

Demystifying Nationwide Injunctions

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The phenomenon of nationwide injunctions—when a single district court judge completely prevents the government from enforcing a statute, regulation, or policy—has spawned a vigorous debate. Scholars overwhelmingly reject this practice, arguing that an injunction should benefit only the actual plaintiffs to a lawsuit and should not apply to persons who were not parties. These critics root their arguments in various constitutional and structural constraints on federal courts, including due process, judicial hierarchy, and inherent limits on “judicial power.” This Article shows why these arguments are not persuasive.

Demystifying Nationwide Injunctions offers one of the few defenses of nationwide injunctions and is grounded in a unique theory deriving from preclusion. A rich and nuanced preclusion jurisprudence has developed to answer the very question that the current debate raises: who should be bound by the results of litigation? Preclusion principles help explain why there are no constitutional or structural impediments to courts’ power to issue a nationwide injunction. These principles also reveal the circumstances under which such an injunction is (and is not) appropriate. Specifically, they suggest that while a nationwide injunction should not issue as a matter of course, it is permissible when the government acts in bad faith, including most notably when government officials fail to abide by settled law.

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Introduction

In April 2017, then-Attorney General Jeff Sessions famously declared himself “amazed” that a single “judge sitting on an island in the Pacific” could enjoin the President from enforcing one iteration of the so-called travel ban.¹ The phrasing was infelicitous. But Sessions captured a widespread sentiment about the seeming oddity that one district court judge could declare a federal statute, regulation, or policy invalid and prevent the executive branch from enforcing it anywhere or against anyone.

Although the specific practice is a relatively recent phenomenon, dating back only to the 1960s,² it has taken on fresh life and political salience in the twenty-first century. During George W. Bush’s presidency, individual judges prohibited his administration from enforcing several environmental regulations.³ Numerous Obama-era regulations met similar fates,⁴ perhaps most conspicuously when a federal judge in Texas prohibited the

¹ Charlie Savage, *Jeff Sessions Dismisses Hawaii as ‘an Island in the Pacific,’* N.Y. TIMES (Apr. 20, 2017).

² See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 437-45 (2017).

³ See, e.g., *Citizens for Better Forestry v. USDA*, No. C 05-1144 PJH, C 04-4512 PJH, 2007 WL 1970096, at *19; *California ex rel. Lockyer v. USDA*, 468 F. Supp. 2d 1140, 1144 (N.D. Cal. 2006), aff’d, 575 F.3d 999 (9th Cir. 2009); *Earth Island Inst. v. Ruthenbeck*, No. CIV F-03-6386 JKS, 2005 WL 5280466, at *1–2 (E.D. Cal. Sept. 20, 2005); *Nw. Envtl. Advocates v. U.S. E.P.A.*, No. C 03-05760 SI, 2005 WL 756614, at *13 (N.D. Cal. Mar. 30, 2005); *Am. Lands All. v. Norton*, No. CIV.A. 00-2339 (RBW), 2004 WL 3246687, at *3-*4 (D.D.C. June 2, 2004).

⁴ See, e.g., *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 669–70 (N.D. Tex. 2016); *Nevada v. U.S. Dep’t of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016); *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016); *Nat’l Fed’n of Indep. Bus. v. Perez*, No. 5:16-CV-00066-C, 2016 WL 3766121 (N.D. Tex. June 27, 2016).

Department of Homeland Security from implementing its “deferred action” immigration policies.⁵ Nationwide injunctions dominated the headlines during the early weeks of the Trump administration, as courts broadly enjoined various versions of the travel ban,⁶ and in short order other courts prohibited the administration from excluding transgender persons from the military.⁷ By one count, the Trump administration faced twenty-two such injunctions in its first year.⁸

This power, vested in a single lower court, is profound and discomfiting, and an overwhelming consensus has emerged that nationwide injunctions are never appropriate. Most scholars have endorsed that proposition,⁹ as has Justice Thomas in his recent concurrence in *Trump v.*

⁵ See *Texas v. United States*, 86 F. Supp. 3d 591, 677-78 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), as revised (Nov. 25, 2015) (issuing preliminary injunction against enforcement of the Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”)).

⁶ See *Hawaii v. Trump*, 265 F. Supp. 3d 1140 (D. Haw.), *aff'd in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *rev'd and remanded*, 138 S. Ct. 2392 (2018); *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 632 (D. Md. 2017), *aff'd*, 883 F.3d 233 (4th Cir. 2018), *cert. granted, judgment vacated*, No. 17-1270, 2018 WL 1256938 (U.S. June 28, 2018); *Washington v. Trump*, No. C17-0141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017); *Hawai'i v. Trump*, 245 F. Supp. 3d 1227 (D. Haw.), *aff'd in part, vacated in part, remanded sub nom.* *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017), *vacated and remanded*, 138 S. Ct. 377 (2017), *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 543 (D. Md.), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017), *vacated and remanded sub nom.* *Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017); *Darweesh v. Trump*, No. 17 CIV. 480 (AMD), 2017 WL 388504, at *1 (E.D.N.Y. Jan. 28, 2017).

