A NATIONAL COURT FOR NATIONAL RELIEF: CENTRALIZING REQUESTS FOR NATIONWIDE INJUNCTIONS IN THE D.C. CIRCUIT

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I. INTRODUCTION

Nationwide injunctions, sometimes called "universal"[1] or even "cosmic"[2] injunctions,[3] are a peculiar remedy that have become increasingly common in recent decades.[4] Like traditional

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1. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2425 n.1 (2018) (Thomas, J., concurring) (discussing the semantic distinction between "universal" and "nationwide" injunctions).

2. *See* Transcript of Oral Argument at 72–73, *Trump*, 138 S. Ct. 2392 (2018) (No. 17-965) (Justice Gorsuch discussing the "troubling rise of this nationwide injunction, cosmic injunction").

3. Unless otherwise noted, the terms "nationwide" and "universal" injunctions will be used interchangeably throughout this Article although some commentators have expressed strong opinions as to the proper descriptor that should be used. *See, e.g.*, Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 419 n.5 (2017) (arguing that "nationwide" is an inferior adjective to use because it "emphasizes territorial breadth, when the real point of distinction is that the injunction protects nonparties").

4. *See Assistant Attorney General Beth Williams Delivers Remarks on Nationwide Injunctions at The Heritage Foundation: Remarks as Prepared for*

injunctions, which have clear roots in common law and longstanding use in American jurisprudence, nationwide injunctions attempt to bind conduct. Unlike traditional injunctions, which typically only prescribe conduct between the parties before the court, nationwide injunctions often attempt to control the defendant's actions against non-parties and outside the scope of the court's geographic jurisdiction.[5]

There is no statute that expressly grants district courts the power to issue nationwide injunctions, nor is there any present statute expressly forbidding their use.[6] At least one scholar has argued that the federal courts have no constitutional authority to issue injunctions for non-parties,[7] a sentiment heavily implied by Justice Thomas.[8] With the exception of class action lawsuits,[9] plaintiffs generally lack Article III standing to seek relief for non-parties.[10] Further, expansive injunctions that cover additional

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Delivery, U.S. DEP'T OF JUST. (Feb. 4, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-beth-williams-delivers-remarks-nationwide-injunctions-heritage (discussing the rise of nationwide injunctions in the Reagan, Obama, and Trump presidencies) [hereinafter *Williams*].

5. *See* OFF. OF THE ATT'Y GEN., LITIGATION GUIDELINES FOR CASES PRESENTING THE POSSIBILITY FOR NATIONWIDE INJUNCTIONS 1 (2018) ("'Nationwide injunctions' purport to bar the federal government from enforcing a law or policy as to any person or organization, anywhere in the United States, regardless whether those persons or organizations are parties to the case, and regardless whether such broad injunctions are necessary to provide relief to the plaintiff in the case") [hereinafter ATTORNEY GENERAL'S 2018 MEMORANDUM].

6. *Trump*, 138 S. Ct. at 2425 (2018) (Thomas, J., concurring). Justice Thomas also notes that even if Congress were to enact a statute purporting to grant the district courts this power, it would still need to comply with Article III limitations. *Id.*

7. *See* Bray, *supra* note 3, at 471 ("The court has no constitutional basis to decide disputes and issue remedies for those who are not parties.").

8. *See Trump*, 138 S. Ct. at 2425 (Thomas, J., concurring) (discussing nationwide injunctions and noting that all remedies issued by the federal courts still need to comply with Article III limitations). *But see id.* at 2446 n.13 (Sotomayor, J., dissenting) (stating that the district court did not abuse its discretion in granting a nationwide injunction).

9. *See* 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, 516 (2016).

10. Powers v. Ohio, 499 U.S. 400, 410 (1991) ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties."); *accord* Hollingsworth v. Perry, 570 U.S. 693, 707–08 (2013); *see also* Morley, *supra* note 9, at 523–24 (noting that plaintiffs only have standing to seek redress for violation of their own rights and that courts generally lack subject matter jurisdiction to grant nationwide defendant-oriented injunctions).

actions producing no concrete harm to the plaintiffs are inconsistent with modern standing doctrine.[11] After all, "constitutional rights are personal and may not be asserted vicariously."[12] While every citizen has an interest in the government acting lawfully, this is not concrete or particularized enough to confer standing.[13] Generalized interests in the proper operation of government should be resolved at the ballot box, not the courthouse. By requiring that plaintiffs litigate their own, personal rights we prevent the federal courts "from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders."[14]

Despite the concerns regarding standing and the absence of statutory authority, some federal courts still insist that they have the power to issue nationwide injunctions. Due to the ambiguity regarding statutory authority, Congressman Andy Biggs has introduced legislation that would effectively forbid their use.[15] Congressional legislation like this that alters the remedial powers of the federal courts presents interesting political and jurisprudential concerns, and its effect would be unclear. What is clear is that all three branches of government are considering the implications of allowing this practice to continue.[16] It remains to be seen whether this legislation will progress,[17] or if it will even be rendered moot by subsequent judicial decisions. But the issue of nationwide injunctions is a classic baseline assumption problem; in the absence of express authority or prohibition, what results? Whether

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11. Salazar v. Buono, 559 U.S. 700, 734 (2010) (Scalia, J., concurring).

12. Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973).

13. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974) ("[S]tanding to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share").

14. United States v. Students Challenging Regul. Agency Procs., 412 U.S. 669, 687 (1973).

15. *See* Injunctive Authority Clarification Act of 2019, H.R. 77, 116th Cong. § 2 (2019) (stating that no federal district court shall issue "an order that purports to restrain the enforcement against a non-party of any statute, regulation, order, or similar authority unless the non-party is represented by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure").

16. *See generally* ATTORNEY GENERAL'S 2018 MEMORANDUM, *supra* note 5 (highlighting the fact that the branches of government are considering the implications of this practice).

17. On January 3, 2019, the Injunctive Authority Clarification Act of 2019 was referred to the Subcommittee on Crime, Terrorism, and Homeland Security. No further action was taken, and this proposed legislation expired unenacted. *See* H.R. 77.

eventually resolved by Congress or the Supreme Court, this question deserves an answer, and the present uncertainty has put nationwide injunctions in a tenuous position.

With some notable exceptions,[18] there is a growing scholarly consensus[19] that there should either be a bright-line rule against universal injunctions[20] or at least significant reform[21] to ameliorate their abuse. One of these suggested reforms has been to limit the geographic scope of courts' authority to issue non-party injunctions.[22] This solution has some intuitive appeal because the federal courts already have clear geographic limits under the law of the circuit doctrine, where circuit court decisions are only binding in the circuit in which they are made, and district courts then apply those decisions at the trial level.[23] It seems logically inconsistent that a

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18. *See generally* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020).

19. Szymon S. Barnas, Note, *Can and Should Universal Injunctions Be Saved?*, 72 VAND. L. REV. 1675, 1679–80 (2019) (discussing the development of this general consensus over the Bush, Obama, and Trump presidencies). *See generally* Michael T. Morley, *Nationwide Injunctions, Rule 23 (B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017).

20. *See* Bray, *supra* note 3, at 420 ("No matter how important the question and no matter how important the value of uniformity, a federal court should not award a national injunction.").

21. *See, e.g.*, Matthew Erickson, *Who, What, And Where: A Case for a Multifactor Balancing Test as a Solution to Abuse of Nationwide Injunctions*, 113 NW. U. L. REV. 331, 335 (2018) (proposing a three-factor balancing test for when to impose a nationwide injunction); *see also* Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 73 (2019) (proposing a bad faith standard for when a federal court should issue a nationwide injunction against the government).

22. *E.g.*, Getzel Berger, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1100–04 (2017) (proposing reform based on geographic limitations); *see also* Morley, *supra* note 9, at 497 (discussing how nationwide injunctions should be constrained by the current class action system and "that the class be limited to rightholders within the geographical boundaries of the intermediate appellate court in which the trial court sits"). An even "stricter alternative would be to limit the class solely to rightholders within the trial court's geographic jurisdiction." Morley, *supra* note 9, at 497. The history behind this practice would date back at least to *Hammer v. Dagenhart*. 247 U.S. 251 (1918). There, challengers to a federal child labor statute successfully procured an injunction preventing the law from being enforced in the Western District of North Carolina. *See* Bray, *supra* note 3, at 436 (discussing *Hammer* and its implications on the history of non-party injunctions).

23. *See* Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 30–31 (2015) (noting that circuit courts "under the law of the circuit doctrine[] issue authoritative decisions which are binding law

district court can make a binding decision for the entire nation at an early stage of litigation when an actual final decision of their supervising court would only be limited to that specific circuit. Further, because district court final opinions are not even precedential *in the same district*,[24] the practice of granting binding preliminary injunctions for the entire country is wholly disproportionate with their existing powers.

Still, legitimate injunctions cannot and are not generally limited by geographic scope as a prevailing party deserves to have their rights protected across jurisdictions.[25] Additionally, there are certain circumstances where in order to fully grant relief to a plaintiff, the court must also invalidate a statute or regulation as applied to everyone.[26] There are also occasions where a third party receives some incidental benefit due to a remedy tailored specifically to one plaintiff.[27] However, this is not the norm, and it is often possible to craft an injunction that grants full relief to individual plaintiffs without extending this relief to non-parties.[28] The focus should always be on preventing harm to the plaintiff, even if some ancillary benefit accrues to third parties.

The Supreme Court has explicitly recognized these principles, for instance in *Doran v. Salem Inn., Inc.*,[29] in which it held that "neither

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on all judges in the circuit absent *en banc* or Supreme Court intervention"); *see also* Morley, *supra* note 9, at 494 (discussing how nationwide injunctions are in conflict with class actions as they essentially allow "courts to give their rulings the force of law outside their respective geographic jurisdictions" when they would normally be precluded from doing so).

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

25. *See* Califano v. Yamasaki, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff . . . .").

26. *See* Morley, *supra* note 9, at 491 (using the example of an unconstitutional legislative district, where obviously a court cannot invalidate that district to one voter but not others); *see also* Pro. Ass'n of Coll. Educators v. El Paso Cnty. Cmty. Coll. Dist., 730 F.2d 258, 273–74 (5th Cir. 1984) (holding that an injunction "is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties . . . if such breadth is necessary to give prevailing parties the relief to which they are entitled").

27. *See* Meyer v. Brown & Root Constr. Co., 661 F.2d 369, 374 (5th Cir. 1981) ("[T]here are many cases where injunctive relief designed to assist a party will accidently assist persons not before the court."); *see also* Sohoni, *supra* note 18, at 932 ("Clearly, a federal court has the ability to issue an order that will benefit nonparties—as when it abates a nuisance, restrains future lawbreaking conduct, or orders restitution . . . .").

28. Morley, *supra* note 9, at 491.

29. 422 U.S. 922 (1975).

declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs."[30] Four years later, in *Califano v. Yamasaki*,[31] the Supreme Court reaffirmed this principle by stating "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."[32] Nationwide injunctions flout these principles by crafting remedies specifically designed to provide relief to non-parties completely unaffiliated with the plaintiff before them.[33]

Apologists of the nationwide injunction often offer remedies that rely on more stringent standards or judicial restraint.[34] However, as Professor Samuel Bray has noted, "[i]f these solutions would work, they would already have worked."[35] It is evident that the status quo is unsustainable, and if anything, the problem is only getting worse.[36] Reform is needed, whether that comes in form or a blanket prohibition or prudential limitations. Further, if this reform does not arrive soon enough, it is entirely possible that the Supreme Court will simply forbid the practice altogether.

Presently, the debate regarding nationwide injunctions operates on a continuum between two extremes. On the one hand, some have suggested that nationwide injunctions violate Article III and there should be a bright-line rule forbidding their use.[37] Others contend that these injunctions are perfectly consistent with Article III and that they fulfill an important remedial role in our federal court

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30. *Id.* at 931.

31. 442 U.S. 682 (1979).

32. *Id.* at 702. Certain circuits have read *Califano* as precluding courts from issuing injunctions, restricting defendants' conduct towards third parties, because this is not typically necessary to make plaintiffs whole. *E.g.*, Meyer v. CUNA Mut. Ins. Soc'y, 648 F.3d 154, 169–71 (3d Cir. 2011); Sharpe v. Cureton, 319 F.3d 259, 273 (6th Cir. 2003).

33. *See* ATTORNEY GENERAL'S 2018 MEMORANDUM, *supra* note 5, at 3.

34. *E.g.*, Erickson, *supra* note 21 (proposing a balancing test to be employed by courts when deciding whether to issue a nationwide injunction).

35. Bray, *supra* note 3, at 419.

36. *See* ATTORNEY GENERAL'S 2018 MEMORANDUM, *supra* note 5, at 4 ("Scholars have not found a single example of any judge issuing this type of extreme remedy in the first 175 years of the Republic. It took more than 200 years for the first 22 nationwide injunctions to be issued; recently, courts issued 22 in just over one year.").

37. Bray, *supra* note 3, at 420, 471–72.

system.[38] Between these two extremes are a variety of compromise solutions that would preserve the nationwide injunction but limit its prevalence.

Some reformers have attempted to reach this middle ground by suggesting the creation of some type of national court that would specialize in these high-profile cases seeking a nationwide injunction.[39] But a court like this already exists; it's called the D.C. Circuit. Unlike the geographic circuits, the D.C. Circuit supervises only a single trial court[40] and has been characterized as a national court[41] that acts as the ombudsmen and overseer of the federal government.[42] While the D.C. Circuit does not have exclusive jurisdiction to review federal action,[43] it is a *de facto* specialized court for administrative law cases.[44]

The D.C. Circuit's expertise in administrative law is undisputed, and a disproportionate amount of its cases involve disputes originating from agency action.[45] And despite many of its cases being

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38. *See* Sohoni, *supra* note 18, at 921 ("If the Supreme Court can issue a universal injunction against enforcement of a federal law, then—as an Article III matter—so can a lower federal court.").

