup>334</sup>

Second, the necessity doctrine also ignores class certification's impact on the scope of preclusion. As discussed above, if a government defendant wins a case brought by an individual plaintiff, the judgment does not preclude other right holders from relitigating the same claim, potentially even in the same circuit.<sup>335</sup> Members of a certified class, in contrast, are bound by the judgment in a class action and generally precluded from raising the same claims in subsequent litigation.<sup>336</sup> A district court's decision as to whether to certify a class determines the preclusive scope of its judgment.<sup>337</sup> Thus, the necessity doc-

statute did not protect nonparties to the original lawsuit); cf. FED. R. CIV. P. 71 ("When an order grants relief for a nonparty . . . the procedure for enforcing the order is the same as for a party."); *Ahearn ex rel. NLRB v. Int'l Longshore & Warehouse Union, Locals 21 & 4*, 721 F.3d 1122, 1131 (9th Cir. 2013) ("[I]n limited circumstances courts have allowed civil contempt sanctions to be awarded to non-parties where doing so was directly necessary to enforce an injunction.").

330. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.5.1, at 137–38 (7th ed. 2016).

331. *Turner v. Rogers*, 564 U.S. 431, 439–40 (2011) (citing *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)) (discussing the exception to the mootness doctrine for claims that are capable of repetition yet evade review).

332. *Sosna v. Iowa*, 419 U.S. 393, 399–402, 402 n.11 (1975); see also *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) (noting that a putative class action remains justiciable, even after the named plaintiff's claim becomes moot, if the nature of the issue prevented the court from ruling on the class certification motion in time).

333. 138 S. Ct. 1532, 1536, 1538–39 (2018).

334. See *Ball v. Wagers*, 795 F.2d 579, 581–82 (6th Cir. 1986) (holding that the district court's refusal to certify a class due to the necessity doctrine was erroneous because, once the plaintiff's claim became moot, the case's continued justiciability hinged on whether a class had been certified).

335. See *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008).

336. *Hansberry v. Lee*, 311 U.S. 32, 41–42 (1940); see also *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989), superseded on other grounds by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1074, as recognized in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994).

337. See *Washington v. Finlay*, 664 F.2d 913, 928–29 (4th Cir. 1981) (holding that, after declining to certify a class action at the outset of a case, the district court could not change its mind at the end of the case and certify a class in conjunction with its dismissal of the action, because such belated certification would preclude subsequent independent litigation by the class members).

trine's foundation is already fundamentally flawed; the elimination of nationwide defendant-oriented injunctions would add yet another compelling reason to abandon it.

### 3. *Examining Plaintiffs' Standing*

An even more broadly accepted doctrine is the notion that, in a multi-plaintiff case, a court may proceed to the merits after confirming that at least one plaintiff has standing, without separately confirming the standing of each of the other plaintiffs, as well.<sup>338</sup> Professor Aaron-Andrew P. Bruhl recently demonstrated that this “one-plaintiff rule” is invalid.<sup>339</sup> He explains, “Given that judgments operate for and against specific people, it follows that each person invoking this judgment-issuing power must have standing.”<sup>340</sup> If courts no longer issue nationwide defendant-oriented injunctions and instead must tailor each injunction to enforcing the rights of the particular plaintiffs before them, it will be even more important to determine whether each plaintiff in a case has standing. Greater precision in crafting relief will require equivalent precision in determining which plaintiffs' claims are justiciable.<sup>341</sup>

### 4. *Reconsidering Federal Venue*

If nationwide defendant-oriented injunctions are eliminated, stare decisis will replace injunctive relief as the primary mechanism for giving third-party nonlitigants the benefit of favorable court rulings. Congress will therefore have to consider whether to amend—and the Supreme Court will have to decide whether to reinterpret—the federal venue statute to prevent litigants from using the federal district and circuit courts for the District of Columbia to obtain effectively nationwide relief.

Certain types of issues, primarily involving administrative law, are already centralized in the D.C. federal courts.<sup>342</sup> And plaintiffs are already free to bring

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338. See, e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977) (“[W]e have at least one individual plaintiff who has demonstrated standing . . . [W]e [therefore] need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit.”); see also *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (“Only one of the petitioners needs to have standing to permit us to consider the petition for review.”).

339. Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481, 485 (2017).

340. *Id.* at 519.

