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

*Ronald A. Cass**

Introduction

Scholars have focused extraordinary attention on issues surrounding the availability and terms of judicial review for legislative and administrative actions—what reader of law journals hasn't seen plenty about *Marbury*[1] and *Chevron*?[2]—but the academy has paid far less attention to the choice of remedies for actions found to be unlawful.[3] Yet remedies

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* Dean Emeritus, Boston University School of Law; Distinguished Senior Fellow, C. Boyden Gray Center for the Study of the Administrative State; Senior Fellow, International Centre for Economic Research; President, Cass & Associates, PC. I have benefitted from helpful discussions with and comments from Jack Beermann, Christopher DeMuth, Sr., Frank H. Easterbrook, Douglas H. Ginsburg, Boyden Gray, Gary S. Lawson, Ronald Levin, Jonathan Mitchell, Alan Morrison, A. Raymond Randolph, Eugene Scalia, Victoria Toensing, Matthew Wiener, Stephen F. Williams, and the participants in a Research Roundtable and subsequent conference on "The New Normals" at the Antonin Scalia Law School's C. Boyden Gray Center for the Study of the Administrative State. While these individuals have helped steer me away from a few cliffs, they do not bear responsibility for any errors that remain.

[1] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[2] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). *Marbury* and *Chevron* are among the most written-about cases in American law; they are singled out for special attention and serve as the focal point for broader concerns. On the place of *Marbury* in American legal scholarship, see generally Akhil Reed Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989); Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983). On the scope of attention given to *Chevron*, see generally Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 NW. U. L. REV. 551 (2012). These are important cases for many reasons, but generally are springboards for discourses on matters other than remedy.

[3] Though only a rough approximation of the disparity, searching on Google Scholar for articles on "judicial review" yielded more than a million entries, while searching for "injunctions" yielded fewer than one-fourth of that number. *Compare* Search Results for "judicial review," GOOGLE SCHOLAR, https://scholar.google.com/ (search "judicial review"), *with* Search Results for "injunctions," GOOGLE SCHOLAR, http://scholar.google.com/ (search "injunctions"). There are, to be sure, notable

also can have dramatic implications for issues associated with debates over judicial review.

This is plainly true for the increasingly common practice of lower federal courts issuing "nationwide injunctions" that stop, alter, or condition the operation of national government policies. These injunctions (sometimes referred to as "national" or "universal" injunctions) address government actions, extend beyond the geographic bounds of the issuing court's mandate, and directly control action respecting persons and entities beyond the immediate parties to the litigation giving rise to the injunctions. In these respects, nationwide injunctions stand in sharp contrast to the geographic divisions among federal courts and also to long-respected restrictions on the parties to whom (and in whose favor) legal remedies apply. While a small number of suits present matters and settings for which nationwide injunctive relief is appropriate, federal district court judges have begun using these injunctions in situations far beyond that set. High-profile litigation over immigration issues in particular has focused attention on this remedy.[4]

Both the reasons for seeking these injunctions and the bases for concern over them should be evident. The remedy's attraction to opponents of government policy is its capacity to halt implementation of a policy or specific objectionable features everywhere, not just against a limited set of parties, and not just in the locale where the opponents reside or work or where the officials responsible for its adoption are found. Those features of nationwide injunctions do not make the injunctions inappropriate in all circumstances.[5] Yet, expanded use of nationwide injunctions in a wide array of settings—indeed, the vast majority of settings in which argument over their propriety has been joined—

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exceptions to the focus on availability and terms of review rather than on remedies' nature, conditions, and effects. *See generally* OWEN M. FISS & DOUG RENDLEMAN, INJUNCTIONS (2d ed. 1984); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS (4th ed. 2010); Andrew Kull, *Restitution as a Remedy for Breach of Contract*, 67 S. CAL. L. REV. 1465 (1994); Doug Rendleman, *Remedies: A Guide for the Perplexed*, 57 ST. LOUIS U. L.J. 567 (2013). Recently, several administrative law scholars also have turned to questions of remedy. *See generally* Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253 (2017); Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481 (2014); Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106 (2017); Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553 (2014) [hereinafter *Ordinary Rule*]. These writings, however, remain a relatively small part of the administrative law scholarly corpus.

[4] The highest-profile attention came in Justice Clarence Thomas's concurring opinion in *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring), in which he both objected to the practice of expansive ("universal") injunctions and observed that the Supreme Court at some point would be "duty-bound to adjudicate" courts' authority to issue them. *Id.* at 2426, 2429.

[5] *See infra* text accompanying notes 116–20.

undermines rule of law values, threatens the operation of courts as impartial arbiters of disputes over legal rights, and erodes the Constitution's careful separation of functions among the branches of government.

Given the problems associated with nationwide injunctions, which are serious and endemic to this remedy's expanding use, courts and Congress should reassess the grounds needed to justify them. Recognizing and reversing the trend toward routine use of nationwide injunctions in disputes outside the special cases where they are at least arguably proper is critical to preserving the constitutional order, respecting the structure of the federal courts, and sustaining long-accepted practices respecting equitable remedies.

This Article first reviews the implications of constitutional structure—especially the separation of powers and restraints on judicial power—and historical limitations on equitable remedies for broad, nationwide injunctive relief. In Part II, the Article recounts major developments in nationwide judging, before turning in Parts III and IV to problems of forum shopping and politicizing courts. Part V analyzes the conflict between nationwide injunctions and both constitutional design and the design of the federal judiciary. It also addresses the peculiar use of the overarching legal framework governing federal administrative law as a basis for nationwide injunctions.

I. Federal Structure and Traditional Limits on Remedies

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

A. *Constitutional Structure: Separation and Constraint*

The original understanding of American governance was that basic policy decisions are made by Congress—through a process designed to assure both deliberation and broad acceptance of those choices—and implemented by the Executive (that is, the President and officials working under his direction).[6] Courts, which make retrospective decisions applying

[6] *See, e.g.*, THE FEDERALIST NOS. 10, 42, 45–51 (James Madison), NOS. 52–63, 65–77 (Alexander Hamilton), NO. 64 (John Jay).

law to particular facts, were deliberately insulated from political influence.[7]

Critical parts of judges' mandates were assuring predictability and legitimacy. Judges were expected to assure that legal rules are not matters of surprise, turning on peculiar applications by particular interpreters, because everyone should be able to live by rules known or knowable in advance.[8] Judges were expected to address issues of constitutionality and other questions of legality to assure the rules that bind citizens—rules that courts apply to the particular cases before them—are properly adopted and applied, come from legitimate sources of binding authority and conform to superior sources of law.[9] Judges, thus, wield the power to declare administrative actions illegal and may even declare laws unconstitutional; they possess this power, however, *only* as an incident of deciding concrete cases brought to them by individual parties whose own legal rights are at stake.[10]

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

> The Americans have retained all the ordinary characteristics of judicial authority, and have carefully restricted its action to the ordinary circle of its functions. . . . Whenever a law which the judge holds to be unconstitutional is argued in a tribunal of the United States, *he may refuse to admit it as a rule* . . . . [F]rom the time that a judge has refused to apply any given law in a case, that law loses a portion of its moral cogency. The persons to whose interests it is prejudicial, learn that means exist of evading its authority; and *similar suits are multiplied*, until it becomes powerless. . . . *If the judge had been empowered to contest the laws on the ground of theoretical generalities*; if he had been enabled to open an attack or to pass a censure on the legislator, *he would have played a prominent part in the political sphere; and as the champion or the antagonist of a party, he would have arrayed the hostile passions of the nation in the conflict.* But when a judge contests a law, applied to some particular case in an obscure proceeding, the importance of his attack is concealed from the public gaze; his decision bears upon the interest of an individual, and if the law is slighted, it is only collaterally.[11]

As Tocqueville notes, the power given to judges was not a roving commission to supervise and correct the acts of other governmental officers. Instead, it was the power to recognize the *priority* of legal rules and to decide *not to apply rules in a given case* if those rules violated higher laws (those deemed supreme by the document that governed our legal

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[7] *See, e.g.*, THE FEDERALIST NO. 78 (Alexander Hamilton).

[8] *See id.*

[9] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

[10] This was understood both from discussions around the framing and ratification and from early observation of the way American courts worked. *See id.*; THE FEDERALIST NO. 78 (Alexander Hamilton); 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 100–06 (Henry Reeve trans., Schocken Books 1961) (1835).

[11] TOCQUEVILLE, *supra* note 10, at 101–05 (emphasis added).

order).[12] It was not a *general* power to pass on the legality of laws, only a power to determine the law applicable to a *particular* case;[13] and because each judge was limited to deciding only that case, other individuals in similar situations would need to *ask other judges* to reach the same conclusion in cases specifically addressing their own particular claims.[14] While the first-deciding judge's ruling may set a pattern for later decisions, the initial decision would not bind others. The authority to declare a law unconstitutional, thus, was both powerful and limited.

The explicit precept behind this arrangement was that judges would interpret and apply legal rules in neutral fashion but would not intrude into the realm of policymaking reserved to the political branches (and reserved as well to decision by constitutionally prescribed means). Despite apprehensions of some Anti-Federalists, who were especially fearful of potential exercise of equitable power by a federal judiciary,[15] those who framed the Constitution, and were party to its early implementation, were confident that judges would not pose a threat to the operation of the other branches of government.[16] After all, judges were to be insulated from direct application of political forces, as their decisions require reasoned explanation and grounding in text and precedent, and judges' interpretations of law also would be framed by the specific, limited setting for which those interpretations would apply.

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[12] *See, e.g.*, *Marbury*, 5 U.S. at 177–80.

[13] A broader revisory power shared between the Executive and the Judiciary was proposed and debated in the Constitutional Convention, and though it drew support from James Madison, Oliver Ellsworth, and James Wilson, among others, it was ultimately rejected by the Convention. *See* JAMES MADISON, RECORDS OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 422–29 (Charles C. Tansill ed., Legal Classics Library 1989) (1927).

[14] For a careful analysis of the reasons behind such limited scope for declarations of statutes' unconstitutionality and expressions supportive of—or at least linguistically consistent with—broader powers of judicial invalidation of legislative enactments, see generally Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018).

[15] *See, e.g.*, BRUTUS NO. XI (Jan. 31, 1788), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 293–98 (Ralph Ketcham ed., Penguin Books 1986).

[16] *See, e.g.*, *Marbury*, 5 U.S. at 170; THE FEDERALIST NO. 78 (Alexander Hamilton); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 459–63 (1969); *see also* Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941 (1995) (describing balance between power of retrospective adjudication and structural limits on that power and the officials who exercise it); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (describing the special nature of adjudication and reasons for particular features of traditional adjudication).

B. *Federal Equitable Remedies: Limited Focus, Limited Reach*

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

Federal courts historically have understood injunctions as limited, focused remedies for violations of rights not addressable through standard legal remedies such as compensatory damages.[17] Although there have been some exceptions,[18] Supreme Court decisions continue to emphasize the need for caution in framing and issuing injunctions.[19]

1. Equitable Relief in Private Suits: Geography and Identity

The test for injunctive relief for private suits traditionally has looked at a balance of harms (from granting or withholding relief), inadequacy of standard legal remedies, and potential public interest effects.[20] Injunctions were limited to the specific parties before the court, although class actions were permitted to address conduct that affected unnamed class members who participated only via representation that in theory protected their interest, even if this protection often was more fictional than meaningful.[21]

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[17] *See, e.g.*, John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 530 (1978); Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1412–14 (2015).

[18] The most notable exceptions fall under the heading of "structural injunctions" and remedy perceived failings of state governance institutions in particular settings, a form of relief both extensively lauded and criticized. *See generally* Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978).

[19] *See, e.g.*, Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 156–57 (2010); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

[20] *See* Leubsdorf, *supra* note 17, at 539.

[21] The general rule is stated in FED. R. CIV. P. 65(d)(2). *See also* FED. R. CIV. P. 23(b)(1)–(3) (discussing types of class actions and how class actions are maintained); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 702 (2004). For different perspectives on problems with class actions, and different proposed solutions for them, see generally John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995);

While the parties had to be before the court and have the requisite connection to the place in which suit was joined, the conduct enjoined might take place outside the court's geographic locus—so long as the court had jurisdiction over the matter and the parties (which required activity that brought the parties within the court's reach), the injunction could address actions that might take place elsewhere.[22] This sort of "long-arm" authority was expressly contemplated in actions under the bankruptcy law.[23]

Typically, however, courts' remedies were limited geographically and operated only with respect to specific parties. Enforcement outside the issuing court's jurisdiction depended on accord from other courts.[24]

Still, courts asked to enforce injunctions rarely looked at the injunctions' substantive justifications. Courts generally regarded injunctions as prima facie entitled to enforcement and generally treated violations of injunctions as grounds for findings of contempt.[25]

2. Equitable Remedies Against the United States

Suits against the United States government implicate special concerns. First, the government enjoys a presumption of immunity from

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Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377 (2000); Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchen Products, Inc., 80 CORNELL L. REV. 1045 (1995).

[22] For analysis respecting remedial limitations relating to contacts with or effects within the issuing jurisdiction, see Walden v. Fiore, 571 U.S. 277, 283–91 (2014); Calder v. Jones, 465 U.S. 783, 788–91 (1984). *See generally* Allan Erbsen, *Personal Jurisdiction Based on the Local Effects of Intentional Misconduct*, 57 WM. & MARY L. REV. 385 (2015); Geoffrey P. Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction*, 2 STAN. J. COMPLEX LITIG. 1 (2014); George Rutherglen, *Reconceiving Personal Jurisdiction: Sovereignty, Authority, and Individual Rights* (Univ. of Va. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, No. 2015-13), https://perma.cc/R478-PQ3V.

[23] *See* 28 U.S.C. § 1334(e)(1) (2012) (giving a relevant bankruptcy court exclusive in rem jurisdiction over a debtor's property, wherever located); *see also* Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004).

[24] *See* FED. R. CIV. P. 45(c)(2)(A) (limiting enforcement of subpoenas compelling appearance to within 100 miles of the issuing court).

