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# The Myth of the “Nationwide Injunction”

PORTIA PEDRO\*

*A growing number of scholars, judges, and Justices are debating the permissibility and propriety of relief that they are calling “national injunctions” or “nationwide injunctions.” An injunction is a court order that prohibits an entity from taking certain actions or that requires an entity to take specified actions. Drawing from scholarly literature and popular discourse, some define a “nationwide injunction” as an injunction with no geographic limitation that benefits nonparties, in addition to named plaintiffs or defined plaintiff classes. Injunctive relief in a number of high-profile cases falls within the crosshairs of “nationwide injunction” opponents. On the chopping block is relief in cases involving controversial presidential executive orders, Affordable Care Act provisions, and civil rights issues. Yet it is not clear that a category of “nationwide injunctions” is meaningful or even exists.*

*“Nationwide injunction” skeptics indicate that the distinctiveness of the targeted injunctions is either due to the injunctions’ geographic scope or, alternatively, because such injunctions provide benefits to nonparties in addition to parties. But almost no federal court injunctions are limited in geographic scope and there is no clear rule*

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*or core principle limiting injunctions to provide benefits only to plaintiffs or plaintiff classes.*

*I provide a comprehensive taxonomy of the challenges to “nationwide injunctions,” which I divide into subcategories of jurisdictional and prudential concerns. Then, I suggest that “nationwide injunctions” skeptics’ criticism, and even the concept of a “nationwide injunction,” are muddled due to the incomplete and skewed framing of the discussion. I propose exploring and engaging several, until now, ignored factors to develop a more robust understanding and conversation about the targeted injunctions, their implications, and the potential implications of decreasing or eliminating the targeted injunction as a form of relief in civil litigation.*

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## I. INTRODUCTION

During oral argument for, and opinions on, *Trump v. Hawaii*<sup>1</sup> in 2018, three United States Supreme Court Justices—for the first time—shared their thoughts on what some are calling a recent, unjustified phenomenon upon which the Court had not previously spoken: “nationwide injunctions.”<sup>2</sup> According to some jurists and scholars, the notable features of “nationwide injunctions”<sup>3</sup> are that these court orders: (1) have no geographic limitation and (2) benefit entities beyond the named plaintiffs or defined plaintiff classes.<sup>4</sup> Although the *Trump v. Hawaii* majority opinion did not “consider the propriety of the nationwide scope of the [challenged] injunction,”<sup>5</sup> Justice Gorsuch noted during oral argument that there has been a “troubling rise of this nationwide injunction, cosmic injunction,”<sup>6</sup> and Justice Thomas voiced skepticism, in his concurrence, about federal courts’ authority to issue such injunctions.<sup>7</sup> Justice Sotomayor, in her dissent, however, noted that providing complete relief to the plaintiffs *required* a “nationwide injunction.”<sup>8</sup>

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<sup>1</sup> *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). I have included ‘okina, or glottal stops, in all Hawaiian words regardless of Bluebook format except where they were originally omitted in titles and case names. See Avis Kuuipoleialoha Poai, *Tales from the Dark Side of the Archives: Making History in Hawai‘i Without Hawaiians*, 39 U. HAW. L. REV. 537, 537 n.\* (2017); Jordan Kealaikalani Inafuku, *E Kūkulu ke Ea: Hawai‘i’s Duty to Fund Kaho‘olawe’s Restoration Following the Navy’s Incomplete Cleanup*, 16 ASIAN-PAC. L. & POL’Y J. 22, 23 n.3 (2015).

<sup>2</sup> *Id.* at 2424–29 (Thomas, J., concurring); *id.* at 2446 n.13 (Sotomayor, J., dissenting); Transcript of Oral Argument at 72–73, *Trump v. Hawaii*, 138 S. Ct. 2392 (No. 17-965) (comments by Justice Gorsuch); see *infra* Part II.

<sup>3</sup> “I put ‘nationwide,’ ‘national,’ ‘universal,’ ‘defendant-oriented’ injunctions, and other similar terms in quotation marks . . . because I worry that the term ‘nationwide injunction’ and all similar terms are a misleading and inaccurate framing that biases the debate and masks the true concerns and stakes of the debate.” Portia Pedro, *Toward Establishing a Pre-Extinction Definition of “Nationwide Injunctions,”* 91 U. COLO. L. REV. 847, 849–50 (2020).

<sup>4</sup> See *infra* Part II.

<sup>5</sup> *Trump v. Hawaii*, 138 S. Ct. at 2423.

<sup>6</sup> Transcript of Oral Argument, *supra* note 2, at 72.

<sup>7</sup> *Trump v. Hawaii*, 138 S. Ct. at 2424–29 (Thomas, J., concurring).

<sup>8</sup> *Id.* at 2446 n.13 (Sotomayor, J., dissenting).

These three Justices cannot all be right. And, given the significant disagreement between Justices and the notion that these injunctions<sup>9</sup> are proliferating, the Court might not refrain from considering this “nationwide injunction” question much longer. Moreover, Justices continue to call upon the Court to decide whether “nationwide injunctions” are appropriate.<sup>10</sup> Those calls might soon earn a response. As the Justices on the Supreme Court have changed over the past few years, a new majority has begun to flex its muscles,<sup>11</sup> unrestrained by the swing vote that had previously been customary<sup>12</sup> and, as some might suggest, perhaps unrestrained by precedent.<sup>13</sup> Yet, even as Justices join scholars, nongovernmental litigants, governmental entities, and federal judges<sup>14</sup> debating the permissibility and propriety of “nationwide injunctions” in constitutional and civil rights challenges to controversial presidential executive orders and federal legislation, it is not clear that this fairly newly-coined category of “nationwide injunctions” is necessarily meaningful.

While an injunction is a court order that requires an entity to take (or not take) specified actions, voices in this relatively nascent debate focus on injunctions in a variety of different cases challenging executive orders, federal statutes, and agency rulemaking or decisions.<sup>15</sup> Although there are similarities in the terminology with which most people often currently refer to the targeted

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<sup>9</sup> For reading ease, I refer to the targeted court orders as “injunctions” throughout this Article, but the orders targeted by “nationwide injunction” critics include some orders that are designated “temporary restraining orders” in addition to some preliminary and permanent injunctions. *See infra* Part II.C.

<sup>10</sup> *E.g.*, *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 599–601 (2020) (Gorsuch, J., concurring) (mem.) (granting a stay of preliminary injunction pending petition for a writ of certiorari). “I hope, too, that we might at an appropriate juncture take up some of the underlying equitable and constitutional questions raised by the rise of nationwide injunctions.” *Id.* at 601.

<sup>11</sup> Robert Barnes, *With Sweep and Speed, Supreme Court’s Conservatives Ignite a New Era*, WASH. POST (July 2, 2022), <https://www.washingtonpost.com/politics/2022/07/02/supreme-court-conservative-majority/> [<https://perma.cc/9QED-WE4F>].

<sup>12</sup> *See* Sabrina Willmer, *The Chief Stands Alone: Roberts, Roe and a Divided Supreme Court*, BLOOMBERG L. (June 25, 2022), <https://news.bloomberglaw.com/us-law-week/the-chief-stands-alone-roberts-roe-and-a-divided-supreme-court> [<https://perma.cc/U9CD-48WE>].

<sup>13</sup> *See id.*; Barnes, *supra* note 11.

<sup>14</sup> Pedro, *supra* note 3, at 859–62, 859 nn.35–41.

<sup>15</sup> *Id.* at 869 nn.65–67.

injunctions<sup>16</sup>—as “nationwide,”<sup>17</sup> “national,”<sup>18</sup> or “universal”<sup>19</sup> injunctions—a few scholars have noted that some of these terms for the targeted injunctions are “misleading and inapt.”<sup>20</sup> I contend, however, that there is a far more significant problem in the “nationwide injunctions”<sup>21</sup> debate than terminological issues. Regardless of what one calls the targeted injunctions, the “nationwide injunctions” framework is muddled at best.

We can tell that “nationwide injunctions” are not an obviously meaningful type of injunction by analyzing the literature’s working definition of this supposed category of injunction—injunctions that (1) do not have any geographic limitation and that (2) benefit people beyond named plaintiffs or defined plaintiff classes.<sup>22</sup> The absence of a geographic limitation on the scope of the targeted injunctions is not a unique characteristic for injunctions because federal courts rarely issue injunctions with geographic limitation.<sup>23</sup> Thus, defining a category of injunction

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<sup>16</sup> *Id.* at 857 (“I call ‘nationwide injunctions’ a ‘targeted’ remedy because it seems that the central organizing feature of the ‘nationwide injunctions’ debate is *which* injunctions critics are attacking. I worry that the tail may be wagging the dog because critics are taking aim at certain injunctions and, perhaps, reverse engineering a label, a category, and a type of injunction that they claim fits the targeted injunctions. The ‘nationwide injunctions’ category strikes me as a potentially false construction.”).

<sup>17</sup> See generally Spencer E. Amdur & David Hausman, Response, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49 (2017); Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977 (2020); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017); Jack Beermann, *Two Views on the Nationwide Injunction*, ADMIN. L.: JOTWELL (Aug. 8, 2018), <https://adlaw.jotwell.com/two-views-on-the-nationwide-injunction/> [<https://perma.cc/N2NU-ZLYS>]; Ronald A. Cass, *Nationwide Injunctions’ Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29 (2019).

<sup>18</sup> See generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).

<sup>19</sup> See generally Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335 (2018).

<sup>20</sup> Pedro, *supra* note 3, at 864 & nn.49–51.

<sup>21</sup> Although the focus of the discussion of this issue has been on injunctions that affect federal actors and that have either no geographic limits or at least have no limitations within the U.S., the implications of this discussion, and also thinking through this controversy, seem to be just as relevant for injunctions that affect state actors and that have no geographic limitations within a state, territory, or district. While other scholars largely have limited their focus to litigation challenging federal actions, I also consider litigation challenging states’ actions because those pursuing civil rights and impact litigation, historically, have sued state governmental defendants in addition to federal governmental defendants.

<sup>22</sup> See *infra* Part IV.

<sup>23</sup> See *infra* Part IV.A. Most anti-“nationwide injunction” scholars do not pose a geographic objection to the targeted injunctions, but several do propose solutions that directly or indirectly

by limiting the category to those injunctions without a geographic limitation is no distinction at all. Correspondingly, there is no requirement that court orders or injunctions limit their benefits to non-parties, so it isn't readily apparent that the targeted injunctions need to be considered differently from other injunctions on that basis either.

One could think that this is yet another article too many on a topic that is either in its grave or should be. But that level of finality on this discussion would be largely premature as the interests of entire communities and a whole type of litigation have not even been integrated into the discussion, not to mention their concerns fully vetted. This conversation continues to be of the utmost importance to several controversial issues before courts today.<sup>24</sup>

This Article proceeds in four parts.<sup>25</sup> In Part II, I describe the current debate's definition of the term "nationwide injunction." Part II also

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impose geographic limitations in order to resolve what they see as the problem of "nationwide injunctions." *See infra* Part III.

<sup>24</sup> *See infra* Part II.

<sup>25</sup> This article is the second in a series of my articles on this topic. Each article takes on a specific set of questions related to broader themes of the function, context, and possible future for this type of injunction. In one earlier article, *Toward Establishing a Pre-Extinction Definition of "Nationwide Injunctions,"* 91 U. Colo. L. Rev. 847 (2020), I call for clarification of what types of relief the term "nationwide injunctions" refers to, before jurists decide whether to significantly curtail or eliminate this form of relief.

In this Article, as I describe below, I argue that no rule, precedent, or doctrine clearly prevents courts from issuing the targeted injunctions and I provide a comprehensive taxonomy of the challenges to "nationwide injunctions." I argue that "nationwide injunctions" skeptics' criticisms, and even the concept of a "nationwide injunction," are muddled due to the incomplete and skewed framing of the discussion.

In my third manuscript on this topic, *Impact Injunctions*, I explore several of those previously ignored factors about these injunctions. I argue that the challenged injunctions are what I call "impact injunctions"—injunctions in impact litigation, often in civil rights cases and against governmental defendants. I propose that, whether intentional or not, the criticism of "nationwide injunctions" is the latest iteration in a long history of attacks on civil rights and impact litigation. Thus, the arguments against impact injunctions as a legitimate form of relief would be particularly detrimental for claims brought to vindicate rights of members of marginalized groups.