⁷ See *Stockman v. Trump*, No. EDCV171799JGBKXX, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017); *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017); *Doe v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017).

⁸ See Jeff Sessions, *Nationwide Injunctions Are a Threat to Our Constitutional Order*, NATIONAL REVIEW (Mar. 10, 2018); see also Application for a Stay at 22, *Trump v. Karnoski*, No. 18-676 (S. Ct. Dec. 13, 2018) (arguing that in two years “district courts have issued 25 nationwide injunctions or temporary restraining orders” against the Trump administration).

⁹ See Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 247-54 (2016); Bray, *supra* note 2, at 469-73; Aaron-Andrew Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481, 512 (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, 521-38 (2016) [Morely, *De Facto Class Actions?*]; Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 616-19 (2017) [Morley, *Nationwide Injunctions*]; Howard W. Wasserman, *“Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 353-85 (2018); Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1073-74 (2017); see also Letter from Law Professors to Members of Congress Regarding H.R. 6730 (Sept. 10, 2018) (letter from eighteen legal academics endorsing a categorical prohibition on nationwide injunctions).

Hawaii.¹⁰ The Justice Department in September 2018 directed its civil litigators to oppose nationwide injunctions as inappropriate in every case.¹¹ And Congress has even considered legislation that would completely prohibit courts from issuing such injunctions.¹²

Opponents of nationwide injunctions emphasize different arguments to bolster their conclusion, but a common thread running through all of them is that nationwide injunctions are anomalous. In this telling, they are ahistorical.¹³ They are inconsistent with principles of equity.¹⁴ And they violate constitutional and structural imperatives,¹⁵ including due process,¹⁶ Article III's definition of the "judicial power,"¹⁷ and fundamental notions of judicial hierarchy.¹⁸

A few scholars have begun to challenge this consensus. Their contributions are careful and thoughtful, persuasively demonstrating why nationwide injunctions are sometimes necessary for pragmatic reasons¹⁹ or

¹⁰ *Trump v. Hawaii*, 138 S. Ct. 2392, 2426-29 (2018) (Thomas, J., concurring) (arguing that equity requires injunctions to be limited to the parties to a case).

¹¹ See U.S. Dep't of Justice, *Litigation Guidelines for Cases Presenting the Possibility for Nationwide Injunctions* (Sept. 13, 2018) ["DOJ Guidelines for Nationwide Injunctions"] ("The Department consistently has argued against granting relief outside of the parties to a case.").

¹² See Injunctive Authority Clarification Act of 2018, H.R. 6730, 115th Cong. (2018) (directing that no federal court may issue "an order that purports to restrain the enforcement against a non-party of any statute, regulation, order, or similar authority").

¹³ See, e.g., *Bray*, *supra* note 2, at 437 (tracing the first instance of a nationwide injunction to 1963).

¹⁴ See, e.g., at 425 ("There is an easy, uncomplicated answer to the question whether the national injunction is traceable to traditional equity: *no*"); Wasserman, *supra* note 9, at 339 (arguing that "[u]niversal injunctions remain inconsistent with the historic scope of courts' equity powers").

¹⁵ See DOJ Guidelines for Nationwide Injunctions, *supra* note 11.

¹⁶ See *Morley, De Facto Class Actions?*, *supra* note 9, at 527-31.

¹⁷ U.S. Const. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."); see also *Bray*, *supra* note 2, at 471-72; *Bruhl*, *supra* note 9, at 517-19.

¹⁸ See *Morley, De Facto Class Actions?*, *supra* note 9, at 520, 537-38; *Morley, Nationwide Injunctions*, *supra* note 9, at 649; *Berger*, *supra* note 9, at 1088-90, 1100-06.

¹⁹ See, e.g., Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); see also Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49 (2017); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56 (2017). Zach Clopton has also begun to explore the parallels between nationwide injunctions and preclusion. See Zachary D. Clopton, *Nationwide Injunctions and Preclusion*, 117 MICH. L. REV. (forthcoming 2019). His article traces the historical development of preclusion principles. This article focuses more on the structural arguments about nationwide injunctions and builds out the preclusion analogy with reference to nonacquiescence doctrines and bad faith.

to provide complete relief to the plaintiffs in a given case.²⁰ These arguments have started to provide a critical counterweight to the opponents of nationwide injunctions, but in some ways they remain tethered to the notion that nationwide injunctions are anomalous. In other words, an important question remains unanswered—how to justify nationwide injunctions as a theoretical matter, particularly when those injunctions benefit nonparties intentionally rather than just incidentally.