[25] *See, e.g.*, GTE Sylvania, Inc. v. Consumers Union of the United States, Inc., 445 U.S. 375, 386 (1980); Walker v. City of Birmingham, 388 U.S. 307, 319–21 (1967); ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 61 (1975) (noting that someone who violates a speech injunction "may be assured of being held in contempt"); William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 275 (1982) ("[T]he sanction for violation of an injunction—contempt of court—is swift and certain.").

unconsented suits.[26] This bar to litigation often was avoided by bringing actions against individual government officers, a practice that raised other concerns about the intrusion of judicial scrutiny into the functions of other, coequal branches.[27] The Administrative Procedure Act of 1946 ("APA") provided broad opportunity for challenges to administrative actions, waiving immunity with respect to most suits seeking declaratory or injunctive relief, though still not providing an open door to litigation against the United States.[28]

Second, even where the government acquiesced to suits, it did not abandon pre-existing doctrines intended to prevent litigation from becoming a substitute for constitutionally prescribed decisional processes.[29] For example, the APA carried forward requirements that parties bringing suit against the government have a personal stake and contest a legal right personal to them or within the umbrella of protection granted to a class of people under relevant law.[30] An important component of standing, increasingly emphasized in Supreme Court decisions over the past thirty years, is the requirement that courts be able to grant plaintiffs a remedy for the asserted harm, often referred to as "redressability."[31] The redressability requirement plays an important role in assuring that litigation resolves narrowly focused controversies, rather than simply eliciting judges' views on general policy disputes.[32] While it would be fatuous to suggest that decisions on matters such as standing have been

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[26] Even opponents of sovereign immunity have recognized this reality. *See, e.g.*, Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 466–67 (1970); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2 (1963).

[27] *See* Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1115 (1981).

[28] The APA's provisions on availability of judicial review are codified at 5 U.S.C. §§ 701–704 (2012). For a lucid explanation of the clarifying amendment of the Act's waiver of sovereign immunity (its purpose, limits, and the role played in that legislation by Antonin Scalia), see generally Kathryn E. Kovacs, *Scalia's Bargain*, 77 OHIO ST. L.J. 1155 (2016).

[29] *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974) (noting that standing doctrine preserves domain committed to political branches and prevents "government by injunction").

[30] *See* 5 U.S.C. § 702; Summers v. Earth Island Inst., 555 U.S. 488, 493–94 (2009); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102–04 (1998); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

[31] *See Lujan*, 504 U.S. at 560–61, 568–71.

[32] *See* Maxwell L. Stearns, Spokeo, Inc. v. Robins *and the Constitutional Foundations of Statutory Standing*, 68 VAND. L. REV. EN BANC 221, 221–22, 230–31 (2015) (explaining the role of standing features, including redressability, in preserving constitutionally separate roles for the three branches, but critiquing aspects of evolving standing law as inconsistent with better understandings of what rules best accomplish that goal).

wholly consistent—or consistently attentive to fundamental concerns over judicial review's potential tensions with basic constitutional structures—judicial decisions generally respect doctrines designed to protect constitutionally anchored structures.[33]

Third, when the government was found to have acted unlawfully, judicial remedies were traditionally of limited scope. Individuals who brought actions before a court could, under certain conditions, secure a declaration respecting the conduct at issue and, where appropriate, an injunction preventing the relevant officials or agencies from engaging in conduct found to be unlawful.[34] However, courts generally did not enjoin *all* conduct that took place *anywhere* with respect to *any party* potentially having similar legal claims. Instead, injunctive relief was generally restricted both with respect to the parties covered[35] and to the injunction's geographic reach.[36] As discussed further below, although some language in the APA might have supported a different, broader construction of courts' remedial authority or responsibility, the law was not initially understood as altering traditional rules.[37]

II. Recent Developments: Nationwide Judging

The federal courts' tradition has been one of remedial modesty, but the last few years—especially the time since President Donald Trump's

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[33] *Compare* Massachusetts v. EPA, 549 U.S. 497 (2007), *and* Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc., 528 U.S. 167 (2000), *with Summers*, 555 U.S. 488, *Steel Co.*, 523 U.S. 83, *and Lujan*, 504 U.S. 555. For discussion of this point through the lens of Justice Antonin Scalia's engagement with concerns about structure, see Ronald A. Cass, *Administrative Law in Nino's Wake: The Scalia Effect on Method and Doctrine*, 32 J.L. & POL. 277, 281–84 (2017).

[34] In fact, historically, most suits seeking injunctions against assertedly unlawful government acts asked courts to enjoin anticipated actions against the specific party before the court. *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 449–50 (2017); *see also* John Harrison, *Ex Parte* Young, 60 STAN. L. REV. 989, 996–97, 1005, 1008–09 (2008); Alfred Hill, *Some Realism About Facial Invalidation of Statutes*, 30 HOFSTRA L. REV. 647, 681–82 (2002).

[35] *See, e.g.*, Bray, *supra* note 34, at 449–50. The Federal Rules of Civil Procedure generally provide that injunctive relief binds only parties before the court and those who are "in active concert or participation with" them. FED. R. CIV. P. 65(d)(2). As discussed *infra* text accompanying notes 162–64, this rule grants less protection for the government than for other parties. Questions respecting injunctions in cases involving the government are not apt to be whether injunctions sought by government can bind non-parties, but whether injunctions against the government can bind it with respect to rights of non-parties and what risks affect assertion of degrees of freedom from injunctions. *See* sources cited *infra* note 164. Those questions are not directly answered by Rule 65(d)(2).

[36] *See, e.g.*, Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. Rev. 1068, 1100–04 (2017); *see also* Zayn Siddique, *Nationwide Injunctions*, 117 COLUM L. REV. 2095 (2017).

[37] *See infra* text accompanying notes 181–95.

election—have been a marked departure. At least *some* federal judges in this era have shown far greater willingness to issue nationwide injunctions and have offered explanations for their use that depart from past understandings of federal remedies' limitations and purposes.[38] Consider, for example, litigation challenging executive actions respecting immigration, which has given rise to many of the most discussed and debated injunctions.

A. *Immigration Programs and Nationwide Injunctions*

President Barack Obama directed officials in his administration to implement programs, labeled "Deferred Action for Childhood Arrivals" ("DACA") and "Deferred Action for Parents of Americans" ("DAPA"), that conferred presumptive non-removal status on two classes of immigrants who had entered the country illegally.[39] Suits against these programs objected that they constituted bold revisions of immigration law under the guise of merely setting enforcement priorities, which violated both the relevant legislation directed at immigration and general requirements for administrative action.[40] Notably, the controversy in *Texas v. United States*[41] resulted in a nationwide injunction barring DAPA's continued implementation.[42]

President Trump issued a series of executive orders restricting immigration from nations deemed to have insufficiently dependable screening procedures to guard against potential threats to US security.[43] Plaintiffs sought, and obtained, nationwide injunctions against each of these orders.[44] After a review by the Department of Justice (which found

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[38] *See, e.g.*, cases cited *infra* notes 42, 44; *see also* E. Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922, 929–931 (N.D. Cal. 2019); City of Chicago v. Sessions, 264 F. Supp. 3d 933, 951–52 (N.D. Ill. 2017).

[39] *See, e.g.*, Memorandum from Jeh Charles Johnson to Thomas S. Winkowski et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), https://perma.cc/VJ6P-8TL5; Memorandum from Janet Napolitano to David V. Aguilar et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), https://perma.cc/8JJS-5N8Z; President Barack Obama, Remarks on Immigration (Jun. 15, 2012), https://perma.cc/B6HK-F5TW.

[40] *See, e.g.*, Texas v. United States, 787 F.3d 733, 745–46 (5th Cir. 2015).

[41] 787 F.3d 733 (5th Cir. 2015).

[42] *See* Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015), *aff'd*, United States v. Texas, 787 F.3d 733 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.).

[43] *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017); Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

[44] *See* Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570, 633 (D. Md. 2017); Hawaii v. Trump, 241 F. Supp. 3d 1119, 1122–23, (D. Haw. 2017); Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 544, 565–66 (D. Md. 2017); Washington v. Trump, No. C17-0141JLR, 2017 WL 462040,

the DACA program's creation legally defective), President Trump's administration announced its intention to cease accepting applications for deferred deportations under DACA and to cease accepting renewal applications to extend deportation deferrals under DACA beyond a period of six months.[45] Those actions, too, were halted by a nationwide injunction.[46]

B. *Bases for Nationwide Injunctions*

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

1. Relief to Specified Litigants

The US Court of Appeals for the Fifth Circuit affirmed the injunction against deferring deportations under DAPA based on the deferrals' effects on the state of Texas and other plaintiff states.[47] Defending the decision to use a nationwide injunction, the majority opinion noted the "substantial likelihood that a partial injunction would be ineffective because DAPA beneficiaries would be free to move between states."[48] States cannot constitutionally bar migration from within the United States. Therefore, a remedy preventing the government from deferring deportation of current illegal-immigrant residents in a specific plaintiff state (such as Texas) would not prevent illegal immigrants moving from any other state to take up residence in the plaintiff state.

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

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at *1–*3 (W.D. Wash. Feb. 3, 2017); Tootkaboni v. Trump, No. 17-cv-10154, 2017 WL 386550, at *1 (D. Mass. Jan. 29, 2017). Note that presidential actions are not directly reviewable under the terms of the APA, which applies only to agency actions (a phrase that does not include acts of the President). However, implementation of presidential directives by the various agencies, such as the Department of Homeland Security, can be challenged under the APA.

[45] *See* Adam Edelman, *Trump Ends DACA Program, No New Applications Accepted*, NBC NEWS, (Sept. 5, 2017), https://perma.cc/6ACS-66JA; Jeff Sessions, Att'y Gen., Dep't of Justice, Remarks on DACA (Sept. 5, 2017), https://perma.cc/ME2L-MUWF; Letter from Jeff Sessions, Att'y Gen., Dep't of Justice, to Elaine Duke, Acting Sec'y, Dep't of Homeland Sec. (Sept. 4, 2017), https://perma.cc/G8CZ-VV3W.

[46] *See* Alan Feuer, *Second Federal Judge Issues Injunction to Keep DACA in Place*, N.Y. TIMES (Feb. 13, 2018), https://perma.cc/C2ZZ-24UV; Michael D. Shear, *Trump Must Keep DACA Protections for Now, Judge Says*, N.Y. TIMES (Jan. 9, 2018), https://perma.cc/3399-D7JR.

[47] Claims asserted by twenty-six states were joined in the suit. *See Texas*, 787 F.3d at 743–46.

[48] *Id.* at 769.

Rather, it was that a traditional, geographically restricted injunction well might provide *no meaningful relief* at all. Whatever one thinks of the particular (much criticized) application, the Fifth Circuit's test, at bottom, was the traditional balancing test for injunctive relief, attending to the specific interests of the parties before the court even if the remedy ultimately had nationwide scope.[49]

2. Relief for Others and Doctrinal Concerns

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

Take, for example, the US Court of Appeals for the Fourth Circuit's affirmance of a district court injunction against implementation of the third Executive Order from President Trump restricting immigration from specified nations—an injunction that was both *nationwide* and *unlimited* as to its beneficiaries.[50] In reaching that decision, the Fourth Circuit explained that "because we find that the Proclamation was issued in violation of the Constitution, enjoining it only as to Plaintiffs would not cure its deficiencies."[51] Extraordinary relief based on an imperative to prevent unconstitutional government action—encompassing any application of the challenged policy to anyone, anywhere—seemed self-evidently justified to the judges in that case.[52] It is difficult, however, to believe that the judges would so easily have embraced the same view in *every* case of a government action found to be unconstitutional without other supporting reasons.

The US Court of Appeals for the Ninth Circuit, in addition to invoking similar doctrinal considerations in its opinion upholding a nationwide injunction against immigration restrictions in *Hawaii v.*

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[49] The Fifth Circuit decision is often portrayed as equivalent to later decisions on challenges to immigration orders reaching different legal conclusions and similarly resulting in nationwide injunctions (and rightly seen as a product of the same sort of forum shopping discussed below). *See, e.g.*, Berger, *supra* note 36, at 1100–04; Bray, *supra* note 34, at 457–63; Siddique, *supra* note 36, at 2145–47. However, the decision on remedy in *Texas* is manifestly different in its focus and justification respecting injunctive relief. *See Texas*, 787 F.3d. at 767–69.

[50] *See* Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 272–74 (4th Cir. 2018), *vacated*, 138 S. Ct. 2710 (2018).

[51] *Id.* at 273.

[52] *See id.* at 273–74.

Trump,[53] seemed to invoke considerations mirroring the Fifth Circuit's concerns with the effects of interstate travel.[54] It stated that "the Government did not provide a workable framework for narrowing the geographic scope of the injunction."[55] Quoting the district court's decision, the Ninth Circuit remonstrated, "the Government has not proposed a workable alternative form of the [injunction] that accounts for the nation's multiple ports of entry and interconnected transit system and that would protect the proprietary interests of the States at issue here while nevertheless applying only within the States' borders."[56]

The problem identified by the Fifth Circuit, however, was the impracticality of *excluding* illegal immigrants from one state if they gained entry through another state (or continued residence in another state). As the Fifth Circuit noted, freedom of travel among the states would make a geographically limited exclusion order (or its equivalent) ineffective respecting the narrow, particularized claims of the states before the court.[57] There is *no parallel problem* for protecting interests in the *admission* of immigrants. Freedom of travel once immigrants are admitted does not make state interests in admission to the particular jurisdiction before the court any weightier or diminish the utility of providing specifically for admission to the state or states before the court. In the end, to justify the scope of the *Hawaii* district court's injunction, the Ninth Circuit needed to rely on its concerns for uniform nationwide application of the rules it thought were legally proper (and not rules it deemed improper).[58]

Because the Supreme Court reversed the Ninth Circuit's decision on the merits, it did not reach questions about the propriety of the remedy.[59] Justice Thomas's sharply critical concurring opinion, however, noted both the importance of addressing the increasing frequency of what he termed "universal injunctions" and some tensions between such injunctions and constitutional structure.[60]

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53 859 F.3d 741 (9th Cir. 2017), *vacated sub nom. Int'l Refugee*, 138 S. Ct. 377.

54 *See id.* at 787–88; *see also Texas*, 787 F.3d at 769.

55 *Hawaii*, 859 F.3d at 787.

56 *Id.* at 787–88.