In my final manuscript in this area, *The Chancellor's New Clothes and the Government's Coronation: The Case for Preserving Impact Injunctions*, I examine the extent to which existing rules, doctrines, principles, and institutional structures, such as the availability of stays pending appeal, sufficiently resolve concerns with impact injunctions. I propose that, for some unresolved concerns, courts should continue to use the same four-prong preliminary and permanent injunction standards to determine whether to grant impact injunctions. But to address the larger problems created by forum-shopping—when some specific jurisdictions attract certain types of cases and have outsized effects on broad swaths of law and people—we need to think more broadly about solutions to that larger problem because issues that forum-shopping creates will not and should not be resolved by decreasing or wholly eliminating impact injunctions.



contextualizes this “nationwide injunction” debate. The debate is not merely a scholarly exercise—federal judges and Justices seem to be increasingly contemplating decreasing the number of “nationwide injunctions” that they issue or ceasing to issue such injunctions altogether.<sup>26</sup> Next, I set out the rules and doctrines that apply to injunctions.

In Part III, I outline the main criticisms of this category of injunctions and describe the current proposed solutions to the problems that critics worry these injunctions pose. Scholars posit numerous bases for questioning whether courts can or should issue “nationwide injunctions,” but the grounds for critics’ concerns fall into two broader categories—claims that the targeted injunctions are inappropriate or problematic for jurisdictional or prudential reasons.<sup>27</sup> And, in Part IV, I propose that this debate is conceptually muddled.

In Part V, I suggest unearthing several, until now, ignored considerations that we should engage in order to meaningfully consider whether and when courts should stop granting the targeted injunctions. Various factors—including the absence of rules prohibiting this type of injunction and the importance of the type of litigation in which “nationwide injunctions” arise—may weigh in favor of courts continuing to issue such injunctions, but these concerns have been largely left out of the debate.<sup>28</sup>

## II. UNDERSTANDING INJUNCTIONS

After providing a definition for the targeted injunctions, this Part contends that whether courts can or should issue “nationwide injunctions” is a live issue that federal judges are actively grappling with and that some courts of appeals or the Supreme Court may soon decide.<sup>29</sup> But in light of the mounting criticisms of “nationwide injunctions,” discussion of the remedial doctrine and rules relevant to injunctions is surprisingly thin.<sup>30</sup> This Part concludes with a brief background of the rules and doctrine that apply to injunctive relief generally.

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Through this body of scholarship, I argue that we should avoid enthrone governmental defendants who act broadly regarding all people and entities to the point that no court can issue correspondingly broad injunctions of such governmental action if and when the governmental action is illegal or unconstitutional in all applications.

<sup>26</sup> *See, e.g.,* Dep’t of Homeland Sec. v. New York, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring) (mem.) (“I hope, too, that we might at an appropriate juncture take up some of the underlying equitable and constitutional questions raised by the rise of nationwide injunctions.”).

<sup>27</sup> *See infra* Part III.

<sup>28</sup> *See infra* Part V.

<sup>29</sup> *See generally* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

<sup>30</sup> *See* Pedro, *supra* note 3, at 857 (“I hope that scholars engage with and figure out what the salient characteristics and groupings, if any, of the targeted injunctions actually are.”).

### A. “Nationwide Injunction” Definition in the Literature

As mentioned earlier, the existing “nationwide injunctions” literature offers a two-part definition of these injunctions—injunctions that: (1) have no geographic limitation<sup>31</sup> and (2) benefit people beyond named plaintiffs and defined

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<sup>31</sup> Bray, *supra* note 18, at 418, 425 (“Federal district judges . . . are issuing injunctions that apply across the nation, controlling the defendant’s behavior with respect to nonparties” and “the federal defendant’s conduct against everyone, not just against the plaintiff.”); Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1076–77 (2017); 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, 490 (2016) [hereinafter Morley, *De Facto Class Actions*] (noting that such injunctions “enjoin the defendant officials or agencies (‘government defendants’) from enforcing or implementing the challenged provision against anyone in the state or even the nation”); Katherine B. Wheeler, Comment, *Why There Should Be a Presumption Against Nationwide Preliminary Injunctions*, 96 N.C. L. REV. 200, 200–03 (2017) (discussion limited to preliminary injunctions); Morley, *supra* note 17, at 620 (noting that one potential definition of a “nationwide injunction” is “a Defendant-Oriented Injunction: an order issued by a federal court in a case brought by individual plaintiffs or entities (i.e., a nonclass case) completely prohibiting a defendant government agency or official from enforcing an invalidated statute, regulation, or policy against anyone, anywhere in the nation”); Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 4, 10 (2019) [hereinafter Morley, *Disaggregating*] (describing types of “nationwide injunctions” that a court should not issue as including “an order in a case brought by a plaintiff entity asserting associational standing on behalf of its members that prohibits the defendant from enforcing a challenged legal provision against anyone, anywhere in the nation (or potentially even the world)” and “an order in a nonclass case brought by individuals or entities asserting organizational standing that prohibits the defendant from enforcing a challenged legal provision against anyone, anywhere in the nation (or potentially even the world), including third-party nonlitigants”); Siddique, *supra* note 17, at 2098–2100 (using “geographic scope” to identify “nationwide injunctions”); Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 8 (2019) (“[T]he key feature is that they ‘prohibited or purported to prohibit enforcement of the challenged laws, regulations, and policies not only against the named plaintiffs, but against all persons everywhere who might be subject to enforcement of those laws.’” (quoting Wasserman, *supra* note 19, at 338)); James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex Parte Young*, 72 STAN. L. REV. 1269, 1275 n.18 (2020) (“A growing scholarly consensus holds that such injunctions are best understood as ‘universal’ because their defining feature is to protect nonparties from unlawful government action without regard to geographic scope.”); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 68 (2019) (Such injunctions “declare a federal statute, regulation, or policy invalid and prevent the Executive Branch from enforcing it anywhere or against anyone”).

classes<sup>32</sup> even when the injunction's benefits are potentially divisible.<sup>33</sup> While there is disagreement among some "nationwide injunction" skeptics regarding whether the lack of geographic limitation for these injunctions is troubling or problematic,<sup>34</sup> "nationwide injunction" critics generally agree regarding these two definitional characteristics.<sup>35</sup> Some scholars avoid the question of whether the lack of a geographic limitation matters by limiting the category to include only injunctions against federal governmental defendants or federal (meaning applicable nationwide) action.<sup>36</sup>

### B. "Nationwide Injunctions" in Federal Courts

While scholars are only beginning to discuss what is at stake if courts decrease or altogether stop issuing "nationwide injunctions," some federal

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<sup>32</sup> Bray, *supra* note 18, at 418; Berger, *supra* note 31, at 1076–77; Wasserman, *supra* note 19, at 338; Morley, *Disaggregating*, *supra* note 31, at 4, 10; Maureen Carroll, *Class Actions, Indivisibility, and Rule 23(b)(2)*, 99 B.U. L. REV. 59, 62 (2019); Morley, *supra* note 17, at 620–21; Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 922 (2020); Clopton, *supra* note 31, at 8; Frost, *supra* note 17, at 1067; Pfander & Wentzel, *supra* note 31, at 1275 n.18; Trammell, *supra* note 31, at 68.

<sup>33</sup> The benefit of an injunction is divisible (or some say that the right at issue is divisible) if defendants "could refrain from applying the challenged policy or provision to a named plaintiff [or designated class] and could continue applying the policy or provision to every other person similarly situated." Pedro, *supra* note 3, at 865 n.54; *see also* Wasserman, *supra* note 19, at 371 ("Divisible rights belong to the plaintiffs alone and can be remedied by a limited injunction protecting the plaintiffs alone. With indivisible rights, the rights of one person cannot be separated from the rights of others, thus a remedy benefitting one person must benefit other people similarly situated." (footnote omitted)); Morley, *supra* note 17, at 620–21 ("Most cases . . . involve divisible rights, in which the court can fully enforce particular plaintiffs' rights without necessarily enforcing third parties' rights.").

<sup>34</sup> Compare Bray, *supra* note 18, at 419 n.5, and Berger, *supra* note 31, at 1076, and Wasserman, *supra* note 19, at 338–39, with Morley, *supra* note 17, at 620.

<sup>35</sup> *See supra* notes 31–33 and accompanying text.

<sup>36</sup> Bray, *supra* note 18, at 419 n.5, 425 (noting "the distinctive fact that these injunctions constrain the national government, as opposed to state governments" and noting that this type of injunction "controls the federal defendant's conduct against everyone"); Berger, *supra* note 31, at 1077 (defines "'nationwide injunction' as a judicial order in a non-class action lawsuit prohibiting the federal government from enforcing a statute, rule, or policy against anyone in the country"); Sohoni, *supra* note 32, at 922 (describing "nationwide injunctions" as "injunctions blocking the executive branch from enforcing federal laws, regulations, or policies"); Trammell, *supra* note 31, at 68 (noting that such injunctions "declare a federal statute, regulation, or policy invalid and prevent the Executive Branch from enforcing it anywhere or against anyone"); Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, YALE L.J.F. 242, 242 n.1 (2017) (defining "nationwide injunctions" as "injunctions that bar federal actors from implementing a policy or rule or otherwise taking an action affecting any individual, including beyond the named plaintiffs"); Morley, *supra* note 17, at 620 (discussing only "challenges to federal statutes, regulations, and other policies" and "an invalidated federal statute, regulation, or policy" (emphases added)).

judges and Supreme Court Justices have already indicated that they are likely to stop issuing or affirming the targeted injunctions.<sup>37</sup> Some federal judges have declined to issue injunctions on the basis that the injunction would be a “nationwide injunction.”<sup>38</sup> Justices have noted that it is increasingly important that the Court “remedy the problem”<sup>39</sup> of courts issuing “nationwide injunctions.”<sup>40</sup> Some have even noted instances when the Court used the “nationwide” scope of an injunction as the foundation for a decision that was separate and apart from whether a court should grant the injunction.<sup>41</sup>

Federal judges who question their authority to issue, and the propriety of issuing, “nationwide injunctions” do so for a variety of reasons.<sup>42</sup> Some members of the federal judiciary indicate a number of prudential concerns regarding “nationwide injunctions”—questioning the courts’ practice of granting “nationwide injunctions” even if and when plaintiffs demonstrate that they meet the multi-prong standard for injunctions.<sup>43</sup> But there are also federal judges opining that courts have the authority to issue “nationwide injunctions” and should do so when the circumstances of a case so justify.<sup>44</sup>

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<sup>37</sup> See *infra* notes 38–49 and accompanying text.

<sup>38</sup> See *infra* note 47 and accompanying text.

<sup>39</sup> *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 599–601 (2020) (Gorsuch, J., concurring) (mem.).

<sup>40</sup> *Id.*

<sup>41</sup> *Wolf v. Cook Cnty.*, 140 S. Ct. 681, 682 (2020) (Sotomayor, J., dissenting) (noting that, when the Court granted the Government’s application for a stay in *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, two Justices discussed the propriety of the “nationwide injunction” at issue and “[n]o Member of the Court discussed the application’s merit apart from its challenges to the injunction’s nationwide scope”).

<sup>42</sup> See *infra* Part III.A.1.

<sup>43</sup> See *infra* Part III.A.2.

<sup>44</sup> See *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2088–89 (2017) (per curiam); *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255–56 (9th Cir. 2018), *superseded by*, 932 F.3d 742 (9th Cir. 2018).

This question of whether or not judges should grant this type of relief is far from a hypothetical concern.<sup>45</sup> To the contrary, it is very much a live issue.<sup>46</sup> Several federal judges have declined to grant requests for the targeted injunctions and several courts of appeals have vacated “nationwide injunctions” granted by district courts.<sup>47</sup> But some judges continue to issue or affirm the targeted injunctions.<sup>48</sup> There is also a significant risk of district courts declining to issue

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<sup>45</sup> By way of example, *Dobbs v. Jackson Women’s Health Organization*, which was recently decided by the Supreme Court in 2022, was what critics might define as a “statewide injunction” case, challenging a Mississippi abortion regulation. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2285 (2022) (reversing judgment in *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265, 269 (2019), that affirmed the district court’s permanent injunctive relief); *Jackson Women’s Health Org. v. Currier*, 349 F. Supp. 3d 536, 545 (S.D. Miss. 2018) (“The defendants; their officers, agents, servants, employees, and attorneys; and all other persons who are in active concert or participation with them; shall not enforce H.B. 1510 at any point, ever.”), *aff’d sub nom.* *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), *rev’d*, 142 S. Ct. 2228 (2022); Amy Howe, *Roe v. Wade Hangs in Balance as Reshaped Court Prepares to Hear Biggest Abortion Case in Decades*, SCOTUSBLOG (Nov. 29, 2021), <https://www.scotusblog.com/2021/11/roe-v-wade-hangs-in-balance-as-reshaped-court-prepares-to-hear-biggest-abortion-case-in-decades/> [<https://perma.cc/UJ95-MVBX>]. Multiple lawsuits challenging a recent Florida law sought this type of injunction, but those suits have been dismissed for lack of standing. See *Judge Tosses Challenge to Florida’s ‘Don’t Say Gay’ Law*, ASSOCIATED PRESS (Feb. 16, 2023), <https://apnews.com/article/florida-tallahassee-education-lawsuits-c568376af04807379346b23e0e2d7769> [<https://perma.cc/P2X2-66AT>] (discussing federal litigation challenging the Florida “Don’t Say Gay” legislation).