Nationwide injunctions indeed raise thorny issues, but they are not nearly as peculiar as both critics and defenders suggest. At their core, the problems revolve around one central question: Who should be bound by the results of litigation?

This question is far from new, and several interlocking doctrines have developed to answer it, including most notably preclusion. When someone litigates a matter and loses, preclusion principles usually prevent her from relitigating that same matter in a subsequent lawsuit. More precisely, preclusion helps resolve who is bound by an unfavorable result and, conversely, who may take advantage of a favorable one. These are the exact questions that nationwide injunctions raise.

Focusing on the quirks of nationwide injunctions runs the risk of obscuring the coherence and fairness that preclusion already fosters across wide swaths of the legal landscape. Accordingly, viewing nationwide injunctions through the lens of preclusion and related principles can help explain why such remedies are not categorically verboten and also can provide a theoretically robust understanding of the circumstances under which they should issue. The rich and nuanced parallels between nationwide injunctions and preclusion suggest a surprisingly straightforward solution to an increasingly urgent problem.

In short, just as courts do not automatically apply certain contentious forms of preclusion, so too they should not issue nationwide injunctions as a matter of course. The touchstone for when nationwide injunctions are most necessary and appropriate is when the government acts in bad faith by refusing to abide by settled law.

²⁰ See Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017) (exploring how nationwide injunctions are often necessary to provide “complete relief” to plaintiffs in private law litigation). As discussed below, however, the “complete relief” doctrine does not explain whether and under what circumstances a court may fashion relief for nonparties in a targeted, rather than merely incidental, way.

Part I of this Article debunks the constitutional and structural objections to the nationwide injunction. Preclusion is a large part of that story. For example, it can explain what some scholars regard as the most disconcerting features of the nationwide injunction—that nonparties receive the benefit of a judgment and that lower courts can effectively bind higher courts as well as courts in other geographic jurisdictions. With preclusion, though, none of this is anomalous or problematic.

Part II develops the analogy between nationwide injunctions and preclusion, arguing that preclusion doctrine can elucidate the circumstances under which a nationwide injunction is appropriate. At a basic level, the analogy is straightforward. Assume that *A* sues the government (say, alleging that a policy is unconstitutional) and wins. *B* then brings her own lawsuit and argues that the government, which already had its day in court on this question, should be precluded from relitigating whether the policy is constitutional. Under basic preclusion principles, *B*'s argument is viable.

Note that a nationwide injunction essentially accomplishes the same end. Once *A* has litigated and prevailed, a nationwide injunction allows *B* (and many others) to benefit from the holding. The analogy becomes more complicated in light of limits on certain forms of preclusion and, most importantly, the Supreme Court's refusal to apply nonmutual preclusion against the federal government in *United States v. Mendoza*.²¹

These limitations on the analogy are not fatal. In fact, they turn out to be analytically productive and are the key to discerning when nationwide injunctions are (and are not) proper. The *Mendoza* doctrine, which overwhelmingly permits the government to relitigate questions that it has lost, also enables the government to engage in nonacquiescence—a practice whereby the government refuses to conform its conduct to judicial precedent and instead adheres to its own interpretation of the law. Nonacquiescence is understandably controversial. Prominent scholars have defended it, though, as an interim measure when the law is in flux and the government is acting in good faith to vindicate its view.²² But once the law is settled, nonacquiescence is impermissible.

Relying on these carefully refined preclusion and nonacquiescence principles, Part III articulates the standard that should govern whether courts grant nationwide injunctions. Presumptively, a nationwide injunction should

²¹ 464 U.S. 154 (1984).

²² See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence By Federal Administrative Agencies*, 98 YALE L.J. 679 (1989).

not issue, especially when courts are still grappling with an unsettled legal question and the government is defending its position in good faith. 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. Drawing on an informal rule that the Department of Justice traditionally has observed, I suggest a rule of three. That is, when three lower courts have resolved a particular question in the same way, a nationwide injunction might be appropriate, especially if there is a particular need to resolve that question uniformly and expeditiously.