57 Judge Daniel Manion made a similar point. *See* City of Chicago. v. Sessions, 888 F.3d 272, 298–99 (7th Cir. 2018) (Manion, J., concurring in part and dissenting in part) (commenting on the difference between a remedy necessary to grant relief to parties before the court that incidentally protected third parties as well and a remedy granted in order to provide relief to third parties not before the court).

58 *See Hawaii*, 859 F.3d at 787–88.

59 *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018); *see also id.* at 2426–29 (Thomas, J., concurring).

60 *Id.* at 2425–29.

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

III. Forum Shopping and Its Discontents

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

A. *Forum Shopping: Looking for Mr. Goodbench*

The first, and most obvious, consequence of enabling individual district judges to issue nationwide injunctions is the creation of incredibly strong incentives for plaintiffs to rush to file suit in jurisdictions thought most likely to provide a sympathetic forum for their claims.[61] The first judge to decide a matter frequently has an outsized impact on the development of the law with respect to that specific issue.[62] But the degree to which that first judge's effect obtains and endures is tempered by the ability of other judges to reach different, or even contrary, determinations.

In general, a judge's decision *at most* constitutes precedent that only binds other judges within that judicial district (for a panel of the Court of Appeals, a decision binds other judges only within the particular circuit).[63] Further, for ordinary injunctions, the decision will not provide relief to a large group because it will command the defendant only to take action

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[61] *See, e.g.*, Berger, *supra* note 36, at 1091–93; Bray, *supra* note 34, at 457–61.

[62] This is true as well with novel interpretations of law that break with received doctrine. *See, e.g.*, David G. Owen, *The Evolution of Products Liability Law*, 26 REV. LITIG. 955, 965–74 (2007); Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 48 YALE L.J. 390, 390–94 (1939). It long has been understood that judicial reasoning generally relies on prior authorities even when not formally constrained by them, and scholars also have found this process at work across international boundaries. *See, e.g.*, Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 101, 106 (1994). That finding underscores the "first-mover advantage" of initial judicial decisions.

[63] *See, e.g.*, Berger, *supra* note 36, at 1094–95; Bray, *supra* note 34, at 465; *see also* Va. Soc'y for Human Life, Inc. v. FEC, 263 F.3d 379, 393 (4th Cir. 2001), *overruled on other grounds by* Real Truth About Abortion, Inc. v. FEC, 681 F.3d 544 (4th Cir. 2012); Siddique, *supra* note 36, at 2137–38.

respecting the parties before the court, and perhaps similarly situated parties within the geographic reach of the court. Thus, both the decision's direct effect and its power as precedent will be limited.[64]

This is most emphatically true for suits against the United States government, as it is commonly permitted to decide not to follow judicial declarations respecting an action's or rule's legality outside the issuing court's designated geographic region.[65] This practice evinces respect for constitutional and legislative commitments of authority to executive officers and to limitations on the authority reposed in any one judicial officer. In the ordinary case, then, even if litigants always prefer a friendlier forum to a more hostile one, there is relatively little to be gained by rushing to put a case before the friendliest possible set of potential judges. Simply put, the less sweeping the potential remedy, the lower the benefit from raising the odds of obtaining it.

The situation changes dramatically when a court can effectively bind the entire nation with an injunction that constrains behavior with respect to an unlimited range of persons and to conduct occurring and having effects in an equally unlimited array of places. As one commentary put it, "nationwide injunctions . . . incentivize[] an extreme race to courthouses more inclined to issue nationwide injunctions and more sympathetic to the plaintiff's position."[66] Professor Samuel Bray adds, "The pattern is as obvious as it is disconcerting. Given the sweeping power of the individual judge to issue a national injunction and the plaintiff's ability to select a forum, it is unsurprising that there would be rampant forum shopping."[67]

The enticement to rush to a friendly forum is increased where the stakes are the nature of government policy, rather than more concrete returns to litigants. This flows partly from the asymmetry of the stakes.

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64 While the binding effect of circuit precedent on district courts within the circuit is clear, several courts have refused to recognize any binding effect (or similar precedential effect, apart from whatever persuasive effect it may have) for a district court decision, even within the same district. *See, e.g.*, Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011); Threadgill v. Armstrong World Indus., 928 F.2d 1366, 1371 (3d Cir. 1991); United States v. Articles of Drug Consisting of 203 Paper Bags, 818 F.2d 569, 572 (7th Cir. 1987); Colby v. J.C. Penney Co., 811 F.2d 1119, 1124 (7th Cir. 1987); Bray, *supra* note 34, at 465; Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339–40 (2000). *But see* Kerr v. Hurd, 694 F. Supp. 2d 817, 843 (S.D. Ohio 2010); United States v. Hirschhorn, 21 F.2d 758, 759–60 (S.D.N.Y. 1927); Eugene Volokh, *District Court Opinions Precedential Within the Same District?*, VOLOKH CONSPIRACY (May 25, 2010, 8:33 PM), https://perma.cc/WFD7-4HWF.

65 *See, e.g.*, Ross E. Davies, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65, 71–75 (2003) (explaining reasons for intercircuit nonacquiescence); Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 735–41 (1989) (same).

66 Berger, *supra* note 36, at 1091.

67 Bray, *supra* note 34, at 460.

Given the usual rules of estoppel and enforcement of injunctions, a win for the government does not end litigation, while a win anywhere, anytime for plaintiffs effectively precludes the enjoined officials or offices from continuing to apply the policy.[68] This asymmetry does not necessarily represent the best rule—while it is easy to justify refusal to bind future litigants who were not party to a decision that disadvantages them, one-way "offensive estoppel" also can be problematic.[69] The Supreme Court has recognized that asymmetry is especially evident where the government is the party estopped.[70] A nationwide injunction exacerbates difficulties with estoppel rules, essentially ending the prospect for litigation in other courts which may take a different view of the law. The benefits of preserving potential for other courts to consider similar questions are discussed further below;[71] the point here is simply that nationwide injunctions and offensive collateral estoppel together virtually eliminate that option.

B. *Forum Shopping's Rule of Law Problems*

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

In marked contrast to structural features of federal court practice, such as the creation of "diversity" jurisdiction (which was intended to, and probably does, limit biases of "home court" advantage for plaintiffs from one state facing off against defendants from another),[72] forum shopping

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[68] *See, e.g.*, Berger, *supra* note 36, at 1090–91; Bray, *supra* note 34, at 460–61; 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, 494 (2016). Even if the government is not formally bound by a rule of non-mutual collateral estoppel that would obtain in private litigation, rules respecting penalties for violating injunctions would have similar effect. *See infra* text accompanying notes 161–64.

[69] *See, e.g.*, Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 TEX. L. REV. 63, 75–77, 81–83 (1988). For an exposition of the generally applicable legal rule, see, for example, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 336–37 (1979). For general support of non-mutual collateral estoppel (but with reservations), see, for example, Brainerd Currie, *Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25, 36–37 (1965).

[70] *See, e.g.*, United States v. Mendoza, 464 U.S. 154, 159–63 (1984).

[71] *See infra* text accompanying notes 147–49.

[72] *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1515, 1523 n.36 (1995); Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 93, 103–04 (1980); James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 6, 15–16 (1964). Whether the benefits of limiting local biases justify the costs of disposing of arguments

seeks to exploit biases beyond those naturally associated with affinity for one's local compatriots. In fact, it seeks out biases that contradict fundamental features of a system that embodies the rule of law.

1. Forum Shopping vs. Principled Predictability

This Part explains the interplay between the doctrines of principled predictability and the rule of law. Afterwards, this Part discusses two different sorts of variation in decisional-based outcomes: concepts described here under the labels "decisional vibration" and "decisional divergence." Last, this Part argues that nationwide injunctions' encouragement of forum shopping—which is the antithesis of the rule of law—has the potential to interfere with proper application of the rule of law.

a. *Principled Predictability and the Rule of Law*

The rule of law, at its core, demands that legal rules are predictable based on *principles* knowable in advance.[73] *Predictability* of the law is essential to knowing how you can live your life without risking penalties imposed against your will by government. Yet, the rule of law requires more than just the ability to predict. *Principled predictability* is essential to law's legitimacy; it assures that laws apply the same way to everyone and that the laws are applied the same way by each official charged with enforcement.[74]

If judges are supposed to interpret and apply law impartially within the confines of what is necessary to decide disputes properly before them, the rule of law ideal is that litigants need not know the identity of the person who will judge their claims to predict the outcome. Accepting the analogy of judges to baseball umpires,[75] the ideal is that each umpire

about the proper venue for particular disputes is a separate question, but the notion behind diversity jurisdiction is solidly opposed to permitting expansive opportunity for plaintiff choice of forum.

[73] *See* RONALD A. CASS, THE RULE OF LAW IN AMERICA 2–19 (2001); F. A. HAYEK, THE ROAD TO SERFDOM 80–81 (1994); MICHAEL OAKESHOTT, *The Rule of Law*, *in* ON HISTORY AND OTHER ESSAYS 1, 1 (1983); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989).

[74] *See* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 89–90 (1998); CASS, *supra* note 73, at 7–12; LON L. FULLER, THE MORALITY OF LAW 38–81 (rev. ed., 1969); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 10, 14–15 (1971); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 670–71, 682–84 (1995); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 14–17, 19 (1959).

[75] *See* CASS, *supra* note 73, at 7; Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 CATH. U. L. REV. 683, 685–86, 689–90, 692 (2016). The most publicly noted use of the baseball umpire analogy was by Chief Justice John Roberts during his confirmation hearing before the US Senate. *See*

applies the rules of baseball the same way as other umpires and that each applies the rules the same way to all players and all teams.

b. *Judge-as-Referee and "Decisional Vibration"*

There are serious arguments about how possible it is to attain the ideal of principled predictability (the core of the "judge as umpire" metaphor).[76] Certainly there are difficult judgment calls in law and sports alike. Even people of good conscience and great skill—who agree on the task and endeavor to reach the right result under shared views of the rules—can differ on nuances of the rules' meaning or on the particulars of their application.[77] In fact, there are times when the judgment or perception required for a given decision makes application of governing rules so difficult that the *same* judge or referee might reach different outcomes if the matter could be replayed repeatedly (with the judge or referee making a new, independent judgment each time). This weak form of outcome difference can be termed *decisional vibration*. It is easy to accept this form of difference as consistent with an overall picture of decisional consistency and adherence to the rule of law.

The debate over the extent to which limits of language, perception, or reason inevitably produce differences (how far they move rule-application from merely cases of decisional vibration to more serious types of divergence) should be taken seriously.[78] Yet, in a real sense, decisional

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Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., J.).

[76] *See, e.g.*, Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 19, 24, 60–62, 66 (1984); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 818, 823–24 (1983).

[77] *See, e.g.*, CASS, *supra* note 73, at 74–85 (analogizing judicial decisions based on text to translation); Kavanaugh, *supra* note 75, at 685–90 (describing the analogy of judicial work to umpires); *see also* CASS, *supra* note 73, at 86–97 (describing special case of the Supreme Court). *But see* JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 233–41 (1990) (using translation heuristic to incorporate far greater degrees of freedom); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1367–68, 1371–76 (1997) (same).

[78] Arguments based on claims about such limitations are at the heart of a number of well-known critiques of efforts to reach neutral, predictable results in legal decision making. *See, e.g.*, Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 377–83 (1973); Singer, *supra* note 76, at 51–53, 57, 63; Tushnet, *supra* note 76, at 784–85, 805, 825. *But see* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 191–96 (Oxford: Clarendon Press, 2002) (1991) (providing a careful analysis of the degree to which linguistic indeterminacy affects operation of rules that constrain legal and other decision-making); Ken Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 283, 285–86 (1989); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 463, 466–67, 495–97 (1987).

vibration should also be seen as more of a footnote than a central consideration on the core issue respecting the judicial function. What matters far more is the existence of very broad agreement—cutting across time and divergent perspectives on many aspects of legal reasoning and judicial action—that judges *should* endeavor to do their job in a way that is consistent with the goal of principled predictability, including its components of neutrality, generality, and externality, notwithstanding potential limitations on effectuation of that aspiration.[79]

c. *Forum Shopping and "Decisional Divergence"*

The predicates for (and goals of) forum shopping, however, are the antithesis of this rule-of-law vision. Forum shopping embraces the understanding that particular judges will decide a given matter in divergent ways—not because of random differences in perception of the sort that would lead to different calls by a referee in the repeat-play hypothetical, but because of disparate views of how laws should be interpreted and what extrinsic information should come into play (what could be termed *decisional divergence*).[80] The differences that are essential to forum shopping are the sorts of differences that lend themselves to predictions on expected outcomes that vary for particular decision-makers, while the variances incorporated in the repeat-play hypothetical and common versions of the judge-as-umpire metaphor do not.[81]

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[79] *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 445–48 (2012); BARNETT, *supra* note 74, at 136–44; CASS, *supra* note 73, at xi–xiv, 2–19, 26–45, 149–51; FULLER, *supra* note 74, at 87, 89, 91–94, 96–99; JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 206–09, 213–14, 224–26 (prtg. 1983) (1979); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (Amy Guttman ed., 6th prtg. 1998) (1997) [hereinafter SCALIA, INTERPRETATION]; SCHAUER, *supra* note 78, at 195–96; Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1430–31, 1435–38 (1987); Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 13, 16–18 (1998); Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 550–51, 574–76 (1999); Gary Lawson, *Reflections of an Empirical Reader (Or: Could Fleming Be Right this Time?)*, 96 B.U. L. REV. 1457, 1465–66 (2016); Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 530–31, 536, 543–44 (1998) (reviewing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996)); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 853, 855 (1989) [hereinafter Scalia, *Originalism*].

[80] *See, e.g.*, Davies, *supra* note 65, at 112.

[81] *Compare* Ward Farnsworth et al., *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 260–62, 271–72 (2010) (describing experimental work supporting conclusions on judges' personal viewpoints' effects on legal decisions), *with* Kavanaugh, *supra* note 75, at 685–86 (arguing that the "judge as umpire" view is correct and is incompatible with

Moreover, forum shopping self-consciously seeks out judges who lie at an extreme among the relevant class of judges, because the most extreme judges have the greatest probability of deciding a matter in a way that correlates with the interests of *one* party to a dispute.[82] If that were not true, there would be no need to seek out a forum whose judges are expected to be especially favorable to the party picking the forum—random selection among the relevant set of judges in the class of potentially available courts would be good enough.