<sup>46</sup> *New York v. U.S. Dep’t of Homeland Sec.*, 969 F.3d 42, 87–88 (2d Cir. 2020) (“The issuance of nationwide injunctions has been the subject of increasing scrutiny in recent years.”); *City of Chicago v. Barr*, 961 F.3d 882, 912–14 (7th Cir. 2020).

<sup>47</sup> *City & County of San Francisco v. Barr*, 965 F.3d 753, 764–65 (9th Cir. 2020) (vacating “the district court’s imposition of a nationwide injunction”), *cert. dismissed per stipulation sub. nom.* *Wilkinson v. City & County of San Francisco*, 141 S. Ct. 1292 (2021) (mem.); *Doe 2 v. Shanahan*, 755 F. App’x 19, 23 n.1 (2019); *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1244–45 (9th Cir. 2018) (regarding a preliminary injunction); *United States v. AMC Ent., Inc.*, 549 F.3d 760, 773–74 (9th Cir. 2008) (vacating the district court’s order); *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 665 (9th Cir. 2011); *Meinhold v. U.S. Dep’t of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994); *Ramos v. Wolf*, 975 F.3d 872, 904 (9th Cir. 2020) (Nelson, J., concurring) (citing *Innovation Law Lab v. Wolf*, 951 F.3d 986, 990 (9th Cir. 2020)), *en banc rehearing granted*, No. 18-16981, 2023 WL 1880467 (9th Cir. Feb. 10, 2023); *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 733–35 (5th Cir. 1977); *Free Speech Coal., Inc. v. Att’y Gen. U.S.*, 974 F.3d 408, 431 (3d Cir. 2020). Several federal courts have also vacated “statewide injunctions” granted by district courts. The concerns about “statewide injunctions” can sometimes mirror many of the concerns about “nationwide injunctions.” See *Brakebill v. Jaeger*, 932 F.3d 671, 673–74 (8th Cir. 2019); *Flores v. Huppenthal*, 789 F.3d 994, 1007–08 (9th Cir. 2015); *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028 (9th Cir. 2019).

<sup>48</sup> See, e.g., *Roe v. U.S. Dep’t of Def.*, 947 F.3d 207, 233–34 (4th Cir. 2020); *Rodgers v. Bryant*, 942 F.3d 451, 459–60 (8th Cir. 2019) (affirming “statewide preliminary injunction”); *Pennsylvania v. President U.S.*, 930 F.3d 543, 575 (3d Cir. 2019), *rev’d sub nom.* *Little*

these injunctions, of courts of appeals doing the same or vacating such injunctions solely on the basis of their status as “nationwide injunctions,” and of the Supreme Court holding that federal courts should not issue such injunctions.<sup>49</sup>

### C. *The Mechanics of Injunctions*

This section briefly describes the rules, doctrine, and processes for injunctions. An injunction is relief in the form of a court order that prohibits or requires an act or acts.<sup>50</sup> Injunctions can be preliminary<sup>51</sup>—as they are when requested before a court has rendered a final decision on the merits—or injunctions can be permanent, or final.<sup>52</sup> A court can also grant an injunction while an appeal is pending.<sup>53</sup> Federal Rules of Civil Procedure 62 and 65 and Federal Rule of Appellate Procedure 8 outline the requirements for injunctions.<sup>54</sup> Federal courts have established, in opinions, the standard for determining whether to grant injunctions.

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Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020); Hawaii v. Trump, 859 F.3d 741, 788 (9th Cir. 2017), *vacated*, 138 S. Ct. 377 (2017); Regents of the Univ. of California v. U.S. Dep’t of Homeland Sec., 908 F.3d 476, 512, 520 (9th Cir. 2018) (preliminary injunction), *rev’d in part, vacated in part*, 140 S. Ct. 1891 (2020); Price v. City of Stockton, 390 F.3d 1105, 1117–18 (9th Cir. 2004); Chevron Chem. Co. v. Voluntary Purchasing Grps., 659 F.2d 695, 705–06 (5th Cir. 1981) (instructing district court to issue an injunction with no specific geographic limitation). Several federal courts have also affirmed “statewide injunctions” granted by district courts. *See, e.g.*, Mayor of Balt. v. Azar, 973 F.3d 258, 293–94 (4th Cir. 2020), *cert. dismissed per stipulation sub nom.* Becerra v. Mayor of Balt., 141 S. Ct. 2170 (2021) (mem.). Concerns regarding “statewide injunctions” can be similar to those regarding “nationwide injunctions.” *See* discussion *supra* note 47.

<sup>49</sup> Trump v. Hawaii, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring) (“[U]niversal injunctions are legally and historically dubious. If federal courts continue to issue them, this Court is dutybound to adjudicate their authority to do so.”).

<sup>50</sup> Pedro, *supra* note 3, at 849.

<sup>51</sup> A court may issue a preliminary injunction before it has conducted a full hearing on the merits and with only notice to the adverse party, instead of an opportunity to be heard. FED. R. CIV. P. 65(a). Judicial review for preliminary injunctions is interlocutory because such injunctions are not final relief. 28 U.S.C. § 1292(a)(1); 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3921.1, Westlaw (database updated Apr. 2022). Because courts can issue preliminary injunctions without a full hearing, without giving the adverse party an opportunity to be heard, and because, generally, the adverse party cannot obtain judicial review of a preliminary injunction, there are additional requirements for preliminary injunctions as opposed to permanent injunctions. 11A WRIGHT & MILLER, *supra*, § 3921.1.

<sup>52</sup> 11A WRIGHT & MILLER, *supra* note 51, § 2941.

<sup>53</sup> FED. R. CIV. P. 62(d).

<sup>54</sup> *See* FED. R. CIV. P. 62, 65; FED. R. APP. P. 8.

Whether a court should grant an injunction is up to the judge's discretion.<sup>55</sup> To obtain a preliminary injunction, a plaintiff must establish:

- (1) that they<sup>56</sup> are "likely to succeed on the merits,"
- (2) that they are "likely to suffer irreparable harm in the absence of preliminary relief,"
- (3) "that the balance of equities tips in their favor," and
- (4) "that an injunction is in the public interest."<sup>57</sup>

To obtain a permanent injunction, a plaintiff must establish:

- (1) that they have "suffered an irreparable injury,"
- (2) that "remedies available at law, such as monetary damages, are inadequate to compensate for that injury."
- (3) that, "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted," and
- (4) that the "public interest would not be disserved by a permanent injunction."<sup>58</sup>

Despite the specifics required for courts to grant the injunctive order, judges typically draft injunctive orders "in flexible terms" that are "molded to meet the needs of each case."<sup>59</sup> The only entities bound by an injunction are those who receive actual notice of the order and who are "the parties"; "the parties' officers, agents, servants, employees, and attorneys"; and "other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)."<sup>60</sup>

A temporary restraining order (TRO) is a court order that prohibits or requires a specified act or acts if a party might otherwise suffer irreparable injury before a preliminary injunction hearing.<sup>61</sup> Courts treat every TRO that a court

<sup>55</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *see* 11A WRIGHT & MILLER, *supra* note 51, § 2941.

<sup>56</sup> I use "they/them/their(s)" as default, gender-neutral pronouns for any individual of unspecified gender and for groups. *See Singular 'They,'* MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/singular-nonbinary-they> [<https://perma.cc/4L8J-HUVQ>]; Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 961–63 (2019) (discussing the practice of, reasons for, and objections to using singular "they" as a gender-neutral pronoun).

<sup>57</sup> *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (first citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008); then citing *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987); and then citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–12 (1982)).

<sup>58</sup> *eBay*, 547 U.S. at 391 (first citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–13 (1982); and then citing *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987)).

<sup>59</sup> 11A WRIGHT & MILLER, *supra* note 51, § 2942.

<sup>60</sup> FED. R. CIV. P. 65(d)(2).

<sup>61</sup> *See* 11A WRIGHT & MILLER, *supra* note 51, § 2951. I discuss TROs because "nationwide" TROs, or preliminary injunctions referred to as TROs, are included in the "nationwide injunction" debate. *See supra* note 9.

issues after the opposing party received notice of the TRO application as a preliminary injunction even if the court calls the order a TRO.<sup>62</sup> When the adverse party receives notice of the TRO application in advance, the procedure and proceeding do not differ from that for a preliminary injunction, and Rule 65(B), which is specific to TROs, does not apply.<sup>63</sup> When there is such advance notice of the application and there is an adversary hearing or the order does not have an expiration date, courts treat the order as a preliminary injunction even if courts refer to the order as a TRO.<sup>64</sup>

Ordinarily, TROs expire no later than fourteen days after the entry of the order or at an earlier time that the court sets.<sup>65</sup> Before the expiration date, the court can extend the TRO for good cause if the court enters the reasons for the extension in the record.<sup>66</sup> A court must expedite the hearing for the preliminary injunction motion for any TRO issued without notice.<sup>67</sup> If the party who obtained the TRO does not proceed with their motion at the preliminary injunction hearing, the court must dissolve the TRO.<sup>68</sup> Upon meeting certain notice requirements, the adverse party may appear before the court and move to dissolve the TRO that was granted without notice.<sup>69</sup> A court must decide that motion to dissolve a TRO “as promptly as justice requires.”<sup>70</sup>

### III. “NATIONWIDE INJUNCTIONS” CRITICS’ CONCERNS AND PROPOSALS

In this Part, I distill scholarly arguments to develop a typology of the main criticisms of the targeted injunctions. These challenges include concerns that can be divided into two primary groups, largely jurisdictional or prudential. I also describe the skeptics’ proposed solutions for those concerns.

#### A. *Concerns*

Judges, Justices, and scholars posit numerous bases for questioning whether courts can or should issue “nationwide injunctions.” The grounds for critics’ concerns fall into two general categories, claiming that these injunctions are

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<sup>62</sup> 11A WRIGHT & MILLER, *supra* note 51, § 2951.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

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

<sup>66</sup> *Id.* § 2952.

<sup>67</sup> FED. R. CIV. P. 65(b)(3).

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

<sup>69</sup> FED. R. CIV. P. 65(b)(4).

<sup>70</sup> *Id.*



inappropriate or problematic for either jurisdictional or prudential reasons, with a number of different concerns within those broader categories.<sup>71</sup>

Table 1: *Classification of "Nationwide Injunction" Criticisms*

General Area	Category of Concern	Subcategory	Detailed Concern
Jurisdictional	Article III		
	Article I & II		
	Due Process*		
	Standing*		
Prudential	Jurisprudential	Right-Remedy Nexus	
		Forumshopping	
		Preclusion Asymmetry	
		Nonacquiescence	
		Inconsistent Judgments	Class Actions
	Accuracy	Availability of Other Relief	Voluntary Overcompliance
		Percolation	
		Premature Freezing of the Law	
		Weakening the Certiorari Process	
		Rights Articulation	
	Process Integrity/ Legitimacy	Judges Making Policy or Legislating	
		Nonparty Potential Future Plaintiff Autonomy, Representation & Agency	
	Institutional Design	Geographic Divisions of Federal Courts	
		Precedential Reach	
	Efficiency	Overdeterrence	
		Judicial Economy	

I use the terms jurisdictional, meaning what courts *can* do (what authority they have), and prudential, meaning what courts *should* do (whether and when courts should exercise their authority based on policies and principles). Dividing

<sup>71</sup> Previously, I grouped the grounds for critics' concerns into four categories. Pedro, *supra* note 3, at 866–67. Other scholars have grouped concerns in some similar ways. Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1124–25 (2020) (referring to "legal and policy grounds"); Trammell, *supra* note 31, at 74 (identifying concerns as constitutional and structural or as prudential).

up categories in this way is not meant to be rigid, but instead, is an attempt to make it easier to identify the types of issues at the heart of this debate.

