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## Nationwide Injunctions

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## NATIONWIDE INJUNCTIONS

Russell L. Weaver\*

Conversation overheard in Heaven: “Saint Peter, Saint Peter, come quick, God thinks that he is a federal judge.”<sup>1</sup>

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Although U.S. federal courts have issued nationwide injunctions for nearly half-a-century, such injunctions have become quite commonplace in recent decades.<sup>2</sup> Although nationwide injunctions can be issued against private entities, they are commonly used to enjoin governmental entities (during both Democratic and Republican administrations) from enforcing laws and policies.<sup>3</sup> The distinguishing feature of such injunctions is that they purport to apply not only to the named plaintiffs in the litigation but to everyone else who might be subject to the challenged law or regulation anywhere in the country.

Scholarly views regarding the wisdom and desirability of nationwide injunctions vary. Some question the appropriateness of such injunctions. For

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<sup>1</sup> Unknown origin.

<sup>2</sup> Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 420 (2017) (suggesting that the national injunction is a “recent development in the history of equity” and one that did not become prominent until the second half of the twentieth century).

<sup>3</sup> See *Monsanto v. Geersten Seed Farms*, 561 U.S. 139 (2010); *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *Scheidler v. Nat’l Org. for Women, Inc.*, 547 U.S. 9 (2006); *Nat’l Credit Union Admin. v. First Nat’l Bank & Tr. Co.*, 522 U.S. 479 (1998); *Immigration & Naturalization Servs. v. Nat’l Ctr. for Immigrants Rights, Inc.*, 502 U.S. 183 (1991); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871 (1990); *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305 (1985); *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841 (1984); *Califano v. Yamasaki*, 442 U.S. 682 (1979).

example, Professor Samuel Bray has flatly stated that federal court injunctions should protect “the plaintiff vis-a-vis the defendant” and “should not constrain the defendant’s conduct vis-a-vis nonparties.”<sup>4</sup> Professor Douglas Laycock generally agrees, arguing that “the court in an individual action should not globally prohibit a government agency from enforcing an invalid regulation; the court should order only that the invalid regulation not be enforced against the individual plaintiff.”<sup>5</sup> Others disagree. For example, Professor Amanda Frost has argued that in “some cases, nationwide injunctions are the only means to provide plaintiffs with complete relief, or to prevent harm to thousands of individuals who cannot quickly bring their own cases before the courts.”<sup>6</sup> She identifies three categories of cases where she believes that nationwide injunctions are appropriate: when such injunctions “are the only method of providing the plaintiff with complete relief; when they are the only means of preventing irreparable injury to individuals similarly situated to plaintiffs; and when they are the only practical remedy because a more limited injunction would be chaotic to administer and would impose significant costs on the courts or others.”<sup>7</sup> She argues that, when “nationwide injunctions can serve one or more of these goals, the benefits of such an injunction may outweigh the costs.”<sup>8</sup>

This short article examines the wisdom and desirability of allowing trial courts to enter nationwide injunctions, as well as how such injunctions have fared in the U.S. Supreme Court.

## I. THE DEVELOPMENT OF NATIONWIDE INJUNCTIONS

Nationwide injunctions are a relatively recent phenomenon. Indeed, the “older English and American practice suggested that an injunction should restrain the defendant’s conduct vis-à-vis the plaintiff, not against the entire world.”<sup>9</sup> In the U.S., no nationwide injunctions were issued in the nineteenth century.<sup>10</sup> For example, in *Georgia v. Atkins*,<sup>11</sup> the State of Georgia sought to challenge a federal tax imposed on it. In enjoining the tax, the court did not

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<sup>4</sup> Bray, *supra* note 2, at 469.

<sup>5</sup> Howard Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335, 339 (2018) (internal quotations omitted) (“[C]ourts should not issue injunctions protecting beyond the plaintiffs to the case. An injunction in a constitutional case should protect the plaintiffs from government enforcement of the invalid law against them; it should not prohibit the government from enforcing the law against the universe of non-parties to the litigation, absent a new or broader injunction protecting them.”).

<sup>6</sup> Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1065 (2018).

<sup>7</sup> *Id.* at 1090.

<sup>8</sup> *Id.*

<sup>9</sup> Bray, *supra* note 2, at 420.

<sup>10</sup> *Id.* at 428.