The fact that litigants in a number of high-profile cases obviously *do* engage in forum shopping underscores the widely shared perception that at least *some* judges can be expected to make decisions that are heavily influenced by personal inclinations (that is, by something apart from generally accepted principles of decision).[83]

Recognizing that litigants in high-profile cases engage in forum shopping does not, in itself, constitute a condemnation of the federal judiciary. It does, however, reflect a common understanding about differences among federal judges—both of the existence and the limits of these differences. The nearly 700 federal district judges and roughly 180 circuit judges currently serving could be arrayed on a curve representing likely approaches to a given issue—products of the overlay of judicial views, the judges' approaches to related issues, and the ideological or methodological commitments on judges' decisions.[84] The broad middle

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consideration of personal views); *see also* Scalia, *Originalism*, *supra* note 79, at 853, 862, 864 (defending originalism and textualism for constraining inappropriate intrusion of judges' personal views).

[82] The fact that so many of the cases that seek nationwide injunctive relief are connected to claims integrally related to active political conflicts underscores the difference between the sort of forum shopping at issue here and the variance that is unpredictable and inevitable. *See infra* text accompanying notes 95–109; *see also* Berger, *supra* note 36, at 1092–93; Bray, *supra* note 34, at 459–61; Morley, *supra* note 68, at 547–48.

[83] *See* Farnsworth et al., *supra* note 81, at 258, 276.

[84] This curved array of potential decisions, grouped within clusters (statistically, arranged in mathematically derived standard deviations) differs from the common linear representation of potential decisions or judicial approaches (most liberal on one end, most conservative on the other) often used to describe Supreme Court decision-making. *See* Brandon Bartels, *It Took Conservatives 50 Years to Get a Reliable Majority on the Supreme Court: Here Are 3 Reasons Why*, WASH. POST (Jun. 29, 2018), https://perma.cc/V4L5-T42D; Linda Greenhouse, *The Supreme Court's Power Play Against Labor*, N.Y. TIMES (Mar. 1, 2018), https://perma.cc/93E7-M4DK; Linda Greenhouse, *Will Politics Tarnish the Supreme Court's Legitimacy?*, N.Y. TIMES (Oct. 26, 2017), https://perma.cc/XY72-CLR6.

Unidimensional depictions of the Supreme Court are reinforced by scholarly work emphasizing the significance of individual justices' preferences, arrayed on a similar sort of scale. *See, e.g.*, Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 146–49 (2002); Lawrence Sirovich, *A Pattern Analysis of the Second Rehnquist U.S. Supreme Court*, 100 PROCEEDINGS OF NAT'L ACAD. SCI. 7432, 7433–34 (2003); *see also* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL

part of the curve, reflecting the central standard deviations from a decisional norm, covers the vast bulk of the judiciary.[85] If the outcomes of predicted decisions resemble a standard bell-curve or normal curve, 95% of outcomes will fall within two standard deviations of the mid-point and 99.7% within three standard deviations.[86] The tails of the distribution, thus, represent true outliers. Anything even remotely approaching that sort of distribution suggests that there will be a few—but very few—judges who can be comfortably predicted to diverge dramatically from the norm.

For most sorts of cases and most sorts of claims, there is limited opportunity for forum shopping, for seeking out judges who would be in the tails of the distribution. Plaintiffs generally have few options on where to file their cases. Where broader opportunity for selecting a forum has existed, the Supreme Court self-consciously has begun cutting back on forum shopping options, as it did with respect to patent litigation recently in *TC Heartland LLC v. Kraft Food Group Brands LLC*.[87]

Yet, where nationwide injunctive relief is possible, there is a much broader range of possibilities. Although plaintiffs still must have sufficient contacts in whatever locale they file suit in to satisfy jurisdictional requisites, those interested in a matter of broad public interest generally can find one person or entity that can meet that test for a desirable venue.[88] The ability of a single judge to bind the entire nation frees plaintiffs from needing to litigate in each individual's location, enabling those hoping to benefit from a nationwide injunction to seek out the outermost tails of the entire distribution of judges—creating an extreme form of the forum shopping problem.[89]

MODEL REVISITED 86–96 (2d rptg. 2002); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 324–27 (1992).

[85] *See* CASS, *supra* note 73, at 35–69, 74–97, 110–15, 150–51.

[86] *See* HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS 494–95 (2003). While this is not the only sort of distribution of outcomes, it is a common—perhaps the most common—result in randomly distributed attributes or outcomes (hence the name "normal distribution").

[87] 137 S. Ct. 1514 (2017).

[88] So, for example, if cities and interest groups opposed to a particular federal policy expect to obtain nationwide injunctive relief from a successful suit, collectively they can file in any (and every) jurisdiction that seems especially sympathetic. *See, e.g.*, City of Chicago v. Sessions, No. 1:17-cv-05720 (N.D. Ill. Nov. 16, 2017) (raising a claim that three conditions attached to the 2017 Byrne Jag Grant by the Attorney General were unconstitutional); City of Philadelphia v. Sessions, 280 F. Supp. 3d 579 (E.D. Pa. 2017) (same).

[89] *See* Berger, *supra* note 36, at 1091–93; Bray, *supra* note 34, at 460.

2. Forum Shopping and Sources of Judicial Divergence

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

From the first vantage, the nature of the views or commitments that cause the divergence does not matter to this judgment as much as the fact that some judges and courts consistently stand apart from others—that they reason differently or reach different conclusions due to factors not common (not generally or randomly distributed) across the broad sweep of judges who might hear and decide similar issues.[90] The harm to rule of law values is the reduction in principled predictability in individuals' ability to assess how the law will treat their behavior without needing to know who will decide.[91] Because the actual decision-maker is not knowable in advance of actions that may be subject to judgment, significant deviations from principled predictability seriously threaten a core attribute of the rule of law.[92]

In another sense, though, the reason that a particular judge or court is in demand *does* matter. If litigants rush to get their claims before a court that is known for flaunting established rules and finding creative (or simply unlawful) ways around precedent,[93] that signals a sense that the overall system is fairly law-bound.

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[90] The conflict between forum shopping and rule of law values has been observed in multiple, different contexts, with varied explanations for expected differences in outcomes and variation as well in labels for the values at stake. *See, e.g.*, THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 21–22 (1986); Berger, *supra* note 36, at 1091–93; Bray, *supra* note 34, at 457–61; Stephen B. Burbank, Semtek, *Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1050–51 (2002); G. Marcus Cole & Todd J. Zywicki, *Anna Nicole Smith Goes Shopping: The New Forum-Shopping Problem in Bankruptcy*, 2010 UTAH L. REV. 511, 511–14; Andreas F. Lowenfeld, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM. J. INT'L L. 314, 314 (1997); Arthur Taylor von Mehren, Comment, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347, 350–56 (1974).

[91] *See, e.g.*, CASS, *supra* note 73, at 7–12; HAYEK, *supra* note 73, at 80–81; Dorf, *supra* note 74, at 653, 656–57; Scalia, *supra* note 73, at 1179.

[92] *See, e.g.*, HAYEK, *supra* note 73, at 80–81; Cass, *supra* note 16, at 947, 960–62; Dorf, *supra* note 74, at 656–57, 681–85; Fuller, *supra* note 16, at 372–74.

[93] While no judge would be expected to announce such disrespect for settled legal rules, more than a few well-known theories about how judges should decide matters are based on significant creativity in moving from where the law is to where a particular normative view posits it ought to be.

Paradoxically, a more charitable view of some departures from current dominant norms—and of some investments in forum shopping in response—is *more* damning of the legal system. Consider whether litigants are willing to invest significant amounts of time, energy, and financial resources in seeking out a court or judge that stands out as especially likely to base decisions on approaches that are *consistent* with law as written and contemporaneously understood (with decision approaches that are defended as most constraining and most consistent with principled predictability).[94] That would imply a larger and more widespread departure from principled predictability on the part of other courts and judges.

IV. Politicizing the Courts: Incentives and Effects

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

A. *Politically Motivated Litigation: Quagmire in the Making*

Politically motivated litigation presents special problems, almost inevitably generating concerns about judges' ability to render fair decisions that are not tainted by their own political leanings. This Section explores concerns with impartial decision-making in politically motivated litigation and the contours of judicial decision-making observed in politically motivated litigation.

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

As discussed above, any systemic differences in predicted outcomes (significant variations between the decisions expected from one specific court or judge and those expected from a different court or judge) are

See Ronald A. Cass, *Quality and Quantity in Constitutional Interpretation: The Quest for Analytic Essentials in Law*, 46 EUR. J.L. & ECON. 183, 187 n.16 (2018).

[94] For sympathetic explanations of such methodologies, see, for example, SCALIA, INTERPRETATION, *supra* note 79, at 14–41; Lawson, *supra* note 79, at 1457–59; Prakash, *supra* note 79, at 529–31; Scalia, *Originalism*, *supra* note 79, at 852–54; Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 269–70 (2017).

problematic.[95] While generally discussed in rule of law terms, the point has more general application across a range of activities and decisions.

Consider, for instance, problems encountered with teachers grading student work (a typical setting in which variation among decision-makers is both common and problematic). Having one group of teachers in a school known to be remarkably easy graders and another group with well-earned reputations as astoundingly hard graders undermines the notion of grades across the curriculum being a fair basis for comparing student performance.

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

2. Politically Tinged Decisions

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

While any inducement to forum shopping and increased divergence among potential decisions from different federal courts is problematic, the critical exacerbating factor for disputes about nationwide injunctions plainly is the underlying cases' connection to *political* issues. Notable cases where nationwide injunctions are sought—such as the immigration-related cases discussed above—have had obvious political overtones, as

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[95] *See* CASS, *supra* note 73, at 7–12 (discussing the importance of principled predictability); Dorf, *supra* note 74, at 656–57, 681–85 (same). Concerns regarding disparities in rates at which claims for Social Security disability benefits were granted by different administrators led the Social Security Administration to adopt a grid to guide (and to inform review of) lower level decisions. For discussion of considerations relevant to these decisions, see, for example, JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 149–68 (1983); Jon C. Dubin, *Overcoming Gridlock:* Campbell *After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration's Disability Programs*, 62 ADMIN. L. REV. 937, 938–40 (2010).

especially polarizing programs can be stopped or dramatically slowed with an injunction that has broad scope and wide reach.

Further, plaintiffs strongly identified with political causes—politically active interest groups and political officials (largely state attorneys general, a class of officials who are politically connected, politically selected, and often interested in higher political office)—frequently have been the moving parties in cases where nationwide injunctions are sought.[96] Indeed, the pattern that emerges is the routine use of suits seeking nationwide injunctions in highly politically salient cases with relatively consistent blocs of public officials and interest groups, from relatively consistent parts of the nation, lining up in opposition.[97] Reflecting the same pattern seen in the actual political arena, suits by Republicans from "red states" opposed President Obama's administration on matters related to health care, environmental and public land regulation, and immigration, while suits by Democrats from "blue states" have opposed President Trump's administration on those same issues.[98]

Inserting the judiciary into quintessentially political fights, even when there is a substantial legal issue to be decided on recognizably legal grounds, plainly risks the perception that judges base decisions on

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[96] *See generally* Int'l Refugee Assistance Project v. Trump, 883 F.3d 233 (4th Cir. 2018); County of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017); Hawaii v. Trump, 245 F. Supp. 3d 1227 (D. Haw. 2017); Washington v. Trump, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012 (W.D. Wash. Feb. 3, 2017); Texas v. United States, No. B-14-254, 2015 U.S. Dist. LEXIS 45483 (S.D. Tex. Apr. 7, 2015).

[97] *See, e.g.*, Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U. RICH. L. REV. 633, 633–35, 641–43 (2018) (describing coordination among politically allied state attorneys general and other groups in legal challenges); Sarah N. Lynch, *Attorney General Vows to Fight Nationwide Court Injunctions*, REUTERS (Sept. 13, 2018), https://perma.cc/ET9N-XKUR (describing shift from use of nationwide injunction suits by "Republican-led state attorneys general" to block Obama administration policies to use by "Democratic state attorneys general . . . who seek to block many of President Donald Trump's policies"); Alan Neuhauser, *State Attorneys General Lead the Charge Against President Donald Trump*, U.S. NEWS & WORLD REP. (Oct. 27, 2017), https://perma.cc/W8MK-5UDM (describing lawsuits by twenty-two Democratic state attorneys general seeking nationwide injunctions against actions of Trump administration); Paul Nolette, *State Attorneys General Have Taken Off as a Partisan Force in National Politics*, WASH. POST (Oct. 23, 2017), https://perma.cc/9F5M-J555 (recounting state attorney generals' efforts to stop actions of opposing party).

[98] *See, e.g.*, Lin, *supra* note 97, at 634–46 (describing efforts both of Republican state attorneys general to stop programs of the Obama administration and of Democratic state attorneys general to stop programs of the Trump administration); Lisa Friedman & John Schwartz, *Borrowing G.O.P. Playbook, Democratic States Sue the Government and Rack Up Wins*, N.Y. TIMES (Mar. 21, 2018), https://perma.cc/QQ5J-43MZ (describing "state attorneys general as partisan warriors against presidential administrations" and especially "Blue-state attorneys general" suits against Trump administration); Nolette, *supra* note 97 (recounting evolution from more standard litigation to partisan tool and stating that "stable coalitions of AGs have organized largely by party").

political preferences, or at least are affected by those preferences.[99] That perception is far likelier, and better grounded, when the judicial decision-makers are selected by one side of a political contest precisely because of their expected prejudices.