### 1. *Jurisdictional Concerns*

The core of the jurisdictional criticisms of “nationwide injunctions” is that nothing in the Articles of the U.S. Constitution, the judiciary’s equitable powers, or the Federal Rules of Civil Procedure gives federal courts the authority to issue this type of injunction.<sup>72</sup> Moreover, some worry that courts do not even have jurisdiction over the cases in question or the claims at issue, at least not as plaintiffs frame these cases and claims. The primary historical concern with “nationwide injunctions” is that there is no basis for federal courts to exercise this equitable power.<sup>73</sup>

One line of jurisdictional concerns centers on the idea that courts issuing “nationwide injunctions” impinge on Article I or Article II powers, or at least exceed Article III powers.<sup>74</sup> Concerns about the targeted injunctions that center on Article I or Article II of the U.S. Constitution emphasize that, by issuing such injunctions, courts essentially usurp powers that are only properly exercised by the legislative and executive branches.<sup>75</sup> Criticisms of “nationwide injunctions” based on Article III are founded on the idea that issuing “nationwide injunctions” exceeds the judicial power granted to courts by Article III, Section 2.<sup>76</sup> Some argue that federal courts do not have the authority to issue “nationwide injunctions” because the Article III “case and controversy requirement” limits federal courts to “adjudicate only disputes in which the plaintiff has standing” and no plaintiff has standing to seek injunctive relief to protect anyone other than themselves, the

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<sup>72</sup> See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–25 (2018) (Thomas, J., concurring); *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) (mem.). Justice Clarence Thomas said that arguments in support of “nationwide injunctions” at the time that the Court was deciding *Trump v. Hawaii* “d[id] not explain how these injunctions are consistent with the historical limits on equity and judicial power.” 138 S. Ct. at 2429 (Thomas, J., concurring) (discussing *Amdur & Hausman*, *supra* note 17, at 51, 54; Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 57, 60–62 (2017)); see also *Ramos v. Wolf*, 975 F.3d 872, 903–04 (9th Cir. 2020) (Nelson, J., concurring), *en banc rehearing granted*, No. 18-16981, 2023 WL 1880467 (9th Cir. Feb. 10, 2023).

<sup>73</sup> *Bray*, *supra* note 18, at 423; *Morley*, *supra* note 17, at 622; Wasserman, *supra* note 19, at 364.

<sup>74</sup> See *Bray*, *supra* note 18, at 471; Wasserman, *supra* note 19, at 359–63.

<sup>75</sup> See Wasserman, *supra* note 19, at 353.

<sup>76</sup> See, e.g., *Bray*, *supra* note 18, at 471–72; *Morley*, *De Facto Class Actions*, *supra* note 31, at 516; Wasserman, *supra* note 19, at 339; *Frost*, *supra* note 17, at 1082; *Clopton*, *supra* note 31, at 10.

plaintiff (regardless of whether a court holds that the challenged federal governmental action is facially unconstitutional or illegal).<sup>77</sup>

Some scholars have suggested that nonparties do not have the standing necessary to obtain a “nationwide injunction” or that no plaintiff has standing to seek relief that would benefit anyone other than themselves or their plaintiff class.<sup>78</sup> However, it is not clear that any “nationwide injunction” critic has grounded their concerns in a constitutional-based remedial standing requirement.<sup>79</sup> Instead, it seems that critics refer to these potential constitutional remedial standing concerns as Article III “case-or-controversy” concerns, discussed above, or prudential concerns, discussed below—framing the discussion as a question of how judges should use their discretion to limit the scope of injunctions.

Professor Samuel Bray notably argues, and some judges and Justices agree,<sup>80</sup> that federal courts do not have the authority to issue such injunctions, in part, because injunctions that “control the defendant’s behavior against nonparties” are not a part of equity’s historic tradition.<sup>81</sup> Others note that “nationwide injunctions” “infringe the due process rights of the third parties whose underlying substantive rights the court is adjudicating and enforcing” and that such injunctions “also might violate the substantive due process right of third parties to control their own causes of action.”<sup>82</sup> The asterisk on the category of due process

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<sup>77</sup> Morley, *De Facto Class Actions*, *supra* note 31, at 523–26; *see, e.g.*, Bray, *supra* note 18, at 472; Siddique, *supra* note 17, at 2110, 2119; Wheeler, *supra* note 31, at 215–17. Justice Gorsuch noted that, when a court directs “how [a] defendant must act toward persons who are not parties to the case,” that “raise[s] serious questions about the scope of courts’ equitable powers under Article III” because “it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies.” *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. at 600; *see also* *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 256, 258–59 (4th Cir. 2020), *en banc rehearing granted*, 981 F.3d 311 (4th Cir. 2020). *But see* Frost, *supra* note 17, at 1081–82.

<sup>78</sup> *See* Morley, *De Facto Class Actions*, *supra* note 31, at 523–26; Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481, 519 (2017).

<sup>79</sup> *But see* Andrew Coan & David Marcus, *Article III, Remedies, and Representation*, 9 CONLAWNOW 97, 101 (2018) (proposing that the Court has not yet adopted what “nationwide injunction” critics hope will be “a third rule of remedial standing,” that “an injunction can do no more than what is necessary to redress the injury the plaintiff suffers”).

<sup>80</sup> *See* *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. at 599–601 (Gorsuch, J., concurring); *see also* *CASA de Md. v. Trump*, 971 F.3d at 257 (“Nationwide injunctions are irreconcilable with these limitations, as they lack any basis in traditional equity practice.” (citing *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. at 600)); *Rodgers v. Bryant*, 942 F.3d 451, 465 (8th Cir. 2019) (Stras, J., concurring in part and dissenting in part) (“The bottom line is that the relief ordered in this case does not resemble what was ‘traditionally accorded’ to plaintiffs like these in cases like this one . . . . If the Court of Chancery could not grant a universal injunction in 1789, then neither can the district court today.” (quoting *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999))).

<sup>81</sup> Bray, *supra* note 18, at 418, 421, 423, 425; *see also* Clopton, *supra* note 31, at 3; *cf.* Frost, *supra* note 17, at 1080, n.74.

<sup>82</sup> Morley, *De Facto Class Actions*, *supra* note 31, at 527–29.

concerns in Table 1 is there to indicate that these purported rights, if they exist, would belong to nonparty plaintiffs, but it is not clear that these injunctions have any effects on the due process rights of any nonparties. The injunctions prohibit or require certain actions on the part of defendants only.<sup>83</sup> Further, the nonparty plaintiffs are not bound by any injunction or judgment in a case to which they are not parties.<sup>84</sup> Thus, the due process rights of these nonparty plaintiffs are not actually implicated. Instead, this is more of a prudential concern regarding the autonomy, representation, and agency of these nonparty plaintiffs.<sup>85</sup>

## 2. Prudential Concerns

Judges, Justices, and scholars who make prudential criticisms of “nationwide injunctions” posit that courts should not issue “nationwide injunctions” because doing so would violate, or conflict with, various principles and concerns.<sup>86</sup> The prudential concerns, which constitute the vast majority of the concerns presented in that “nationwide injunctions” scholarly literature, largely center on worries that are jurisprudential or focused on accuracy, process integrity, institutional design, or efficiency.

### a. Jurisprudential

The jurisprudential subcategory is something of a catch-all for all of the court-specific policies, principles, and doctrines that may counsel against the targeted injunctions. Jurisprudential concerns include the right-remedy nexus, forum-shopping, preclusion asymmetry, agency nonacquiescence, inconsistent judgments, and the availability of other relief.

Several “nationwide injunction” critics’ concerns revolve around right-remedy nexus issues.<sup>87</sup> Some describe the right-remedy nexus as the principle that a court can only grant a remedy if the plaintiff has a specific legal entitlement to that remedy

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<sup>83</sup> See *id.* at 532 (noting that a “defendant-oriented injunction” bars the government defendant from taking certain actions).

<sup>84</sup> See FED. R. CIV. P. 65(d)(2) (providing that the only entities bound by an injunction are the parties who receive actual notice of the injunction; those parties’ “officers, agents, servants, employees, and attorneys”; and other persons “in active concert or participation” with those preceding two categories of entities bound).

<sup>85</sup> See Trammell, *supra* note 31, at 74–78.

<sup>86</sup> Wasserman, *supra* note 19, at 372–73; Frost, *supra* note 17, at 1103; Berger, *supra* note 31, at 1071; Russell L. Weaver, *Nationwide Injunctions*, 14 FIU L. REV. 103, 118–19 (2020).

<sup>87</sup> See, e.g., Wasserman, *supra* note 19, at 354–56 (noting the right-remedy nexus as a guide for courts in determining the scope of injunctions and noting that the “principle supports limiting such injunctions to the plaintiffs”); see also *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018); *Va. Soc’y for Hum. Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001), *overruled by* *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012).

under law.<sup>88</sup> Under this view, “[a]ny significant divergence between the contours of the entitlement and the relief granted represents an improper exercise of judicial power, a departure from the rule of law itself.”<sup>89</sup> Thus, the right-remedy nexus is “an inherent limitation on judicial power.”<sup>90</sup>

Another prevalent jurisprudential concern is that the possibility of a court issuing a “nationwide injunction” will lead plaintiffs to “rampant forum shopping”—choosing where to file litigation based on expectations of which district courts and appellate courts are friendly to plaintiffs’ claim and cause.<sup>91</sup> Many critics worry that the targeted injunctions will result in unfair preclusion asymmetry and courts treating the government in a way that creates asymmetric risks.<sup>92</sup> New plaintiffs can bring new claims against the government even if prior plaintiffs lost when litigating their similar claims. But if the government loses just once and that one court issues a “nationwide injunction,” then the government loses regarding all potential rights-holders everywhere, including those not party to the litigation.<sup>93</sup>

Another strand of jurisprudential criticisms proposes that the availability of “nationwide injunctions” interferes with the possibility of agency intercircuit nonacquiescence,<sup>94</sup> violates the principle of comity, or risks inconsistent judgments. Agency intercircuit nonacquiescence occurs when a court of appeals issues an order regarding agency action toward a specific, individual claimant and,

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<sup>88</sup> Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 46 (1982); Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 12–13 (1989).

<sup>89</sup> Chayes, *supra* note 88, at 46–47.

<sup>90</sup> *Id.* at 46.

<sup>91</sup> Bray, *supra* note 18, at 460; *see also* Berger, *supra* note 31, at 1091–92; Huddleston, *supra* note 36, at 243; Siddique, *supra* note 17, at 2124–25; Wasserman, *supra* note 19, at 363; Wheeler, *supra* note 31, at 202–03; Frost, *supra* note 17, at 1069, 1104; Clopton, *supra* note 31, at 9; Trump v. Hawaii, 138 S. Ct. 2392, 2424–25 (2018) (Thomas, J., concurring); Dep’t of Homeland Sec. v. New York, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring) (mem.) (“[T]here is a nearly boundless opportunity to shop for a friendly forum to secure a win nationwide.”); CASA de Md. v. U.S. Dep’t of Homeland Sec., 924 F.3d 684, 718 (4th Cir. 2019) (Richardson, J., concurring in part and dissenting in part) (“[S]uch injunctions sharpen plaintiffs’ incentives to forum-shop . . . .”); City of Chicago v. Barr, 961 F.3d 882, 916 (7th Cir. 2020); California v. Azar, 911 F.3d 558, 583 (9th Cir. 2018) (“Nationwide injunctions are also associated with forum shopping . . . .”); United States v. AMC Ent., Inc., 549 F.3d 760, 773 (9th Cir. 2008); Ramos v. Wolf, 975 F.3d 872, 904 (9th Cir. 2020) (Nelson, J., concurring), *en banc rehearing granted* No. 18-16981, 2023 WL 1880467 (9th Cir. Feb. 10, 2023).

<sup>92</sup> *See* Clopton, *supra* note 31, at 3, 9.

<sup>93</sup> Morley, *De Facto Class Actions*, *supra* note 31, at 494; Berger, *supra* note 31, at 1090; Carroll, *supra* note 32, at 77; Wheeler, *supra* note 31, at 203; Frost, *supra* note 17, at 1110; Clopton, *supra* note 31, at 14.

<sup>94</sup> *See, e.g.*, Berger, *supra* note 31, at 1073, 1093, 1097–1100; Morley, *supra* note 17, at 654; Siddique, *supra* note 17, at 2124–25.

then, the agency follows the court's ruling for the specified claimant and maybe for other similarly situated claimants within that circuit, but the agency does not choose to adopt that decision's rule or reasoning for claimants in other circuits.<sup>95</sup> Those apprehensive of conflicting judgments are concerned that, if all federal courts have the ability to issue the targeted injunctions, that might result in inconsistent judgments because different courts might issue injunctions that conflict with each other.<sup>96</sup> According to this criticism, the circumstance of conflicting judgments created by "nationwide injunctions" would also violate principles of comity, which requires that a court of appeals not "grant relief that would cause substantial interference with the established judicial pronouncements of . . . sister circuits."<sup>97</sup>

One subset of prudential issues with the targeted injunctions that critics raise is that the availability of other types of relief counsels against the availability of "nationwide injunctions."<sup>98</sup> For example, some argue that the availability of class actions through Rule 23(b)(2) counsels against "nationwide injunctions" because such injunctions flout the rule's requirements and make the rule superfluous.<sup>99</sup> In that way, there is a concern that the availability of "nationwide injunctions" contradicts congressional intent that class actions, as described in Federal Rule of Civil Procedure 23(b)(2), are the only way to obtain aggregate equitable relief.<sup>100</sup> Yet another strand of criticism posits that "nationwide injunctions" are not needed because of the availability of voluntary overcompliance—governmental defendants might stop, or are likely to stop,

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<sup>95</sup> See Berger, *supra* note 31, at 1073; Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681–82 (1989).