39. *See* Barnas, *supra* note 19, at 1707 (suggesting the creation of "[a] specialized forum to adjudicate suits seeking universal injunctions against federal executive action" composed of one judge from each circuit serving two year terms).

40. Virtually all appeals from the United States District Court for the District of Columbia (the "D.D.C.") go to the D.C. Circuit, with the exception of patent claims and a few other types of claims, which are centralized in the Federal Circuit. *See* 28 U.S.C. § 1295 (2018).

41. *See generally* Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. MIAMI L. REV. 159 (1993); *see also* JEFFREY BRANDON MORRIS, CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT 293 (2001) (describing the D.C. Circuit as a "national court of administrative appeals").

42. Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L.J. 549, 564–65, 578 (2002).

43. *But see* Assigning Proper Placement of Executive Action Lawsuits Act, H.R. 2660, 115th Cong. (2017) (proposed legislation that would grant "exclusive original jurisdiction to the United States District Court for the District of Columbia of certain cases relating to the powers of the Executive"). While this proposed bill has since expired unenacted and was not explicitly targeted at nationwide injunctions or remedial powers, it demonstrates that at least some members of Congress have considered centralizing challenges to Executive action. *See* Barnas, *supra* note 19, at 1709–10 (discussing this proposed legislation, its advantages, and disadvantages).

44. Barnas, *supra* note 19, at 1710.

45. *See* Adam Feldman, *Empirical SCOTUS: The Singular Relationship Between the D.C. Circuit and the Supreme Court*, SCOTUS BLOG (Oct. 3, 2019, 10:44 AM), https://www.scotusblog.com/2019/10/empirical-scotus-the-singular-relationship-

exceptionally sensitive and complex, the D.C. Circuit has the second lowest reversal rate of all circuits.[46] With its quasi-national jurisdiction and unique caseload, many consider the D.C. Circuit to be the second highest court in the land, inferior only to the Supreme Court.[47]

Starting in 1838 with *Kendall v. United States ex rel. Stokes*,[48] the D.C. Circuit's remedial powers were distinguished from its sister circuits. This "first among equals" status defies explicit hierarchical classifications but is nevertheless present.[49] In the context of nationwide injunctions, the D.C. Circuit is widely regarded to have issued the first one in 1963 with *Wirtz v. Baldor Electric Co.*[50] This novel remedy went largely unnoticed at the time but laid the framework for the increasing use[51] of nationwide injunctions since.[52] Due to its expertise and structure, the most equitable and prudential compromise to the nationwide injunction debate is the centralization of all requests for such an injunction within the jurisdiction of the D.C. Circuit. Such a solution would probably have to come through statute and would entail granting the D.C. Circuit exclusive jurisdiction over appeals seeking nationwide injunctions from the United States District Court for the District of Columbia (the "D.D.C.") and agency decisions.[53] Plaintiffs would still be totally free to seek individual relief nationwide from any district court, thus

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between-the-d-c-circuit-and-the-supreme-court/ ("One major distinction between the D.C. Circuit and other courts of appeals is the frequency with which it hears cases originating from actions of federal agencies.").

46. From 1986 to 2018, approximately 52% of D.C. Circuit decisions before the Supreme Court were reversed. *Id.* Only the First Circuit had a lower reversal rate at around 49%. *Id.* Perhaps unsurprisingly, the Ninth Circuit had by far the highest with a reversal rate of approximately 76%. *Id.*

47. *See* Meghan Keneally, *Meet All of the Sitting Supreme Court Justices Ahead of the New Term*, ABC NEWS (Nov. 30, 2018, 10:49 AM), https://abcnews.go.com/Politics/meet-sitting-supreme-court-justices/story?id=37229761 ("Kavanaugh spent more than a decade serving on the United States Court of Appeals for the D.C. Circuit, which is widely seen as the second-highest court in the land.").

48. 37 U.S. (12 Pet.) 524, 526 (1838) ("[I]f the power to issue a mandamus in such a case as that before the Court exists in any court, it is vested in [the D.C. Circuit]."); *see also infra* Part V.

49. Daniel Suhr, *First Among Equals*, MARQ. U. L. SCH. FAC. BLOG (Dec. 10, 2008), https://law.marquette.edu/facultyblog/2008/12/first-among-equals/.

50. 337 F.2d 518, 535 (D.C. Cir. 1963); *see also infra* Part II.

51. Or abuse, depending on your perspective.

52. *See* Sohoni, *supra* note 18, at 991–93.

53. Some agency appeals, such as reviews of air quality standards under the Clean Air Act, are already within the exclusive jurisdiction of the D.C. Circuit. 42 U.S.C. § 7607(b)(1) (2018).

ensuring that their rights are just as easily protectable as they are now. By centralizing plaintiffs who are actually seeking national remedies in a national court, we would avert almost all of the harms of nationwide injunctions while still protecting the possibility of their use for extraordinary cases. Even the potential for a nationwide injunction is likely to deter Executive overreach and abuse, especially with the added legitimacy an affirmative grant of this power would bring.[54]

While this solution is not without its drawbacks,[55] these faults pale in comparison to a system where every single federal court has the power to bind the entire nation with these injunctions. The growing criticism of nationwide injunctions is not likely to subside, either in the literature or on the bench.[56] If defenders of the nationwide injunctions wish to preserve this extraordinary remedy in any form, they must accept reform. Similarly, a blanket prohibition on nationwide injunctions will inevitably generate controversy and backlash from those that are already skeptical of the courts' ability to protect plaintiffs from harm. Like any good compromise, centralizing requests for nationwide injunctions within the D.C. Circuit is likely to leave the devotees of either extreme unsatisfied. While there is no "Goldilocks solution" that will please everyone, granting this exclusive authority to the D.C. Circuit will

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54. The Department of Justice has disputed that nationwide injunctions are even a valid exercise of judicial power. *See* ATTORNEY GENERAL'S 2018 MEMORANDUM, *supra* note 5, at 2 ("Department litigators should remind courts that the constitutional limitations on their authority do not permit them to issue injunctions that extend beyond the parties to the case before them if such action is unnecessary to provide relief to the parties to the case.").

55. *See infra* Part V.B.

56. At present, two Supreme Court justices are openly questioning the propriety of nationwide injunctions, and it seems unlikely that they will reverse course. *See* Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (mem.) (Gorsuch, J., concurring) ("The real problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them. Whether framed as injunctions of 'nationwide,' 'universal,' or 'cosmic' scope, these orders share the same basic flaw—they direct how the defendant must act toward persons who are not parties to the case . . . . It has become increasingly apparent that this Court must, at some point, confront these important objections to this increasingly widespread practice. As the brief and furious history of the regulation before us illustrates, the routine issuance of universal injunctions is patently unworkable, sowing chaos for litigants, the government, courts, and all those affected by these conflicting decisions."); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (criticizing nationwide injunctions and noting that all remedies issued by the federal courts still need to comply with Article III limitations).

be able to answer the strongest criticisms of the detractors while assuaging the greatest fears of the supporters.

This Article will proceed by discussing the history of nationwide injunctions in Part II, followed by a summary of the problems created by nationwide injunctions in Part III. After that, Part IV offers a brief discussion of the current status of nationwide injunctions. Finally, Part V deals with the D.C. Circuit, its role in the proposed reform, and the potential downsides of centralization.

II. HISTORY OF NATIONWIDE INJUNCTIONS

Nationwide injunctions are a fairly recent judicial creation and are totally absent from traditional conceptions of equity.[57] Because the United States inherits its common law tradition from England, it is valuable to consider the equitable remedies available under English law. The closest analogue at common law to the nationwide injunction would be the bill of peace, where multiple suits involving a common question would be aggregated for efficiency purposes.[58] This "proto-class action" would control the defendant's conduct against the class but not against the world at large or future plaintiffs bringing a different claim.[59]

When the U.S. Constitution was adopted, it granted judicial power to the federal courts to decide cases and controversies.[60] Further, any exercise of this judicial power is limited to "the traditional role of the Anglo-American courts."[61] Against the

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57. *See* Bray, *supra* note 3, at 425 ("There is an easy, uncomplicated answer to the question whether the national injunction is traceable to traditional equity: *no*."); *see also* ATTORNEY GENERAL'S 2018 MEMORANDUM, *supra* note 5, at 3 (describing the recent rise in nationwide injunctions as "an ahistorical anomaly inconsistent with centuries of judicial practice by courts sitting in equity").

58. Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1862 (1998).

59. Bray, *supra* note 3, at 426.

60. U.S. CONST. art. III, §§ 1–2.

61. Summers v. Earth Island Inst., 555 U.S. 488, 492 (2009); *see also* Grupo Mexicano de Desarrollo, S. A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999) (quoting Atlas Life Ins. Co. v. W.I. S., Inc., 306 U.S. 563, 568 (1939) (stating that the Judiciary Act of 1789 only gave the federal courts "an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries")); Guar. Tr. Co. v. York, 326 U.S. 99, 105 (1945) ("Equitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery").

Executive Branch at common law, there was a fairly discrete universe of prerogative writs that could be brought, such as mandamus and habeas corpus.[62] From the founding of the Republic until at least the 1960s, there appears to be zero recorded instances of nationwide injunctions,[63] although some plaintiffs sought injunctions that would effectively be universal.[64] Federal courts during this time period still routinely issued injunctions protecting plaintiffs from government action, but these injunctions did not restrain government action against other possible plaintiffs throughout the country.[65]

One early exception to this general practice was *Hammer v. Dagenhart*[66] where challengers to a federal child labor statute argued for and won an injunction preventing enforcement in the Western District of North Carolina.[67] While Attorney General Thomas Watt Gregory seemingly conceded the facial propriety of this type of injunction, he directed the Department of Justice to continue bringing challenges under this statute in other federal districts.[68] The case was directly appealed to the Supreme Court and affirmed without discussion of this peculiar remedy.[69]

Eventually ruled unconstitutional in *United States v. Butler*,[70] the processing tax of the Agricultural Adjustment Act of 1933[71] was challenged thousands of times in courts all across the country.[72] This

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62. *See* Mead & Fromherz, *supra* note 23, at 6. *See generally* Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523 (1923).

63. *See* Bray, *supra* note 3, at 428–37 (discussing the conspicuous absence of universal injunctions prior to the 1960s). *But see infra* notes 83, 87 (discussing whether or not there were prior examples of nationwide injunctions).

64. *See, e.g.*, Scott v. Donald, 165 U.S. 107, 110 (1897) (seeking an injunction barring the government from "preventing the plaintiff or any other person from importing, holding, possessing, and using the said liquors so imported").

65. *See* Bray, *supra* note 3, at 428 ("In the nineteenth century, federal courts would issue injunctions that protected the plaintiff from the enforcement of a federal statute, regulation, or order—not injunctions that protected all possible plaintiffs throughout the United States.").

66. 247 U.S. 251 (1918).

67. *See* STEPHEN B. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW 81–99, 107–08 (1968).

68. *See id.* at 109.

69. *See Hammer*, 247 U.S. 251; *see also* Bray, *supra* note 3, at 436 (discussing *Hammer* and its appellate history).

70. 297 U.S. 1 (1936).

71. Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 (codified in scattered sections of 7 U.S.C.).

72. *See, e.g.*, Franklin Process Co. v. Hoosac Mills Corp., 8 F. Supp. 552, 554 (D. Mass. 1934).

law was part of a slate of New Deal legislation signed into law by President Roosevelt to combat the Great Depression.[73] In an attempt to stabilize agricultural prices, it paid farmers to reduce their output of certain commodities.[74] To pay for these subsidies, the Secretary of Agriculture taxed the first processor of these goods.[75] In effect, this law essentially subsidized farmers at the cost of processors. In doing so, the government hoped to prevent farmers from flooding the market with supply, allowing commodity prices to rise to the desired levels.[76] Like much of the New Deal legislation, this expansive interpretation of federal power attracted significant scrutiny and questions of constitutionality.[77]

Naturally, this scrutiny resulted in a number of legal challenges by processors who were now subject to an additional tax. And despite what was surely some degree of duplicitous litigation,[78] this resulted in over 1,600 individual injunctions but not a nationwide one.[79] The almost incalculable number of challenges to the Agricultural Adjustment Act and the absence of a nationwide injunction forbidding enforcement demonstrates that the issuance of a nationwide injunction prior to the 1960s was likely not even

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73. *See generally* Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 MINN. L. REV. 299 (1983).

74. *Butler*, 297 U.S. at 54.

75. *Id.* at 55.

76. *Id.* at 54.

77. *Franklin Process Co.*, 8 F. Supp. at 554.

78. While skeptics of the nationwide injunction like to point to the litigation surrounding the Agricultural Adjustment Act as evidence that these types of injunctions were unheard of for most of this country's history, defenders of the practice might cite these circumstances as an example of the necessity of the nationwide injunction. After all, if a given government action is consistently being found unconstitutional in the lower courts (and eventually the Supreme Court), it seems much more efficient to issue a nationwide injunction in order to adequately protect all rightsholders. The initial answer to this concern is that we simply do not know which statutes or regulations will eventually be struck down. Law is an art, not a science. While *Butler* was not particularly close, it still had three dissenters, and there are obviously countless examples of closer cases in American jurisprudence. Further, even plaintiff-specific injunctions can have a significant deterrent effect on potentially unconstitutional actions, especially when these injunctions are numerous and widespread. *See* Bray, *supra* note 3, at 435 ("The injunctions did severely impede the national government's efforts to enforce New Deal legislation. But that impediment came from the quantity of injunctions, the quantity of plaintiffs in some individual cases, and the force of precedent dissuading federal officers from enforcing a statute.").