The problem is not that politically salient legal challenges (ones that implicate issues of great political significance) inescapably lack other valid legal bases or that politically motivated lawsuits (ones brought by or prompted by politically active plaintiffs for reasons connected to political conflicts) inevitably are without merit as a matter of black-letter law. Nor is the problem that federal courts routinely base decisions on political considerations, or that issuance of a nationwide injunction necessarily signals a political basis for decision. In the main, the evidence respecting federal court decisions is at odds with each of those charges.[100]

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[99] *See* TOCQUEVILLE, *supra* note 10, at 104–05 (warning of this risk and lauding the construction of the US Judiciary for minimizing it). This is illustrated in the courts'—both state and federal—decisions respecting vote counting in the 2000 US presidential election, culminating in two US Supreme Court decisions on the merits of constitutional challenges that were decided by 9–0 and 7–2 votes. *See* Bush v. Gore, 531 U.S. 98 (2000) (per curiam); Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (per curiam). Despite the strong consensus among Justices (whether appointed by Republican or Democratic Presidents), the decisions—especially the decision in *Bush v. Gore*—continue to be criticized as "politically influenced." *See, e.g.*, Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1407–10 (2001); Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1093–95 (2001); Margaret Jane Radin, *Can the Rule of Law Survive* Bush v. Gore?, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 110, 114–22 (Bruce Ackerman ed., 2002); Jonathan Chait, *Yes,* Bush v. Gore *Did Steal the Election*, N.Y. MAG. (Jun. 25, 2012), https://perma.cc/RD88-7VZU; Sanford Levinson, *Return of Legal Realism*, NATION (Dec. 22, 2000), https://perma.cc/26QD-A83G; Elspeth Reeve, *Just How Bad Was* Bush v. Gore?, ATLANTIC (Nov. 29, 2010), https://perma.cc/C9XY-A6MY; Jeffrey Toobin, *Precedent and Prologue*, NEW YORKER (Dec. 6, 2010), https://perma.cc/9GFQ-DBHG.

However, examination of the governing law at the time respecting presidential election contests reveals that, whatever the influences on judicial decisions, the Supreme Court's pronouncements did not affect the outcome of the 2000 presidential election. *See, e.g.*, CASS, *supra* note 73, at 95–97, 193 n.95; *see also* Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, *in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT 98, 100–01 (Cass R. Sunstein & Richard A. Epstein eds., 2001); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 2–3.

[100] *See, e.g.*, CASS, supra note 73, at 35–45, 72–97, 150–51; *The District of Columbia Circuit: The Importance of Balance on the Nation's Second Highest Court: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. On the Judiciary*, 107th Cong. 45–54 (2002) (statement of Ronald A. Cass, Dean of Boston University School of Law) (noting unanimity of results in more than ninety-eight percent of decisions from the DC Circuit, a court often described as deciding highly politicized cases and reflecting political influence on the judiciary); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358–60 (1998) (providing a similar argument based on experience as a member of that court). *But see, e.g.*, Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1717–21 (1997) (arguing that politically connected ideology of judges plays a significant role in DC Circuit decisions).

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

B. *Today's Risks with Nationwide Injunction Suits: Political Causes, Political Reactions*

The combination of three factors that characterize contentious nationwide injunction cases almost inevitably draws the courts further into the political domain. Namely: (1) political goals, (2) forum shopping for sympathetic judges, and (3) court decisions with nation-wide effects that have the potential for profound impact on politically salient issues. Combined, those factors largely explain why commentary on these court decisions tilts toward explanations characterizing the court decisions as rooted more in politics than in law.

For a small window onto the way these decisions are discussed, consider descriptions of the travel ban decisions on the widely read website *Above the Law* by its Executive Editor. His posts include titles like "We've Finally Achieved a Patina of Legalism to Cover the Bigotry" and references to anyone who supports the President's position on immigration or opposes nationwide injunctions to halt his administration's orders as "#MAGA jerkfaces."[101]

Rhetoric that seems more the province of political combatants in campaign mode than of lawyers analyzing legal claims and decisions is now common. Much of the commentary on nationwide injunction cases describes both the *officials* who bring the suits seeking nationwide injunctions and the *judges* who decide to issue the injunctions in decidedly political terms. Suits seeking nationwide injunctions have been described as "political cudgels" for state attorneys general to brandish against the

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[101] Elie Mystal, *Supreme Court Lifts Injunction on Travel Ban*, ABOVE THE LAW (Dec. 4, 2017), https://perma.cc/5V4V-HNHP; Elie Mystal, *Travel Ban 3.0: We've Finally Achieved a Patina of Legalism to Cover the Bigotry*, ABOVE THE LAW (Sep. 25, 2017), https://perma.cc/ZV4F-85VF.

rival party,[102] devices used by state attorneys general acting as "partisan warriors"[103] fighting against opposing presidential administrations, examples of "pure politics,"[104] and products of "increasingly partisan AG coalitions."[105] Observers also declare that judges have "turn[ed] to [an] extreme remedy" and "wield" these injunctions as a "major political weapon" in the fight between a President and his opponents.[106] Other commentary notes the obvious, strong ideological leanings of judges in particular districts that invite filings from lawyers seeking to stop policies of the competing party—at times even manipulating rules respecting "related cases" to "steer" specific matters in their direction.[107] In other words, politically motivated lawsuits brought before courts thought likely to share (and act on) the plaintiffs' political predilections generate legal decisions that are widely viewed through political lenses and often (rightly or wrongly) suspected of being the result of judges' political leanings.

The increasing political characterization of court decisions not only encourages *litigants* to seek special advantages in future litigation where potentially broad relief is in play. It also threatens an increasingly political focus on judicial *appointments*, including appointments at the district court level—a level at which appointments have been relatively insulated from boldly politicized debates. Senatorial input has tended to play a greater role in nominations for district court judges, including input from senators not of the President's own party, and fights over confirmation to district judgeships have been less frequent than fights over circuit judges' confirmations.[108]

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

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102 Jason L. Riley, *When District Judges Try to Run the Country*, WALL ST. J. (Jul. 17, 2018), https://perma.cc/5589-ZNDK.

103 Friedman & Schwartz, *supra* note 98.

104 *Id.*

105 Nolette, *supra* note 97.

106 Ariane de Vogue, *Judges Turn to Extreme Remedy to Block Trump Administration*, CNN POLITICS (Oct. 17, 2017), https://perma.cc/CY3P-VNLF; Alex Swoyer, *Judges Unleash 'Political Weapon' Against Trump*, WASH. TIMES (Feb. 27, 2018), https://perma.cc/F72J-25DP.

107 Andrew Kent, *Nationwide Injunctions and the Lower Federal Courts*, LAWFARE (Feb. 3, 2017, 3:02 PM), https://perma.cc/PR9A-QC9U.

108 *See* Ryan J. Owens et al., *Ideology, Qualifications, and Covert Senate Obstruction of Federal Court Nominations*, 2014 U. ILL. L. REV. 347, 369–79; Lydia Wheeler, *GOP Talks of Narrowing 'Blue Slip' Rule for Judges*, THE HILL (May 20, 2017), https://perma.cc/979N-8AAR.

both sides of the political aisle—will take steps to protect what matters to them.[109]

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

V. Constitutional Structure and Federal Judiciary's Design

A third consequence of the expansion of nationwide injunctions is their role in undermining the division of constitutional responsibilities among the different branches of government. As explained below, this includes intrusion on Congress' function of writing the laws and, in some cases, also on properly delegated exercises of executive discretion over laws' implementation. It also contradicts the historical commitment of specially tailored equitable discretion to federal judges and the essence of a system of lower court assignments below the Supreme Court.[110]

A. *Nationwide Judging Versus Constitutional Structure*

Judicial decisions that have conclusive nationwide effect are fundamentally at odds with the structure of the Constitution. This Section explains the constitutionally delegated authority of the courts, the limited circumstances in which nationwide relief may be appropriate, and assesses courts' role in and standards governing injunctions for politically motivated litigation.

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109 *See, e.g.*, Thomas Burr, *Democrats Criticize Utah Judicial Pick Over His Fight for Prop 8 and Support for Memos Justifying Torture*, SALT LAKE TRIB. (Jan. 10, 2018), https://perma.cc/22TJ-4P62; Nina Totenberg & Lee Sheehan, *Judicial Nominee Wendy Vitter Gets Tough Questions on Birth Control and Abortion*, NPR (Apr. 11, 2018), https://perma.cc/XH6B-6VM9; Letter from Vanita Gupta, President, Leadership Conf. on Civil & Human Rights, Opposing the Confirmation of Michael Truncale to the U.S. District Court for the Eastern District of Texas (May 15, 2018), https://perma.cc/K72F-NUWC.

110 *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2425–29 (2018) (Thomas, J., concurring).

1. Courts, Law-Making, and Delegated Discretion

Most obviously, the Constitution's plain commitment of law-making and related policy choices to the Congress, and of subordinate exercises of discretion over implementation of the laws to the executive branch, cannot be reconciled with routine invocation of judicial power to revisit those branches' choices. Stated differently, the assignments of authority in Articles I and II of the Constitution cannot be made consistent with granting courts broad power to reverse national policy choices made by the politically responsible branches.[111]

Courts enjoy authority, in appropriate cases, to say what the law is, how far the Constitution permits Congress to go in its exercise of authority, and how far the law permits executive action to go.[112] But using that authority outside those settings, stretching the contours of judicial authority, risks assertion of a broad supervisory power over those branches' decisions that manifestly changes the basic constitutional design.[113]

For most of America's history, Article III was not understood to incorporate any such revisory power, even by the most vigorous champions of federal judicial power. Indeed, judges' fear of intruding into

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[111] That was clear from the founding generation's exposition of the initial constitutional assignments. *See, e.g.*, THE FEDERALIST NOS. 10, 42, 45–51 (James Madison), NOS. 66–77 (Alexander Hamilton). It also was an important point in combatting concerns of Anti-Federalists. *See Hawaii*, 138 S. Ct. at 2425–28 (2018) (Thomas, J., concurring); BRUTUS NO. XI, *supra* note 15, at 293, 298.

[112] This includes authority to declare laws unconstitutional on grounds that Congress has avoided making important policy choices, and, thus, has granted excessive discretion to executive branch officials. On problems of excessive administrative discretion and appropriate tests for identifying and addressing it, see, for example, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 4, 83–110, 378–402 (2014); Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1038, 1041–48 (2007); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1297–99, 1309–19 (2003); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 148–51 (2017); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328–30, 334 (2002); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1464–68 (2015); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1224–28, 1240–41 (1985); David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 355–58 (1987).

[113] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (1962); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 1–2 (Simon & Schuster, 1991) (1990); JAMES BRADLEY THAYER, THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW 8–12, 25–26 (1893); Bork, *supra* note 74, at 3–7; John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 926–37 (1973); *see also* MADISON, *supra* note 13, at 422–29 (discussing the Constitutional Convention's rejection of a proposal for the Judiciary to share, along with the Executive, a revisory power over legislation).

the proper domain of the political branches—even when a serious question of law-interpretation is presented in court—explains a wide variety of judicial doctrines (encompassing standing, political questions, related rulings on justiciability, the ability to withhold judgment where no remedy would be available, and the canons of construction avoiding constitutional questions).[114]

The critical distinction emphasized by Tocqueville, Hamilton, Madison, and John Marshall was that between, on the one hand, deciding what law to apply to *specific* parties in a *specific* case (including whether a given act violated constitutional restraints) and, on the other hand, determining what law applies nationwide to anyone anywhere who may share the concerns asserted about a choice made by the politically chosen branches.[115] In contrast to the limited view of courts' role, widespread use of nationwide injunctions to shape applicable law on the basis of *general*, national considerations—especially in cases infected with partisan, political overtones—effectively replaces the tri-partite constitutional structure with one that puts courts in the position of overall political overseers.

2. Limited Defense of Nationwide Relief

Despite its problems, broad injunctive relief may be appropriate in certain circumstances, perhaps even in cases connected to issues of governance. Regulatory initiatives of administrative officials whose discretionary authority stretches (and often breaches) the bounds of constitutionally permissible delegation frequently put individuals and entities in a position where they must either submit to a possibly unlawful demand or risk large penalties for resisting.[116] Professors Jonathan Adler

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114 *See* Alexander M. Bickel, *The Supreme Court 1960 Term – Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42–48, 60–63 (1961); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223–28, 243–46; John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1220–23, 1230–31 (1993); Kevin C. Walsh, *The Ghost That Slayed the Mandate*, 64 STAN. L. REV. 55, 60–72 (2012); Wechsler, *supra* note 74, at 7–10.

115 *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); THE FEDERALIST NO. 78 (Alexander Hamilton); James Madison, *Notes on the Ratification Convention Debates (Aug. 27, 1787)*, *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., rev. ed., Yale Univ. Press 1966) (reporting Madison's comment respecting the Constitution's limitation of federal courts' authority only to making decisions "of a Judiciary nature"); TOCQUEVILLE, *supra* note 10, 100–06; *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–62 (1992) (connecting standing requirements to limits on the scope of judicial power recognized by the Constitution's framers); Roberts, *supra* note 114, at 1230–31 (same).

116 *See, e.g.*, Ronald A. Cass, *Staying Agency Rules: Constitutional Structure and Rule of Law in the Administrative State*, 69 ADMIN. L. REV. 225, 250–57 (2017).

and Michael Greve's descriptions of the saga of the Environmental Protection Agency's "Mercury and Air Toxics Rule" illustrates the problem.[117] Without an injunction delaying the administrative fiat, the practical result is to eliminate the prospect of meaningful review. Any investments in compliance (through reconfiguring businesses, purchasing new equipment, and changing aspects of everyday practice that limit exposure to penalties), even if not eliminating courts' willingness to consider challenges, plainly deprive judicial review of real significance.[118]

Assuming no strong, countervailing need for immediate implementation of the relevant rule, the norm for injunctive relief would be to stay the rule pending judicial review. Unlike ordinary litigation where the appropriate response to this problem undoubtedly would be staying an action solely with respect to the particular litigants, in some instances of federal regulation, this option's impact on other regulated competitors will be serious in its own right but also often will result in serious risk of harm to the parties seeking the stay.[119] Where there is a strong showing of regulatory overreach—of a decision that exceeds legal authority or of a basis for action that transgresses constitutional strictures—courts appropriately may enter broader injunctive relief while review proceeds.[120]

3. Politically Situated Litigation and the Judicial Role

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

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117 *See* Jonathan H. Adler, *Placing the Clean Power Plan in Context*, WASH. POST: VOLOKH CONSPIRACY (Feb. 10, 2016), https://perma.cc/5YDF-TVRG; Michael S. Greve, *Clean Power, Dirty Hands,* LAW & LIBERTY (Feb. 1, 2016), https://perma.cc/9XN2-DRAJ.

118 *See* Cass, *supra* note 116, at 228–29, 254–56; *see also* Adler, *supra* note 117; Greve, *supra* note 117.