<sup>96</sup> See, e.g., Bray, *supra* note 18, at 462–64; Wasserman, *supra* note 19, at 382; Wheeler, *supra* note 31, at 210; Frost, *supra* note 17, at 1104; Clopton, *supra* note 31, at 13; Dep't of Homeland Sec. v. New York, 140 S. Ct. at 599.

<sup>97</sup> New York v. U.S. Dep't of Homeland Sec., 969 F.3d 42, 88 (2d Cir. 2020); United States v. AMC Ent., Inc., 549 F.3d 760, 773 (9th Cir. 2008).

<sup>98</sup> But see Leah Litman, *Remedial Convergence and Collapse*, CALIF. L. REV. 1477, 1480 (2018) (describing a phenomenon in remedies where courts use the availability of a remedy as justification for denying a similar remedy in a way that leads toward eliminating all related remedies because they could substitute for one another).

<sup>99</sup> Bray, *supra* note 18, at 464–65; see also Berger, *supra* note 31, at 1091; Morley, *supra* note 17, at 633–34; Morley, *De Facto Class Actions*, *supra* note 31, at 490–91, 537–38; Morley, *Disaggregating*, *supra* note 31, at 29; Wasserman, *supra* note 19, at 367–68; Wheeler, *supra* note 31, at 221; Frost, *supra* note 17, at 1085–86 (noting that "nationwide injunction" critics argument that such injunctions are "in tension with the existence of class actions" is a valid policy matter); Clopton, *supra* note 31, at 33–34 (discussing critics arguments about the tension of "nationwide injunctions" with class actions and noting that "the ability to obtain a national (b)(2) class has waned").

<sup>100</sup> See CASA de Md., Inc. v. Trump, 971 F.3d 220, 259 (4th Cir. 2020), *en banc rehearing granted* 981 F.3d 311 (4th Cir. 2020); Ramos v. Wolf, 975 F.3d 872, 906 (9th Cir. 2020) (Nelson, J., concurring), *en banc rehearing granted* No. 18-16981, 2023 WL 1880467 (9th Cir. Feb. 10, 2023); Brown v. Trs. of Bos. Univ., 891 F.2d 337, 361 (1st Cir. 1989).

enforcing the enjoined law against all entities even if a court only prohibits enforcement against plaintiffs.<sup>101</sup>

#### b. Accuracy

A less prevalent, but still significant, type of prudential concern centers on accuracy. Skeptics worry that the existence of “nationwide injunctions” will prevent sound judicial decision-making by preventing percolation<sup>102</sup> and by making the Supreme Court “decide important questions more quickly, with fewer facts, and without the benefit of contrary opinions.”<sup>103</sup> Some are concerned that the targeted injunctions result in rushed litigation and review such that the form of relief undercuts the benefits of the adversarial system<sup>104</sup> because these injunctions transform every run of the mill case into a “national emergency.”<sup>105</sup> Overall, this concern is that the targeted injunctions will result in a premature freezing of the law and a weakening of the certiorari process.<sup>106</sup> Another concern about accuracy is that “nationwide injunctions,” especially if they involve repeated litigation of similar claims with some different parties, might

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<sup>101</sup> See, e.g., Wasserman, *supra* note 19, at 373–75; see also Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2055–57 (2015) (discussing “inferential stare decisis,” meaning that later courts may interpret prior quasi-individual action decisions in a more sweeping manner).

<sup>102</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–25 (2018) (Thomas, J., concurring) (opining that “nationwide injunctions” prevent “legal questions from percolating through the federal courts”); *CASA de Md. v. U.S. Dep’t of Homeland Sec.*, 924 F.3d 684, 718 (4th Cir. 2019) (Richardson, J., concurring in part and dissenting in part) (noting that “nationwide injunctions” inhibit “the proper ventilation of difficult legal issues by deterring other lower courts from grappling with them”); *City of Chicago v. Barr*, 961 F.3d 882, 916 (7th Cir. 2020); *City of Chicago v. Sessions*, 888 F.3d 272, 297 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part); *Va. Soc’y for Hum. Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001), *overruled by* *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012); *Ramos v. Wolf*, 975 F.3d at 903.

<sup>103</sup> *Bray*, *supra* note 18, at 461–62; see, e.g., *Berger*, *supra* note 31, at 1085; Carroll, *supra* note 101, at 2021; Morley, *supra* note 17, at 628–29; Wasserman, *supra* note 19, at 384; Wheeler, *supra* note 31, at 215; Frost, *supra* note 17, at 1107–08; Clopton, *supra* note 31, at 22.

<sup>104</sup> *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) (mem.).

<sup>105</sup> *Trump v. Hawaii*, 138 S. Ct. at 2424–25 (Thomas, J., concurring); see also *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. at 601 (Gorsuch, J., concurring).

<sup>106</sup> See, e.g., *Berger*, *supra* note 31, at 1096–97; Carroll, *supra* note 101, at 2072; Morley, *De Facto Class Actions*, *supra* note 31, at 534; Frost, *supra* note 17, at 1112; Clopton, *supra* note 31, at 27.

not advance the articulation of the underlying rights as much as litigation in another form.<sup>107</sup>

*c. Process Integrity/Legitimacy*

Prudential concerns of process integrity or legitimacy include that the targeted injunctions “politicize the courts” and harm “the federal judiciary’s reputation as impartial and nonpartisan” when the public sees “red state” and “blue state” federal judges enjoin policies from the opposing major political party’s administration.<sup>108</sup> Another process concern is that “nationwide injunctions” interfere with the autonomy, representation, agency, and even the claims or rights of nonparties by depriving nonparties of the ability to litigate.<sup>109</sup>

*d. Institutional Design*

Critics concerned with institutional design problems suggest that a custom of lower courts issuing such injunctions contravenes some of the principles behind the structure of the federal judiciary, including the reasons for the geographic divisions of regional courts of appeals and districts.<sup>110</sup> Some worry that “nationwide injunctions” allow lower court decisions to have an unintended precedential reach by preventing other courts from deciding the issue and by binding entities across the entire country.<sup>111</sup> They express concern that this all occurs despite the lack of district court decision precedential authority and despite the fact that a court of appeal’s precedential authority is limited to the circuit.<sup>112</sup>

*e. Efficiency*

A final main type of prudential concern with the targeted injunctions centers on efficiency. This subcategory includes the worry that defendants in “nationwide

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<sup>107</sup> Carroll, *supra* note 101, at 2068–69 (comparing “quasi-individual” litigation to class actions).

<sup>108</sup> See Frost, *supra* note 17, at 1069, 1104–5.

<sup>109</sup> See, e.g., Carroll, *supra* note 101, at 2057–65; Morley, *De Facto Class Actions*, *supra* note 31, at 494; Wheeler, *supra* note 31, at 210–11, 215; Siddique, *supra* note 17, at 2124–25; *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018); *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 258–59 (4th Cir. 2020), *en banc rehearing granted*, 981 F.3d 311 (4th Cir. 2020).

<sup>110</sup> See, e.g., Berger, *supra* note 31, at 1093–96; Carroll, *supra* note 101, at 2059; Morley, *De Facto Class Actions*, *supra* note 31, at 535; Frost, *supra* note 17, at 1102.

<sup>111</sup> Morley, *supra* note 17, at 622.

<sup>112</sup> See, e.g., Morley, *De Facto Class Actions*, *supra* note 31, at 552–53; Frost, *supra* note 17, at 1102; *Clopton*, *supra* note 31, at 6; *Va. Soc’y for Hum. Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001), *overruled by* *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012).



injunction” cases are subject to a greater risk of over-deterrence than defendants in other types of cases<sup>113</sup> and that the availability of “nationwide injunctions” can harm judicial economy in comparison to class actions.<sup>114</sup>

### B. Problems to Resolve & Proposals

Depending on which types of “nationwide injunction” criticisms a scholar espouses, scholars’ arguments can vary from asserting that:<sup>115</sup>

- (1) no court (including the Supreme Court) *can* issue a “nationwide injunction”;<sup>116</sup>
- (2) no court (including the Supreme Court) *should* issue a “nationwide injunction”;<sup>117</sup>

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<sup>113</sup> See, e.g., Carroll, *supra* note 101, at 2055–56 (specifically discussing “quasi-individual” actions and not necessarily arguing that courts should not issue “nationwide injunctions”).

<sup>114</sup> See, e.g., *id.* at 2065–68.

<sup>115</sup> While scholars have set forth most of the combinations of arguments in this list, this is not an attempt to provide an exhaustive list of every possible iteration of combinations of beliefs that each scholar has espoused to the exclusion of unique compilations of arguments that I may not yet have come across or may not have been published at the time of writing this Article.

<sup>116</sup> That is, no U.S. court has the authority to issue such injunctions. See, e.g., Wasserman, *supra* note 19, at 364; Bray, *supra* note 18, at 423–24, 471–73 (noting that, because federal courts do not have authority otherwise, “federal courts should issue injunctions that control a federal defendant’s conduct only with respect to the plaintiff”); Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 257 (2016) (noting that an injunction that enjoins enforcement of an unconstitutional law against entities similarly situated to the plaintiffs is “inappropriately overbroad”).

<sup>117</sup> That is, courts should decline to issue the targeted injunctions due to jurisprudential concerns. See, e.g., Morley, *Disaggregating*, *supra* note 31, at 33–34.

[I]n nonclass cases, courts should tailor injunctions to enforce only the rights of the plaintiffs before the court, and not third-party nonlitigants, as well. In class actions, courts should certify district- or circuit-wide classes, rather than nationwide classes requiring nationwide relief. Because of the problems posed by Rule 23(b)(2) classes, however, courts should rely primarily on *stare decisis* rather than such class actions to give third-party nonlitigants the benefit of their constitutional and other public law rulings. And courts should ensure that plaintiff entities do not use associational standing to bring *de facto* class actions outside the context of Rule 23 to obtain backdoor nationwide injunctions.

*Id.* at 8; Berger, *supra* note 31, at 1088; Bray, *supra* note 18, at 424 (“[F]ederal courts should issue injunctions that control a federal defendant’s conduct only with respect to the plaintiff.”); Morley, *supra* note 17, at 621 (“I have argued elsewhere that courts should decline to issue Defendant-Oriented Injunctions in nonclass cases due to jurisdictional, procedural, and other important concerns.” (citing Morley, *De Facto Class Actions*, *supra* note 31, at 494–97)); Bruhl, *supra* note 78, at 512.

(3) *no lower court* (meaning no district court and no court of appeals) *can* issue a “nationwide injunction,” *but the Supreme Court can* do so, depending on the merits of a case;

(4) *no lower court should* issue a “nationwide injunction,” *but the Supreme Court can and should*, depending on the merits of a case;<sup>118</sup> or

(5) lower courts *can* issue “nationwide injunctions,” *but lower courts should* issue “nationwide injunctions” *only in certain circumstances* while the Supreme Court *can and should* issue “nationwide injunctions,” depending on the merits of a case.<sup>119</sup>

Commentators’ proposed solutions to the problems that they identify fall into three main groupings:

(1) that lower federal courts stop providing this type of relief;<sup>120</sup>

(2) that federal courts (including the Supreme Court) never issue injunctions that benefit anyone other than named plaintiffs or named plaintiff classes unless those benefits are indivisible;<sup>121</sup> and

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<sup>118</sup> In a discussion of federal district court judges issuing preliminary injunctions against federal governmental defendants, Professor Wheeler notes that:

Given the combination of the preliminary nature and the broad scope of a nationwide remedy, there should be a presumption against nationwide preliminary injunctions. When a judge truly believes a nationwide scope is necessary, she should implement procedural safeguards to protect against the concerns that result from a determination prior to a hearing on the merits that affects parties not before the court.

Wheeler, *supra* note 31, at 203.

<sup>119</sup> See, e.g., Clopton, *supra* note 31, at 42–44 (noting that if *United States v. Mendoza*, 464 U.S. 154 (1984), remains good law (in contradiction with the article’s central argument), then judges or legislators could let nonmutual preclusion guide imposing limits on “national injunctions” and describing those potential limitations); Trammell, *supra* note 31, at 73 (“Presumptively, a nationwide injunction should not issue . . . . However, when the government refuses in bad faith to abide by settled law, a nationwide injunction is appropriate. Such injunctions might also be appropriate when the law is, so to speak, settled enough.”); *id.* at 74–90 (“Those who have argued that nationwide injunctions are impermissible partially ground their objections in constitutional and structural constraints. These include fundamental notions of due process, judicial hierarchy, and limits on the judicial power. None of these objections are sustainable.”).