79. *See id.* at 434–35 (reviewing a Department of Justice report on injunctions and finding no mention of a nationwide injunction).

considered a possibility.[80] Courts preferred to issue individual remedies, which would wholly protect plaintiffs from this unconstitutional tax, while still allowing the government to defend this law in other cases. This allowed the issue to percolate in the lower courts. Thus when the case finally arrived at the Supreme Court, there were extensive lower court analyses to inform the justices' review.

While in some circumstances "nationwide" and "universal" injunctions are synonymous, the exact adjective used becomes critically important when discussing the "first" such injunction.[81] Nationwide injunctions obviously have to bind the entire nation, whereas universal injunctions could "universally" bind the government within a specific judicial district. In other words, the government is forbidden from enforcing a statute against everyone within that district.[82] Similarly, an injunction could be nationwide, but not universal. Imagine a situation where a national retailer operating many stores seeks and is granted relief. While this relief would be nationwide, it is still limited to the plaintiff and thus not universal. To reconcile these issues, the "first" nationwide injunction should be one that is both nationwide *and* universal.

While there is some dispute,[83] partially due to the semantic distinction between "nationwide" and "universal," the first

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80. *See id.* at 428 (describing how nationwide injunctions were "rejected as unthinkable" in *Massachusetts v. Mellon*, 262 U.S. 447 (1923) and "conspicuously absent" from *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

81. Depending on how you define the term, there are several early cases that could be considered the first universal injunctions. While there were definitely some broad injunctions issued prior to 1963, none meet all the criteria of this new breed of injunction that modern courts have recently started using. These criteria are: issuance by a lower federal court, non-plaintiff relief, and nationwide impact. *See* California v. Azar, 911 F.3d 558, 583 (9th Cir. 2018).

82. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 268 (1918).

83. *See generally* Sohoni, *supra* note 18. Professor Sohoni disputes the generally-held belief that universal injunctions first arose in the 1960s and discusses several early cases that she believes should be classified as a universal injunction, such as *Lewis Publshing Co. v. Morgan*, 229 U.S. 288 (1913), and *Hill v. Wallace*, 259 U.S. 44 (1922). *Id.* at 944–52. However, both *Lewis* and *Hill* are distinguishable because, as Professor Sohoni notes, it was the Supreme Court itself that issued the injunctions. *Id.* at 954. Critics of the nationwide injunction object to territorially-limited district and circuit courts issuing non-party remedies nationwide, not the nationwide jurisdiction and powers of the Supreme Court. Additionally, Professor Sohoni discusses both *Hammer v. Dagenhart* and *Board of Trade of City of Chicago v. Olsen*, 262 U.S. 1 (1923). *Id.* at 952–54, 954 n.228. In these cases, the district court had barred enforcement of a federal statute against non-parties, although only within their districts. *Id.* at 954 n.228. The injunctions in these cases could certainly

nationwide injunction that was imposed in the United States is generally considered to have occurred in *Wirtz v. Baldor Electric Co*.[84] In *Wirtz*, the Secretary of Labor appealed from the trial court's order striking down federal minimum wage determinations in the electrical motors and generators industry due to procedural deficiencies.[85] Noting that "a court order enjoining the Secretary's determination for the sole benefit of those plaintiffs-appellees who have standing to sue would be to give them an unconscionable bargaining advantage over other firms in the industry," the court held that an injunction must be issued enjoining enforcement against the entire industry.[86] Notably, this decision was issued by the D.C. Circuit.[87]

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be thought of as sweeping given the broad class of individuals and businesses that they sought to protect, but they were not nationwide or truly universal due to their limited geographic scope. Similarly, Professor Sohoni offers a thorough discussion of *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and its progeny. *Id.* at 959–62. The facts and circumstances in each of these cases differ slightly, but the overall import is that federal district courts were able to issue injunctions preventing the enforcement of state law. *Id.* Like *Hammer* and *Olsen*, these injunctions were sweeping but geographically limited. Because state law was being enjoined, these injunctions were not nationwide; although, they did protect non-parties to the original suit. While it is possible to classify these injunctions as "universal," and Professor Sohoni does so, they certainly were not nationwide. Further, most conceptions of "universal" would probably not be limited to a single state in the Union. Finally, it is worth considering whether courts were simply more lenient in allowing broad injunctions prior to the creation of the modern class action system in 1966 and whether these types of remedies have been functionally preempted by Rule 23. *See infra* Part III.D. Professor Sohoni's excellent article challenging the prevailing beliefs regarding the "first" nationwide injunction generated significant commentary even before publication. *See* Samuel Bray, *A Response to The Lost History of the "Universal" Injunction*, YALE J. REGUL. (Oct. 6, 2019), https://www.yalejreg.com/nc/a-response-to-the-lost-history-of-the-universal-injunction-by-samuel-bray/#_ftn1 (responding to Professor Sohoni's claims that there were universal injunctions predating *Wirtz*).

84. 337 F.2d 518, 535 (D.C. Cir. 1963); *see also* Bray, *supra* note 3, at 437–39 (discussing *Wirtz* and noting that it appears to be the first recorded instance of a nationwide injunction). *But see* Sohoni, *supra* note 18, at 992–93 (agreeing that *Wirtz* serves as an example of a nationwide injunction but disputing that it was the first).

85. *Wirtz*, 337 F.2d at 520.

86. *Id.* at 534–35.

87. As discussed, there is some scholarly debate as to the exact first issuance of a nationwide or universal injunction. *See supra* note 83. One of the more convincing early cases that Professor Sohoni cites as the first universal injunction is another D.C. Circuit case, *Lukens Steel Co. v. Perkins*, which dealt with minimum wage requirements for federal contracts. 107 F.2d 627, 629 (D.C. Cir. 1939). After losing at the trial court, the D.C. Circuit issued an injunction *pendente lite* that may or may not have attempted to bind the government's action against non-parties. *Id.* In fact,

Wirtz was a fairly innocuous origin for the nationwide injunction as preventing the minimum wage regulations from only applying to the plaintiffs would have granted them a clear advantage over their competitors. Such an injunction would not only have provided complete relief to the plaintiffs but excessive relief, and the interests of third parties would have been harmed. For this reason, the D.C. Circuit used a novel remedy: the first nationwide injunction. By doing so, it sought to provide complete relief to the plaintiffs—no more, no less. The remedy in this case attracted very little controversy at the time,[88] and it was not until recently that the case has attracted scrutiny for its use of the nationwide injunction.[89]

Wirtz did not describe its injunction as either nationwide or universal, although it was effectively both. The first judicial opinion to use the phrase "nationwide injunction" appeared a year later in 1964.[90] While the phrase "universal injunction" appeared as early as 1921, the actual injunction issued in this case was limited to the two

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the government sought an order clarifying such, although the case reached the Supreme Court before the scope of the original injunction was made clear. Perkins v. Lukens Steel Co., 310 U.S. 113, 122 n.6 (1940). Once there, the Supreme Court overruled the D.C. Circuit, harshly characterizing its use of such a sweeping remedy:

> In our judgment the action of the Court of Appeals for the District of Columbia goes beyond any controversy that might have existed between the complaining companies and the Government officials. The benefits of its injunction, and of that ordered by it, were not limited to the potential bidders in the 'locality,' however construed, in which the respondents do business.

Id. at 123. While Professor Sohoni believes that this was an example of a universal injunctions by the D.C. Circuit, she admits that the Supreme Court was "deeply skeptical" of this particular remedy. Sohoni, *supra* note 18, at 986. In any event, whether *Perkins* or *Wirtz* was the first issuance of a modern nationwide injunction, it was issued by the D.C. Circuit.

88. While *Wirtz* proved fairly influential for its administrative law holding, a Westlaw Citing References search reveals that its novel injunctive remedy was not discussed in a published judicial opinion until *City of Chicago v. Sessions*. No. 17-C-5720, 2017 WL 4572208, at *4 (N.D. Ill. Oct. 13, 2017). Similarly, the academic literature did not begin to discuss its role as the progenitor of the modern nationwide injunction until recently. *See, e.g.*, Berger, *supra* note 22, at 1077 n.44.

89. *See* Bray, *supra* note 3, at 438–39 (describing it as "especially remarkable" that "the court cited no prior cases that offered support for the scope of the remedy").

90. Int'l Breweries, Inc. v. Anheuser-Busch, Inc., 230 F. Supp. 662, 663 (M.D. Fla. 1964), *aff'd*, 364 F.2d 261 (5th Cir. 1966); *see also* Berger, *supra* note 22, at 1077 n.44 (performing a Westlaw and Lexis Advance database search for the phrase "nationwide injunction" and also noting that *Wirtz* was "a top contender" for the distinction of first nationwide injunction).

private parties before the court.[91] The first use of the phrase "universal injunction" to explicitly bind non-parties appears to be in *Liberte Capital Group, LLC v. Capwill* in 2006.[92] There, the Sixth Circuit upheld the district court's use of a universal injunction in a receivership case and stated:

> Once assets are placed in receivership, a district court's equitable purpose demands that the court be able to exercise control over claims brought against those assets . . . . To this extent, the receivership court may issue a blanket injunction, staying litigation against the named receiver and the entities under his control unless leave of that court is first obtained . . . . Because the court's power of injunction in a receivership proceeding arises from its power over the assets in question, non-parties to the underlying litigation may be bound by a blanket stay, so long as the non-parties have notice of the injunction.[93]

While there is no guarantee that universal or nationwide injunctions would be explicitly described as such by their issuing courts, it is clear that these phrases rarely appeared in judicial opinions even after *Wirtz*.

The rise of nationwide injunctions after *Wirtz* was slow at first. In *Flast v. Cohen*,[94] the Supreme Court heard arguments from taxpayers who wished to enjoin the use of federal funds for religious

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91. *See In re* L.P. Larson, Jr., Co., 275 F. 535, 538 (7th Cir. 1921) ("Looking to Larson Company's legal rights flowing from these adjudicated issues of fact, we found Larson Company entitled in law and equity to a perpetual and universal injunction against Wrigley Company's Doublemint"). The court "entered a final injunction, perpetual in time and universal in place." *Id.* at 536. Because it did not bind non-parties, this remedy appears to be more analogous to the "nationwide but not universal" national retailer example discussed previously.

92. 462 F.3d 543, 555 (6th Cir. 2006) ("Against the backdrop of the general, universal injunctions against suits already in place, the posture of the parties . . . ."). This case was identified with a Westlaw search for the phrase "universal injunction" and then a review of the remedy granted in each case. It is possible that earlier cases exist outside of Westlaw's database, but the relative dearth of electronic records demonstrates that the use of this phrase was relatively uncommon until at least the twenty-first century.

93. *Id.* at 551–52.

94. 392 U.S. 83 (1968).

schools on First Amendment grounds.[95] It noted without outright condemnation that "[t]he injunctive relief sought by appellants is not limited [by geographic scope] but extends to any program that would have the unconstitutional features alleged in the complaint."[96] Nevertheless, the Court upheld the taxpayers' standing to challenge the allegedly unconstitutional expenditures in federal court.[97] However, the *Flast* doctrine has effectively been limited to its facts, and the Supreme Court has not been receptive to taxpayer standing since this case.[98]

While *Wirtz* and *Flast* laid the foundation for nationwide injunctions in the 1960s, they were still few and far between through the 1970s. Nationwide injunctions continued to be "exceedingly rare until President Reagan took office" and the country then averaged about 1.5 per year through the George W. Bush Administration.[99] There was an substantial increase of approximately 40% during Barack Obama's Presidency, and an eightfold increase in President Trump's first year in office alone.[100] By the Department of Justice's count, there have been more nationwide injunctions issued since 2017 than there have been in the rest of American history combined.[101] This trend shows no sign of abating naturally, and neither does the growing disapproval among the Supreme Court, Congress, and academics.[102]

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95. *Id.* at 85–86.

96. *Id.* at 89.

97. *Id.* at 106.

98. *See* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 615 (2007) ("We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it."); *see also* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 489–90 (1982) (denying taxpayer standing to challenge an Executive Branch donation of real property to a Christian college).

99. Williams, *supra* note 4.

100. *Id.*

101. *See id.* ("We are now at 30, matching the total number of injunctions issued against the first 42 presidents combined.").

102. While the current prevalence of nationwide injunctions may please some partisans, this is short-sighted and ignores even recent history. The first dramatic rise in nationwide injunctions occurred during Ronald Reagan's Presidency, and the second during Barack Obama's, demonstrating that these questionably legitimate remedies will besiege presidents of both parties. While opponents of President Trump may relish this third wave of escalations, it is doubtful that they will feel the same when the Biden Administration faces the same treatment. With hundreds of federal judges spread across ninety-four districts and thirteen courts of appeals and the possibility for ideological litigants to forum shop, it is inevitable that there will be some federal judges willing to block the President's agenda no matter which party he belongs to.

III. PROBLEMS WITH THE CURRENT FRAMEWORK

The current system, where some district courts claim to have the power to issue injunctions nationwide, is fraught with problems. Some of these problems relate to the logical inconsistencies nationwide injunctions create within our federal court system, such as asymmetric preclusion or overlap with class action law. Others are simply the practical implications of nationwide injunctions, such as forum shopping or conflicting injunctions. These issues are summarized below.