<sup>11</sup> *Georgia v. Atkins*, 10 F. Cas. 241 (C.C.N.D. Ga. 1866).

enjoin the government from enforcing the tax against other states, or even specifically against the State of Georgia, but rather enjoined only the particular tax at issue in that case.<sup>12</sup>

Professor Bray identifies the U.S. Supreme Court's holding in *Frothingham v. Mellon*,<sup>13</sup> as illustrating the early judicial aversion to nationwide injunctions.<sup>14</sup> In that case, the Court emphasized the limited nature of federal court jurisdiction:

If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned.<sup>15</sup>

The Court emphasized that “no precedent sustaining the right to maintain suits like this has been called to our attention.”<sup>16</sup>

Even the wave of injunctions issued against New Deal legislation in the 1930s (some 1,600 injunctions in all) did not involve nationwide injunctions.<sup>17</sup> Indeed, the only early injunction that departed from this approach was the lower-court injunction issued in *Hammer v. Dagenhart*,<sup>18</sup> but that injunction extended only to an entire federal district.<sup>19</sup>

Despite the early “uncertainty” and “discomfort” with the idea of using national injunctions, such injunctions had become “an ordinary part of the remedial arsenal of the federal courts” by the 1980s and 1990s.<sup>20</sup> Since then, courts have issued nationwide injunctions in an extraordinary array of contexts: to prevent the planting of an altered strain of alfalfa,<sup>21</sup> to prohibit the U.S. Forest Service from exempting salvage timber sales from notice and comment processes,<sup>22</sup> to prohibit protest activities at abortion clinics,<sup>23</sup> to

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<sup>12</sup> See Bray, *supra* note 2, at 428.

<sup>13</sup> *Frothingham v. Mellon*, 262 U.S. 477 (1923).

<sup>14</sup> See Bray, *supra* note 2, at 431–32.

<sup>15</sup> *Frothingham*, 262 U.S. at 487.

<sup>16</sup> *Id.*

<sup>17</sup> See Bray, *supra* note 2, at 434–35.

<sup>18</sup> *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

<sup>19</sup> See Bray, *supra* note 2, at 436 (“The federal district judge held the law unconstitutional and granted the injunction the plaintiffs requested—an injunction restraining the enforcement of the statute within the Western District of North Carolina. The injunction thus went further than merely prohibiting enforcement against the plaintiffs.”).

<sup>20</sup> See *id.* at 428.

<sup>21</sup> See *Monsanto Co. v. Geersten Seed Farms*, 561 U.S. 139 (2010).

<sup>22</sup> See *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

<sup>23</sup> See *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9 (2006).

prohibit a credit union from expanding its field of membership,<sup>24</sup> to enjoin the government from imposing release bonds on excludable aliens that barred them from seeking employment,<sup>25</sup> to prohibit the Bureau of Land Management's "land withdrawal review program,"<sup>26</sup> to enjoin a regulation limiting the fees that could be paid to attorneys for handling service connected death or disability benefits cases,<sup>27</sup> to enjoin a federal regulation that denied federal financial aid to students who failed to register for the draft,<sup>28</sup> and to impose procedures on the government in cases involving old age and survivor benefits.<sup>29</sup>

By the time of the Obama and Trump administrations, such injunctions were becoming commonplace. During the Obama administration, a Texas trial court issued nationwide injunctions against President Obama's Deferred Action for Childhood Arrivals (DACA) and his Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA),<sup>30</sup> as well as against his Department of Education's interpretive guidance regarding the treatment of transgender students in public schools.<sup>31</sup> During the Trump administration, such injunctions seem to be issued on almost a daily basis. For example, a judge entered an injunction against President Trump's second Executive Order (EO) suspending for 90 days the right of nationals from six predominantly Muslim countries from entering the United States, suspending for 120 days the United States Refugee Admissions Program (USRAP), and decreasing refugee admissions by more than half.<sup>32</sup> In another case, a trial court entered an injunction against President Trump's order that indefinitely barred entry into the U.S. by nationals from six predominantly Muslim countries (Iran, Libya, Syria, Yemen, Somalia, and Chad),<sup>33</sup> and injunctions have been issued against a Trump administration order denying federal funding to sanctuary cities.<sup>34</sup>

Why have nationwide injunctions become commonplace? Professor Bray points to the Federal Declaratory Judgment Act (FDJA),<sup>35</sup> which was enacted in 1934. He believes that the FDJA encouraged courts to think about

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<sup>24</sup> See *Nat'l Credit Union Admin. v. Nat'l Bank & Tr. Co.*, 522 U.S. 479 (1998).

<sup>25</sup> See *Immigration & Naturalization Servs. v. Nat'l Ctr. for Immigrants Rights, Inc.*, 502 U.S. 183 (1991).

<sup>26</sup> See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990).

<sup>27</sup> See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985).

<sup>28</sup> See *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841 (1984).

<sup>29</sup> See *Califano v. Yamasaki*, 442 U.S. 682 (1979).

<sup>30</sup> See *United States v. Texas*, 136 S. Ct. 2271, 2272 (2015), *reh'g denied*, 137 S. Ct. 285 (2016).

<sup>31</sup> See *Texas v. United States*, 201 F. Supp. 3d 810, 835–36 (N.D. Tex. 2016).

<sup>32</sup> See *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017).