341. See *id.* at 512–13 (explaining how the “one plaintiff” rule can make courts more willing to issue broad, nationwide defendant-oriented injunctions). Even in cases involving indivisible rights, where the plaintiffs' identities would not affect the scope of the relief, courts should still confirm each plaintiff's standing to ensure it is a proper party because only parties are bound by res judicata, *id.* at 507. Similarly, only parties are entitled to appeal and seek court costs and attorneys' fees. *Id.* at 508–09. It also tends to be easier for them to enforce injunctions. *Id.* at 507 & n.123.

342. Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131, 142–43 (2013).

most other types of public law challenges in those courts, as well. The federal venue statute, 28 U.S.C. § 1391(e)(1), provides that, when a plaintiff sues a government agency or official in his or her official capacity, the suit may be filed in any district in which the plaintiff resides (if no real property is involved), any defendant resides, or “a substantial part of the events or omissions giving rise to the claim occurred.”<sup>343</sup> This provision makes venue proper in the District of Columbia for most challenges concerning the validity or proper construction of federal level provisions “due to legal residence of federal defendants or the making of policy decisions there.”<sup>344</sup>

If nationwide defendant-oriented injunctions (and nationwide plaintiff-class injunctions) are eliminated, plaintiffs seeking to nullify federal legal provisions on a nationwide basis are likely to sue in the U.S. District Court for the District of Columbia as a next-best alternative. If a plaintiff persuades the D.C. district court that a provision is invalid (or that it should interpret the provision advantageously) and that ruling is given *stare decisis* effect,<sup>345</sup> then any other right holder anywhere in the nation would be able to claim the benefit of that precedent simply by suing in the same court.

While the D.C. district court would not be issuing a nationwide injunction, its precedents would be applicable to right holders nationwide by virtue of § 1391(e)(1)’s venue provisions. And even if the district court’s rulings are not afforded *stare decisis* effect, the same analysis would apply once the D.C. Circuit declared a legal provision invalid.<sup>346</sup> The D.C. district court would be bound to follow that ruling, and § 1391(e)(1) would allow any right holder, anywhere in the nation, to sue there. Conversely, if the D.C. federal courts uphold a legal provision’s validity, right holders living in other jurisdictions would retain the ability to invoke venue in their home districts (or even some other district, if relevant events occurred there) to seek more favorable rulings.<sup>347</sup>

Accordingly, courts should consider whether to reinterpret § 1391(e)(1), and Congress should assess whether to amend it. They could clarify that the “events or omissions giving rise to the claim”<sup>348</sup> are deemed to occur where the right holder will suffer adverse consequences from the challenged governmental activity, rather than the location where the government adopted or issued the policy. Congress should likewise reconsider laying venue where a federal

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343. 28 U.S.C. § 1391(e)(1)(A)–(C) (2012).

344. Huddleston, *supra* note 23, at 248.

345. *See supra* Part II.C.

346. The D.C. Circuit’s rulings, of course, have both a horizontal *stare decisis* effect on subsequent panels of the same court, *see, e.g.*, *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147, 1155 (D.C. Cir. 2017), as well as a vertical *stare decisis* effect on the U.S. District Court for the District of Columbia, *see* Michael T. Morley, *Vertical Stare Decisis and Three-Judge District Courts*, GEO. L.J. (forthcoming 2020).

347. *See* 28 U.S.C. § 1391(e)(1).

348. *Id.* § 1391(e)(1)(B).

agency or official resides<sup>349</sup> because that provision is likely to have a similar centralizing effect on public law litigation once nationwide injunctions are abolished.

Spreading constitutional and other challenges concerning federal legal provisions across the various districts in which plaintiffs live or will suffer adverse consequences<sup>350</sup> would help prevent the D.C. federal courts from imposing their views of the Constitution across the nation. Although Congress intentionally conferred such nationwide primacy on the D.C. federal courts over administrative law,<sup>351</sup> there is no evidence that Congress intended for them to play a comparable role over constitutional law, as well. Once nationwide injunctions have been cabined, reforming § 1391(e) would be the next step toward reinforcing the decentralized structure of the federal judiciary, in which important issues percolate across different circuits and the impact of lower courts' rulings is limited.