A. Forum-Shopping

Forum-shopping, or the practice of litigants choosing in which court to file for its perceived or actual amenability to their claim, has long been a concern for the legal profession.[103] In many cases, as there is not a single "correct" court to file in—the prospective litigants may have several options. Given that plaintiffs are the originators of most suits, this choice is most often theirs. Although the language used by courts when discussing forum-shopping is generally negative, some degree of forum-shopping is generally accepted.[104] In a scenario where a plaintiff has been injured and has a choice of several appropriate venues, very few would fault her for choosing the one whose juries award the highest average verdicts despite this contributing to the disparate treatment of like claims across jurisdictions.[105]

But when forum-shopping is actually just judge-shopping, this presents a systemic challenge to the integrity of the legal system by

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103. *See* Hanna v. Plumer, 380 U.S. 460, 467–68 (1965) (discussing the "twin aims" of the *Erie* doctrine: to discourage forum-shopping and to avoid the inequitable administration of the laws); *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77–78 (1938) (overruling Swift v. Tyson, 41 U.S. 1 (1842) and discussing how it led to "injustice and confusion" among litigants).

104. *See* Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 268 (1996) (discussing how "the language contained in the clear majority of cases addressing forum-shopping issues reflects contempt for" the practice, yet many of those same decisions actually promote forum shopping).

105. *See id.* (discussing a similar hypothetical and the legal system's general attitude towards it).

undermining the image of judicial impartiality.[106] The federal courts are the least political branch of government given that they are unelected and serve lifetime appointments, so keeping them above the partisan fray is essential to preserving their political legitimacy. They do not have Congress's power of the purse, nor do they have the Executive Branch's command of the military. Their only real source of power is people's belief that they have power. Because of the potential reputational damage judge-shopping can do to this image of judicial impartiality and legitimacy, the practice is almost universally condemned.[107]

In the context of nationwide injunctions, the risks associated with judge-shopping are particularly acute as the federal government can essentially be sued in any jurisdiction.[108] In a nation as large and diverse as the United States, it is inevitable that at any given time tens of millions of individuals will oppose the President's agenda. Likewise, there will never be a shortage of special interest groups supporting or opposing any specific government action. These ideologues use the court system not as tool to protect individual rights but as a forum to wage political battles. Opponents of both Presidents Obama[109] and Trump[110] know exactly where to file in order to challenge Executive action, contributing to the politicization

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106. *See id.* at 268–69, 303–04; *see also* Barnas, *supra* note 19, at 1686 ("While forum shopping is both a feature and a bug of a decentralized judicial system, judge shopping erodes the legitimacy of the judiciary.").

107. *See, e.g.*, *In re* Mason, 916 F.2d 384, 386 (7th Cir. 1990) (recognizing that a legal system that encourages judge-shopping "would imperil the perceived ability of the judicial system to decide cases without regard to persons"); *see also* Lazofsky v. Sommerset Bus Co., Inc., 389 F. Supp. 1041, 1044 (E.D.N.Y. 1975) (describing judge-shopping as "a practice which has been for the most part universally condemned").

108. *See* Barnas, *supra* note 19, at 1685–86 ("The lack of any true limiting principles to guide judges' broad equitable discretion in determining the scope of injunctive relief can be compounded by plaintiffs handpicking judges."); *see also* ATTORNEY GENERAL'S 2018 MEMORANDUM, *supra* note 5, at 6 ("The availability of nationwide injunctions offers would-be plaintiffs a strong incentive to forum shop.").

109. *See* Alex Botoman, Note, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297, 300–08 (2018) (discussing how opponents of the Obama Administration allegedly engaged in judge-shopping to challenge Executive action).

110. Nicholas Bagley & Samuel Bray, *Judges Shouldn't Have the Power to Halt Laws Nationwide*, ATLANTIC (Oct. 31, 2018), https://www.theatlantic.com/ideas/archive/2018/10/end-nationwide-injunctions/574471/ ("It's no coincidence that the latest Obamacare suit was filed in Texas. It's also no coincidence that many of the high-profile challenges to Trump policies have been brought in deep-blue states.").

of the Judiciary.[111] Further, because these cases are often so high profile and involve extremely controversial political matters, they are likely to draw even greater attention than the typical case. And when judges order relief nationwide for non-parties, these controversies are only exacerbated.

B. Counter-majoritarian Concerns

The nature of the federal courts in resolving disputes relating to public interests is inherently counter-majoritarian; one judge or perhaps a small panel of unelected, unrepresentative, politically-unaccountable individuals make broad pronouncements about the rights and duties of citizens at large. In some respects, the adage "it's not a bug, it's a feature" holds true in this instance; we *want* judges to have some degree of insulation from popular sentiment so that they hopefully can resist whatever present craze is befalling the general public. Similarly, it is probably a good idea that federal judges are not perfectly representative of the average citizen, as the average citizen is not very knowledgeable of the law. This technocratic approach has the inevitable consequence of largely homogenizing the Federal Judiciary when it comes to profession and experience. While a system that appoints as many doctors and electricians to the bench as it does lawyers would undeniably be more representative, it would also almost certainly be less effective.

Because of this, there are strong counter-majoritarian concerns when it comes to the decisions of federal judges on public matters. Both Congress and the President have public mandates from the electorate, and their actions serve to enact that mandate. Whenever their efforts are blocked by the federal courts, it is, by definition,

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111. *See* Barnas, *supra* note 19, at 1686 ("This delegitimization is compounded by the fact that universal injunctions are often sought by ideological litigants against sweeping executive actions with great political salience."). Further:

> Sophisticated litigants and interest groups carefully choose their federal district court, intra-district division, and corresponding circuit court, with an eye toward the courts most likely to be sympathetic to their claims. Such forum shopping in litigation of high-profile, politically-sensitive cases designed to achieve nationwide injunctions may do lasting harm to the public's confidence in the rule of law and the fairness and impartiality of the federal judiciary.

ATTORNEY GENERAL'S 2018 MEMORANDUM, *supra* note 5, at 6.

undemocratic. We have made this structural choice because we recognize not just that the political branches sometimes need checks and balances, but sometimes the people do as well. In a free and democratic society, there is perhaps no more solemn a power to wield, and the federal courts exercise this power with great care.

When it comes to nationwide injunctions, these counter-majoritarian concerns are only intensified. The Presidency, for better or worse, is the ultimate reflection of the will of the American people. This is the only office for which every single citizen in the electorate has the opportunity to vote, [112] and presidential election years typically have the highest turnout rate.[113] Simply due to the raw size of his constituency, that is, every single American, the President is also typically the most admired man in America.[114] Because of this, any ruling hindering the President's national agenda is likely to draw the attention of the media and the ire of huge swaths of Americans, particularly when dealing with politically charged subjects.

We accept some level of counter-majoritarianism from the federal courts because they are more knowledgeable on the law than the average citizen. But when the issue before the court is simply one of ethics or politics, this technocratic deference evaporates. The average person would probably admit that a federal judge knows more about the law than they do, but very few believe that a judge's opinion on morality or politics is inherently superior to their own. All professions are capable of forming an opinion on these fundamental human topics and there is no objective reason that a judge's or lawyer's opinion on these matters should outrank those of the public

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112. Perhaps with the exception of the Vice President; although, these offices are obviously intertwined.

113. *See generally National General Election VEP Turnout Rates, 1789-Present*, U.S. ELECTION PROJECT, http://www.electproject.org/national-1789-present (last visited Mar. 13, 2021).

114. *See* Jeffrey M. Jones, *Obama, Trump Tie as Most Admired Man in 2019*, GALLUP (Dec. 30, 2019), https://news.gallup.com/poll/273125/obama-trump-tie-admired-man-2019.aspx (finding that Presidents Obama and Trump were tied for most admired man in the world among Americans). President Trump secured his position at the top of this list for 2020, followed by Presidents Obama and Biden. The popular allure of the Presidency also seemingly extends to First Ladies, as Michelle Obama and Melania Trump finished in the top two spots for 2019, and Hillary Clinton held the top spot from 1993 to 1994, 1997 to 2000, and 2002 to 2017. *Most Admired Man and Woman*, GALLUP, https://news.gallup.com/poll/1678/Most-Admired-Man-Woman.aspx. (last visited Mar. 13, 2021).

at large. With such sensitive subjects as abortion[115] and immigration,[116] courts will make headlines and spark controversy with overbroad injunctions. While the federal courts must often decide cases dealing with controversial subjects, narrow injunctions tailored specifically to protecting the actual parties before the court prevents the needless expenditure of the Judiciary's political capital.

None of this is to say, obviously, that the courts should refrain from scrutinizing the actions of the Executive Branch. The President is not a king, and the Judiciary provides a critical check on the power of the Executive Branch.[117] The Executive Branch is also checked by the other political branch, and Congress has specifically provided standards for judicial review when evaluating Executive actions, most notably in the Administrative Procedure Act.[118] We want the courts to strike down unlawful governmental actions, and even narrow remedies can be very effective at hindering such actions. Further, narrow remedies will produce a proportionate response to any alleged governmental abuse. Clearly unconstitutional actions will be widely and quickly halted while questionably lawful actions will receive more middling results and clearly constitutional actions will be allowed to proceed unimpeded. Importantly, in these close cases where the issues of law are unclear or debatable, narrowly tailoring relief will prevent courts from issuing overlapping injunctions. These overlapping injunctions and their potential to conflict are discussed next.

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115. *See* Va. Soc'y for Hum. Life, Inc. v. FEC, 263 F.3d 379, 382 (4th Cir. 2001) (chastising the district court for awarding a nationwide injunction sought by a pro-life advocacy group seeking to enjoin the FEC's enforcement of a challenged regulation against "any other party in the United States of America"), *overruled by* Real Truth About Abortion, Inc. v. FEC, 681 F.3d 544, 550 n.2 (4th Cir. 2012).

116. *See* Bresgal v. Brock, 843 F.2d 1163, 1172 (9th Cir. 1987) (upholding the district court's grant of a nationwide injunction requiring the Department of Labor to apply the plaintiff's interpretation of the Migrant and Seasonal Agricultural Worker Protection Act universally and not just to the plaintiffs); *see also* Morley, *supra* note 9, at 514–16 (criticizing *Bresgal* as a sweeping and inaccurate attempt at tailoring an injunction to provide complete relief to plaintiffs).

117. *See generally* THE FEDERALIST NO. 69 (Alexander Hamilton) (discussing how the powers of the President would differ from the King of Great Britain).

118. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–559, 701–706).

C. Conflicting Injunctions

One of the greatest risks with every single district court claiming the authority to issue nationwide injunctions is the potential for overlapping jurisdiction and conflicting results.[119] Especially with the possibility of forum-shopping,[120] it is easy to imagine a situation where two ideologically divergent district court judges reach opposite conclusions on the same issue and issue nationwide injunctions to require the enforcement of their preferred interpretation.[121] This would inevitably force the federal government to then choose which court order to defy and which to obey.[122] It also creates a perverse incentive for district court judges to be the first to issue a nationwide

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119. *See* ATTORNEY GENERAL'S 2018 MEMORANDUM, *supra* note 5, at 5–6 ("[I]n some circumstances, nationwide injunctions may result in conflicting obligations placed on the federal government, in which it is logically impossible for the government to comply with all court orders.").

120. *See supra* Part III.A; *see also* ATTORNEY GENERAL'S 2018 MEMORANDUM, *supra* note 5, at 6–7 ("Nationwide injunctions may further undermine the public's confidence in the judiciary because they may be perceived as a sign of disrespect from one court to another. . . . A judge's refusal to respect the judgment of his or her colleagues sends a strong signal to the public that their own respect for judicial decision-making is misplaced.").

121. *Compare* Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015) (granting a nationwide injunction blocking the implementation of President Obama's Deferred Action for Childhood Arrivals ("DACA") program), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.), *with* Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 438 (E.D.N.Y. 2018) (granting a nationwide injunction requiring that the Trump Administration fully restore the DACA program). In *Texas*, the court found that the Obama Administration had "clearly legislated a substantive rule without complying with the procedural requirements under the Administration [sic] Procedure Act." *Texas*, 86 F. Supp. 3d at 677. In contrast, the court in *Batalla Vidal* held that the Trump Administration's later conclusion of the unconstitutionality and illegality of DACA's enactment was "erroneous." F. Supp. 3d at 436. The Eastern District of New York even explicitly referenced the injunction by the Southern District of Texas and described its analysis as "unpersuasive." *Id.* at 425. The appeal from *Batalla Vidal* was consolidated with similar cases and argued before the Supreme Court on November 12, 2019, and decided June 18, 2020. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1891–1936 (2020). Regardless of the outcome of this case, the risk of district courts openly contradicting each other and issuing competing injunctions over the same legal issue is concerning. Not only does it promote uncertainty and discord, but it effectively forces the Supreme Court to prematurely weigh in on an issue that it would rather let percolate. *See infra* Part III.E.

122. *See* ATTORNEY GENERAL'S 2018 MEMORANDUM, *supra* note 5, at 5–6 ("Unless and until the Supreme Court settles the issue, conflicting injunctions may place government agencies and attorneys in the untenable position of choosing which court order to comply with and which to—unavoidably—contravene.").

injunction because this will effectively moot other litigation around the country and perhaps ensure that its preferred interpretation is the one followed.