<sup>33</sup> See *Trump v. Hawaii*, 138 S. Ct. 2392, 2404 (2018).

<sup>34</sup> See *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 507 (N.D. Cal. 2017).

<sup>35</sup> The Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202 (2010).

the fundamental validity of statutes and to issue broad injunctions striking down those statutes.<sup>36</sup> In other words, the FDJA promoted facial challenges to laws.<sup>37</sup>

Bray also argues that judges have fundamentally changed the way that they respond to unconstitutional laws: from perceiving that they should strike down unconstitutional laws down as opposed to simply refusing to apply or enforce them.<sup>38</sup> In other words, rather than viewing “courts as preventing or remedying a specific wrong to a person and only incidentally determining the constitutionality of a law, many now see the courts as determining the constitutionality of a law and only incidentally preventing or remedying a specific wrong to a person.”<sup>39</sup> Bray suggests that these shifts have prompted courts to view themselves as vindicating constitutional rights on a national basis.<sup>40</sup> Professor Frost seems to share Professor Bray’s views regarding why nationwide injunctions have become so common place. She argues that:

At its core, the debate over nationwide injunctions is really a debate about the role of the federal courts in the constitutional structure. Are courts primarily intended to resolve disputes between the parties, or do they also declare the meaning of federal law for everyone? To what degree are courts intended to serve as a check on the political branches, and should their authority expand in lockstep with that of Congress and the President?<sup>41</sup>

Bray also suggests that other considerations may have led to a proliferation of national injunctions.<sup>42</sup>

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<sup>36</sup> See Bray, *supra* note 2, at 450.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 451.

<sup>39</sup> *Id.*

<sup>40</sup> That shift matters for the logic of the national injunction. If a court considers a statute inconsistent with the Constitution, and thus *does not apply it*, nothing follows about the remedy. The court has not done anything to the statute. It remains undisturbed. But on the newer conception of what a court does—striking down or setting aside an unconstitutional statute or unlawful regulation—a national injunction begins to have a relentless logic. If a court strikes down a statute, regulation, or order, why should it give it respect by allowing its continued enforcement? Wouldn’t enforcement, anywhere, offend the court’s determination that it was invalid, struck down, *obliterated*? If a law is unconstitutional in all its applications, why should the court permit it to be applied to anyone? Again, reasons can be given for stopping short—ones grounded in equitable remedies, judicial competence, humility, separation of powers, federalism, and so on. But the logic of the national injunction is certainly strengthened by the newer view of what judges do when one law is inconsistent with a higher one, as well as by the metaphorical language used to express that view.

*Id.* at 452.

<sup>41</sup> Frost, *supra* note 6, at 1086–87.

<sup>42</sup> Bray, *supra* note 2, at 452–57.

## II. POLICY CONSIDERATIONS: PRO AND CON

But is it desirable or proper for courts to issue nationwide injunctions at all, much less routinely? There are arguments on both sides of the debate.

### A. *The Need for Uniformity*

One argument that has been advanced in favor of nationwide injunctions is the need for uniform application of the laws, especially immigration laws.<sup>43</sup> Suppose, for example, that the plaintiff in one jurisdiction contends that the current presidential administration (and, to be clear, I am not naming a particular president because it strikes me as preferable to consider the legal issues without regard to the particularity of who holds the presidency at a particular moment) has adopted a policy that is allegedly unconstitutional. The policy is challenged in one jurisdiction by individuals who claim to be aggrieved by that policy, and the trial court decides to issue an injunction against the policy. Arguably, if the government is enjoined in that jurisdiction, it is inappropriate to allow the government to continue to apply and enforce that policy in other jurisdictions. A nationwide injunction precludes the government from doing so by effectively decreeing that the policy cannot be enforced nationwide.<sup>44</sup>

Professor Amanda Frost states the idea a bit differently:

Without nationwide injunctions, the federal courts would be powerless to protect thousands or millions of people from potentially illegal or unconstitutional government policies—policies that can be applied with minimal notice or process, and to many who lack the ability to bring their individual cases before the courts. The need for such injunctions is particularly great in an era when major policy choices are increasingly made through unilateral executive action affecting millions.<sup>45</sup>

### B. *Should Trial Courts Be Imposing Nationwide Uniformity?*

On the surface, this “uniformity” argument seems to make sense. If a law or policy is unconstitutional, then it seems inappropriate to allow the government to enforce that policy in other jurisdictions where suits have not been brought against such policies. The difficulty with the uniformity

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<sup>43</sup> See Wasserman, *supra* note 5, at 338.

<sup>44</sup> See *id.* at 356–59.