Attorney Kate Huddleston is one of the few scholars who has considered the relationship between nationwide injunctions and the federal venue statute.<sup>352</sup> She approaches the issue from a different perspective, however. Huddleston contends that, without nationwide injunctions, only litigants with substantial resources could afford to invoke § 1391(e)(1) to take advantage of favorable precedents in the D.C. federal courts, rather than litigating in their home districts.<sup>353</sup> Thus, forum shopping would still occur but only for more privileged litigants.<sup>354</sup> Huddleston contends that nationwide defendant-oriented injunctions allow all right holders throughout the nation, regardless of their financial resources, to benefit from favorable rulings, particularly those from the D.C. federal courts. Amending the federal venue statute to limit the range of constitutional challenges that may be brought in the U.S. District Court for the District of Columbia would largely address these fairness concerns by limiting the ability of all plaintiffs to assert venue there.

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349. *Cf. id.* § 1391(e)(1)(A).

350. *Cf. id.* § 1391(e)(1)(B)–(C).

351. See Fraser, *supra* note 342, at 145; John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 GEO. WASH. L. REV. 553, 554 (2010).

352. Huddleston, *supra* note 23, at 252–53.

353. *Id.* at 252 (“Because of venue rules, the absence of formal nationwide injunctions would not preclude the functional equivalent of forum shopping in lawsuits over particular federal governmental actions, at least for those with the resources and sophisticated legal representation to reach forums with favorable judgments and venue based on defendants’ characteristics.”).

354. *Id.* at 253.

## III. CONCLUSION

Nationwide injunctions have become a ubiquitous and highly controversial weapon in the federal judiciary's remedial arsenal. It is important to distinguish among the various types of orders that might be termed "nationwide injunctions" and identify the circumstances under which each is appropriate. This Article's recommended taxonomy<sup>355</sup> seeks to reduce confusion, provide a consistent vocabulary, and ensure that the judiciary's response to each type of order is tailored to the unique issues and concerns it raises.

Federal courts should avoid issuing nationwide defendant-oriented injunctions in which the court completely enjoins a government defendant from enforcing a challenged legal provision against any right holder, anywhere in the nation, when doing so is unnecessary to enforce the rights of the plaintiffs before it. Such orders raise serious questions under Article III and Rule 23, give rise to unfairly asymmetric preclusive effects, and are inconsistent with both the structure of the federal judiciary and the evolution of federal jurisdictional statutes in the twentieth century. They also lead to extreme forum shopping and unnecessary emergency appeals.

At a minimum, if a court wishes to protect the rights of third-party nonlitigants, it should certify a plaintiff class under Rule 23(b)(2) and issue an injunction protecting its members' rights. Such classes should be limited to right holders of a particular district or circuit, however. Although a nationwide plaintiff-class injunction would avoid many of the problems with nationwide defendant-oriented injunctions, they remain inconsistent with the structure of the federal judicial system, allowing lower court judges to give their legal conclusions the force of law across the nation, well beyond the bounds of their respective jurisdictions.

Such injunctions likewise preclude relitigation of important constitutional issues, despite the Supreme Court's holding in *United States v. Mendoza* that a district court's rulings do not preclude the government from relitigating the same issues against other litigants in other jurisdictions.<sup>356</sup> They also prevent intercircuit percolation, depriving the Supreme Court of the opportunity to assess different circuits' approaches and select the best vehicle in which to address controversial issues. Thus, notwithstanding *Califano v. Yamasaki*,<sup>357</sup> district courts should generally certify only district- or circuit-wide classes under Rule 23(b)(2) in public law challenges.

Because Rule 23(b)(2)'s requirements will almost always be virtually automatically satisfied as a matter of law in most challenges to legal provisions, requiring plaintiffs to go through the formality of the class-certification process

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355. See *supra* Part I.

356. 464 U.S. 154, 160 (1984).

357. 442 U.S. 682 (1979).



should not impose unreasonable burdens. In the context of a motion for a temporary restraining order or preliminary injunction, which are typically adjudicated before the court certifies a plaintiff class, the court could simply decide whether class certification is likely in the course of determining the plaintiff's likelihood of success on the merits.<sup>358</sup>

More importantly, however, we should stop viewing injunctions as the primary judicial tool for protecting the rights of third-party nonlitigants. If district court rulings are afforded *stare decisis* effect on either a district- or circuit-wide basis, favorable rulings in constitutional and other public law cases can protect the rights of third-party nonlitigants in the same way that court of appeals and Supreme Court precedents already do. Most constitutional restrictions that presently bind government actors are embodied in precedent rather than injunctions. Empowering district courts to issue precedential rulings within limited geographic regions is a simple, elegant solution that offers a different type of protection than broad injunctions, yet it avoids the myriad constitutional, rule-based, fairness-related, structural, prudential, and other problems with most types of nationwide injunctions.

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358. See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).