Part III concludes by situating nationwide injunctions within wider developments, including the litigation of public law issues that have far-reaching effects beyond the actual parties to a case. Through precedent, class actions, and other forms of embedded aggregation, law can become settled for society writ large. Nationwide injunctions fit comfortably within this unexceptional phenomenon. Moreover, the contemporary discussion of nationwide injunctions informs the debate about judicial supremacy (the idea that courts determine what the law is generally) versus departmentalism (the theory that courts resolve only specific cases and that other constitutional actors remain free to interpret the law as they see fit). The fundamental notion that law can become settled suffuses all of these potent debates. Losing sight of that premise invites doctrinal oddities and theoretical errors that are both pernicious and avoidable.²³

I. Constitutional and Structural Limits

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,

²³ Some definitional brush clearing at the outset: A “nationwide injunction” does not have to apply nationwide, and sometimes it does not even have to be an injunction. Commentators tend to use the term “nationwide” because the injunctions *can* apply that broadly. Sometimes they are not that sweeping—for instance, when a court enjoins enforcement of a state’s voting regulation, the injunction applies only throughout the state. Other scholars have suggested alternative terminology. See Bray, *supra* note 2, at 419 n.5 (preferring “national injunction”); Morley, *De Facto Class Actions?*, *supra* note 9, at 490 (preferring “defendant-oriented injunction”); see also Trump v. Hawaii, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring) (preferring “universal injunction”). No term is perfect, but I have opted for the most familiar terminology.

Although there are critical differences between preliminary injunctions, temporary restraining orders, and permanent injunctions, I generally do not distinguish between them here. They obviously vary in scope and effect, but when such relief directly and intentionally benefits nonparties, the concerns are overwhelmingly the same. To the extent that the distinctions matter, I make clear which remedy I am discussing.

judicial hierarchy, and limits on the “judicial power.” None of these objections is sustainable.

Opponents also advance practical and prudential arguments, which are far more persuasive and should factor into courts’ decisionmaking, as discussed in Part II. But first things first.

A. Due Process

Among the core constitutional objections to nationwide injunctions is the claim that they violate due process norms. This contention is incorrect for two main reasons. First, due process concerns arise primarily when a nonparty is bound by an adverse judgment, and that concern is almost entirely absent with nationwide injunctions against a governmental entity. Second, due process does not presumptively give every interested person a right to participate or be heard when courts adjudicate public rights.

As opponents of nationwide injunctions note, the Supreme Court has repeatedly observed that due process prevents someone from being “bound by a judgment *in personam* in a litigation in which he is not designated as a party.”²⁴ Until the middle of the twentieth century, this ensured a type of symmetry—only actual parties were bound by judgments. Accordingly, one might infer that a nonparty should not benefit from a nationwide injunction.

But preclusion has evolved and demonstrates why nationwide injunctions actually do not implicate core due process concerns. Preclusion principles indeed used to require “mutuality”—that the same parties be involved in the first and second lawsuits—such that only those specific parties could invoke the benefits of preclusion.²⁵ Courts have steadily relaxed the insistence on mutuality, though, meaning that nonparties increasingly may take advantage of preclusion.²⁶

Consider, for example, a case in which a plaintiff sues a defendant for infringing the plaintiff’s patent, and the defendant wins on the ground that the patent is invalid. The same plaintiff then attempts to sue a second

²⁴ Taylor v. Sturgell, 553 U.S. 880, 893 (2008) (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)); see also, e.g., Morley, *De Facto Class Actions?*, *supra* note 9, at 516 (noting that “[a] judgment generally does not apply beyond the immediate parties to a case”).

²⁵ See DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 102 (2001); 18A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4448 (2d ed. 2002).

²⁶ See RESTATEMENT (SECOND) OF JUDGMENTS § 29 (AM. LAW INST. 1982); Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 282-85 (1957); SHAPIRO, *supra* note 25, at 105-09.

defendant, also alleging infringement of the (now invalid) patent. Even though the new defendant was not a party to the first lawsuit, she may invoke issue preclusion against the plaintiff. This is entirely fair because the plaintiff already litigated (and lost) the question of the patent's validity.²⁷

The key, for due process purposes, is that the person *against whom* preclusion is invoked must have been a party to the lawsuit and, so to speak, had her “day in court.”²⁸ Thus, the specter of a due process violation is largely absent when a nonparty benefits from, but is not burdened by, the results of a lawsuit.

This is almost exactly what happens when a nationwide injunction issues against the government. Nonparties did not participate in the lawsuit, but they presumptively have no due process objection because they benefit from the judgment. At the same time, the government has no cognizable due process objection because even though it is being bound by what it regards as an unfavorable judgment, it actually participated in the lawsuit. That is, the government has already received what due process requires—a “full and fair” opportunity to litigate the matter.²⁹

A second due process objection is that the supposed beneficiaries of nationwide injunctions actually might not want what the nationwide injunction offers.³⁰ Indeed, one of the principal difficulties of litigation over public rights is that one person or a small group of people can bring a lawsuit that has groupwide effects, even though not all members of the group share the same goals. Scholars have been grappling with this problem for years and have proposed numerous ways to ameliorate the problem.³¹ These concerns are real, and courts and scholars are wise to be sensitive to them. For these very reasons, courts should not issue sweeping injunctions as a matter of course.³² But the appropriate limits on nationwide injunctions—as with many

²⁷ See *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 314-17, 328-50 (1971) (describing this scenario and presumptively approving preclusion).