<sup>45</sup> Frost, *supra* note 6, at 1069.

argument is that, in a surprising number of cases, trial courts have “gotten it wrong” in their analysis of the legal issues. In other words, they issued nationwide injunctions that should not have been issued, and therefore imposed “nationwide uniformity” based on incorrect or unsound reasoning. Many of these nationwide injunctions have been vacated or modified by the U.S. Supreme Court but not before paralyzing government for a considerable period of time.<sup>46</sup>

Examples of erroneous nationwide injunctions abound. For example, in *Walters v. National Ass’n of Radiation Survivors*,<sup>47</sup> the U.S. Department of Health, Education, and Welfare attempted to recoup overpayments made to beneficiaries under the Social Security Act. The beneficiaries sued claiming that they were entitled to a hearing before an assessment was made against them and asked the court to certify a nationwide class and issue an injunction. The lower court did. However, the U.S. Supreme Court found the “District Court’s analysis of this issue totally unconvincing, and quite lacking in the deference which ought to be shown by any federal court in evaluating the constitutionality of an Act of Congress.”<sup>48</sup> Indeed, the Court went on to hold that the trial court decision inappropriately frustrated the congressional objective of keeping the proceeding simple, and in fact would have greatly complicated the process.<sup>49</sup> In other words, the trial court decision created uniformity across the nation, but the result was uniform inaccuracy.

There are lots of other examples where trial court judges have issued erroneous rulings. *Selective Service System v. Minnesota Public Interest Research Group*<sup>50</sup> involved a suit by male college students challenging a federal statute which denied federal student aid to students who failed to register for the draft. The trial court issued a nationwide injunction, finding multiple constitutional violations. In addition to concluding that the law

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<sup>46</sup> See, e.g., *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (overturning the injunction in part); *Monsanto v. Geersten Seed Farms*, 561 U.S. 139 (2010); *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *Scheidler v. Nat’l Org. for Women, Inc.*, 547 U.S. 9 (2006); *Immigration & Naturalization Servs. v. Nat’l Ctr. for Immigrants Rights, Inc.*, 502 U.S. 183 (1991); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871 (1990); *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305 (1985); *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841 (1984).

<sup>47</sup> *Walters*, 473 U.S. 305.

<sup>48</sup> *Id.* at 326 (“Thus, even apart from the frustration of Congress’ principal goal of wanting the veteran to get the entirety of the award, the destruction of the fee limitation would bid fair to complicate a proceeding which Congress wished to keep as simple as possible.”).

<sup>49</sup> *Id.* at 326 (“It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys. And this additional complexity will undoubtedly engender greater administrative costs, with the end result being that less Government money reaches its intended beneficiaries.”).

<sup>50</sup> *Minn. Pub. Interest Research Grp.*, 468 U.S. at 844.

constituted an unconstitutional Bill of Attainder, the court found that the law infringed the students' privilege against self-incrimination. The U.S. Supreme Court flatly repudiated the trial court's analysis of the constitutional claims, concluding that the statute was constitutional, that there was no Bill of Attainder,<sup>51</sup> and that there was no violation of the plaintiffs' privilege against self-incrimination.<sup>52</sup> As a result, the Court vacated the injunction.

In *Scheidler v. National Organization for Women, Inc.*,<sup>53</sup> the trial court imposed a nationwide injunction restricting protest activities near abortion clinics anywhere in the nation. The ruling was based on a federal statute<sup>54</sup> that prohibited the use of violence in an effort to extort or rob. In *Scheidler*, there were claims that anti-abortion protestors had engaged in violence, but there was no claim that they had done so in order to extort or rob. As a result, the U.S. Supreme Court concluded that the trial court had misconstrued and misapplied the federal statute, and therefore the Court vacated the nationwide injunction.

In *Immigration & Naturalization Service v. National Center for Immigrants Rights, Inc.*,<sup>55</sup> a trial court issued a nationwide injunction precluding the government from enforcing a regulation requiring that release bonds for excludible aliens contain a condition barring them from seeking employment. Among other things, the court held that the regulation was inconsistent with the agency's governing statute and deprived aliens of the right to due process. The U.S. Supreme Court vacated the nationwide injunction on the basis that the agency did not violate its statutory authority.<sup>56</sup>

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<sup>51</sup> *Id.* at 856 (“[W]ithin the meaning of Bill of Attainder Clause, we hold that the District Court erred in striking down § 12(f) as an impermissible attainder.”).

<sup>52</sup> *Id.* at 856–57 (“However, a person who has not registered clearly is under no compulsion to seek financial aid; if he has not registered, he is simply ineligible for aid. Since a nonregistrant is bound to know that his application for federal aid would be denied, he is in no sense under any ‘compulsion’ to seek that aid. He has no reason to make any statement to anyone as to whether or not he has registered.”).

<sup>53</sup> *Scheidler v. Nat’l Org. for Women, Inc.*, 547 U.S. 9 (2006).

<sup>54</sup> 18 U.S.C. § 1951(a) (2019).