In *Dep't of Homeland Security v. New York*,[123] a case dealing with the so-called "public charge" rule, Justice Gorsuch acerbically laid out the chaotic risks inherent to nationwide injunctions and their potential to overlap:

> These efforts have met with mixed results. The Northern District of California ordered the government not to enforce the new rule within a hodge-podge of jurisdictions—California, Oregon, Maine, Pennsylvania, and the District of Columbia. The Eastern District of Washington entered a similar order, but went much farther geographically, enjoining the government from enforcing its rule globally. But both of those orders were soon stayed by the Ninth Circuit which, in a 59-page opinion, determined the government was likely to succeed on the merits. Meanwhile, across the country, the District of Maryland entered its own universal injunction, only to have that one stayed by the Fourth Circuit. And while all these developments were unfolding on the coasts, the Northern District of Illinois was busy fashioning its own injunction, this one limited to enforcement within the State of Illinois.
>
> If all of this is confusing, don't worry, because none of it matters much at this point. Despite the fluid state of things—some interim wins for the government over here, some preliminary relief for plaintiffs over there—we now have an injunction to rule them all: the one before us, in which a single judge in New York enjoined the government from applying the new definition to anyone, without regard to geography or participation in this or any other lawsuit. The Second Circuit declined to stay this particular universal injunction, and so now, after so many trips up and

123. 140 S. Ct. 599 (2020) (mem.).

> down and around the judicial map, the government brings its well-rehearsed arguments here.[124]

As Justice Gorsuch notes, these "mixed results" are not only dangerous but outright confusing.[125] The only way the government could ever hope to comply with inconsistent injunctions nationwide would be if traditional conceptions of equity prevail and courts limit their remedies to the parties before them. In this way, the government would not have to choose which court orders to follow or defy but would simply refrain enforcement against a discrete list of plaintiffs who have been determined to be entitled to relief.

In a world where every single district court effectively has national jurisdiction over non-parties, it is downright probable that we will see conflicting injunctions. This is a harm that could otherwise be avoided with the geographic divisions of the federal court system and the doctrine of standing. This doctrine "embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights," and "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches . . . ."[126] It is important that courts not entertain suits that are seeking redress for perceived harms to third parties as those parties themselves may seek relief in another suit. Further, their interests or desired relief may not even be aligned with the plaintiffs in the original suit.[127] Similarly situated parties should not have their rights adjudicated without having the opportunity to advocate for their own interests and desired

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124. *Id.* at 599 (Gorsuch, J., concurring).

125. *Id.*

126. Allen v. Wright, 468 U.S. 737, 751 (1984).

127. There are examples for these incongruent interests among similarly situated individuals on both sides of the political spectrum. For instance, there may be potential plaintiffs subject to the Affordable Care Act that would *not* support a challenge to the constitutionality of the individual mandate. By granting a nationwide injunction based on the claims of a single plaintiff instead of providing narrow relief, a court has prejudiced the interests of similarly situated plaintiffs. Likewise, a plaintiff challenging the propriety of a merit-based immigration policy as opposed to a lottery-based one does not have identical interests to all potential plaintiffs. Because there will be potential immigrants who feel that their chances are actually better off under a merit-based system, their interests are not aligned with those challenging such a system. Class-wide relief without class certification will often lead to similarly situated plaintiffs having their rights prejudiced without their involvement or knowledge.

remedies, especially if those interests would be to not litigate in the first place.

D. Conflicts with Class Action

Defenders of nationwide injunctions sometimes claim that they fulfill an important role and help provide relief to similarly situated plaintiffs.[128] There are clear risks to efficiency and judicial economy if the federal courts had to preside over countless, nearly identical claims brought by individual plaintiffs all litigating the same exact legal issue.[129] There are also equitable concerns for plaintiffs regarding their ability to achieve like outcomes for like claims.[130] However, the Federal Rules of Civil Procedure already have a clear and superior answer to this dilemma: Rule 23.[131]

The federal courts already have a robust and formalized class action system designed for broad groups of plaintiffs bringing similar claims, [132] and the practice of issuing nationwide injunctions is in clear tension with our modern class action system. Justice Thomas alluded to such in his concurrence in *Trump v. International Refugee Assistance Project*.[133] Noting that "no class has been certified" and that a court's role is to provide relief to claimants only, he criticized the Supreme Court for keeping in place an injunction protecting "an unidentified, unnamed group of foreign nationals abroad."[134]

If nationwide injunctions are a legitimate exercise of judicial authority, then the class action system is largely superfluous.[135]

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128. *See* Frost, *supra* note 18, at 1069 ("But in some cases, nationwide injunctions are also the only means to provide plaintiffs with complete relief and avoid harm to thousands of individuals similarly situated to the plaintiffs.").

129. *See* Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507, 507 (1987) (discussing how the principal objectives of the class action system are to avoid duplicative litigation, the unnecessary waste of judicial resources, and inconsistent judgments).

130. *See* Alexandra Lahav, *Due Process and the Future of Class Actions*, 44 LOY. U. CHI. L.J. 545, 556 (2012) (arguing that similarly situated individuals are entitled to similar outcomes).

131. FED. R. CIV. P. 23.

132. *See generally id.*

133. 137 S. Ct. 2080, 2090 (2017) (Thomas, J., concurring in part and dissenting in part).

134. *Id.*

135. *See* ATTORNEY GENERAL'S 2018 MEMORANDUM, *supra* note 5, at 5 ("[A] court that issues a nationwide injunction flouts the specific mechanism that the law provides for large numbers of similarly situated persons to pursue relief efficiently: the class action system").

Rule 23 exists to allow similarly situated plaintiffs litigating like claims to band together and seek redress for their alleged injuries. Nationwide injunctions basically function as an end-around exception where plaintiffs can circumvent the usual requirements of Rule 23[136] yet still retain the possibility of receiving broad, class-based relief.[137] One scholar has described this as effectively transforming an individual lawsuit "into a *de facto* class action, without satisfying the requirements of Rule 23 or giving the injunction's purported beneficiaries notice of the suit or an opportunity to opt out."[138]

In the absence of Rule 23 or class certification, "an action is not properly a class action"[139] and should not be treated as such.[140] In *McKenzie v. City of Chicago*,[141] a Seventh Circuit panel consisting of Judges Posner, Easterbrook, and Manion unanimously reversed a district court injunction halting a Chicago program for the demolition of blighted buildings. The plaintiffs attempted "to broaden the case by serving as representatives of a class of all owners of residential, one- or two-story buildings in Chicago," but

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136. Barnas, *supra* note 19, at 1695 ("[S]eeking a universal injunction is more expedient and cheaper than seeking a classwide injunction").

137. It is also worth considering the rights of third parties and how such remedies may violate these rights. For instance:

> Allowing individual plaintiffs to obtain injunctions to enforce the rights of others outside the context of class-action litigation also may violate the rights of those third parties not before the court. The plaintiffs are permitted to leverage the rights of third parties over whom the court has not acquired personal jurisdiction, without the consent of those third parties–indeed, often without their knowledge–and without giving them an opportunity to opt out. Government defendants may be enjoined from enforcing a law against people who support the measure, would prefer or even benefit from its enforcement, and would gladly refrain from enforcing their rights against it. When courts grant sweeping injunctive relief against unconstitutional or otherwise invalid measures in individual-plaintiff cases, they generally fail to consider or address these factors.

Morley, *supra* note 9, at 516–17.

138. *Id.* at 490–91.

139. Baxter v. Palmigiano, 425 U.S. 308, 310–11 n.1 (1976).

140. *See* Morley, *supra* note 9, at 510–11 (discussing how many courts prohibit the enforcement of questionably valid legal actions "only against the individual plaintiffs in a suit while leaving the government defendants free to enforce that provision against anyone else").

141. 118 F.3d 552 (7th Cir. 1997).

were never granted class certification.[142] Recognizing the impropriety of the lower court's injunction, the Seventh Circuit stated:

> The fundamental problem with this injunction is that plaintiffs lack standing to seek—and the district court therefore lacks authority to grant—relief that benefits third parties. . . . Because a class has not been certified, the only interests at stake are those of the named plaintiffs. . . . A wrong done to plaintiff in the past does not authorize prospective, class-wide relief unless a class has been certified. Why else bother with class actions? . . . The district court wrote that it was appropriate to enjoin the entire program, despite the lack of class certification, in order to prevent the City from violating the Constitution. . . . Instead it assumes an affirmative answer to the question at issue: whether a court may grant relief to non-parties. The right answer is no. Sometimes a judge may overhaul a statutory program without a class action; in reapportionment and school desegregation cases, for example, it is not possible to award effective relief to the plaintiffs without altering the rights of third parties. Plaintiffs in this case, however, can be protected by an injunction forbidding fast-track demolition of their properties.[143]

As the Seventh Circuit astutely noted, in the absence of class certification, the purpose of an injunction should be to afford relief to the plaintiffs. This is true even when there are alleged constitutional violations, especially because it is very easy to allege a constitutional violation. Relief should not be granted to non-parties unless that relief is incidental to protecting the plaintiff's rights. The court system benefits from individually adjudicating similar claims with slightly different factual scenarios as this gives appellate courts a more complete understanding of a given law or regulation's impact on society as a whole. This process of similar cases being reviewed by different trial and appellate courts has been described as "percolation," discussed next.

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142. *Id.* at 554.
143. *Id.* at 555 (citations omitted).

E. Loss of Percolation

Loss of percolation is one of the main concerns that justices have explicitly mentioned in regards to nationwide injunctions.[144] When courts issue nationwide injunctions, they prevent a contested legal issue from percolating around other federal courts and effectively bind their peers by their decision.[145] This is inappropriate because a central aspect of our federal court system is the hierarchical structure of the federal courts, where only superior courts have the power to bind lesser ones.[146] If a single district court judge has the power to issue binding decisions nationwide on a contested legal issue, not only would the judge wield greater power than the judge's respective appellate circuit which is geographically limited, but the judge would also effectively outrank any individual Supreme Court justice. This is due to the fact that a majority of justices is almost always required to issue decisions which bind the entire country.[147] Such a grossly illogical power dynamic is obviously inconsistent with the structure of our federal court system.

None of this is to diminish the important work that the lower federal courts do or detract from their role as administrators of justice. The lower federal courts are an essential component of our judicial system—they decide countless cases every year, many dealing with our most fundamental constitutional rights. But these decisions should be limited to the parties before them so as to not infringe upon the jurisdiction of their peers all across the country.

In any normal constitutional challenge, the court must decide whether a certain government action is facially unconstitutional or only unconstitutional as applied to the plaintiff.[148] For a statute or regulation to be facially unconstitutional, there must be no

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144. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring); s*ee also* Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) (discussing how percolation allows "multiple judges and multiple circuits to weigh in only after careful deliberation, a process that permits the airing of competing views that aids this Court's own decisionmaking process").

145. ATTORNEY GENERAL'S 2018 MEMORANDUM, *supra* note 5, at 4.

146. *See id.* ("One of the primary benefits of our judicial system is the ongoing dialogue that develops over time among the lower courts, whose decisions ordinarily do not bind one another pending review by the Supreme Court.").

147. There is of course the possibility for a plurality decision or a quorum-majority four-justice decision. *See* 28 U.S.C. § 1 (2018) (requiring a quorum of six justices). In any event, multiple justices are needed to exercise the Court's judicial power nationwide.

148. Morley, *supra* note 9, at 489.

conceivable set of circumstances for which it would be constitutional.[149] In contrast, if a government action is only unconstitutional as applied to the plaintiffs, the government is still free to take that action under other circumstances and against other potential parties.[150] By bifurcating constitutional challenges in this way, the federal court system gets to the heart of the problem, namely, whether the given action is always unconstitutional or merely unconstitutional given the facts of that specific case. These as-applied challenges give appellate courts the ability to review government actions in wide-ranging and diverse factual scenarios, greatly contributing to percolation.

When a trial court grants a nationwide injunction, it effectively forces the government to appeal immediately and prevents the issue from percolating in the federal courts.[151] This immediate appeal necessarily limits the record to a narrower set of facts than if the issue had been analyzed by multiple courts under multiple circumstances.[152] When deciding cases with broad ramifications across the nation, and often at a preliminary stage of litigation, a limited record on appeal is particularly concerning. Appellate courts are thus forced to decide complex legal questions often affecting an incalculably large number of people with only the facts and briefing of a single case and on a truncated timeline.

This forced immediate appeal also puts pressure on appellate courts, including the Supreme Court, to grant the appeal. While normally an appellate court could wait for extensive analyses from lower courts on similar cases, such a drastic measure as a nationwide injunction essentially forces its hand.[153] At the Supreme

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149. *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008) (holding that a facially unconstitutional law "is unconstitutional in all of its applications").

150. *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994) ("[W]hen a court holds a statute unconstitutional as applied to particular facts, the state may enforce a statute in different circumstances."); *see also* Bray, *supra* note 3, at 434–35 (discussing how, despite numerous individual injunctions being granted, the federal government was still able to enforce the Agricultural Adjustment Act's processing tax against other parties).

151. Morley, *supra* note 9, at 534.

152. *See* ATTORNEY GENERAL'S 2018 MEMORANDUM, *supra* note 5, at 4 ("This dialogue occasionally will lead circuit courts to resolve conflicts on their own; at a minimum, it provides useful information to the Supreme Court in the form of multiple reasoned lower court opinions and the consequences that have flowed from them.").

153. *Id.* ("When a lower court enjoins a federal law, regulation, or policy on a nationwide basis, that decision typically forces the government to appeal and, if

Court level, this prevents the development of circuit splits, which is typically the point at which the Court feels it must weigh in.[154] Because the Supreme Court only hears about eighty cases per year, these "must-grant" appeals have the potential to be a significant portion of the Court's docket, robbing it of discretion.[155] A district court that issues a nationwide injunction also infringes upon the domain of other district courts because injunctions have the potential to render moot or effectively overrule other courts' decisions in cases dealing with the same contested legal issue. All of these factors combine to make it more likely that appellate court decisions are made prematurely and on the basis of incomplete information.