119 *See* Cass, *supra* note 116, at 229–30. This factor comes within the set of third-party interests traditionally considered as part of the determination on equitable remedies. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 394 (2006); Leubsdorf, *supra* note 17, at 525.

120 *See, e.g.*, Cass, *supra* note 116, at 248–49. This exception should not be treated as an invitation to imagine that every claim of regulatory overreach or of constitutional transgression merits staying government's hand. The Supreme Court's decision in *Trump v. Hawaii*, 138 S. Ct. 2392, 2419–20 (2018), explains why such claims should be treated with caution, especially claims based on suppositions about officials' intentions. On the other hand, one factor that may properly cause courts to feel less constrained in issuing nationwide injunctive relief is discussed *infra* text accompanying notes 153–54.

Instead, typically the request for an injunctive remedy having nationwide and universal coverage is integrally related to the goal of reversing a *politically contested choice* made by the legislative or executive branches of government.[121] In that context, unlimited coverage for an injunction makes bigger headlines, bolder claims of having reversed the successes of political opponents, lesser prospect for judicial determinations seeming like byproducts of ordinary litigation, and greater tension with the original constitutional order.[122]

Bold, simple statements about the division of constitutional authority—and expansive conclusions about what such division means for the roles of courts—must be tempered by recognition that legislative and administrative decisions often are made strategically, taking account of background expectations respecting potential judicial decisions.[123] At times, legislators may, for example, pass laws that a majority (or a critical element of a majority) of Congress believes are *not* constitutional because they gain personally from voting in favor of such laws, despite their expectation that the laws will be found invalid if challenged in court.[124] Similarly, administrative officials may adopt rules or make other decisions that they do not expect will be sustained as within statutory authority because they will gain personally from embracing the positions in those rules or decisions, or, in contrast, they may make decisions that stretch the limits of their authority expecting that judges will defer to them.[125]

More broadly, the relationship among legislative decisions, administrative decisions, and judicial decisions may implicate strategic considerations both in courts' determinations and in other official actions made in contemplation of courts' decisions.[126] Recognizing that reality complicates efforts to assess when courts are intruding into the political domain, as opposed to merely fulfilling legitimately assigned tasks

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121 *See supra* text accompanying notes 97–99.

122 *See* Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 363–64 (2018).

123 *See* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 885 (1975).

124 *See, e.g.*, Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 S.M.U. L. REV. 281, 283 (2008).

125 *See* James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction*, 45 AM. J. POL. SCI. 84, 97 (2001); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1062–63 (2015); Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 INT'L J. CONST. L. 446, 455–56 (2003).

126 *See* Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory Explanation of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. ECON. & ORG. 263, 264–65 (1990); Landes & Posner, *supra* note 123, at 888; McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 707 (1992); Rogers, *supra* note 125, at 97; Whittington, *supra* note 125, at 455–56.

consistent with the limited domain set forth in the Constitution and elaborated in statutes.

Still, the constitutional pattern of separated authority and defined, basic roles for the different branches of the national government provides a touchstone that suggests the limited role courts should play and the boundaries of judicial remedies. First, courts should not be making rules on important matters of policy, but instead should be giving effect to rules set by others. Second, when called upon to resolve questions of legal interpretation, courts should employ their remedial authority in ways consistent with their role in resolving concrete legal contests, not in ways tantamount to setting broad national policy.[127]

4. "Complete Relief": A Misleading and Incomplete Standard

Given the considerations just discussed, the standard of "complete relief"—making the injunction as broad as needed to give full protection to the interests asserted by plaintiffs—cannot be the test for determining how broad an injunction should be.[128] Although the standard was framed as restricting courts from issuing injunctions that exceeded the scope needed to provide relief to parties before the court,[129] in practice it pushes toward excessively broad injunctions, especially where the focus is not limited to an action's effect solely on parties before the court.[130] Further, in settings where political judgments are integrally related to the assessment of interests involved on both sides (for and against the injunction), the standard of complete relief tilts remedies toward the political forces opposing the government.

While that bias may be justified in certain areas, such as cases involving government restraints on core political speech,[131] applying it

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127 *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208 (D.C. Cir. 1985); *see also infra* text accompanying notes 167–78.

128 For additional reasons, this is not a sufficient (or, at times, appropriate) standard, see, for example, Berger, *supra* note 36, at 1085–91; Bray, *supra* note 34, at 466–68. *But see* Siddique, *supra* note 36, at 2140–49 (advocating the "Complete Relief Principle" as the key consideration for injunctions' scope).

129 *See* Califano v. Yamasaki, 442 U.S. 682, 702–03 (1979).

130 *See* Bray, *supra* note 34, at 466–67.

131 *See, e.g.*, Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 552–53; Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 456 (1985); Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Action*, 56 U. CIN. L. REV. 1317, 1319 (1988); Ronald A. Cass, *Weighing Constitutional Anchors:* New York Times Co. v. Sullivan *and the Misdirection of First Amendment Doctrine*, 12 FIRST AMEND. L. REV. 399, 416–21 (2014); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 281 (1981);

more broadly—especially in the types of cases commonly seeking sweeping injunctive relief—inevitably embroils courts in ongoing *political* disputes in ways that will not seem even-handed.[132] The bias inherent in the complete relief standard exaggerates the bias that is already present in litigation seeking nationwide relief, because the side asking for the injunction has specifically chosen a court thought likely to favor broader relief in the particular case.[133] In this sense, it combines an easier venue for the moving party, and an easier standard for relief if that party prevails.

Some areas of the law contain rules consciously tilted toward one party or one result. This is the case, for instance, with requirements of unanimous guilty verdicts and of proof of guilt beyond a reasonable doubt in criminal trials; as with other "tilted" rules, these requirements reflect a sense of asymmetric social costs—here, between convicting innocents and releasing guilty parties.[134] But the tilt in nationwide injunction cases adds bias to what are at their core *political* debates, which already have moved to courts from the arena in which political disputes are more naturally resolved. Adding cumulative biases to the outcome seems especially unwarranted in this context, where the courts, if they are involved at all, should be neutral arbiters of law.[135]

Moreover, the issuance of one nationwide injunction (especially where the injunction is permanent, not merely a stay pending review)[136]

Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1185 (1988).

132 *See supra* text accompanying notes 66–99.

133 *See* Berger, *supra* note 36, at 1091; Bray, *supra* note 34, at 460.

134 *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 476 (2000); Apodaca v. Oregon, 406 U.S. 404, 411–12 (1972); In re Winship, 397 U.S. 358, 361–62 (1970); 4 WILLIAM BLACKSTONE, COMMENTARIES *352; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 54 (2d ed. 1995); Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1067–73 (2015); Kate Stith, *Crime and Punishment Under the Constitution*, 2004 SUP. CT. REV. 221, 227. Recognition of uneven error costs, of course, does not automatically justify any given rule, especially when dynamic effects of a rule are taken into account. *See, e.g.*, Epps, *supra* note 134, at 1092–93.

135 For discussion of different manners of, and reasons for, addressing asymmetries in information, error costs, or other attributes through asymmetric legal rules in other settings, see Ian Ayres & Robert Gertner, *Strategic Contractual Inefficency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 733 (1992); Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 692–700 (2001); Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187, 199 (1993); Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 823–24 (2012); Saul Levmore & Ariel Porat, *Asymmetries and Incentives in Plea Bargaining and Evidence Production*, 122 YALE L.J. 690, 692–93 (2012); Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 4–5 (1990).

136 Note, in this regard, that the *Califano* case (most heavily relied on to support expansive injunctive relief) addressed *temporary* relief and the importance of providing equitable remedies to forestall irreparable harm in that context. *See* Califano v. Yamasaki, 442 U.S. 682, 705–06 (1979); *see*

has the effect of stopping the government. As a practical, if not legal, matter, it is a *one-sided* bar against actions challenging, or providing a basis for challenging, the court's decision.[137] A more limited injunction allows both the government and affected parties to decide whether to contest that specific judicial judgment in other fora.[138] This effect of nationwide injunctions also raises the political importance of decisions on the grounds for an injunction and judgments on its scope—further removing litigation potentially resulting in nationwide injunctions from ordinary, apolitical legal decision-making of the sort that Tocqueville lauded and our Constitution's framers expected.

B. *Nationwide Judging's Contrast with Federal Judiciary Design*

Two types of limitations—rooted in historical practice and the logic of courts' structure and function—have been offered as the principal means for avoiding the problems associated with nationwide injunctions: geographic restrictions on injunctive relief (confining relief to the district or circuit within which the enjoining court sits) and restricting injunctions solely to the parties in court (or, in appropriate cases, a properly certified class). These generally have been presented as alternatives, with debates over which is the more legally sound approach.[139] Both limitations matter, however, as they are complementary protections against judicial determinations that stray into domains reserved to the other branches of government. And both limiting practices are at odds with the issuance of nationwide injunctions.

1. Geography and the Organization of Federal Courts

The first traditional limitation on injunctive relief in federal courts is geographic. The design of the federal judiciary, from its inception, was for there to be one Supreme Court with national supervisory authority and a number of lower courts responsible for particular regions of the nation.[140]

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also Cass, *supra* note 116, at 247–48 (further addressing the problem of irreparable harm in the context of ongoing judicial review).

137 *See* Berger, *supra* note 36, at 1090–91; Bray, *supra* note 34, at 460–61; Morley, *supra* note 68, at 494; *see also supra* text accompanying notes 68–70.

138 *See* Berger, *supra* note 36, at 1085–88, 1090–93, 1096–1100; Bray, *supra* note 34, at 460, 466–68; Wasserman, *supra* note 122, at 345.

139 *See, e.g.*, Bray, *supra* note 34 at 440; Siddique, *supra* note 36, at 2098.

140 *See* U.S. CONST., art. III, § 1; *see also* THE FEDERALIST NO. 82 (Alexander Hamilton) (explaining the division of authority between the Supreme Court and inferior courts and the consistency of the organization of the federal judiciary with state courts' judicial authority).

Starting with the Judiciary Act of 1789,[141] the federal courts have included district courts and circuit courts, with the circuit courts beginning primarily as trial courts for more serious matters but evolving into intermediate appellate courts.[142] While the details of the courts' jurisdiction and composition have changed over time, the overall pattern of geographically divided judicial authority has remained constant throughout the past 240 years.

a. *Geographic Divisions' Limited Powers*

One aspect of divided authority has been the limitation on lower courts' powers. Each lower court is geographically limited as to what matters can come before it. So, for example, authority over suits initially must be anchored in the involvement (as claimant, defendant, or subject) of persons resident and property located within the relevant district and to claims arising within the particular district, but generally not to matters, persons, and property outside the district.[143] The same limitation arises for circuits of the US Courts of Appeals, which hear appeals from districts located within each circuit's assigned region—thus, the Second Circuit hears cases arising in or concerning entities located in New York while the Seventh Circuit hears matters from Chicago, and so on. Geography historically restricted the scope of jurisdiction and authority for all courts, at least for those exercising temporal power necessarily restricted by the extent of the sovereign's control.

The same limitation seemed entirely natural to those who set the template for the federal judiciary, despite the broader reach of national power.[144] That limitation is reflected, among other things, in the original residence requirements for judges (who, starting with the 1789 Act, were required to live in the assigned district),[145] allocation of jurisdiction to each district and circuit, and—most important for understanding the proper limitations on injunctive relief—restrictions on the effect of the courts' rulings.

The practice has long been that courts in one circuit are not bound to follow decisions of those in another circuit.[146] While there are different

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141 Judiciary Act of 1789, ch. 20, §§ 3–4, 1 Stat. 73, 73–74.

142 *See* ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 201–11 (2d ed. 2002); RUSSELL R. WHEELER & CYNTHIA HARRISON, CREATING THE FEDERAL JUDICIAL SYSTEM 4 (2d ed. 1995).

143 *See* 28 U.S.C. § 1391 (2012).

144 *See* WHEELER & HARRISON, *supra* note 142, at 4, 7.

145 Judiciary Act of 1789, ch. 20, § 3, 1 Stat. 73, 73.

146 *See, e.g.*, Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488–89 (1900); *see also* Berger, *supra* note 36, at 1093–95; Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1463 (2010).

views on the historical bases for the practice's development, the Supreme Court has clearly accepted it, and Congress has left it in place.[147]

Limited scope for lower court decisions has obvious benefits. It provides opportunity for other courts (including those whose judges may reflect other regional values and perspectives) to look at the same issues and to consider them in other settings and from other vantages. This both respects the positions of other courts (the *comity* argument for limited effect of federal court decisions) and provides a better foundation for Supreme Court consideration in the event that circuits reach divergent conclusions about the law (the *percolation* argument for limited scope).[148]

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

That power would not be *entirely* on a par with the Supreme Court's; the Supreme Court still could exercise its prerogative to review and reverse the decision of the circuit. However, the first circuit to rule on a matter would attain powers consciously allocated to the Supreme Court. This is especially evident given the enormous difference between the caseload of the Supreme Court and the circuit courts, for a great many matters—truly, for the vast bulk of broadly framed legal questions that come before the federal courts. Wholly apart from its implications for forum shopping, this realignment of authority is clearly at odds with the long-accepted structure of, and constitutional design for, the federal judiciary.[149]

b. *Limited Scope: Government Non-Acquiescence*

The existence of regional courts and the deeply embedded practice of rejecting binding intercircuit precedent also fits judicial recognition of government agencies' freedom to decide whether to accede to a decision of one circuit in activities taking place in (or having effect in) other circuits

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147 *See* John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 504–05 (2000).

148 *See, e.g.*, United States v. Mendoza, 464 U.S. 154, 160 (1984); Califano v. Yamasaki, 442 U.S. 682, 702–03 (1979); Bray, *supra* note 34, at 420–22; Siddique, *supra* note 36, at 2105, 2137; *see also* Harold Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U. L. REV. 881, 907 (1975) (explaining value of percolation for development of the law).

149 *See* Berger, *supra* note 36, at 1093–1101; Dobbins, *supra* note 146, at 1453; *see also* Estreicher & Revesz, *supra* note 65, at 683, 735.