<sup>55</sup> *Immigration & Naturalization Servs. v. Nat’l Ctr. for Immigrants Rights, Inc.*, 502 U.S. 183 (1991).

<sup>56</sup> The Court did not reach the constitutional issue because it was not considered or relied on by the court of appeals’ decision affirming the trial court’s decision. In regard to the statutory issue, the Court concluded that:

Taken together all of these administrative procedures are designed to ensure that aliens detained and bonds issued under the contested regulation will receive the individualized determinations mandated by the Act in this context. For these reasons, we conclude that 8 CFR § 103.6(a)(2)(ii) (1991) is consistent with the Attorney General’s statutory authority under § 242(a) of the INA.

*Id.* at 195.

### C. Promoting Judicial Economy

Another argument made in favor of nationwide injunctions is that they promote “judicial economy.”<sup>57</sup> The idea is that, if a law is unconstitutional, rather than force a multitude of lawsuits all over the country, it is preferable to have a single judge hear and decide the issue. The actions of that single court obviate the need for numerous courts all over the country to consider and decide the same issue.

The judicial economy argument was prominent in the analysis of the lower courts in the *Califano* case. The district court decided to certify a nationwide class composed of “all individuals eligible for [old-age and survivors’ benefits] whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing.” The court of appeals held that it would be inappropriate to require the recipients to sue individually because that would result in an unnecessary duplication of actions.<sup>58</sup> In the appellate court’s view, the “issues involved are common to the class as a whole. They turn on questions of law applicable in the same manner to each member of the class,” and the court decided that it is “unlikely that differences in the factual background of each claim will affect the outcome of the legal issue.”<sup>59</sup> Accordingly, the appellate court concluded that the certification of a nationwide class-action “saves the resources of both the courts and the parties by permitting an issue potentially affecting every social security beneficiary to be litigated in an economical fashion under Rule 23.”<sup>60</sup>

### D. Judicial Economy or Precipitous Review?

However, it is not clear that the “judicial economy” argument is sound. In *Califano*, both the appellate court and the trial court mis-analyzed the case and issued a nationwide injunction when one should not have been issued. Moreover, as will be discussed in the next section, because the injunction was issued on a nationwide basis, the actions of the lower courts forced the U.S. Supreme Court to become prematurely, indeed precipitously, involved in the case.

Professor Frost cites the case of *Trump v. International Refugee Assistance Project*<sup>61</sup> as an example of a situation when a nationwide injunction would be appropriate.<sup>62</sup> However, one can argue that *Trump*

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<sup>57</sup> Wasserman, *supra* note 5, at 338.

<sup>58</sup> *Califano v. Yamasaki*, 442 U.S. 682, 690 (1979).

<sup>59</sup> *Id.* at 701.

<sup>60</sup> *Id.*

<sup>61</sup> *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017).

<sup>62</sup> Frost, *supra* note 6, at 1099.

illustrates the exact opposite. Because a nationwide injunction had been issued in that case, the case hurtled through the lower courts at a precipitous pace. After several lower courts enjoined enforcement of a Trump executive order, the Court agreed to hear the government's request for a stay of the injunction on an expedited basis. Although the lower court rulings were not rendered until late May, a petition for certiorari was filed on June 1 and the Court directed that responses to the request for stay be filed just eleven days later on June 12. The Court rendered its decision on the stay just fifteen days later on June 27.

In *Trump*, the lower court's injunction allowed certain types of individuals to enter the country who would not ultimately prevail in the U.S. Supreme Court. Indeed, the *Trump* Court stayed important parts of the trial court's injunction. In particular, it stayed: (1) the preliminary injunctions preventing enforcement of 90-day suspension of entry into the United States with respect to foreign nationals who lacked any bona fide relationship with a person or entity in United States, (2) it stayed the preliminary injunctions that stayed enforcement of a 120-day suspension of entry into the U.S. by refugees, and (3) it stayed preliminary injunctions against enforcement of an annual limit on refugee admissions with respect to refugees who lacked any bona fide relationship with a person or entity in United States. So, the net effect was that the lower court's order erroneously allowed several classes of individuals to enter the United States who should not have been allowed to enter.

Likewise, in *Selective Service System v. Minnesota Public Interest Research Group*, a case involving individuals who challenged the denial of federal student assistance because of their refusal to register for the draft, the case came quite rapidly to the U.S. Supreme Court.<sup>63</sup> The trial court issued a nationwide injunction on June 16, 1983, and the case was before the U.S. Supreme Court on a request for stay on June 29, 1983. In other words, only thirteen days later. Thereafter, the Court heard and resolved the case. In other words, because the trial court issued a nationwide injunction, the case was not able to percolate its way to the U.S. Supreme Court.