F. Asymmetric Preclusion

A troubling dynamic exists when district courts are able to issue nationwide injunctions; the government must win every single challenge in every single jurisdiction while opponents need prevail only once to halt the challenged conduct nationwide.[156] Unlike class action suits,[157] which ensure that both sides to a dispute are bound by its outcome, defendants get the worst of both worlds.[158] For them, winning does not have nationwide effects, but losing does. The asymmetrical nature of nationwide injunctions raises fundamental fairness concerns for defendants as countless legal victories could be

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necessary, petition for a writ of certiorari—even if a different case might have more cleanly presented the issue, or even if review by another court might have provided helpful additional material for the Supreme Court's eventual consideration.").

154. *See* SUP. CT. R. 10 (listing circuit splits as one factor in the decision whether to grant certiorari).

155. *See Frequently Asked Questions*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/faq_general.aspx (last visited Mar. 13, 2021) ("The Court receives approximately 7,000-8,000 petitions for a writ of certiorari each Term. The Court grants and hears oral argument in about 80 cases.").

156. *See* ATTORNEY GENERAL'S 2018 MEMORANDUM, *supra* note 5, at 5 ("[A] win for the plaintiff resulting in a nationwide injunction binds the government, but a win by the government allows additional plaintiffs to continue to challenge a law or policy until one of them succeeds. In other words, the government must litigate a number of suits all across the country and must win them all, while litigants challenging the law or policy need only win once.").

157. *See supra* Part III.D.

158. *See* ATTORNEY GENERAL'S 2018 MEMORANDUM, *supra* note 5, at 5 ("Class action rules have safeguards in place that are faithful to the limits on judicial power established by the Constitution and that protect the interests of both parties.").

rendered meaningless by a single defeat.[159] The government must "run the table" in order to successfully defend a challenged action. But with no shortage of potential plaintiffs and the possibility for forum shopping, this becomes exceedingly difficult,[160] often resulting in "serial relitigation."[161]

Over the course of the twentieth century, the federal government would routinely refuse to reform its internal protocols in order to comply with the decision of one particular circuit court; this practice is called "agency nonacquiescence."[162] While abiding by the circuit court decision with respect to the individual parties involved, the federal government often relitigates the same issue in other circuits.[163] The Supreme Court in *United States v. Mendoza*[164] seemed to signal its approval of this practice when it unanimously held the doctrine of nonmutual collateral estoppel inapplicable against the federal government.[165]

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159. Morley, *supra* note 9, at 494; *see also* Barnas, *supra* note 19, at 1695–96 ("A universal injunction suit allows nonparties to benefit from a favorable outcome without being bound by an unfavorable one.").

160. *See* Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 601 (2020) (mem.) (Gorsuch, J., concurring) ("Because plaintiffs generally are not bound by adverse decisions in cases to which they were not a party, there is a nearly boundless opportunity to shop for a friendly forum to secure a win nationwide."); *see also* Barnas, *supra* note 19, at 1696 ("[I]f the first plaintiff does not secure a universal injunction, a nonparty can seek an identical injunction in even the same forum because the federal government cannot invoke preclusion doctrines against them and the unfavorable outcome has no binding precedential authority across district courts").

161. *See Dep't of Homeland Sec.*, 140 S. Ct. at 601 (Gorsuch, J., concurring) ("[T]he stakes are asymmetric"). *See generally* Maureen Carroll, *Aggregation for Me, But Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017 (2015) (discussing the asymmetrical nature of nationwide injunctions and "serial relitigation").

162. Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 (1989).

163. *See* Morley, *supra* note 9, at 502 (discussing agency nonacquiescence); *see also* Estreicher & Revesz, *supra* note 162 ("The selective refusal of administrative agencies to conduct their internal proceedings consistently with adverse rulings of the courts of appeals . . . is not new in American law.").

164. 464 U.S. 154 (1984).

165. *Id.* at 154. Non-mutual collateral estoppel is when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against a different party. *See* Morley, *supra* note 9, at 490 (discussing non-mutual collateral estoppel and its inapplicability to the government).

The Court's reasoning in *Mendoza* is directly analogous to many of the modern concerns surrounding nationwide injunctions. In that case, the Court noted:

> A rule allowing nonmutual collateral estoppel against the government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.[166]

The practice of issuing nationwide injunctions is inconsistent with *Mendoza* as these injunctions create the same types of harm that this case sought to prevent.[167] In fact, *Mendoza's* reasoning applies with even greater force to injunctive relief because injunctions are often preliminary remedies before a court has reached a final judgment on a case. If final judgments cannot be binding on the government nationwide, neither should preliminary ones. While *Mendoza* did not discuss injunctive relief at all, its analysis is still informative on the topic.

IV. THE CURRENT SITUATION

Supporters of the nationwide injunction may point to the Supreme Court's silence on the issue to bolster the assumption that the lower federal courts have the power to issue such a remedy. But this assumption is mistaken; the Supreme Court has "repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect."[168] Silence is not synonymous with support.

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166. *Mendoza*, 464 U.S. at 160.

167. *See* City of Chicago v. Sessions, 888 F.3d 272, 296–97 (7th Cir. 2018) (Manion, J., concurring in part and dissenting in part) (noting how nationwide injunctions are inconsistent with *Mendoza*), *reh'g en banc granted in part, vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018).

168. Lewis v. Casey, 518 U.S. 343, 352 n.2 (1996); *see also In re* Navy Chaplaincy, 534 F.3d 756, 764 (D.C. Cir. 2008) ("It is a well-established rule that cases in which jurisdiction is assumed sub silentio are not binding authority for the proposition that jurisdiction exists." (quoting John Doe, Inc. v. Drug Enf't Agency, 484 F.3d 561, 569 n.5 (D.C. Cir. 2007))).

Further, the Supreme Court has not yet explicitly endorsed the practice of nationwide injunctions either, so this silence goes both ways. As discussed previously, this is the classic baseline assumption problem. In the presence of ambiguity, what results? While this question was previously raised regarding the absence of statutory authority for nationwide injunctions, it is equally relevant for the lack of Supreme Court guidance on the issue.

The Supreme Court has had periods of silence on many matters in the past that it would eventually reject, and it is not unheard of for the Supreme Court to even reexamine and reject longstanding practices relating to federal courts' authority, like legislative standing.[169] The Supreme Court cannot hear every case. Sometimes it takes decades for an issue to become so pressing that it warrants review. Because nationwide injunctions are a recent invention of the federal courts and their proliferation has only really accelerated in the last decade or so, the potential pitfalls of this system were probably not as concerning to the Supreme Court in years past. Further, the Court has signaled that its current silence on the propriety of nationwide injunctions should not be read as affirming their usage.[170]

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169. *See generally* Raines v. Byrd, 521 U.S. 811 (1997) (holding that members of Congress did not have standing to bring suit in the federal courts challenging the constitutionality of the Line Item Veto Act). *Raines* overruled "a long line of D.C. Circuit cases" that had recognized the doctrine of legislator standing. Neal Devins & Michael A. Fitts, *The Triumph of Timing:* Raines v. Byrd *and the Modern Supreme Court's Attempt to Control Constitutional Confrontations*, 86 GEO. L.J. 351, 353 (1997). The D.C. Circuit had for decades allowed individual legislators to bring suit for alleged harms to their institutional power. *E.g.*, Kennedy v. Sampson, 511 F.2d 430, 435–36 (D.C. Cir. 1974). The appellees in *Raines* argued that the Supreme Court's silence signaled a tacit acceptance of this practice, and that it had explicitly approved of it for state legislators in *Coleman v. Miller*, 307 U.S. 433 (1939). *See* 521 U.S. at 820–26 (discussing appellees' precedential arguments and the complicated history of legislator standing). However, *Coleman* was a fractured opinion that was distinguishable based on the difference between total "vote nullification" and "the abstract dilution of institutional legislative power" alleged in *Raines*. *Id.* at 826. For a more detailed analysis on the current status of the legislator standing doctrine, see William D. Gohl, *Standing up for Legislators: Reevaluating Legislator Standing in the Wake of* Kerr v. Hickenlooper, 110 NW. U. L. REV. 1269 (2016). While the finer nuances of legislative standing are still the subject of debate, it is clear that "*Raines* dramatically narrows the ambit of legislator standing to instances in which legislators can demonstrate that their votes have been nullified . . . ." *Id.* at 1271.

170. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) ("Our disposition of the case makes it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court."). While Justice Thomas was openly skeptical of the ability of lower courts to issue nationwide injunctions, the majority was

A. Present Status

In recent years, universal injunctions have increasingly come under attack, both in the academic literature and on the bench. While Justice Thomas's concurrence in *Trump v. Hawaii* outright stated his skepticism of the practice,[171] he is not the only member of the Court to question the propriety of such injunctions. In oral arguments of the same case, Justice Gorsuch labeled the rise of this type of injunction as "troubling" and questioned counsel regarding potential remedies.[172] Thus far, Justices Thomas and Gorsuch appear to be mostly aligned on this issue.

Justice Gorsuch's concurrence in *Department of Homeland Security v. New York*,[173] in which Justice Thomas joined, reiterated their objections to nationwide injunctions and the Court's present silence regarding these extraordinary remedies. Justice Gorsuch stated that injunctions of this nature "raise serious questions about the scope of courts' equitable powers under Article III" and that "it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies."[174] And given Justice Gorsuch's statement that "[i]t has become increasingly apparent that this Court must, at some point, confront these important objections to this increasingly widespread practice," there seem to be at least two justices ready to permanently proscribe this remedy.[175]

B. Potential Reform

While no one can predict with absolute certainty the fate of nationwide injunctions, even some of their most ardent defenders must have doubts about the practice's continued viability. A Supreme Court ruling announcing a blanket prohibition on the nationwide injunctions would not be unexpected, and two justices are openly calling for the Court to review the practice. While some legal scholars have recently offered strong defenses[176] to the

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content to resolve the case without addressing the appropriateness of the chosen remedy. *See id.* at 2424–29 (Thomas, J., concurring).

171. *Id.*

172. Transcript of Oral Argument, *supra* note 2, at 73.

173. 140 S. Ct. 599, 599–601 (2020) (mem.) (Gorsuch, J., concurring).

174. *Id.* at 600.

175. *Id.*

176. *See* Frost, *supra* note 18, at 1065 (defending nationwide injunctions on the grounds that "[i]n some cases, nationwide injunctions are the only means to provide

widespread criticisms of nationwide injunctions,[177] it remains to be seen which will persuade policymakers and the Supreme Court.

The risk that the Supreme Court or Congress may explicitly revoke the federal courts' ability to issue nationwide injunctions is very real, perhaps even probable. If supporters wish to save the nationwide injunctions in any form, they should accept that reform is necessary. This would still allow for the possibility of universal injunctions in egregious cases of government overreach, and even the threat of such a remedy is likely to deter bad behavior. Decreasing the frequency of nationwide injunctions would greatly reduce the outcry regarding their existence as a remedy as these concerns only really surfaced during the second great proliferation in the Obama Presidency. Even the most skeptical members of the practice on the Supreme Court have signaled that it is really the frequency of these injunctions that is concerning. In an opinion by Justice Gorsuch, he stated that "the *routine* issuance of universal injunctions is patently unworkable. . ."[178] Therefore, any reform that would significantly limit the frequency of nationwide injunctions may be enough to placate the practice's skeptics. If this reform were to also mitigate the numerous jurisprudential defects of the nationwide injunction, then critics would not be able to so easily demonstrate its incongruence with the American legal system.

As stated previously, the perfect solution to this dilemma would be to centralize any requests for a nationwide injunction within the D.C. Circuit. In addition to being the first court to issue a nationwide injunction,[179] the D.C. Circuit has also been granted unique remedial powers in the past.[180] As the D.C. Circuit and the D.D.C. already handle a disproportionate amount of administrative cases and

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plaintiffs with complete relief, or to prevent harm to thousands of individuals who cannot quickly bring their own cases before the courts"); Sohoni, *supra* note 18, at 921 (stating that national injunctions are not a recent invention and do not violate Article III of the Constitution).

177. *See* Bray, *supra* note 3, at 418 (stating that the national injunction first emerged in the "second half of the twentieth century"); Morley, *supra* note 9, at 493 (expressing concern with courts providing "overrelief" to plaintiffs in non-class cases through nationwide injunctions).

178. *Dep't of Homeland Sec.*, 140 S. Ct. at 600 (Gorsuch, J., concurring) (emphasis added).

179. Wirtz v. Baldor Elec. Co., 337 F.2d 518, 536 (D.C. Cir. 1963).

180. *See* Kendall v. United States *ex rel.* Stokes, 37 U.S. 524, 622 (1838) (upholding the D.C. Circuit's ability as a quasi-national court to issue a writ of mandamus to a federal official, despite denying this power to the geographic circuits); *see also infra* Part V.

agency appeals,[181] the D.C. Circuit's expertise in these areas is unmatched. Further, by forcing litigants seeking nationwide relief to file in a national court, we could entirely eliminate the possibility of forum shopping. With only one circuit having the power to issue nationwide injunctions, the possibility of conflicting nationwide injunctions would be completely eliminated at the circuit level. Finally, while the stakes for the government would still be slightly asymmetrical because countless wins in the D.D.C. could still be cancelled out by a single loss at the D.C. Circuit level, this asymmetry would be greatly reduced. The government would no longer have to win in every district court and every circuit court; it merely needs the D.C. Circuit to agree that a nationwide injunction is not necessary.

This solution does have some drawbacks,[182] but none are as severe as either alternative. The current framework is unsustainable, unworkable, and likely unconstitutional. Eliminating nationwide injunctions altogether would be the most ideologically consistent approach, but that eliminates a valuable protection against governmental overreach. In an era where federal and Executive power is so expansive, perhaps the remedies available must be so as well. If this extraordinary power were to be granted to the federal courts, there is only one logical court that could reasonably wield it: the D.C. Circuit.[183]

V. THE D.C. CIRCUIT

Renowned for its "special competence to review actions of officialdom," the D.C. Circuit since its founding has handled cases of the utmost national importance.[184] It was created separately[185] from

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181. *See* Feldman, *supra* note 45 ("One major distinction between the D.C. Circuit and other courts of appeals is the frequency with which it hears cases originating from actions of federal agencies.").