<sup>120</sup> Some would specify that lower federal courts would not and should not provide this type of relief, specifically, against a federal governmental defendant. See, e.g., Berger, *supra* note 31, at 1100–04. “Injunctions against the federal government should not extend beyond the circuit where the enjoining court sits (the ‘circuit-border rule’). In many cases, an injunction barring enforcement against the plaintiff alone will suffice.” *Id.* at 1100.

<sup>121</sup> Bray, *supra* note 18, at 457; Wasserman, *supra* note 19, at 371; Morley, *supra* note 17, at 654.

(3) that lower federal courts only issue injunctions against governmental entities in certain limited circumstances and sometimes in ways that are contingent on other doctrines such as preclusion.<sup>122</sup>

#### IV. UNMASKING THE MYTH

According to “nationwide injunction” critics, the distinctive features of “nationwide injunctions” are that the orders: (1) have no geographic limitation and (2) benefit entities beyond the named plaintiffs or defined plaintiff classes.<sup>123</sup> But this Part explains that the concept of a “nationwide injunction” is a nearly meaningless myth. The primary significance of the targeted injunctions does not lie in their geographic scopes or in the entities whom they benefit. Nearly no federal court injunctions are limited in geographic scope, nor is there any explicit federal rule or doctrinal limit on the geographical scope of injunctions. Furthermore, the injunctions that federal courts issue tend to have no geographical limit on their applicability or enforceability, probably in no small part because there is no rule or core principle requiring that injunctions must only benefit plaintiffs or plaintiff classes. There is no explicit federal rule or doctrinal limit regarding to whom the benefits of injunctions extend. When looking at federal court injunctions, sometimes the injunctions’ benefits are limited to named plaintiffs or defined plaintiff classes, but the benefits of an injunction are not always so limited, nor need they be. In the absence of a rule, doctrine, or precedent that prohibits injunctions from benefiting entities beyond the plaintiffs or plaintiff classes, the fact that the targeted injunctions arguably benefit entities outside of the plaintiffs does not necessarily mean that the targeted injunctions are improper, nor does this characteristic distinguish these

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<sup>122</sup> See, e.g., Frost, *supra* note 17, at 1116–18 (arguing that “[t]he default should be against issuing a nationwide injunction” and that federal district courts should employ special procedures before deciding whether to issue a “nationwide injunction” including special hearings involving third parties and evidence and a written ruling discussing the costs and benefits of the injunction (emphasis in original)); Trammell, *supra* note 31, at 103–04 (“First, courts presumptively should not issue nationwide injunctions, thereby allowing the law to develop in the usual iterative way. Second, courts may issue nationwide injunctions for the benefit of nonparties if plaintiffs can demonstrate that the government is behaving in bad faith, most notably when government officials fail to abide by settled law.”); Clopton, *supra* note 31, at 43 (proposing that “courts could decline to issue national injunctions when nonparties likely would not be candidates for nonmutual preclusion” and that courts should not grant such injunctions in the context of “wait-and-see plaintiffs and the strategic avoidance of class certification”); Wheeler, *supra* note 31, at 223–26 (“[T]here should be a presumption against nationwide preliminary injunctions. Should there be a sufficient showing that a nationwide preliminary injunction is unavoidable, this Comment recommends the requirement of additional procedural safeguards, such as a notice system or class certification.”).

<sup>123</sup> See *supra* Part III. Most “nationwide injunction”-skeptical scholars do not describe a geographic concern, but several suggest geographic limitations as solutions for some of their concerns. See *supra* Parts III.A–B.

injunctions from others in a way that would require a separate standard for issuing the targeted injunctions.

### A. *Geographic Applicability of Injunctions*

That the targeted injunctions have unlimited geographical zones of applicability does not make these injunctions unique or different from other injunctions. Neither the doctrine nor the rules that govern injunctions call for geographic limitations. For some specific cases, there is a possibility that other considerations might lead courts to impose geographic limitations on specific injunctions, but there is no inherent geographic limitation required for all injunctions. Moreover, almost no federal injunctions have any geographical scope limitations.

#### 1. *Rules and Traditional Principles of Equity*

As mentioned earlier, Federal Rules of Civil Procedure 62 and 65 and Federal Rule of Appellate Procedure 8 outline the requirements for injunctions.<sup>124</sup> Although those rules specify all of the conditions for injunctions, including prescribing the “Contents and Scope of Every Injunction,”<sup>125</sup> those rules mention no geographic limitation for injunctions.<sup>126</sup> All that Rule 65 prescribes regarding the acceptable form of an injunction is that a court must include within every order granting an injunction: (1) the reasons why the court issued the injunction, (2) the specific terms of the injunction, and (3) the act or acts restrained or required by the injunction.<sup>127</sup>

The purpose of these Rule 65(d) requirements is neither to restrict the availability of, nor scope of, injunctions, but instead, is “to protect those who are enjoined by informing them of what they are called upon to do or refrain from doing.”<sup>128</sup>

There is no geographic component to determine whether an injunction is overly broad. An injunction is only overbroad if it prohibits permissible conduct.<sup>129</sup> Moreover, when the defendant has or may have infringed upon civil rights, “courts are justified in issuing decrees that embrace a fairly wide range of conduct.”<sup>130</sup> Regarding injunctive scope, Rule 65 only restricts the persons

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<sup>124</sup> See *supra* Part II.C.

<sup>125</sup> FED. R. CIV. P. 65(d).

<sup>126</sup> See FED. R. CIV. P. 62, 65; FED. R. APP. P. 8; Bray, *supra* note 18, at 444–45.

<sup>127</sup> FED. R. CIV. P. 65(d).

<sup>128</sup> 11A WRIGHT & MILLER, *supra* note 51, § 2955.

<sup>129</sup> *Id.* Courts in some cases reject even the contention that an injunction is overbroad because it proscribes permissible conduct. *Id.*

<sup>130</sup> *Id.*

bound by the injunction.<sup>131</sup> No federal rule of procedure mentions or requires any geographic limitation on injunctions.

The leading treatise in the area, Wright and Miller's *Federal Practice and Procedure*, notes no geographic restrictions on the applicability of injunctions. "The only limitations on the application of Rule 65 [which outlines the conditions for courts to issue injunctions] are those prescribed in Rule 65(e)."<sup>132</sup> And the prescriptions in Rule 65(e) do not entail any geographic limitations.<sup>133</sup>

Moreover, *Federal Practice and Procedure* notes that the prerequisites and availability of injunctive relief "depend on traditional principles of equity jurisdiction"<sup>134</sup> and "the question whether injunctive relief is to be granted or withheld is addressed to the judge's discretion" according to English courts of chancery practice.<sup>135</sup> While there is disagreement regarding whether traditional principles of equity or English courts of chancery practice indicate that judges should deny "nationwide injunctions,"<sup>136</sup> it seems that no one has argued that traditional principles of equity or English courts of chancery practice place any geographic restrictions on injunctions.<sup>137</sup> Even Equity Rule 73, which Rule 65 "largely is taken from,"<sup>138</sup> placed no geographic restrictions on injunctions.<sup>139</sup> Furthermore, injunctions without any geographic limitation may be necessary depending on the circumstances of a case.<sup>140</sup>

The limitations on injunctions due to traditional principles of equity jurisdiction, and English courts of chancery practice, largely center on the separation between law and equity, meaning whether there is an adequate remedy at law.<sup>141</sup> The purpose of these limitations is not geographic, but, instead, is to prevent "intrusion[s] upon the jurisdiction of another tribunal" when that other tribunal's jurisdiction is based on type of claim or relief requested.<sup>142</sup>

Experts recognize that there are some circumstances under which a court must consider extraterritorial effects when deciding whether to issue an

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* § 2941.

<sup>133</sup> FED. R. CIV. P. 65(e). Rule 65(e) prescribes that Rule 65(a)–(d) does not modify federal statutes regarding employer and employee actions, a statute that relates to interpleader actions, or actions that a specific federal statute requires to be heard and decided by a three-judge district court. *Id.*

<sup>134</sup> 11A WRIGHT & MILLER, *supra* note 51, § 2941; *see id.* § 2942.

<sup>135</sup> *Id.* § 2941.

<sup>136</sup> Compare Bray, *supra* note 18, at 421, with Pedro, *supra* note 3, at 870–83, and Pfander & Wentzel, *supra* note 31, at 1302–04.

<sup>137</sup> See Bray, *supra* note 18, at 419 n.5, 422 n.19.

<sup>138</sup> 11A WRIGHT & MILLER, *supra* note 51, § 2941.

<sup>139</sup> See *id.* n.6.

<sup>140</sup> See, e.g., 11A WRIGHT & MILLER, *supra* note 51, § 2942; Siddique, *supra* note 17, at 2116–17.

<sup>141</sup> See 11A WRIGHT & MILLER, *supra* note 51, § 2941.

<sup>142</sup> *Id.*

injunction.<sup>143</sup> However, the relevant extraterritoriality is the effect of the injunction in another country—meaning outside of the United States—not any supposed “extraterritoriality” of one district court’s or court of appeal’s order into another U.S. federal judicial district or another U.S. circuit.<sup>144</sup> Moreover, “there is no doubt that if the court has personal jurisdiction over the parties, it has the power to order each of them to act in any fashion or in any place.”<sup>145</sup> Furthermore, there are certain circumstances under which a court can issue an injunction even though that injunction affects a foreign country.<sup>146</sup> Although there may be different considerations for preliminary injunctions, like permanent injunctions, preliminary injunctions have no rule or doctrine that prescribes a geographic limitation on injunctive scope.<sup>147</sup>

## 2. Doctrine

Although some judges in lower federal courts and some Justices have begun to question whether there should be a geographic restriction on injunctions,<sup>148</sup> no current, controlling doctrine restricts the applicability of injunctions geographically. Some scholars argue that certain cases (such as *Califano v. Yamasaki*<sup>149</sup>) or doctrines (such as limits of standing, personal jurisdiction, subject matter jurisdiction, agency nonacquiescence, or balancing the hardships) impose geographic or other limitations that should prevent courts from ever issuing (or at least freely issuing) “nationwide injunctions.”<sup>150</sup> But those cases, principles, and doctrines, at best, might lead to specific litigation with geographically limited injunctions or denials of injunctions because of the factual and legal circumstances unique to those lawsuits.<sup>151</sup> The Court’s injunction opinions and holdings do not prescribe any limitations on the geographic scope of injunctions.<sup>152</sup>

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<sup>143</sup> See *id.* § 2945.

<sup>144</sup> See *id.*

<sup>145</sup> *Id.*

<sup>146</sup> See, e.g., *id.*; *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952).

<sup>147</sup> See FED. R. CIV. P. 65(a); 11A WRIGHT & MILLER, *supra* note 51, §§ 2947, 2948.

<sup>148</sup> *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 599–601 (2020) (Gorsuch, J., concurring) (mem.) (granting a stay of preliminary injunction pending petition for a writ of certiorari); *City & County of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 944 F.3d 773, 785 (9th Cir. 2019); *City & County of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 408 F. Supp. 3d 1057, 1129 (N.D. Cal. 2019), *stay granted*, 944 F.3d 773 (9th Cir. 2019); *Washington v. U.S. Dep’t of Homeland Sec.*, 408 F. Supp. 3d 1191, 1223 (E.D. Wash. 2019), *stay granted*, 944 F.3d 773 (9th Cir. 2019).

<sup>149</sup> *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

<sup>150</sup> See *supra* Part III.

<sup>151</sup> See 11A WRIGHT & MILLER, *supra* note 51, § 2945.

<sup>152</sup> See generally *Brown v. Plata*, 563 U.S. 493 (2011) (permanent injunction); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008) (preliminary injunction); *Munaf v. Geren*, 553 U.S. 674 (2008) (preliminary injunction); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S.

a. *Califano v. Yamasaki*

Several “nationwide injunction” critics cite *Califano v. Yamasaki*<sup>153</sup> for a principle that they say limits the geographical scope of injunctions and limits injunctive benefits to the named parties or defined classes<sup>154</sup>—“injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”<sup>155</sup> However, the Supreme Court did not propose that principle; the governmental defendant did.<sup>156</sup> And the Court did not adopt that principle.

The governmental defendant raised the principle that injunctive relief should not be more burdensome than necessary to provide complete relief to plaintiffs in order to support the government’s argument that the Court should not allow nationwide relief.<sup>157</sup> The Court, however, disagreed with the governmental defendant and noted that nothing in the relevant procedural rule “limits the geographical scope” of an action.<sup>158</sup> Going even further in the opposite direction, the Court noted that nationwide relief is not “inconsistent with principles of equity jurisprudence” because “the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.”<sup>159</sup> Relief that “is nationwide in scope does not necessarily mean that the relief afforded the plaintiffs will be more burdensome than necessary to redress the complaining parties.”<sup>160</sup> In clarifying these points, the Court indicated that the governmental defendant cited *Dayton Board of Education v. Brinkman*<sup>161</sup> as an example supporting the defendant’s argument that nationwide relief was

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388, 391 (2006) (permanent injunction); *Walgreen Co. v. Sara Creek Prop. Co.*, 966 F.2d 273 (7th Cir. 1992) (permanent injunction); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

<sup>153</sup> *Califano v. Yamasaki*, 442 U.S. 682 (1979).