(the practice of "intercircuit nonacquiescence").[150] This permits more politically responsive government officials to determine what weight to give a court's decision outside the court's assigned jurisdiction, a determination that encompasses the policy-based assessments of the value of national uniformity, the strength of the government's position, the benefits of contesting an issue in other jurisdictions, and even the strategic questions respecting the support the agency might receive from politicians and from the public.[151]

The value of any of these practices may be debated, but it should not be open to debate that *the structure of the federal judiciary—its separation into geographically distinct circuits and districts—cannot easily be reconciled with the use of nationwide injunctions outside extraordinary circumstances.* The structure that supports rejection of binding effect for decisions outside the deciding circuit, both for courts and for government agencies, is at odds with virtually *all* aspects of nationwide judging at the lower court level.

c. *Special Cases: Exclusive Jurisdiction*

To be sure, there may be special cases (or, more accurately, categories of cases) in which uniformity in determinations respecting a matter is prized over the benefits of regionally limited decisions. This includes the benefit of allowing consideration of the critical issues to be informed by a larger number of judges from different perspectives, making judgments in circumstances framed by different factual settings. For example, some issues—such as the legality of a Federal Communications Commission allocation scheme for broadcast stations—have enough interconnections among various subparts that it may make sense to concentrate authority in one court, rather than having each part of the scheme contestable in the venue where a given station is allocated (or where allocation to another place blocks a station assignment).[152]

For these special cases, Congress can choose to assign the sole authority of initial appellate review to a specific court. It has, for example,

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150 *See* Davies, *supra* note 65, at 71–75 (defending intercircuit nonacquiescence despite doctrine's costs); Estreicher & Revesz, *supra* note 64, at 735–41, 736 n.275 (explaining reasons for intercircuit nonacquiescence and declaring that, while intercircuit nonacquiescence is even more soundly grounded than the related rejection of intercircuit stare decisis, "the absence of intercircuit stare decisis is now firmly embedded in the legal landscape").

151 *See, e.g.*, Davies, *supra* note 65, at 71–75; Estreicher & Revesz, *supra* note 65, at 735–41; Rogers, *supra* note 125, at 84, 97; Whittington, *supra* note 125, at 447–55.

152 *See* 47 U.S.C. § 307 (2012) (authorizing allocation of stations); 47 U.S.C. § 402(b) (authorizing exclusive review authority vested in US Court of Appeals for the DC Circuit); FCC v. Pottsville Broad. Co., 309 U.S. 134, 144 (1940).

assigned exclusive jurisdiction over certain patent issues to the Court of Appeals for the Federal Circuit[153] and review of various administrative decisions to the DC Circuit.[154] Making the DC Circuit the exclusive venue for challenges to government actions that almost exclusively take place in Washington, DC, could fit the broader pattern of geographically limited assignments of judicial power, but the DC Circuit's exclusive authority plainly precludes suits that could be brought in other venues.[155]

Statutory assignment of exclusive jurisdiction to one court represents a commitment—made by the constitutionally appropriate body through constitutionally specified means—to entrust nationwide authority over those matters to that entity and, necessarily, to allow some remedies with nationwide effect to issue from that court. So, for example, a decision of the DC Circuit respecting the legality of an agency action would have broader effect than a declaratory judgment from another court. If the DC Circuit determines that a rule adopted by the Federal Communications Commission exceeds the agency's authority, that decision almost invariably leads to the court vacating the rule.[156]

The creation of special courts with exclusive, nationwide authority, however, is exceptional. The general understanding, consistent with the design of geographically composed courts, is that courts below the Supreme Court do not have—and certainly should not presume to assert—power to impose their view of a given matter of law on other courts across the United States, or on government officials operating in

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153 *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 127, 96 Stat. 25 (1982) (codified as amended at 28 U.S.C. § 1295 (2012)). In addition to its jurisdiction over issues of patent law, the Federal Circuit (which is the Article III successor to the Court of Customs and Patent Appeals) has exclusive jurisdiction over a collection of other matters deemed to be specially benefitted by decisions that have nationwide uniformity. The benefit of such specialization has been much debated. *See generally* Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437 (2012); Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619 (2007); Diane P. Wood, *Is It Time to Abolish the Federal Circuit's Exclusive Jurisdiction in Patent Cases?*, 13 CHI.-KENT J. INTELL. PROP. 1 (2013).

154 *See* Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131, 143 (2013) (discussing and cataloging provisions dealing with DC Circuit review and noting that there are 130 provisions in the U.S. Code respecting DC Circuit jurisdiction and that "over a third of those jurisdictional provisions grant exclusive jurisdiction to the D.C. Circuit").

155 *See id.*

156 *See, e.g.*, Verizon v. FCC, 740 F.3d 623, 659 (D.C. Cir. 2014); Comcast Corp. v. FCC, 600 F.3d 642, 661 (D.C. Cir. 2010); *see also* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 533 (1985); Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 298 (2003) (describing agency decisions found to be unlawful "routinely vacated" as part of a practice that was "generally accepted and essentially taken for granted").

and affecting persons in other parts of the United States.[157] This long-accepted understanding of the limitations on lower courts is squarely at odds with the assertions of authority inherent in most nationwide injunctions.

2. Injunctions Covering Non-Parties: Stretching Equity

The second restriction is that injunctions historically have been limited to protecting *specific rights of parties before the court*, offering relief deemed necessary to protect those rights when standard legal remedies (such as compensation after the fact) are inadequate.[158] Like other equitable remedies, injunctions were originally conceived as remedies to be deployed only in unusual circumstances and restricted to particular settings where courts could examine and balance the harms from granting or withholding that remedy.[159] Although the "special" nature of injunctions has diminished (or evaporated),[160] courts still understand that the remedy's capacity to impose different and more daunting constraints on subjects' behavior (including contempt punishment for their violation) cautions against treating injunctions as matters of course.[161]

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

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157 Condemnation of remedies that effectively arrogate broad power over law interpretation to a single federal district (or even circuit) court, outside unusual circumstances, does not preclude any instances in which such remedies are appropriate. *See supra* text accompanying notes at 116–20. However, it does suggest a different lens for evaluating remedial propriety than that adopted by a number of other commentators. *See* Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1701–07 (2019).

158 *See* Leubsdorf, *supra* note 17, at 527–29; Rendleman, *supra* note 17, at 1398; *see also* Michael T. Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 620–23 (2017) (distinguishing cases in which an injunction protecting the parties before the court necessarily covers others because the rights at issue are not divisible, as might be the case where redistricting of an electoral jurisdiction is in issue, from the ordinary case where rights are divisible, in which case an injunction would not typically cover non-parties).

159 *See* Leubsdorf, *supra* note 17, at 528; Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 346–48 (1981); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 918–21 (1987). Although discretion was part-and-parcel of decision on equitable remedies, injunction did have its counterpart in the writ of prohibition. *See* FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 625 (2d ed. 1898).

160 *See* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE vii–x (1991).

161 *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008) (finding an injunction is "an extraordinary remedy never awarded as a matter of right"); *see also* Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 156–57 (2010); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

of potential actions affecting anyone anywhere whose concerns might prove similar to those of the parties actually before the court.[162] In the same vein, Federal Rule of Civil Procedure 65(d)(2), which makes injunctive relief applicable to non-parties who have actual notice of the injunction and are "in active concert or participation with"[163] parties subject to the injunction, manifestly was designed to prevent circumvention of relief directed to specific persons and settings, not to create a new mechanism for limiting government.[164]

Allowing such remedies as a matter of course in challenges to statutes, regulations, and similar broadly applicable administrative actions converts the injunction from a narrow mechanism for protecting individual rights in extraordinary circumstances to a tool for judicial control over political decision-making.[165] While a *scalpel* and a *chainsaw* both cut, they are vastly different instruments suited to extremely different uses. Arguments for the similar legitimacy of injunctive relief in both settings—narrow use to protect individual litigants' rights and broad use to intervene in political conflicts on behalf of anyone affected by the currently prevailing legal rules[166]—fail to grasp this essential distinction.

Concerns over potential misuse of equitable power, allowing it to be used as a vehicle for broad, discretionary judicial decisions respecting the actions of constitutionally empowered officials—officials whose positions make them responsive to political inputs either directly or indirectly—have been part of the fabric of constitutional discourse for the past 220 years. These concerns were raised at the outset by Anti-Federalists during debates over ratification of the Constitution.[167] And they remain central

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162 *See* FED. R. CIV. P. 65(d)(2); LAYCOCK, *supra* note 3, at 275–76; Berger, *supra* note 36, at 1075–76; Bray, *supra* note 34, at 459–60, 469–71; Morley, *supra* note 158, at 646–47; Wasserman, *supra* note 122, at 359–60; *see also* Int'l Refugee Assistance Project v. Trump, 137 S. Ct. 2080, 2090 (2017) (Thomas, J., concurring in part and dissenting in part); Woolhandler & Nelson, *supra* note 21, at 702–03.

163 FED. R. CIV. P. 65(d)(2).

164 *See* Regal Knitwear Co. v. NLRB, 324 U.S. 9, 13–15 (1945); United States v. Philip Morris USA Inc., 566 F.3d 1095, 1136 (D.C. Cir. 2009). One commentator on this paper noted that judicially imposed requirements that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order," create special difficulties for government officials, particularly when combined with any ambiguity about the operation of Rule 65(d)(2). GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 386 (1980) (citing Walker v. City of Birmingham, 388 U.S. 307, 314–21 (1967)). These difficulties are multiplied exponentially when the injunction at issue is nationwide and unlimited. Although this is an important issue, exploring the soundness of the rule from *Walker* is beyond the scope of this article.

165 *See* Morley, *supra* note 158, at 652–53.

166 *See, e.g.*, Spencer E. Amdur & David Hausman, Response, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 50 (2017); Siddique, *supra* note 36, at 2135.

167 *See* BRUTUS NO. XI, supra note 15, at 293–95.

today, playing a prominent role, for example, in the objections to broad, nationwide ("universal") injunctions articulated by Justice Thomas in his concurrence in *Trump v. Hawaii*.[168] Justice Thomas' opinion expresses his apprehension that permitting broad injunctive remedies directed at government permits courts freedom, unfounded in law, to reshape decisions committed to the political branches.[169] He stresses that this freedom is contrary to the history of equitable remedies and to the (until recently) long-settled understanding of limitations on federal courts.[170]

The Supreme Court emphatically made a similar point in *United States v. Mendoza*.[171] There, the Court explained differences between government and other entities, including the fact that, for the government, even basic litigation decisions (such as whether to appeal or accept a lower court's judgment) implicate political-policy determinations.[172] Courts should not adopt remedies that intrude into the political-policy domain, either directly or by facilitating one administration's or party's ability to freeze policy determinations going forward.[173] Concerns about judicial overreach—about rules that transfer to courts powers that are constitutionally reserved to other branches of government, or that permit judges to exercise influence over political decision-making beyond what is necessary to adjudicate the rights of parties before the court—should be paramount in determining the scope of permissible injunctive authority.[174]

Similarly, before Justice Antonin Scalia moved from the US Court of Appeals for the DC Circuit to the Supreme Court, he cautioned that courts should be careful in issuing declaratory judgments respecting limitations on federal officials' authority. Writing for the court, then-Judge Scalia remonstrated that "all the bases for nonmonetary relief—including injunction, mandamus and declaratory judgment—are discretionary."[175] He then added:

> [D]eclaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as injunction or mandamus,

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168 138 S. Ct. 2392, 2424–29 (Thomas, J., concurring).

169 *See id.*

170 *See id.*

171 464 U.S. 154 (1984).

172 *See id.* at 160–63.

173 *See id.* at 161–62.

174 Some authors critically examine the costs of nationwide injunctions in lost opportunities for consideration of questions by other courts (percolation) and risks of contradictory orders, but clearly consider potential risks of expanding judicial discretion overstated. *See, e.g.*, Glicksman & Hammond, *supra* note 157, at 1701–07.

175 Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207–08 (D.C. Cir. 1985).

> since it must be presumed that federal officers will adhere to the law as declared by the court. Such equivalence of effect dictates an equivalence of criteria for issuance.[176]

Judge Scalia cited an opinion by Justice Hugo Black for the Supreme Court (albeit from a different context, involving intervention in state criminal proceedings) which had asserted that "even if declaratory judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same impact as a formal injunction would."[177] He then concluded that, consequently, "the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment."[178]

The notes of caution sounded by Justice Black, the *Mendoza* Court, Justice Scalia, and Justice Thomas all point in the same direction: judges should be wary of using equitable remedies in settings where the result is inevitably to expand courts' reach into decisions more readily situated in the province of executive branch officials.[179] Further, despite then-Judge Scalia's comparison of declaratory judgments to injunctions, the latter remedy, as noted earlier, plainly holds the prospect of greater restraint on officers subject to it.[180] That observation only increases the importance of the caution he, among others, recommended in shaping equitable remedies.

3. The APA's "Set Aside" Provision: Directive as Distraction

The Administrative Procedure Act, however, has language that might be construed to authorize precisely the authority critiqued above, for courts to exercise broad control over executive branch decision-making.

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176 *Id.* at 208 n.8.

177 Samuels v. Mackell, 401 U.S. 64, 72 (1971). No Justice dissented and none of the concurring Justices demurred on the point for which this opinion was cited.

178 *Id.* at 73.

179 Some scholars reject characterization of declaratory judgments as equitable remedies. *See, e.g.*, LAYCOCK, *supra* note 160, at 14; Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 542, 561–62 (2016). However, describing declaratory judgments as equitable remedies has been the more common position. *See* Rendleman, *supra* note 17, at 1434. In all events, the terminological debate does not affect the considerations discussed here, as the questions revolve around the proper scope of discretion for judges and other officials. For further discussion of the division between law and equity and its implications, see, for example, John C. P. Goldberg & Benjamin C. Zipursky, *From* Riggs v. Palmer *to* Shelley v. Kramer*: The Continuing Significance of the Law-Equity Distinction*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY (Dennis Klimchuk et al. eds., Oxford Univ. Press 2018) (forthcoming), https://perma.cc/G3KG-KP3X.

180 *See supra* notes 25, 158–64 and accompanying text.