²⁸ See *Blonder-Tongue*, 402 U.S. at 329; *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979); James R. Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U. L. REV. 383, 387 (1983).

²⁹ RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(c) (AM. LAW INST. 1982).

³⁰ See Morley, *De Facto Class Actions?*, *supra* note 9, at 517 (arguing that nationwide injunctions impermissibly give actual plaintiffs power “to leverage the rights of third parties . . . without giving them an opportunity to opt out”).

³¹ See, e.g., Bryant G. Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 NW. U. L. REV. 492 (1982); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

³² See *infra* Part III.A.

instances of groupwide litigation—are prudential in nature and do not derive from constitutional notions of due process.³³

Consider the immigration case in Texas regarding President Obama’s deferred action policy. Twenty-six states successfully challenged the policy, and the resulting nationwide injunction prohibited the administration from enforcing it anywhere.³⁴ But sixteen states and the District of Columbia had filed an amicus brief arguing that they did not welcome the injunction and, instead, received “substantial economic, social welfare, and public safety benefits” from the deferred action policy.³⁵ Perhaps the federal courts should have been more solicitous of the view of states that supported the Obama administration. However, due process jurisprudence demonstrates that the failure to do so reflected at worst bad judgment, not a constitutional violation.

The Supreme Court has recognized that due process rights sometimes attach when members of a group do not share the same litigation goals, but those concerns are inapplicable in the context of nationwide injunctions. In class actions that aggregate individual damages claims, for example, class members have the right to receive notice, an opportunity to be heard, and, most critically for present purposes, the ability to opt out of the class action.³⁶ This is, in essence, a due process right *not* to sue if one objects to the ends or means of a class action.³⁷ By contrast, the Court has declined to find that such protections govern actions seeking equitable relief, such as injunctions.³⁸ The distinction is eminently sensible, especially with respect to relief that is truly indivisible.³⁹

Challenges to a statute or a regulation often involve litigation of a public right that cannot sensibly apply to different people in different ways.

³³ Cf. Morley, *De Facto Class Actions?*, *supra* note 9, at 531 (arguing that even if certain concerns “do not amount to due process violations, it still seems unfair and undesirable” for courts to issue broad injunctions affecting nonparties).

³⁴ See *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2016).

³⁵ Brief of The States of Washington et al. as Amicus Curiae in Support of Petitioners, *Texas v. United States*, 809 F.3d 134 (5th Cir. 2016), 2016 WL 922867.

³⁶ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985).

³⁷ See Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 603-05 (2016).

³⁸ See *Phillips Petroleum*, 472 U.S. at 811 n.3 (“We intimate no view concerning other types of class actions, such as those seeking equitable relief.”).

³⁹ See Williams, *supra* note 37, at 649-51. Not every lawsuit that seeks an injunction will involve a public right or truly indivisible relief. See, e.g., Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1609 (2007). But the precise line of demarcation is not especially relevant at the moment; the overarching conceptual point still holds true.

In these situations, individual due process rights simply do not attach. Accordingly, there is no individualized right to participate in a precedent-creating lawsuit, even though the precedent becomes widely binding.⁴⁰ The same notion applies with respect to class actions that seek broad injunctive relief.⁴¹ Similarly, when courts adjudicate a truly public right (such as whether a particular regulation is constitutional), due process does not require that any specific person have a right to participate in the lawsuit, in part because any person's interest likely is one that she shares with other members of the public. This stands in stark contrast to the individual right to notice and a hearing when someone has unique or personal rights (such as an individual damages claim) that other members of the public likely will not pursue with sufficient vigor.⁴²

Taken together, this jurisprudence demonstrates that when a court broadly enjoins the government from enforcing a generally applicable statute or policy, due process is a red herring. Thus, while some states that did not participate in the Texas deferred action litigation were surely miffed when a court issued a nationwide injunction, the court did not trench on any constitutional right to participate or be heard.

There is one narrow sense in which nationwide injunctions potentially could raise a constitutional due process concern. The Supreme Court consistently has grounded its personal jurisdiction jurisprudence in the Due Process Clauses.⁴³ So, if a court were to try to make someone an actual party to a lawsuit (say, in certifying a class of plaintiffs), certain due process protections would apply.⁴⁴ This has little to no bearing on most nationwide injunctions, though, in which the problematic questions are about the rights of *nonparties*.