In most cases, a more deliberate pace might arguably be preferable. In *Walters v. National Association of Radiation Survivors*,<sup>64</sup> the U.S. Supreme Court quickly involved itself because the trial court purported to enjoin the operation of a federal law "across the country and under all circumstances."<sup>65</sup> As a result, the Court concluded that it had jurisdiction to hear the case on an expedited basis. A concurring Justice O'Connor, joined by Justice Blackmun, argued that the trial court "abused its discretion" in issuing a nationwide

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<sup>63</sup> *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841 (1984).

<sup>64</sup> *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985).

<sup>65</sup> *Id.* at 319.

injunction.<sup>66</sup> Under the circumstances, she agreed that “expeditious” review of the case was warranted,<sup>67</sup> in part because the case was not framed as a class action and did not present itself as a “complex case.”<sup>68</sup> She felt that the plaintiffs’ claims should have been considered individually.<sup>69</sup> A dissenting Justice Brennan, joined by Justice Marshall, suggested that the Court should have refused to hear an interlocutory appeal of a nationwide injunction. He argued that it is important to have a full development of the case so that appellate decisions can be fully informed:

where “grave, far-reaching constitutional questions” are presented: the records developed in preliminary-injunction cases are “simply insufficient” to allow a final decision on the merits; as a matter of fairness the litigants are entitled to a full evidentiary presentation before a final decision is reached; and where questions of constitutional law turn on disputed fact, such decisions must initially be rendered by a district court factfinder.<sup>70</sup>

In *Walters*, the Court’s unwillingness to delay review was undoubtedly attributable to the fact that the trial court decided to enjoin application of the regulation “across the country and under all circumstances,” rather than to simply decide the case before it.

#### *E. Development of the Record*

Also cutting against the uniformity argument is the fact that nationwide injunctions can have an adverse effect on the development of the law. Historically, the government has exercised the ability to “non-acquiesce” in a lower court decision. When the government “non-acquiesces,” it agrees to follow the trial court’s holding in that particular jurisdiction (e.g., if the order is issued by U.S. District Court, the government agrees to follow the order in that district) but reserves the right to maintain the rejected position in litigation in other jurisdictions. When the decision is rendered by a U.S. Court of Appeals, the government might agree to acquiesce in that particular circuit but not in other circuits.

Non-acquiescence plays a very positive role in the judicial process because it helps provide the U.S. Supreme Court with a fuller and more developed record and arguments. As more and more judges hear and decide the issues presented, they clarify the issues and facts and help sharpen the

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<sup>66</sup> *Id.* at 336 (O’Connor, J., concurring).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 337.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 342 (Brennan, J., dissenting).

legal analysis. If all lower courts agree regarding the resolution, the U.S. Supreme Court will frequently refuse to involve itself in the case. On the other hand, if the lower courts disagree, then the facts and issues are often sharpened by conflicting lower court decisions. In other words, adversarial litigation helps ensure that the U.S. Supreme Court receives a more highly developed record.

The U.S. Supreme Court made precisely this point in *Califano v. Yamasaki*.<sup>71</sup> Although the Court upheld aspects of a nationwide injunction in that case, it conceded “the force of the Secretary’s contentions that nationwide class actions may have a detrimental effect by foreclosing adjudication by a number of different courts and judges, and of increasing, in certain cases, the pressures on this Court’s docket.”<sup>72</sup> The Court went to state that it “often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts.”<sup>73</sup> For those reasons, the Court concluded that, “a federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts.”<sup>74</sup>

Nevertheless, *Califano* concluded that nationwide injunctions might be appropriate in certain limited situations:

Nor is a nationwide class inconsistent with principles of equity jurisprudence, since the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class. If a class action is otherwise proper, and if jurisdiction lies over the claims of the members of the class, the fact that the class is nationwide in scope does not necessarily mean that the relief afforded the plaintiffs will be more burdensome than necessary to redress the complaining parties.<sup>75</sup>

#### *F. Article III “Case” and “Controversy” Requirement*

Under the U.S. Constitution, the federal judicial power is not unlimited.<sup>76</sup> On the contrary, Article III of the U.S. Constitution provides that the judicial power is limited to the resolution of “cases” and

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<sup>71</sup> *Califano v. Yamasaki*, 442 U.S. 682 (1979).

<sup>72</sup> *Id.* at 702.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *See Wasserman, supra* note 5, at 359–60.

“controversies.”<sup>77</sup> In applying the case and controversy requirement, the Court has made it clear that the federal courts should not issue “advisory” opinions,<sup>78</sup> that they should not hear cases in which the plaintiffs lack standing,<sup>79</sup> and that there must be concrete adverseness between the parties.<sup>80</sup> Moreover, a case may not be ripe for review if the potentially affected person does not suffer a credible threat of prosecution.<sup>81</sup>

Of course, in many cases in which nationwide injunctions are sought, plaintiffs frame their request for relief as a “class action,” which protects a broad range of plaintiffs—some presently before the court, some not. Some commentators have argued that the class action, therefore, provides courts with a solid basis for issuing nationwide injunctions.<sup>82</sup> However, this type of analysis creates potential problems. A court may think that it understands the full ramifications of a requested injunction, and it may think that it fully understands who will be affected by an injunction and how they will be affected, but the court may not be correct.