Section 706 of the APA instructs that in challenges to agency actions, courts:

> shall hold unlawful and set aside agency action . . . found to be—
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or]
>
> (D) without observance of procedure required by law. . . .[181]

This directive to "hold unlawful and set aside agency action" that fails any of a series of tests for lawfulness could be read as if the required judicial response applicable to most successful challenges to administrative decisions is sweeping invalidation of those decisions' products.[182] On this reading, the further assumption could be made that a nationwide injunction is the proper mechanism for setting aside an administrative action found to contravene one of the listed items in Section 706.[183]

This conclusion is contestable on two grounds. Most obviously, the conclusion that a nationwide injunction is the right means for setting aside an agency action found to be unlawful does not follow from the predicate that "set aside" means to hold the agency action globally unenforceable. A number of different remedies could be consistent with a conclusion of broad unenforceability. Notably, allowing a declaration of illegality to be enforced by having those targeted for enforcement enter pleas based on a court's declaration of illegality—that is, providing a basis for *resisting* enforcement rather than *precluding* enforcement—would provide a different route to the same result.[184]

The less obvious problem lies in the predicate that the set aside language in Section 706 necessarily requires that any agency action that fails one of the tests in that section *must* be globally invalidated. That reading certainly *could* be consistent with some pre-APA decisions that arguably treat administrative actions found to be unlawful as conclusively

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181 5 U.S.C. § 706(2) (2012).

182 *See* Amdur & Hausman, *supra* note 166, at 54.

183 *See, e.g.*, Earth Island Inst. v. Ruthenbeck, 490 F.3d 687, 699 (9th Cir. 2007); Amdur & Hausman, *supra* note 166, at 54.

184 The relation between declaratory and injunctive relief returns to concerns raised by then-Judge Scalia in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1986); *see also supra* text accompanying notes 175–78.

invalid in all instances.[185] And it certainly is consistent with many post-APA decisions.[186]

That reading, however, is not the only or even the most natural reading of the APA's instruction. When the APA was written and enacted, it was generally understood that courts would *not apply* laws that violated the strictures listed in Section 706 to parties before them.[187] Although some specific actions of administrative agencies could, indeed, be nullified by reviewing courts, those tended to be in the nature of ratemaking (or similar acts of utility governance) or administrative enforcement orders.[188]

These sorts of administrative activity—those that initially were subject to "set aside" provisions—essentially involved agencies acting in lieu of judicial process, which historically had been used to implement

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185 Some scholars who cite these cases as providing a basis for reading the APA's directive as providing for global invalidation of regulations stop short of asserting that the law mandates that *every* rule found unlawful be globally invalidated. *See, e.g.*, Ronald M. Levin, *The National Injunction and the Administrative Procedure Act*, REG. REV. (Sept. 18, 2018), https://perma.cc/SC8U-ZKGA.

The case cited as supporting reading Section 706 as authorizing—if not mandating—global invalidation, *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407 (1942), shows the difficulty of sorting through this area of law. The *CBS* case plainly treats an order adopting a regulation as subject to review under a provision that allows the order, if invalid, to be set aside. *Id.* at 423–24. The Court, however, takes great pains to establish the exceptional nature of the case, distinguishing "the great variety of administrative rulings which, unlike this one, are not reviewable . . . because they do not adjudicate rights or declare them legislatively," a signal that the general run of substantive regulations, which operate "legislatively" in pronouncing general rules, would not be subject to the set-aside provision. *Id.* at 424.

In another case, the administrative order at issue was found valid, providing no support for the set-aside-as-global-invalidity argument (although seemingly assuming that a different conclusion would have provided grounds for invalidating the order at issue, involving accounting rules for ratemaking for communications common carriers). *See* American Tel. & Tel. Co. v. United States, 299 U.S. 232, 247 (1936). This is both the wrong outcome and, in light of the difference between ratemaking for common carriers—in many instances setting prices for competitors who are required to charge on the same basis for their services—and other matters addressed by regulation, the wrong issue to sustain a broader argument on invalidating administrative rules.

Although Professor Levin and I do not agree on all points respecting the "set aside" language, we agree that the pre-APA precedential support for stronger versions of global invalidation is weak. *See* Levin, *supra* note 185. Further, despite criticizing reliance on *CBS* and *AT&T*, given Levin's generally modulated reading of the APA's provisions and his general care across a range of scholarly endeavors, the complaint is less about Levin's position than about the complexity of the issue debated here as well as the difficulty of identifying clear support for the position that "set aside" necessarily means global invalidation in all settings.

186 *See, e.g.*, FCC v. Midwest Video Corp., 440 U.S. 689 (1979); *see also* Walker, *Ordinary Rule*, *supra* note 3, at 1567, 1602.

187 *See* Bray, *supra* note 34, at 438 n.121; Levin, *supra* note 156, at 310–15.

188 *See, e.g.*, Hepburn Act of 1906, ch. 3591, § 5, 34 Stat. 584, 592 (1906); Federal Trade Commission Act of 1914, ch. 311, § 5, 38 Stat. 717, 720 (1914); *see also* Mitchell, *supra* note 14, at 1013 n.320.

constraints on common carriers for hire and on business activities in restraint of trade.[189] In that context, courts' exercise of the equivalent of judicial supervisory authority over lower court actions could be seen as consistent with traditional approaches to the types of administrative actions being reviewed.[190] Moreover, some of the types of action subject to these provisions, like ratemaking, lent themselves to global constraints. After all, if a common carriage rate was wrongly set, nondiscrimination considerations (requiring uniform charges for customers, who often competed with one another) could not be accommodated with narrower remedies.[191]

Beyond that, because the language in the APA was also written at a time when rulemaking was far less common and its characteristic focus far narrower,[192] the litigation that Section 706's review provisions addressed was expected to involve requests to have *specific decisions* set aside or to have regulations that would apply to a narrow set of entities or circumstances *declared unlawful and* therefore *not applied to them*. These expectations are far removed from one of broad-based rule invalidation.[193]

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189 *See* Norman F. Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411, 413–18 (1927); Oliver Wendell Holmes, Jr., *Common Carriers and the Common Law*, 13 AM. L. REV. 609, 618, 625, 630 (1879); William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 381–85 (1954).

190 *See, e.g.*, Chicago & Alton R.R. Co. v. Kirby, 225 U.S. 155, 162–66 (1912); Wight v. United States, 167 U.S. 512, 515–17 (1897). For other, early applications of similar approaches to supervision of administrative controls over common carriage regulation, see, for example, New Orleans G. N. R. Co. v. R.R. Comm'n of La., 53 So. 322, 323–24 (La. 1910).

191 For explication of the economic rationales for, and critiques of, traditional common carriage restrictions on rate differentials, see, for example, 2 ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 174–88 (1971); Kenneth W. Dam, *The Economics and Law of Price Discrimination: Herein of Three Regulatory Schemes*, 31 U. CHI. L. REV. 1, 15–29, 33–36, 43–48 (1963).

192 *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 523 (2002). The limited focus of administrative rulemaking flowed from historical restrictions on executive power, including the power to issue regulations and the scope of permissible regulations. *See* HAMBURGER, *supra* note 112, at 85–88; Cass, *supra* note 112, at 155–58. For additional arguments for a narrow reading of the "set aside" language, focusing on the limited role of rulemaking and absence of any nationwide injunctions at the time of the APA's adoption, see Sam Bray, *Does the Administrative Procedure Act Authorize National Injunctions?*, WASH. POST: VOLOKH CONSPIRACY (Nov. 20, 2017), https://perma.cc/JW2S-5RB2. *See also* Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1140, 1145–47 (2001).

193 Similar considerations have supported resistance to facial (rather than as-applied) challenges both to statutes and to administrative rules. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 300–01 (1993); United States v. Salerno, 481 U.S. 739, 745, 751–52 (1987); Amfac Resorts, L.L.C. v. Dep't of Interior, 282 F.3d 818, 826 (D.C. Cir. 2002); Aaron L. Nielson, *D.C. Circuit Review – Reviewed: Thoughts from Judge Randolph*, YALE J. REG.: NOTICE & COMMENT (Dec. 8, 2017), https://perma.cc/T87D-HCXY.

The expectations and understandings contemporaneous with the APA's adoption also explain why the same "hold unlawful and set aside" language also instructs courts on what to do with agency actions based on findings found to be "unsupported by substantial evidence" or "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."[194] Those grounds for setting aside administrative actions hardly look like a fit with language comprehending—much less *mandating*—global invalidation of agencies' policy-based decisions.

As noted above, a court such as the DC Circuit, where it enjoys exclusive jurisdiction over review of agency actions, stands in a different position. The impact of a court's remedies in that setting necessarily will be more global—when it finds an agency action unlawful for reasons unrelated to the specific application of an agency rule, precedent, or practice, that court's decision not to apply the law has much the same practical effect as a decision to hold the law invalid. Yet, even there, it will not be quite the same as deeming the rule or practice to be devoid of all legal effect.[195] More to the point, that impact is a function of the court's monopoly over review, not of the APA's direction on what reviewing courts should do. One last note on the special case of the DC Circuit: as authors of a review of its jurisdiction observe, until the 1960s, federal courts located in the District of Columbia were the only courts in the federal system recognized as having authority to issue writs of mandamus, the traditional tool for compelling action by other officers,[196] although equitable remedies (including injunctions) were available through other courts.[197]

At the end of the day, there is little to support reading the APA as a universal directive for courts to abandon traditional constraints on

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194 5 U.S.C. § 706(2)(E)–(F) (2012).

195 *See, e.g.*, Mitchell, *supra* note 14, at 940, 1003, 1014 (explaining differences between, on the one hand, holding a law invalid in its application in a particular case or declaring it unconstitutional in some respect that bars its application, and, on the other hand, deeming it never to have had any legal status or effect).

196 *See* Fraser et al., *supra* note 154, at 135.

197 *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 125, 148 (1998); Levin, *supra* note 156, at 317–18. The background availability of equitable remedies prior to enactment of the APA has given rise to different views of the degree to which the passage of a statute with specific language respecting administrative authority and the role of judicial review should be seen as changing remedial authority. Professor Duffy, for example, emphasizes the importance of grounding law interpretation in the text of the statute, while Professor Levin favors greater reliance on prior administrative common law and the benefits of continued evolution. *Compare* Duffy, *supra* note 197, at 130–31, *with* Levin, *supra* note 156, at 309–12, 317–18. *See also* Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1 (2011); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012).

equitable remedies.[198] This does not mean that courts are flatly prohibited from vacating rules found to be unlawful and remanding the matter before the court to an agency to revise (and to cure the defects identified). Yet, attention to limits on equitable remedies is consistent with the text and history of the law. The evident understanding contemporaneous with the APA's adoption was that the APA did not displace ordinary tests for application of equitable remedies.[199] The Attorney General's Manual, regarded as a reasonably authoritative statement of the administration's contemporaneous reading of the law, makes that point explicit and also plainly states the broader point that the APA's provisions on scope of review, which contain the "set aside" language relied on to support changing the law, were understood merely to "restate[] the present law as to the scope of judicial review."[200]

Cautionary advice cited above for courts to tread lightly when issuing such remedies, injunctions most definitely included, was offered over a period of more than forty years by Justices Black, Rehnquist (for the unanimous *Mendoza* court), Scalia, and Thomas.[201] The advice of those Justices is thoughtful and is consistent both with constitutional structure and the principles underlying and circumstances surrounding adoption of the APA. That counsel, which is in keeping with—and certainly not clearly contradicted by—the APA's text, should be heeded by federal judges today.

Conclusion

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

The traditionally respected limits on the scope of federal court remedies reinforce Tocqueville's reflections on the operation of the American legal system with regard to courts and constitutionally designed

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198 This conclusion is essentially a middle ground between positions taken by other scholars who have urged that current settings require, if anything, even stricter limits on the exercise of equitable discretion (given the difference between the judicial system of today and the system that traditionally gave equitable discretion to only one officer in any jurisdiction), or (harking back to older understandings of equitable discretion) require broader scope for discretion than some courts now grant. *Compare* Bray, *supra* note 34, at 438 n.21, *with* Levin, *supra* note 156, at 309–18.

199 *See, e.g.*, U.S. DEP'T. OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 106–07 (1947).

200 *Id.* at 107–10.

201 See *supra* notes 168–80 and accompanying text.

law-making authority. Tocqueville's comment—that "[w]henever a . . . judge . . . in a tribunal of the United States . . . has refused to apply any given law in a case, that law loses a portion of its moral cogency. . . . and *similar suits are multiplied* until it becomes powerless"[202]—further buttresses his discussion of the way the limited scope of judicial relief (and limited occasions for invoking judicial review) fit broader governance structures for America.[203] The approach Tocqueville recognized as peculiarly fitting the restricted role of the courts and the commitment of political decisions to other branches stands as a fundamental contradiction of the use of nationwide injunctions.

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

Of course, where appropriately raised, courts should decide questions respecting the lawfulness of executive actions and the constitutionality of legislation. But the *remedy* for actions found to exceed legal authority normally should be restricted to the parties before the court. Where broader reach is required to give practical effect to the court's decision *as to the parties before the court* (and is justified by the traditional balance of considerations for granting equitable remedies), legislation should specifically authorize broader relief and courts should ascertain the minimum scope required for injunctive relief.

Similarly, just as declarations of rights by a district court or a circuit do not bind courts outside the district or the circuit, injunctions generally should be limited to the geography that defines an issuing court's jurisdiction. This general rule does not cover judicial directions to parties violating contract rights or property rights (think of patent infringement) that extend outside the geographic jurisdiction of a court—the sort of problems that arise in private suits resting on federal law or on private suits brought under diversity jurisdiction. It does, however, *especially* apply to commands to government officials, which is the particular focus of this Article and the setting in which interference with national governance structure is most likely.

Even in the context of suits against the government, special exception should be made for temporary relief in cases where a stay of regulatory

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202 TOCQUEVILLE, *supra* note 10, at 104–05 (emphasis added).

203 *See id.* at 100–06; THE FEDERALIST NO. 78 (Alexander Hamilton).

action is both well-grounded legally and is necessary to avoid irreparable harm *to the party bringing the action*—not only because of the action's application to the moving party, but also because of effects from its application to other competitors subject to the same regime. This exception does not make "complete relief" the overriding consideration, but does recognize the importance of preserving opportunities for meaningful judicial review. While some regulatory actions address problems that require immediate action, administrators have incentives to overstate the benefits of immediate action and to understate the impact of such action on limiting effective review.

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