⁴⁰ See *infra* Part III.B; see also, e.g., Geoffrey Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1288 n.183 (1961); Alan M. Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565, 598 (2017).

⁴¹ This helps explain why plaintiffs must have opt-out rights in damages class actions but not in class actions that seek injunctive relief only. See FED. R. CIV. P. 23(b)(2), (3).

⁴² In this vein, see the classic distinction between *Londoner v. City & Cty. of Denver*, 210 U.S. 373, 385 (1908) and *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

⁴³ See Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs"*, 100 CORNELL L. REV. 1129, 1153 (2015); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 209-13 (2004).

⁴⁴ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); 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, 2074-83 (2015) (proposing ways to enable courts to certify classes more readily).

The breadth of nationwide injunctions certainly raises a host of concerns, particularly when nonparties disagree with the actual parties' goals and tactics. However, those concerns are prudential, rather than constitutional, and thus beyond the reach of (constitutional) due process.

B. Judicial Hierarchy

Opponents also raise the structural objection that nationwide injunctions contravene judicial hierarchy and courts' inherently circumscribed power. This objection can take several different forms. One focuses on the seeming oddity that when a federal district court issues a nationwide injunction, it effectively binds a higher court. Relatedly, when a single district court judge issues a sweeping injunction, that court's ruling is binding outside the geographic limits of its jurisdiction.⁴⁵

Regardless of the precise nature of the judicial hierarchy objection, the underlying logic is the same. It rests on the premise that the federal court system is organized geographically by circuit, such that each court of appeals reviews the decisions of district courts within the circuit and, in so doing, creates binding precedent within (but not outside of) the circuit.⁴⁶ Moreover, as courts and scholars frequently remark, federal district court precedents are never binding on any other court or even themselves.⁴⁷ Based on this organization of the federal judiciary—and, in particular, the way that binding precedent operates—some commentators have suggested that district courts should not be able to issue nationwide injunctions and that courts of appeals, at most, should confine relief within their geographic boundaries.⁴⁸

Preclusion, though, illustrates why nationwide injunctions are not anomalous and do not flout inherent notions of hierarchy. Inferior courts often issue rulings that bind courts in other jurisdictions and even occasionally superior courts that normally have revisory power over those rulings.

Consider first the potential for a lower court to bind a higher court. Admittedly, this is not usually how judicial hierarchy works because a superior court creates binding precedent for a lower court but not vice versa.

⁴⁵ See Morley, *De Facto Class Actions?*, *supra* note 9, at 537-38; Morley, *Nationwide Injunctions*, *supra* note 9, at 649; Berger, *supra* note 9, at 1088.

⁴⁶ See Berger, *supra* note 9, at 1093-96 (discussing current structure of circuits under the Evarts Act of 1891).

⁴⁷ See, e.g., *Camreta v. Greene*, 563 U.S. 692, 709 (2011); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 825 (1994).

⁴⁸ See Morley, *De Facto Class Actions?*, *supra* note 9, at 492, 517; Morley, *Nationwide Injunctions*, *supra* note 9, at 621, 649; see also Berger, *supra* note 9, at 1100-06.

Under certain circumstances, though, preclusion allows a lower court to render a decision that binds a higher court.⁴⁹

Imagine, for example, an initial lawsuit in which *A* litigates a particular matter (say, *A*'s liability under a contract), loses, and declines to appeal. The resulting judgment is final. In a second lawsuit that involves the same contract, preclusion likely will prevent *A* from relitigating its liability under the contract. Most importantly, if the parties then appeal the second decision to a higher court, preclusion from the first lawsuit will continue to be binding. Thus, a lower court will have decided an issue in the first lawsuit, and a superior court will have to treat that decision as binding during the appeal of the second lawsuit.⁵⁰

Next, consider a district court's power to bind courts and people in other geographic jurisdictions. This actually happens with far greater regularity, as principles of equity and preclusion demonstrate.

One of the traditional maxims of equity is that equity "acts *in personam*."⁵¹ Accordingly, when a court has personal jurisdiction over a defendant and issues an injunction, the duty imposed need not be geographically confined. To the contrary, a court is supposed to accord "complete relief" to the aggrieved plaintiff, and geography is no impediment.⁵²

Similarly, preclusion can travel across geographic boundaries.⁵³ Take a variation on the above example in which *A* litigates a question about a contract's validity, loses, and declines to appeal. Even if a second lawsuit takes place in a different jurisdiction, the second court is likely to be bound by preclusion from the first lawsuit. This is because, as a general rule, a court that renders a judgment also dictates the preclusive consequences of that judgment, regardless of where the second lawsuit takes place.⁵⁴ Note also the

⁴⁹ See, e.g., *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

⁵⁰ See *id.* (noting that a "final, unappealed judgment on the merits" is usually entitled to preclusive effect).