182. *See infra* Part V.B.

183. By extension, the D.D.C. would necessarily be in charge of gathering evidence and managing pleadings before the initial grant or denial of a nationwide injunction. But because the D.C. Circuit only oversees one trial court and any grant of a nationwide injunction will inevitably be noticed by it, the D.C. Circuit would effectively control whether such an injunction goes into force.

184. Bloch & Ginsburg, *supra* note 42, at 605.

185. Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131, 132 (2013); *see also* John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 386 (2006) (discussing the

the other circuit courts and handles a disproportionate share of high profile administrative and regulatory cases.[186] Its résumé is replete with legendary cases dealing with the most sensitive areas of national security and governmental power.[187] Approximately half of the D.C. Circuit's docket is administrative appeals or civil suits challenging the constitutionality of a federal program, while the nationwide average is a mere 20%.[188] Conversely, the D.C. Circuit hears comparatively few criminal cases and private civil suits.[189]

More Supreme Court justices have come from the D.C. Circuit than any other circuit court,[190] including three of the nine current justices.[191] And in contrast to the geographic circuits, D.C. Circuit nominees come from all over the country, contributing to the geographic diversity of its judges.[192] Due to these unique characteristics and its location in the nation's capital, the D.C.

Evarts Act of 1891 creating the other federal circuits in their present form and the separate legislation relating to the D.C. Circuit).

186. Fraser et al., *supra* note 185; *see also* John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 GEO. WASH. L. REV. 553, 556 (2010) (discussing how the D.C. Circuit's "unmatched prestige" is derived from its "regular handling of high-profile administrative law cases involving questions of broad significance").

187. *See, e.g.*, Consumers Union of U.S., Inc. v. FTC, 691 F.2d 575, 577–78 (D.C. Cir. 1982) (en banc) (per curiam) (finding the two house legislative veto unconstitutional); Nixon v. Sirica, 487 F.2d 700, 718 (D.C. Cir. 1973) (en banc) (per curiam) (requiring President Richard Nixon to turn over the Oval Office tapes to Special Prosecutor Archibald Cox); United States v. Washington Post Co., 446 F.2d 1327, 1331 (D.C. Cir. 1971) (en banc) (per curiam) (allowing publication of the "Pentagon Papers" despite alleged threats to national security).

188. Fraser et al., *supra* note 185, at 138.

189. *Id.*; *see also* Roberts, *supra* note 185, at 376 (discussing how the lack of a federal prison within the geographic boundaries of the D.C. Circuit causes it to have comparably few prisoner petitions).

190. Bloch & Ginsburg, *supra* note 42, at 564. Since 2002, the D.C. Circuit has expanded its lead in this statistic with the elevation of Chief Justice John Roberts and Associate Justice Brett Kavanaugh to the Supreme Court. *Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Mar. 13, 2021). In addition, two of the three most recent departures from the Court were D.C. Circuit alumni, as the late Justices Scalia and Ginsburg served there before their respective elevations.

191. Justices Roberts, Thomas, and Kavanaugh all previously sat on the D.C. Circuit. *Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Mar. 13, 2021).

192 Roberts, *supra* note 185, at 376. In addition to its geographic diversity, the D.C. Circuit has also been noted for its racial and gender diversity. Bloch & Ginsburg, *supra* note 42, at 563–64.

Circuit is commonly referred to as the second-highest court in the land, answerable only to the Supreme Court.[193]

While its prominence in the area is undisputed,[194] Congress has not vested the D.C. Circuit with exclusive jurisdiction over administrative law like it did for the Federal Circuit with patent law appeals.[195] Further, the jurisdictional statutes of administrative law are so complicated and numerous that compiling a complete list would probably "be impossible at any given moment."[196] However, when Congress desires to create uniformity of decision-making by placing judicial review in the hands of a single court, it often chooses the D.C. Circuit.[197] This practice has existed at least since 1870,[198] when Congress gave the court the exclusive authority to review the Commissioner of Patents, a federal agency.[199] The D.C. Circuit also enjoys exclusive jurisdiction over certain questions relating to important federal statutes, and this jurisdiction acts to preclude its sister circuits from those areas.[200]

From the very beginning, its jurisdiction was unique from its sister circuits, comprising a variety of national and local matters.[201] For instance, in *United States ex rel. Stokes v. Kendall*,[202] the D.C.

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193. *See supra* note 47.

194. *See generally* Golden, *supra* note 186, at 553–55 (discussing the D.C. Circuit's role in shaping administrative law and making comparisons to the Federal Circuit's exclusive jurisdiction over patent law).

195. 28 U.S.C. § 1295(a)(1) (2018).

196. 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3941 (3d ed. 2012); *see also* Mead & Fromherz, *supra* note 23, at 15 ("Indeed, by our rough count, there are more than a thousand statutory provisions sprinkled through fifty-one titles of the United States Code that direct agency cases to a particular court.").

197. Mead & Fromherz, *supra* note 23, at 32.

198. Roberts, *supra* note 185, at 385.

199. *See* Patent Act of 1870, Pub. L. No. 41-230, § 48, 16 Stat. 198, 205 (repealed 1929).

200. Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1122 (1990). These areas include standards promulgated by the Environmental Protection Agency, certain orders of the Federal Communication Commission, and some actions of the Federal Election Commission. *E.g.*, 42 U.S.C. § 9613(a) (2018); 47 U.S.C. § 402(b) (2018); 52 U.S.C. § 30109(8)(a); (2018).

201. *See* Fraser et al., *supra* note 185, at 134–35 (discussing how the D.C. Circuit was vested with "all the jurisdiction" of the other circuits as well as general jurisdiction over incorporated cities in Maryland and Virginia); *see also* Roberts, *supra* note 185, at 378–79 (discussing the "Jeffersonian purge" of the Judiciary and positing that the D.C. Circuit's dual jurisdiction saved it from a similar fate).

202. 5 D.C. (5 Cranch) 702 (1837).

Circuit became the first court to successfully issue a writ of mandamus to a federal official.[203] This is notable because the Supreme Court had previously rejected the power of both federal[204] and state courts[205] to issue such a writ. But Chief Judge Cranch did not think of his court as the mere equal of the other circuits. In his conception, the D.C. Circuit sat above its sister circuits and had only a single superior. The court's opinion in *Kendall* included a sweeping pronouncement on the authority of the D.C. Circuit:

> This court has all the jurisdiction which any other circuit court of the United States can have in its circuit, and much more. It is the court which the legislature of the United States has thought proper to ordain and establish as one of the courts inferior only to the supreme court of the United States, and to which it has confided the administration of those laws on which depends the protection of the lives, the personal liberty, and the property of the president, vice-president, heads of departments, and other officers of the government, foreign ministers and strangers visiting the seat of government, as well as of the citizens and inhabitants of the district. This court has power to call before it every person found in the district, from the highest to the lowest; and it is upon this power that they all depend for that protection which the law extends over them. If there is any officer of government in the district too high to be reached by the process of this court, then there is no legal security here for our lives, our liberty, or our property.[206]

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203. *See generally* Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524 (1838) (affirming the D.C. Circuit's authority to issue a writ of mandamus against a federal official and reaffirming the inability of other circuits to do so).

204. *See* McIntire v. Wood, 11 U.S. (7 Cranch) 504, 505 (1813). *McIntire* was later superseded by the Mandamus and Venue Act of 1962, Pub. L. No. 87-748, § 1(a), 76 Stat. 744 (codified as amended at 28 U.S.C. § 1361). *See* Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225, 1234–35 (10th Cir. 2005) (discussing *McIntire* and Congressional rationale for the Mandamus and Venue Act).

205. McClung v. Silliman, 19 U.S. (6 Wheat.) 598, 604–05 (1821).

206. 5 D.C. (5 Cranch) at 713.

After the D.C. Circuit's opinion in *Kendall*, the case found its way before the only court that Chief Judge Cranch viewed as imbued with greater powers than his own: the Supreme Court of the United States.[207] After discussing the D.C. Circuit's unique role in the federal court system, the Supreme Court affirmed its decision in this matter.[208] Referring to the D.C. Circuit as "the highest court of original jurisdiction,"[209] and admitting that its holding could only stand if it held powers greater than the other circuit courts,[210] this very early holding of the Supreme Court demonstrates the "first among equals" nature of the D.C. Circuit. For the next 125 years, the D.C. Circuit alone held this power[211] until Congress granted it to the other circuits in the Mandamus and Venue Act of 1962.[212]

From its creation in 1801 through 1970, the D.C. Circuit went through several structural changes while still retaining its dual local and federal jurisdiction.[213] This unique dual jurisdiction was eventually severed in 1970, and local matters are now handled by the Superior Court of the District of Columbia and the District of Columbia Court of Appeals.[214] Jurisdiction over federal matters was retained at the trial level by the D.D.C. and at the appellate level by the D.C. Circuit.[215]

Since 1970, the D.C. Circuit has only solidified its role as the overseer of the federal government.[216] In this period, the D.C. Circuit has influenced the nature of judicial review of agency action more than any other circuit.[217] In addition to a third of the current Supreme Court and several former justices, the D.C. Circuit was also home to many other legal giants since 1970. These include Patricia Wald, Harold Leventhal, Robert Bork, James Skelly Wright, and

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207. *Id.* at 706.
208. 37 U.S. (12 Pet.) at 626.
209. *Id.* at 619.
210. *Id.* at 615.
211. Roberts, *supra* note 185, at 381.
212. Pub. L. No. 87-748, § 1(a), 76 Stat. 744 (codified as amended at 28 U.S.C. § 1361).
213. Fraser et al., *supra* note 185, at 135.
214. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, §§ 11-501–503, 84 Stat. 473, 476 (codified as amended at D.C. CODE §§ 11-501–503 (1970)); *see also* Fraser et al., *supra* note 185, at 135–36 (discussing the evolution of the court system in the District of Columbia and the 1970 reform).
215. D.C. CODE § 11-503.
216. *See* Bloch & Ginsburg, *supra* note 42, at 569–74 (discussing the D.C. Circuit's role in reviewing the actions of the Nixon through Clinton Administrations).
217. *Id.* at 576.

David Bazelon.[218] More than any other court, the D.C. Circuit was responsible for shaping administrative law through the latter half of the twentieth century, and this role shows no signs of abating.[219]

A. Benefits of Centralization in the D.C. Circuit

While some legislation has been introduced to grant the federal courts of Washington, D.C. with exclusive jurisdiction over certain challenges to Executive action,[220] similar to how the Federal Circuit holds exclusive jurisdiction over patent issue appeal,[221] this is not necessary. After all, it is not the mere jurisdiction over these claims that has caused such consternation but the *remedy* to these claims. Every single district and circuit court purporting to hold the power to issue nationwide injunction leads to overlapping jurisdiction and potentially conflicting injunctions.[222] However, all of these courts could still easily hold the power to issue injunctions constraining government action so long as each court's remedy is limited to the parties before it. The government frequently oversteps its bounds,

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218. Exclusion from this short list is not meant to diminish the judicial service or influence of the other esteemed judges who have or currently sit on the D.C. Circuit.

219. This administrative law centralization has naturally corresponded with the growth in the federal bureaucracy:

> In addition to judging acts of the President and Congress, the D.C. federal courts have reviewed countless actions of administrative agencies and have contributed significantly to the development of what we have come to call "administrative law." The rapid multiplication of regulatory agencies during and after the New Deal transformed the dockets of the D.C. federal courts so that by the end of the twentieth century, the D.C. Circuit was reviewing about one-fourth of all federal agency decisions in the country, far more than any other single circuit. Because of the heavy weight of its agency review cases, the D.C. Circuit is sometimes called the nation's "administrative law court."

Bloch & Ginsburg, *supra* note 42, at 575.

220. *See* Assigning Proper Placement of Executive Action Lawsuits Act, H.R. 2660, 115th Cong. (2017) (proposed legislation that would grant "exclusive original jurisdiction to the United States District Court for the District of Columbia of certain cases relating to the powers of the Executive"). If the D.D.C. held exclusive original jurisdiction over these types of claims, then the D.C. Circuit would by extension hold appellate jurisdiction over these claims. However, this proposed legislation has since expired unenacted.

221. 28 U.S.C. § 1295(a)(1) (2018).

222. *See supra* Part III.C.

and the federal courts are designed to protect the rights of individuals from these transgressions. Plaintiffs should be able to easily assert their rights all over the country, as governmental injustice is not limited by geography.

There has also been legislation introduced clarifying that the federal courts do not have the power to issue injunctions binding the government's actions against non-parties at all.[223] While such a rule would certainly avert all the dangers of issuing nationwide injunctions and would appease the hardliners who support a blanket prohibition,[224] it would substantially limit the power of the federal courts to check Executive action. It is not difficult to imagine an Executive action so egregiously unconstitutional and wide-ranging that the best interests of justice would support the use of a nationwide injunction. These very concerns are often what motivates nationwide injunction apologists to defend its legitimacy.[225]

The core problems with the nationwide injunction seem to be trifold: the risk of forum-shopping,[226] overlapping jurisdiction and its potential for conflicting injunctions,[227] and the asymmetrical stakes between parties.[228] As others have astutely noted,[229] centralizing requests for nationwide injunctions would remedy these concerns while still preserving the federal courts' power to check Executive action. But instead of assembling some new Frankenstein court of judges from all over the country with varying backgrounds and expertise, why not just use the current court that already meets these criteria? The D.C. Circuit is filled with diverse judges from all

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223. *See* Injunctive Authority Clarification Act of 2019, H.R. 77, 116th Cong. (2019) (stating that no federal district court shall issue "an order that purports to restrain the enforcement against a non-party of any statute, regulation, order, or similar authority unless the non-party is represented by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure").