<sup>154</sup> See, e.g., Bray, *supra* note 18, at 466.

To be sure, the cases do have apparent constraints on the granting of national injunctions. The one most commonly raised by courts and commentators is the principle of “complete relief,” which is that “injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”

*Id.* (quoting *Califano*, 442 U.S. at 702); Michelle R. Slack, *Separation of Powers and Second Opinions: Protecting the Government’s Role in Developing the Law by Limiting Nationwide Class Actions Against the Federal Government*, 31 REV. LITIG. 943, 955 (2012).

<sup>155</sup> *Califano*, 442 U.S. at 702.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*; see Morley, *supra* note 17, at 624 (“*Califano* expressly affirmed the power of district courts to issue nationwide injunctions against federal agencies.”).

<sup>159</sup> *Califano*, 442 U.S. at 702.

<sup>160</sup> See *id.*

<sup>161</sup> *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977).

improper.<sup>162</sup> The Court, however, cited *Dayton Board* for the principle that nationwide relief is consistent with principles of equity jurisprudence when the extent of the violation established is also nationwide.<sup>163</sup>

#### b. Agency Nonacquiescence

Despite some scholars' arguments to the contrary, the doctrine of agency nonacquiescence does not suggest that there is or should be a limitation on the geographic scope of injunctions. Administrative or agency inter-circuit nonacquiescence is when a court of appeals reviews agency action regarding a particular claimant and, subsequently, issues an order regarding that claimant and, then, the relevant agency decides that it will only follow the court's ruling for that claimant specified in the order or for other claimants within that circuit, but the agency later declines to follow the rule or reasoning for the decision outside of the circuit.<sup>164</sup> The presumed ability of administrative agencies to make such pronouncements of nonacquiescence is the foundation of some arguments that district courts and courts of appeals cannot or sometimes should not issue injunctions that are not limited to their specific district or circuit.<sup>165</sup>

In looking at the court orders in cases that involve agency nonacquiescence, however, it becomes clear that the district courts and courts of appeals did not initially issue injunctions that applied without geographic limitation (or beyond the named plaintiffs or designated plaintiff classes) in the specific litigation.<sup>166</sup>

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<sup>162</sup> *Califano*, 442 U.S. at 702.

<sup>163</sup> *Id.* (citing *Dayton Bd.*, 433 U.S. at 414–20).

<sup>164</sup> See *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015), *aff'd sub nom.* *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1261 (D.C. Cir. 1996) (Rogers, J., dissenting); Drew A. Swank, *An Argument Against Administrative Acquiescence*, 88 N.D. L. REV. 1, 3 (2012).

<sup>165</sup> See, e.g., Swank, *supra* note 164, at 4.

<sup>166</sup> See, e.g., *Murphy Oil*, 808 F.3d at 1018. In *Murphy Oil*, the National Labor Relations Board (NLRB) had concluded that the employer, Murphy Oil, "had unlawfully required employees . . . to sign an arbitration agreement waiving their right to pursue class and collective actions." *Id.* at 1015. In its opinion in *Murphy Oil*, the Fifth Circuit Court of Appeals noted that it had previously held, in separate litigation (*D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013)), that the employer, D.R. Horton, "[did] not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration." *Murphy Oil*, 808 F.3d at 1016 (citing *D.R. Horton*, 737 F.3d at 362). Although the Fifth Circuit, in *Murphy Oil*, adhered to their prior reasoning in *D.R. Horton*, no court had issued an injunction against the NLRB in either case. *Murphy Oil*, 808 F.3d at 1015.

The Fifth Circuit had previously granted D.R. Horton's petition and held that the corporation did not unlawfully require employees to submit to arbitration agreement prohibiting class and collective actions and then, in separate, later litigation, the Fifth Circuit granted Murphy Oil's petition and held that Murphy Oil did not unlawfully require employees to submit to arbitration agreement prohibiting class and collective actions. *Id.* at



The agency is not defying a court injunction requiring the agency to apply a specific rule in a particular way in all cases. Instead, the agency complies with the order, which usually says that a specific rule should be applied to the specific plaintiff in a particular way that requires the agency to take a specified action regarding that plaintiff and, then, the agency decides not to extend the order to apply the order's reasoning outside of the circuit (in intercircuit nonacquiescence) or to other claimants within the circuit (in intracircuit nonacquiescence).<sup>167</sup> So, in instances of intercircuit and intracircuit agency nonacquiescence, the agency treats the appellate court's judgment as the law of the case.<sup>168</sup> The agency takes, or refrains from taking, the specified action regarding the plaintiff.<sup>169</sup> In instances of intercircuit nonacquiescence, the agency proceeds to treat all other claimants within the circuit in that same way as required for the earlier claimant.<sup>170</sup> The agency's nonacquiescence merely means that the agency will not extend the treatment that the court required for the plaintiffs only to claimants in other circuits.<sup>171</sup> Furthermore, in the context of agency nonacquiescence, there is no question that "[t]he decisions of any federal court—whether district, circuit, or Supreme—is [sic] binding" on the agency<sup>172</sup> and that the Supreme Court's rulings and precedent are always binding on administrative agencies.<sup>173</sup> In that sense, the existence of agency nonacquiescence provides little support for arguments that federal courts cannot or should not issue injunctions that bind a defendant without geographic limitation.

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Because there is no rule, doctrine, or precedent imposing a geographic limitation on the scope of injunctions and because most federal injunctions are not limited geographically, there is nothing unique about the scope of the targeted injunctions similarly not having a geographic restriction that requires courts to be more reluctant to issue the targeted injunctions.

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1015–16. While the Fifth Circuit noted that the NLRB should “not be surprised” that their holding in *Murphy Oil* was similar to their holding in *D.R. Horton* and noted that they “do not celebrate the Board’s failure to follow our *D.R. Horton* reasoning,” the court also noted that they did not “condemn its nonacquiescence.” *Id.* at 1015, 1018. When an agency knows that a later case will be reviewed by the same circuit that issued a decision in an earlier similar case, it would be reasonable for the agency to acquiesce and follow the reasoning of the earlier court of appeals decision, but their failure to do so is not noncompliance with an injunctive order or judgment.

<sup>167</sup> See James J. Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 COMPAR. LAB. L. & POL’Y J. 221, 237–38 (2005).

<sup>168</sup> See *id.* at 237–38; Estreicher & Revesz, *supra* note 95, at 687–88.

<sup>169</sup> See Brudney, *supra* note 167, at 237–38; Estreicher & Revesz, *supra* note 95, at 687–88.

<sup>170</sup> See Brudney, *supra* note 167, at 237–38; Estreicher & Revesz, *supra* note 95, at 687–88.

<sup>171</sup> See Brudney, *supra* note 167, at 237–38; Estreicher & Revesz, *supra* note 95, at 687–88.

<sup>172</sup> Swank, *supra* note 164, at 8.

<sup>173</sup> *Id.*

### B. *Beneficiaries of Injunctions*

The other, and perhaps more discussed, characteristic that critics say distinguishes what they call “nationwide injunctions” is that these injunctions benefit entities beyond the named plaintiffs or defined classes. However, there is no rule, doctrine, or precedent requiring that courts limit the benefits of injunctions to plaintiffs or designated plaintiff classes.

Nothing in the applicable rules—Federal Rules of Civil Procedure 62 and 65 and Federal Rule of Appellate Procedure 8—prohibits people or entities who are not named plaintiffs and who are not part of the defined class from benefitting from an injunction. Rule 65(d)(2) prescribes that an injunctive order only binds the following entities:

- (A) the parties;
- (B) the parties’ officers, agents, servants, employees, and attorneys; and
- (C) other persons who are in active concert or participation with anyone described.<sup>174</sup>

Even a cursory reading of the rule reveals that Rule 65(d)(2) does not speak at all regarding which entities can *benefit* from an injunction, but instead, only speaks regarding which entities an injunction can *bind*. That means that an entity is not bound to comply with an injunction if the entity is not within 65(d)(2) and an injunction *cannot be enforced against* someone who is not a party or not related to a party as described. According to Rule 65, a court can issue an order against defendants and an injunction can be enforced against those defendants.

This portion of the rule that prescribes the entities bound by injunctions is not about who can benefit from an injunction, but “is derived from the common law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in ‘privity’ with them, represented by them or subject to their control.”<sup>175</sup> The purpose of this rule is not to limit the benefits of injunctions to named plaintiffs or defined classes, but instead, to prevent injunctions that purport “to bind the world”<sup>176</sup> or to bind “all persons whomsoever,”<sup>177</sup> instead of only binding defendants and those in privity with them or in a delineated relationship with them.<sup>178</sup>

Some critics assert that, when a court issues a “nationwide injunction,” nonparties “cannot enforce the injunction if the government acts inconsistent with the court’s order.”<sup>179</sup> I do not necessarily disagree with that, but I also do not see

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<sup>174</sup> FED. R. CIV. P. 65(d)(2).

<sup>175</sup> 11A WRIGHT & MILLER, *supra* note 51, § 2956 (quoting *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945)).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* (quoting *Chisolm v. Caines*, 121 F. 397, 400 (D.S.C. 1903)).

<sup>178</sup> *See id.*

<sup>179</sup> Wasserman, *supra* note 19, at 373.

why the inability of a nonparty to enforce an injunction against a defendant would necessarily mean that courts cannot or should not issue injunctions that provide benefits to nonparties. Putting Rule 65(d)(2) to the side temporarily for purposes of discussion, *Federal Practice and Procedure* also states that “[a] court ordinarily does not have power to issue an order against a person who is not a party and over whom it has not acquired in personam jurisdiction.”<sup>180</sup> Thus, nothing in the relevant rules, nor the doctrine supporting the rules, limits the entities that may benefit from an injunction.<sup>181</sup>

In making this argument that the applicable rules and doctrine do not prevent injunctions from benefiting an entity beyond the plaintiffs or plaintiff classes, I do not ignore the principle that the governmental defendant put forth in *Califano v. Yamasaki*—that “injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”<sup>182</sup> While the quoted language does include the words “to the plaintiffs,” neither the parties nor the Justices discussed whether injunctive benefits could or should accrue to entities beyond the named plaintiffs or defined plaintiff class.<sup>183</sup> Injunctive benefits to entities beyond plaintiffs was not at issue in the case.<sup>184</sup> Court-ordered remedies that provide benefits to entities outside of the plaintiffs are not limited to the injunctive context either. As Professor Catherine Sharkey discusses in her research, some courts have even ordered defendants to pay money damages to nonparty entities outside of the plaintiffs.<sup>185</sup> If court judgments explicitly order defendants to provide relief to non-plaintiff entities when the benefits are divisible even in the at-law realm of money damages, then it hardly seems impossible or inappropriate for courts to grant equitable relief that benefits entities outside of the named plaintiffs or designated plaintiff classes.

### C. Right-Remedy Nexus

Scholars draw from various doctrines and principles (including the right-remedy nexus) to argue that courts cannot, or often should not, grant injunctions that benefit entities beyond the plaintiffs when benefits are divisible.<sup>186</sup> Some might wonder if the existence of a right-remedy nexus principle would counsel that courts should not use their equitable discretion to grant the targeted

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<sup>180</sup> 11A WRIGHT & MILLER, *supra* note 51, § 2956

<sup>181</sup> See, e.g., Bray, *supra* note 18, at 444–45 (“There is no rule against national injunctions.”).

<sup>182</sup> *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

<sup>183</sup> See *id.*

<sup>184</sup> See generally *Califano*, 442 U.S. 682.

<sup>185</sup> See Catherine M. Sharkey, *Punitive Damages Transformed into Societal Damages*, in PUNISHMENT AND PRIVATE LAW 155, 173 (Elise Bant, Wayne Courtney, James Goudkamp, & Jeannie Paterson eds., 2021); see also Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 387 (2003).

<sup>186</sup> See *supra* Part III.A.

injunctions. However, there are at least three counterarguments to this potential concern that we should not ignore: (1) the purpose of the right-remedy nexus was to restrict the common law jury and that nexus is inapposite in the context of judges using their discretion to fashion equitable remedies; (2) the right-remedy nexus might counsel at least as much in favor of judges granting the targeted injunctions as against; and (3) the right-remedy distinction is a false dichotomy from an outdated, or at least seriously disputed, analytical account.