⁵¹ Howard W. Brill, *The Maxims of Equity*, 1993 ARK. L. NOTES 29, 30; see also *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (noting that in equity "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class"); *Bray*, *supra* note 2, at 422 n.19.

⁵² See *Siddique*, *supra* note 20, at 2103-04.

⁵³ See *Trammell*, *supra* note 40, at 593; see also *Morley, Nationwide Injunctions*, *supra* note 9, at 636-37 (noting that "[t]he res judicata effect of a judgment is not subject to geographic limits").

⁵⁴ The full faith and credit statute mandates this result when the rendering court is a state court, even if the second tribunal is a federal court. See 28 U.S.C. § 1738; see also, e.g., *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) ("It is now settled that

possibility that in the second lawsuit, someone who was not a party to the first lawsuit might have the power to invoke preclusion.⁵⁵

All of this leads to two critical conclusions. First, a court's power to bind parties—or even conclusively resolve a matter involving certain nonparties—is not coextensive with its geographic jurisdiction. Second, a court's power to bind is not coextensive with its supervisory power or its related ability to create binding precedent. For example, federal district courts do not review courts of appeals or ever create binding precedent. Nevertheless, under certain circumstances, district court decisions can bind litigants and courts—even courts that have supervisory power over them—anywhere in the country.⁵⁶ This state of affairs is unexceptional. Put somewhat differently, a court's power to bind litigants—through preclusion and nationwide injunctions alike—is not necessarily moored to the court's geographic boundaries or its authority to create binding precedent.

These conclusions do not imply that geography and judicial hierarchy are irrelevant. As critics of nationwide injunctions correctly observe, if different district courts issue conflicting nationwide injunctions, there is the potential for inconsistent obligations, which are deeply problematic.⁵⁷ Injunctions that are sensitive to courts' geographic boundaries can help avoid such inconsistency. But a geographic limiting principle on a court's remedial authority does not operate as a matter of *power*, only *comity*.⁵⁸

The idea of comity is, in fact, central to how courts with overlapping geographic jurisdiction navigate the omnipresent risk of inconsistent

a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.”). Federal common law determines the preclusive consequences of a federal court judgment. *See Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001) (so holding but noting that in a diversity action federal courts usually should refer to state preclusion law).

⁵⁵ This is an example of offensive nonmutual issue preclusion. *See infra* Part II.

⁵⁶ Another example of this phenomenon comes from state courts. In the federal system, a court of appeals creates binding precedent only for the courts that it directly supervises. So, Ninth Circuit precedent binds district courts in the circuit, but that precedent is only persuasive authority for other district courts. But in some states, like California, *every* lower court is bound by higher court precedents, even precedents from courts that do not directly supervise or review that lower court. *See Auto Equity Sales, Inc. v. Superior Court*, 369 P.2d 937, 940 (Cal. 1962) (en banc).

⁵⁷ For an especially nice example of such inconsistent obligations, see Berger, *supra* note 9, at 1088-89.

⁵⁸ *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 702-03 (1979) (“[A] federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts. But we decline to adopt the extreme position that such a class may never be certified.”).

judgments and obligations. Comity is critical in a system that presumptively gives state and federal courts concurrent jurisdiction to adjudicate federal law.⁵⁹ Perhaps the clearest example comes from the D.C. Court of Appeals (the highest local court in the District of Columbia) and the U.S. Court of Appeals for the D.C. Circuit. The two courts' geographic jurisdictions overlap perfectly, and until the Supreme Court intervenes, they are equally competent to interpret federal law for the District of Columbia. Occasionally, they adopt clashing interpretations.⁶⁰ The overwhelming majority of the time, though, the courts negotiate potential problems seamlessly, but only as a matter of comity, not geographical restrictions on their power.

As discussed at greater length in Part II, the risk of inconsistency is an important prudential factor that should weigh heavily in a court's assessment of whether a nationwide injunction is appropriate. Actual inconsistency is probably the most significant reason why courts should decline to issue nationwide injunctions. However, when there is no inconsistency—and especially when the law is clear—nothing restricts courts' power to issue a nationwide injunction.

C. The “Judicial Power”

One of the more fundamental objections is that nationwide injunctions are simply beyond the “judicial power” of Article III courts.⁶¹ According to this argument, courts possess only the “power to decide a case for a particular claimant.”⁶² That narrowly circumscribed power supposedly means that a court may exercise its remedial authority only on behalf of plaintiffs who allege injury and, conversely, that a court has no power to venture beyond the parties' specific dispute.⁶³ In other words, the “judicial power” allegedly connotes authority to render judgments and accord relief only to the actual parties.