In some instances, the trial court’s action represents an obvious overreach. For example, in *Summers v. Earth Island Institute*,<sup>83</sup> even though the parties had settled the underlying case, so that an Article III case or controversy no longer existed, the trial court decided to go ahead and decide the merits of the case and issue a nationwide injunction. The U.S. Supreme Court reversed, concluding that the settlement deprived plaintiffs of standing to litigate the case.<sup>84</sup> Likewise, in *Lujan v. National Wildlife Federation*,<sup>85</sup>

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<sup>77</sup> U.S. CONST. art. III, § 2, cl. 1 (“The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

<sup>78</sup> See *Muskrat v. United States*, 219 U.S. 346 (1911).

<sup>79</sup> See *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011); *Hein v. Freedom from Religion Found.*, 551 U.S. 587 (2007); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006); *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

<sup>80</sup> See *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>81</sup> See *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014); *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967); *Poe v. Ullman*, 367 U.S. 497 (1961); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

<sup>82</sup> See *Frost*, *supra* note 6, at 1084 (“The class action device further demonstrates that courts have the constitutional authority to enjoin defendants from taking action affecting nonparties. Under Federal Rule of Civil Procedure 23, a few named individuals can bring a lawsuit on behalf of all similarly situated individuals across the nation as long as they satisfy the four class certification requirements listed in Rule 23(a), as well as Rule 23(b)(2)’s requirement that the ‘party opposing the class has acted . . . on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole.’”).

<sup>83</sup> *Summers v. Earth Island Inst.*, 555 U.S. 488, 490–92 (2009).

<sup>84</sup> *Id.* at 500–01.

<sup>85</sup> *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871 (1990).

although the lower courts concluded that plaintiff's injuries were sufficient to warrant the entry of a nationwide injunction, the Court held that plaintiffs lacked standing.

In some cases, the U.S. Supreme Court reverses or limits the scope of an injunctive decree because the trial court's order went well beyond the parties before the court. For example, in *Trump v. International Refugee Assistance Project*,<sup>86</sup> although the lower courts enjoined the Trump administration from enforcing an executive order against anyone, the Court decided to limit the scope of the injunction to protect only those individuals who had a "bona fide" relationship with a person or entity in the U.S.<sup>87</sup> and to lift the injunction as to individuals who did not have a bona fide relationship.<sup>88</sup> The Court found that the government's interest was "at its peak" when individuals with no bona fide relationship to the U.S. are involved.<sup>89</sup> Finding that the individual respondents had such a bona fide relationship, the Court left the injunction in place as to them. Had the trial court kept its focus on the parties before it, rather than certifying a nationwide class that included individuals not before the court, the court's order might not have been so overbroad.<sup>90</sup>

Likewise, in *Califano v. Yamasaki*,<sup>91</sup> which involved the U.S. Department of Health, Education, and Welfare's attempt to recoup overpayments made to beneficiaries under the Social Security Act, the trial court purported to certify a nationwide class composed of "all individuals eligible for [old-age and survivors' benefits] whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing." The court of appeals agreed with the lower court and held that to require recipients to sue individually would result in an unnecessary duplication of actions and, therefore, that class relief was appropriate and that a nationwide injunction could issue. Indeed, the court of appeals concluded that it "is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue." The U.S. Supreme Court disagreed, concluding that the certified class was overbroad because it swept

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<sup>86</sup> *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017).

<sup>87</sup> *Id.* at 2087.

<sup>88</sup> *Id.* at 2087–88.

<sup>89</sup> *Id.* at 2088.

<sup>90</sup> *Id.* ("But the injunctions reach much further than that: They also bar enforcement of § 2(c) against foreign nationals abroad who have no connection to the United States at all. The equities relied on by the lower courts do not balance the same way in that context. Denying entry to such a foreign national does not burden any American party by reason of that party's relationship with the foreign national. And the courts below did not conclude that exclusion in such circumstances would impose any legally relevant hardship on the foreign national himself.").