Some say that, historically in equity, the remedy “was determined first, the right was simply deduced from the contours of the remedy.”<sup>187</sup> In a sense, there was a right-remedy separation when law and equity merged because courts no longer derived rights from the remedy and, instead, used “equitable remedies to vindicate rights that were in no way historically derivative of them.”<sup>188</sup> Trying to impose on equitable relief, such as injunctions, the right-remedy nexus developed in law courts does not work because the important distinction for equitable courts and remedies is that courts can provide equitable “relief for rights that law courts either did not recognize, or did not have the power to remedy.”<sup>189</sup> Additionally, the right-remedy nexus is particularly complicated such that many have criticized the “inherent ambiguity” or misleading nature of the purported nexus in civil rights and impact litigation cases or public law cases.<sup>190</sup>

But if we are focusing on letting the right determine the scope of the remedy, then, first, we need to understand and define what the scope of the violation of the right is. In circumstances where a court finds that the defendant’s challenged actions violate rights, without limitation across a municipality, a state, the country, or the globe, the scope of the injunction could be, and perhaps should be or even must be, correspondingly broad. Yet, there is not general agreement on what the rights at stake are, what the violations are, or what the relationship is or should be between the right and the remedy.

The idea that there is a “sharp division between right and remedy” where rights are “logically prior” or “superior” to remedies is a nineteenth-century natural law view that many modern scholars do not espouse.<sup>191</sup> For those who

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<sup>187</sup> Susan Poser, *Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status*, 81 NEB. L. REV. 283, 312–13 (2002) (“[A] right to an equitable remedy only came into being after it was determined what remedy was appropriate for a particular injury.”).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 311.

<sup>190</sup> See, e.g., Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 873 (1999); Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1737 & n.247 (2004); OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 46–47 (1978).

<sup>191</sup> Bone, *supra* note 88, at 13–15 (explaining that in more modern views, “‘right’ and ‘remedy’ are just handy conventions for describing the form of protection that a court will provide to someone whose interests have been harmed” and the scope of relief “is the product of community decision based on controversial value choices”); see Chayes, *supra* note 88,

adopt Professor Daryl Levinson's concept of remedial equilibration—that "rights are influenced by, and inseparable from, remedies"<sup>192</sup>—then it is not obvious that there is clear-cutting guidance against the targeted injunctions that we can draw from the idea of the right-remedy nexus. Outside of the context of individual judges or Justices deciding how to exercise their discretion, trying to use the concept of the right-remedy nexus to restrict the remedy is a somewhat circular exercise.<sup>193</sup> Much of the critics' arguments could be seen as a sort of "remedial essentialism" wherein the limited contour of the remedy is the device through which the functionality of the right is reined in and through which the right itself is contracted or even abrogated.<sup>194</sup> In some ways, a jurist objecting to the scope of what they purport to be a whole genre of injunctions on the basis of a right-remedy nexus issue is that jurist disliking the remedy because their conception of the right is more restrictive (than that of the plaintiffs and than that of the granting judge or judges); they do not agree with the judge that the plaintiff won on that claim. In the context of the targeted injunctions, it might often be that the critics have different conceptions of rights, remedies, social ideals, and the purposes of the law and courts.<sup>195</sup> A federal judge might find that the right-remedy nexus leans in favor of a geographically-limited or beneficiary-limited injunction based on the specific right violated within a case, but there is no inherent geographic limitation requirement for all injunctions.

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at 47 ("Justice Rehnquist has mounted a serious effort to reimpose the right-remedy linkage as a way of limiting the power of judges . . . [P]reoccupation with the right-remedy analysis has prevented the Court from developing any other basis for effective supervision of the remedial discretion of trial courts.").

<sup>192</sup> Levinson, *supra* note 190, at 884–87; *see also* Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 677–80 (2001) (identifying "a remedy and the underlying substantive interest as two parts of a unified whole").

<sup>193</sup> *See* Levinson, *supra* note 190, at 873. If rights and remedies "are functionally related and inextricably intertwined"—mutually constitutive—then one cannot determine a right before determining, and without concomitantly determining, the remedy. Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 HASTINGS L.J. 73, 79–80 (2007).

<sup>194</sup> Thomas, *supra* note 193, at 76, 79–80 (defining remedial essentialism, "the theoretical premise that a remedy is conceptually isolated from the underlying substantive right," which is a concept required for the idea of reconciling and matching right to remedy and is a foundational assumption for the proposition that "remedies are isolated legal concepts that should be adjudicated apart from the connected substantive right").

<sup>195</sup> *See* Frank H. Easterbrook, *Civil Rights and Remedies*, 14 HARV. J.L. & PUB. POL'Y 103, 103–04 (1991); Bone, *supra* note 88, at 16–17 (noting that the right-remedy dichotomy and relationship "correspond[s] to a particular vision of society and the social function of disputes").

In summary, the two supposedly unique and defining characteristics of what many call “nationwide injunctions” are not unique or distinctive. There is no rule, doctrine, or precedent that requires courts to limit the geographic scope of injunctions or to limit the benefits of injunctions to named plaintiffs or defined plaintiff classes.<sup>196</sup> To the extent that the so-called defining features of “nationwide injunctions” are a distinction without much difference, the category of “nationwide injunctions” begins to disappear. Or, at least, the category of targeted injunctions is not what the current “nationwide injunctions” debate describes it as being and we might, correspondingly, need to shift our criticisms and proposals.

## V. RECONCEPTUALIZING THE DEBATE

Perhaps part of the reason that this “nationwide injunctions” debate, and even the notion of a “nationwide injunction,” are muddled is the incomplete and flawed framing of the discussion. This could be particularly true in the context of remedies because objections to remedies are often motivated by objections to the definition of the underlying rights and the substance of what courts would grant successful plaintiffs.<sup>197</sup> To have a more robust understanding and conversation about the targeted injunctions, their significance, and the potential implications of decreasing or eliminating the targeted injunctions, scholars, judges, and Justices should identify and consider:

- the relevant rules, doctrines, and principles and/or their absence;
- in what types of cases the targeted remedy tends to arise;
- the stakes for litigants, nonparties, and larger society;
- any jurisdictional and/or prudential concerns; and
- any mechanisms that exist to address any of those concerns.

### A. *Relevant Rules, Doctrines, and Principles*

In reviewing the “nationwide injunctions” literature, few have examined or discussed how little the rules speak about, or limit, the targeted injunctions. This Article is arguably the first within the “nationwide injunctions” framework to discuss at length what the defined standard is for courts to use when they decide whether to grant injunctions.<sup>198</sup> Almost no scholarship about the targeted injunctions (except the literature discussing such injunctions in relation to preclusion,<sup>199</sup> when considering the tension between prudential principles that purportedly limit the scope of the targeted injunctions and the broad judicial discretion that courts have in designing injunctive relief) has given a robust

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<sup>196</sup> In so arguing, I do not yet argue that there is no equitable, jurisdictional, or jurisprudential reason to institute such restrictions.

<sup>197</sup> See, e.g., Easterbrook, *supra* note 195, at 103.

<sup>198</sup> See, e.g., Frost, *supra* note 17, at 1099 n.147; Siddique, *supra* note 17, at 2102 nn.32–33; Morley, *De Facto Class Actions*, *supra* note 31, at 498.

<sup>199</sup> See *supra* notes 92–93 and accompanying text.

explanation of why or when more limiting doctrines or principles should rule the day.

There is relatively little meaningful discussion of the rules, doctrines, and principles that weigh in favor of judges granting the targeted injunctions when, according to their discretion, judges find that plaintiffs have met the standard for granting an injunction and that such an injunction is warranted. This Article contributes to providing a more rigorous explication of the rules, doctrines, and principles<sup>200</sup> in this context and calls for more serious consideration of various perspectives before scholars continue to urge courts to stop granting the targeted injunctions.

### B. *Type of Injunction and Litigation*

By saying that this is a “new” type of injunction, critics have largely avoided considering whether this is a type of injunction that tends to be either at issue in, or granted in, certain types of cases or if these targeted injunctions are an existing type of injunction that has already been debated and challenged.<sup>201</sup> If these injunctions are involved in prior debates or are involved in certain types of litigation, the debate should at least be informed by previous iterations of the similar or same discussion. If we do not know what type of litigation is at issue, we cannot consider whether there are competing considerations in favor of protecting and continuing remedies for those types of claims.

### C. *Stakes for Litigants, Nonparties, and Larger Society*

Currently, much of the “nationwide injunctions” literature centers on defendants and their interests. But scholars and jurists should consider the identities and interests of both defendants *and* plaintiffs in cases that tend to involve a court deciding whether to grant the targeted remedy. Considering multiple competing interests will allow us to begin to understand and consider what both the costs and benefits of the remedy are and for whom.

Understanding the types of litigation and the entities involved can also help us to understand the costs and benefits of the remedy (or the loss thereof) to nonparties (including those who may be similar to plaintiffs), to defendants, and to society as a whole. While many in the “nationwide injunctions” debate have

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<sup>200</sup> See *supra* Parts II.C, IV.

<sup>201</sup> In another project, I suggest that the targeted injunctions are actually impact injunctions—a form of relief common in impact litigation, including some civil rights litigation—and I attempt to explain the significance of impact litigation and impact injunctions. See generally Portia Pedro, *Impact Injunctions* (2023) (unpublished manuscript) (on file with author).

described the costs to defendants in these cases, very few have described what is at stake for plaintiffs, especially those from marginalized communities.<sup>202</sup>

#### D. *Jurisdictional and Prudential Concerns*

As mentioned earlier, “nationwide injunction” skeptics have raised numerous jurisdictional and prudential concerns about courts granting the targeted injunctions.<sup>203</sup> But this discussion of jurisdictional and prudential concerns has been lopsided. Within the “nationwide injunctions” literature, discussions of several prudential concerns have been superficial or have relied on skewed oversimplifications of more complex principles. This Article attempts to provide the beginnings of clarification and contestation of several prudential concerns, such as those involving the right-remedy nexus and agency intercircuit nonacquiescence, but there is still much that remains to be said. In addition, I hope to continue to amplify discussion of the prudential concerns that weigh in favor of courts continuing to grant the targeted injunctions, where warranted. And, while the jurisdictional challenges to the targeted injunctions have not gone without rejoinder,<sup>204</sup> this Article may be among the first to begin to suggest that many “nationwide injunction” skeptics’ jurisdictional concerns might actually be prudential concerns, with no constitutional foundation.<sup>205</sup> Jurists should not decrease granting the targeted injunctions, or stop granting them altogether, based on this so-far somewhat cursory and one-sided discourse.

#### E. *Mechanisms that Exist to Address Concerns*

There are almost innumerable mechanisms within the federal court system that are designed to address “nationwide injunction” critics’ prudential concerns, but the current literature leaves these potential resolutions out of the discussion. Fears such as those regarding forum-shopping, percolation, and nonparty autonomy are far from unique to the context of the targeted injunctions. Several mechanisms—such as appeals, stays pending appeal, en banc review, and expedited review by the Supreme Court—in federal court structure, procedure, and doctrine already exist and may assuage these concerns, at least in part. While these mechanisms still may not completely eradicate the “nationwide injunction” skeptics’ concerns, before deciding on a path forward regarding the targeted injunctions, we should have a better understanding of

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<sup>202</sup> See generally *id.* (discussing impact litigation plaintiffs’ interests and the potential risks for those plaintiffs, for marginalized communities, and for society if courts stop granting the targeted injunctions, which I describe as impact injunctions).

<sup>203</sup> See *supra* Part III.A.

<sup>204</sup> See generally, e.g., Pfander & Wentzel, *supra* note 31.

<sup>205</sup> I do not claim to have provided conclusive answers or finality on any jurisprudential topics in this Article. Instead, I hope this may serve as a foot that holds the proverbial door open for more robust consideration of whether courts can and should continue to grant the targeted injunctions.



potential resolutions already in existence and engage in a more comprehensive analysis of which concerns are resolved and which are still left outstanding before scholars or jurists take further steps to reduce or eliminate the targeted injunctions.

## VI. CONCLUSION

Although this Article does not resolve what some view as pressing concerns about the collision of “nationwide injunctions” with jurisdictional and jurisprudential principles, it makes a, perhaps, more important intervention—to expose that we do not yet know what we are actually deciding. If there is a chance that—as many scholars including many “nationwide injunction” skeptics agree—there may be no jurisdictional bar to courts granting injunctions that have no geographic limitation and that benefit entities in addition to the named plaintiffs or plaintiff classes, it is essential that we engage several questions more seriously before we consider decreasing or eliminating altogether this potential category of relief. First, we should identify, focus on, and robustly debate the remedy-specific rules, doctrines, and principles; the types of cases in which this remedy applies and for whom it matters; the prudential concerns; and any mechanisms that already exist to address those concerns. For all we know now from current discussion, naming “nationwide injunctions” as a specific type of injunction (and as a dangerous type at that) may be a distinction without a difference, or we may be entirely ignoring or mischaracterizing the most salient aspects of a new type of injunction that deserves our intentional and thoughtful consideration.