224. *See* Bray, *supra* note 3, at 420 ("No matter how important the question and no matter how important the value of uniformity, a federal court should not award a national injunction.").

225. *E.g.*, Frost, *supra* note 18, at 1069 ("But in some cases, nationwide injunctions are also the only means to provide plaintiffs with complete relief and avoid harm to thousands of individuals similarly situated to the plaintiffs.").

226. *See supra* Part III.A.

227. *See supra* Part III.C.

228. *See supra* Part III.F.

229. *See* Barnas, *supra* note 19, at 1707 (suggesting the creation of "[a] specialized forum to adjudicate suits seeking universal injunctions against federal executive action" composed of one judge from each circuit serving two-year terms).

over the country[230] who already spend their days reviewing administrative law and agency action.

This would wholly prevent forum shopping as litigants seeking nationwide injunctions would be forced to file in the D.D.C. This would ensure that partisan litigants cannot simply file in favorable circuits to challenge federal action. Additionally, it would significantly limit judge-shopping because cases in the D.D.C. are generally assigned at random.[231] This is in contrast to other circuits[232] whose assignment methods are not necessarily random.[233]

None of this would prevent plaintiffs seeking traditional, individual relief from filing in their local federal court or whichever suitable court they prefer. We should not erect hurdles for plaintiffs to obtain vindication of their rights to prevent an alleged harm, and centralizing requests for nationwide injunctions would have no impact on the rights of plaintiffs. But when the remedy sought is actually nationwide non-party relief, it makes sense to centralize these claims in a nationwide court.

As discussed previously, conflicting injunctions are one of the gravest concerns surrounding nationwide injunctions.[234] Because they are likely to arise in a world where every lower federal court is allowed to exceed its geographic jurisdiction on controversial questions of law and politics, the government will face the untenable position of choosing which court to obey and which to defy. Not only do dueling injunctions wreak havoc on the administrative operations of the federal government, but they also damage the public image of

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230. Roberts, *supra* note 185, at 376; *see also* Bloch & Ginsburg, *supra* note 42, at 563–64 (discussing the racial and gender diversity of the federal courts in Washington, D.C.).

231. *See* D.D.C. CIV. R. 40.3(a) ("Except as otherwise provided by these Rules, civil, criminal and miscellaneous cases shall be assigned to judges of this Court selected at random . . . .").

232. *FAQs: Filing a Case*, U.S. CTS., https://www.uscourts.gov/faqs-filing-case#faq-How-are-judges-assigned-to-cases? (last visited Mar. 13, 2021) (noting that judicial assignments vary by circuit but that only a "majority of courts use some variation of a random drawing").

233. This is not to suggest that non-random case assignment is necessarily a bad thing, and in certain circumstances it is even be preferable to random assignment. Obviously, Circuit Judge Morgan Christen sitting in Anchorage, Alaska should not have the same chance of being assigned to a case arising out of Southern California as more localized members of the Ninth Circuit should have. Such an assignment process would be extremely inconvenient to Judge Christen and the litigants. In addition, some cases dealing with specialized or esoteric matters should probably be funneled to district court judges with technical expertise in these areas.

234. *See supra* Part III.C.

judicial impartiality. Additionally, it is operationally and optically preferable to not have ideologically opposed district courts openly feuding with each other over who has the authority to govern the entire nation. While our legal system actually welcomes percolation among the lower courts,[235] this comes in the form of courts rendering judgment on the parties and facts before them. Not only is justice unlikely to be achieved when courts adjudicate the rights of non-parties, but it prevents a diverse array of lower court outcomes from developing to inform the opinion of appellate courts.

Centralization, especially in the D.C. Circuit, virtually eliminates the risk of conflicting injunctions. While two D.D.C. judges may come to different conclusions regarding a contested issue of law, this will be quickly resolved by the D.C. Circuit as it only supervises one trial court. Given the stakes of a nationwide injunctions, it is likely that any review might even be *en banc*, which would be a fitting forum for a case of such national importance. With only one court holding the power to issue a nationwide injunction at the appellate level, we could wholly prevent the risk of conflicting injunctions among the circuits.

Further, centralizing requests for nationwide injunctions in the D.C. Circuit would dramatically reduce the number of "must-take" cases at the Supreme Court level. When a circuit split develops, especially with a nationwide injunction is at stake, the Court is almost obligated to weigh in. And given that the Court only hears about eighty cases a year,[236] reducing the number of must-grant appeals frees up their docket to resolve other important legal issues. As circuit splits relating to nationwide injunctions would be impossible if only the D.C. Circuit had this authority, the Supreme Court would only be obligated to weigh in if they disagreed with that court's decision.

Finally, centralizing nationwide injunctions in the D.C. Circuit would significantly reduce the fundamental fairness concerns towards defendants from the asymmetric stakes. At present, the government is at a nearly insurmountable disadvantage when it comes to nationwide injunctions; countless legal victories all over the country can be effectively overruled by a single loss.[237] Plaintiffs only need to win once to prevail while the government must win every challenge in every jurisdiction. To some, this asymmetry may even

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235. *See supra* Part III.E.
236. *See Frequently Asked Questions*, *supra* note 155.
237. *See supra* Part III.F.

be welcome. It is worth considering how much we even care about fundamental fairness concerns relating to the government. Because the federal government is capable of inflicting much more harm to individuals than any individual could inflict upon it, perhaps this asymmetry is simply inversely proportional to the stakes of losing. A loss to the government may be tedious and frustrating, but a loss to the plaintiffs could involve the infringement of their most fundamental constitutional rights.

Centralization would strike the perfect balance between these two competing concerns by preserving this asymmetry at the trial level but eliminating it at the appellate level. The government would still need to win every single challenge in the D.D.C. to prevail, but the D.C. Circuit would act as the ultimate[238] decider if the trial court results are mixed. Centralization would eliminate the possibility where every single other district and circuit court agree on a contested legal issue, but a single idiosyncratic district court judge decides to overrule all their peers and issue a nationwide injunction anyway.

Two of the other concerns mentioned in this Article, loss of percolation[239] and conflicts with class action,[240] would be affected in more nuanced ways by this proposal. In some ways, percolation among the lower courts would be enhanced by centralizing nationwide injunctions in the D.C. Circuit because other federal courts would be able to adjudicate plaintiffs' claims without one of their peers effectively overruling them. However, this would still create a sort of meta-problem where the law surrounding nationwide injunctions themselves would be wholly developed by the federal courts of Washington, D.C. But given the D.C. Circuit's expertise in reviewing administrative law and agency action, it might even be preferable for such a court to be responsible for developing the jurisprudence around nationwide injunctions. Further, and regardless of any reform or lack thereof, it is likely the Supreme Court will weigh in on the practice in the coming decade anyway. Whether this guidance comes in the form of an outright prohibition or not will likely depend on whether the nationwide injunction can be reformed in time.

Centralizing requests for nationwide injunctions in the D.C. Circuit would not by itself resolve the tension with class action.

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238. Or perhaps penultimate, if the Supreme Court opts to review a certain case.
239. *See supra* Part III.E.
240. *See supra* Part III.D.

However, such a proposal would provide some of the same safeguards that class actions were created to ensure. As discussed above, this centralization would alleviate some of the fundamental fairness concerns for defendants regarding the asymmetrical nature of victory. Additionally, by requiring litigants to file in the D.C. Circuit if they seek a nationwide injunction, interested parties would effectively be put on notice and given the opportunity to intervene, not entirely unlike class action suits.[241] It is currently not practical or perhaps even possible to monitor all the litigation seeking nationwide effect in every single district court. The State of Maryland, for instance, may not see any reason to intervene in a case proceeding in the Western District of Louisiana. But if that district court judge enters a nationwide injunction, suddenly the interests of Maryland and her citizens have been affected.

These types of monitoring limitations may be even greater for non-profit or public interest groups whose institutional legal resources may be less robust than a state attorney general's office. By centralizing litigation in the D.C. Circuit, we can ensure that all interested parties are put on notice regarding potential litigation, even those with more meager resources. The fact that many advocacy groups already have offices in Washington, D.C. makes this route even more convenient for potential intervenors.

B. Drawbacks of Centralization

While centralizing nationwide injunctions in the D.C. Circuit would have a net positive effect, there would be some downsides to such an arrangement. First, this would likely increase the partisan hostilities surrounding the appointment of such judges. Further politicizing appointments to the D.C. Circuit could make their confirmation process more protracted and divisive. While it seems unlikely that such appointments could reach the same level of

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241. While class action suits generally operate on an "opt-out" basis, centralizing nationwide injunctions in the D.C. Circuit would effectively operate as an "opt-in" to be a part of the proceeding. *See* FED. R. CIV. P. 23(c)(2)(B) (specifying the notice requirements for potential class members to opt out). This would allow state governments, interest groups, or other stakeholders to have the opportunity to be heard. However, it would obviously not be possible for interested parties to opt-out of judgment because this would neuter the national effect of nationwide injunctions. Any claim compelling enough to warrant a nationwide injunction *should* be binding on all states, agencies, plaintiffs, and any other relevant party.

acrimony that Supreme Court nominations can achieve,[242] they would almost certainly be scrutinized more than the typical lower court nominee.

It is also worth considering how this potential critique reflects upon the status quo. Under the current framework where every lower court judge can potentially claim nationwide authority, this would necessarily include the judges in the D.C. Circuit. Any alleged increase in political scrutiny would actually be the same level of scrutiny that should now be given to every federal judge, including the D.C. Circuit. Centralizing these injunctions would at least put the President and Senate on notice as to who which positions will be especially contentious. This additional scrutiny could even be considered a positive as these judges will exercise a tremendous amount of power and we want to ensure that they are the right people to do so.

One final potential drawback to centralization is that the federal government could have a "repeat player" advantage.[243] If the same government attorneys are constantly litigating nationwide injunctions in the D.C. Circuit, they might have greater familiarity with the process or predispositions of certain judges. However, this increase in repeat player advantage would likely be minimal for two reasons. First, because U.S. Attorneys' offices are already geographically situated to correspond with the federal district courts, they typically litigate before the same tribunals already. So, in the present system, government attorneys arguing against nationwide injunctions are already likely to be very familiar with the specific judge they are before.

Additionally, while the government may have some minor degree of repeat player advantage, it is likely that its opponents will as

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242. If a nominee to the D.C. Circuit faced significant opposition that threatened to sink their chances of confirmation, it seems likely that the President would simply withdraw their nomination and replace them with a comparable individual. District and circuit judge nominations can be withdrawn without losing too much face in the eyes of the public. However, the Senate blocking the President's nominee to the Supreme Court is seen as enough of a political loss that he may be reluctant to withdraw his nominee. Even those in the legal field may not be able to name a lower court nominee who was defeated in the Senate. However, it is likely that they remember Robert Bork, Harriet Miers, and Merrick Garland.

243. FED. JUD. CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 85 (1993) (discussing how those who litigate before the same tribunal have a repeat player advantage due to their familiarity and predictability).

well. The plaintiffs seeking nationwide injunctions are typically special interest groups or state attorneys general, who are often repeat players themselves.[244] Further, and given the increased opportunity for notice and intervention discussed above, any litigation seeking a nationwide injunction will likely generate enough interest that both sides of the dispute are exceptionally experienced and well-funded. Under the current framework where similar suits are taking place all across the country, it is not practical for all stakeholders to intervene in each suit. But with centralization, these suits would be scarce enough that every interested party could focus their attentions and resources on the D.C. Circuit. This will guarantee that both sides of the dispute are more than adequately represented, and any potential repeat player advantage is be negated.

VI. CONCLUSION

Nationwide, or universal, injunctions present numerous jurisprudential and practical concerns. By continuing to allow their use, we are encouraging forum-shopping, conflicting injunctions, and the politicization of the Judiciary. Further, they are a recent development in American law and have little basis in historical practice. The practice is clearly in tension with modern standing doctrine and the class action system. Criticism of this peculiar remedy is growing, both in the literature and on the bench.

Nevertheless, nationwide injunctions have their defenders. These defenders challenge the conventional wisdom on just how novel of a remedy nationwide injunctions are as well as whether the federal courts would be able to adequately protect vulnerable groups without this tool. It remains to be seen whether these defenses will sway the minds of policymakers. But with two openly skeptical justices on the Supreme Court and proposed legislation in Congress, there is no reason to be optimistic that the defenders will prevail. If defenders of the nationwide injunction wish to preserve its availability in any form, they must accept that reform is necessary.

While many potential reforms have been suggested, up to and including a blanket prohibition on the practice, a compromise

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244. Barnas, *supra* note 19, at 1710 n.237 (discussing the potential for governmental repeat player advantage but noting "the litigants that often seek universal injunctions against the federal government—large public interest groups and state attorneys general—are repeat players themselves").

solution would be best. This could severely limit the practice and ameliorate abuse of this remedy while also preserving the potential for its use in the most egregious cases of government overreach. After all, it is only after these injunctions became more frequent that critics began questioning the practice.

Centralization would preserve the practice's use in extreme cases while also dramatically limiting the frequency with which these injunctions are issued, and the D.C. Circuit is the natural choice for such centralization. As a quasi-national court that already specializes in administrative law, there is no more competent court to review the actions of the federal government. In cases of national importance seeking nationwide relief, litigants should have to file in a national court. In doing so, we can answer the greatest critiques of the detractors, while assuaging the greatest fears of the apologists.