<sup>91</sup> *Califano v. Yamasaki*, 442 U.S. 682 (1979).

in individuals who had not filed requests for reconsideration or waiver.<sup>92</sup> Indeed, there was evidence suggesting that the number of individuals affected was relatively small and that the matter probably should have been handled through individual adjudication.<sup>93</sup>

### G. Encouraging Forum Shopping

If federal courts have the power to issue nationwide injunctions, then potential plaintiffs have powerful incentives to “forum shop” and to try to place their cases before judges who are inclined to issue the requested injunctions.<sup>94</sup> It probably comes as no surprise that challenges to Obama-era rules were brought initially in the (relatively conservative) Texas federal courts and were appealed to the (relatively conservative) Fifth Circuit U.S. Court of Appeals. By contrast, it will come as no more of a surprise that many challenges to Trump administration actions are brought before (relatively liberal) California federal court judges and, therefore, appealed to the (relatively liberal) Ninth Circuit U.S. Court of Appeals.<sup>95</sup>

Moreover, as Bray indicates, prospective plaintiffs need only find a single judge who is willing to grant a nationwide injunction in order to prevail:

The opportunity for forum shopping is extended by the asymmetric effect of decisions upholding and invalidating a statute, regulation, or order. If a plaintiff brings an individual action seeking a national injunction, and the district judge

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<sup>92</sup> *Id.* at 704 (“The relief to which the Secretary objects in this Court is the determination that he must afford class members an opportunity for a prerecoumpment oral hearing. With respect to that relief, the classes certified were plainly too broad. Both the *Elliott* and the *Buffington* classes included persons who had not filed requests for reconsideration or waiver in the past and would not do so in the future. As to them, no ‘final decision’ concerning the right to a prerecoumpment hearing has been or will be made.”).

<sup>93</sup> *Id.* at 314–15 (“Nowhere in the opinion of the district court is there any estimate of what percentage of the annual VA caseload of 800,000 these cases comprise, nor is there any more precise description of the class. There is no question but what the three named plaintiffs and the plaintiff veteran’s widow asserted such claims, and in addition there are declarations in the record from twelve other claimants who were asserting such claims. The evidence contained in the record, however, suggests that the sum total of such claims is extremely small; in 1982, for example, roughly 2% of the BVA caseload consisted of “agent orange” or “radiation” claims, and what evidence there is suggests that the percentage of such claims in the regional offices was even less—perhaps as little as 3 in 1,000.”)

<sup>94</sup> Bray, *supra* note 2, at 457.

<sup>95</sup> *Id.* at 459–60 (“It is no accident which courts have given the major national injunctions in the last three administrations. In the George W. Bush Administration, it was federal courts in California. In the Obama Administration, it was federal courts in Texas. Now, in the Trump Administration, the national preliminary injunctions have come from federal courts in several less conservative circuits (the Fourth, Seventh, and Ninth). The forum selection happens not only for the district court, but also for the appellate court. 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.”).

*upholds* the challenged law, that decision has no effect on other potential plaintiffs. But if one district judge *invalidates* it and issues a national injunction, the injunction controls the defendant's actions with respect to everyone. Shop 'til the statute drops.<sup>96</sup>

One can legitimately inquire whether it is desirable to encourage forum shopping for such important national issues. Such injunctions, if improvidently granted, can tie up federal programs for a considerable period of time—at least until the U.S. Supreme Court can review and overturn those injunctions. And these roadblocks have been thrown up against both Republican and Democratic policies.

### III. CONCLUSION

Although nationwide injunctions have become increasingly commonplace, especially during the Trump administration, they are not necessarily a welcome or desirable addition to the law. Not uncommonly, lower courts “get it wrong.” Indeed, in an extraordinary number of cases, lower court injunctions have been completely overturned or significantly modified by the U.S. Supreme Court.

Nationwide injunctions also may have an undesirable impact on the law. Instead of allowing issues to percolate their way to the U.S. Supreme Court, and providing that Court with the views and analysis of a variety of lower court judges, cases involving nationwide injunctions often move quite quickly through the court system and are rapidly presented to the Court. Undoubtedly, this rapid pace of review is attributable to the significance of the injunction that the lower court issued (e.g., that it purported to enjoin governmental action nationwide).

In the past, the U.S. government has been able to adopt a position of non-acquiescence to lower court decisions. In other words, it agrees to accept the decision in the particular jurisdiction in which a decision was rendered but continues to maintain a contrary position in other jurisdictions. Generally, if the government continues to lose in these other jurisdictions, that is the end of the matter. The U.S. Supreme Court is disinclined to review the matter. On the other hand, if the government's position prevails in other jurisdictions, the U.S. Supreme Court eventually intervenes because there is a split among the circuits that needs to be resolved. By that point, the facts and the legal issues have come into sharper focus and the U.S. Supreme Court can more readily decide the issues.

As a result, even some supporters of nationwide injunctions recognize that nationwide injunctions encourage forum shopping, politicize the courts,

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<sup>96</sup> *Id.* at 460 (emphasis in original).

create the risk of conflicting injunctions, and potentially give enormous power to a single district court judge.<sup>97</sup> Professor Bray argues that injunctions should not protect non-parties.<sup>98</sup>

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<sup>97</sup> See Frost, *supra* note 6, at 1067.

<sup>98</sup> Bray, *supra* note 2, at 469.