This argument against nationwide injunctions fails for three reasons. First, the “judicial power” fundamentally concerns judicial finality, which is

⁵⁹ See *Tafflin v. Levitt*, 493 U.S. 455, 458-60 (1990) (articulating presumption of concurrent jurisdiction).

⁶⁰ For example, until the Supreme Court decided *District of Columbia v. Heller*, the D.C. Court of Appeals and the D.C. Circuit had adopted radically different views of whether the District's handgun ordinances were constitutional. Compare *Andrews v. United States*, 922 A.2d 449 (D.C. 2007) with *Parker v. D.C.*, 478 F.3d 370 (D.C. Cir. 2007), *aff'd sub nom.* *D.C. v. Heller*, 554 U.S. 570 (2008).

⁶¹ U.S. Const. art. III, § 1 (“The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”).

⁶² *Bray*, *supra* note 2, at 471.

⁶³ See *id.* at 471-72; *Bruhl*, *supra* note 9, at 517-19.

not concerned with party status. Second, even to the extent that the judicial power incorporates “case or controversy” requirements, such as standing, nationwide injunctions spring from such live lawsuits. Finally, the Supreme Court no longer adheres slavishly to the dispute resolution model that is central to opponents’ arguments against nationwide injunctions.

To some observers, this section’s conclusion might seem painfully obvious. One might succinctly summarize the point as follows: When courts issue nationwide injunctions, they do so in the context of a live case or controversy and for the benefit of a plaintiff who has standing; therefore, whatever other objections one might have to nationwide injunctions, there is no *Article III* problem. I am sympathetic to this distillation. The argument is worth unpacking, though, because some scholars have forcefully pressed the idea that nationwide injunctions are unconstitutional,⁶⁴ and the Department of Justice now fully embraces and advocates that position in every case presenting the possibility of a nationwide injunction.⁶⁵ Although the Article III objection is misplaced, it is now, to borrow a phrase, “on the wall.”⁶⁶

1. Judicial Finality

Since the earliest days of the republic, the Supreme Court has grappled with what the judicial power does and does not entail. The common theme running through the Court’s jurisprudence is that the “judicial power” is the power to render a final judgment, with an emphasis on *finality*. Critically, that power does not turn on party status.

One of the touchstones of the federal “judicial power” is that the political branches may not revise a court’s judgment.⁶⁷ In the earliest case announcing and applying this principle, *Hayburn’s Case*,⁶⁸ the Supreme Court rejected the role that Article III judges were supposed to play in administering a compensation scheme for Revolutionary War veterans. The problem was that judicial determinations of eligibility were subject to

⁶⁴ See, e.g., Bray, *supra* note 2, at 471-72; Morley, *De Facto Class Actions?*, *supra* note 9, at 523-27; Wasserman, *supra* note 9, at 359-63.

⁶⁵ See DOJ Guidelines for Nationwide Injunctions, *supra* note 11; see also, e.g., Brief for Appellant at 21-25, *City of Chicago v. Session*, 888 F.3d 272 (7th Cir. 2018) (No. 17-2991).

⁶⁶ Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC, <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040>

⁶⁷ Congress may change the law that underlies a judgment, see, e.g., *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32 (1855), but it may not revise the judgment itself.

⁶⁸ 2 U.S. (2 Dall.) 408 (1792) (adjudicating a writ of mandamus under the Invalid Pensions Act of 1792).

executive revision—specifically, by the Secretary of War.⁶⁹ The Supreme Court held that such a design was “radically inconsistent with the independence of that judicial power which is vested in the courts.”⁷⁰ Similarly, in *United States v. Klein*,⁷¹ the Court rejected an attempt by Congress to redefine the President’s pardon power in contravention of recent Supreme Court precedent and to dictate a result that contravened what the Court believed the Constitution required.⁷² Congress, in other words, had usurped the judicial role. Thus, while *Hayburn’s Case* turned on an executive incursion on the “judicial power,” *Klein* involved an equally problematic legislative transgression.

Most recently, *Plaut v. Spendthrift Farm, Inc.*,⁷³ presented a variation on the same themes. The plaintiffs originally had asserted claims alleging violations of federal securities law, which the Supreme Court in an earlier case had dismissed as time barred.⁷⁴ Thus, unlike in *Hayburn’s Case*, those claims did result in final Article III judgments. But Congress intervened by reinstating the dismissed claims and giving the plaintiffs a new statute of limitations.⁷⁵ *Plaut* held that this was “a clear violation of the separation-of-powers principle” that Congress may not reopen a final damages judgment.⁷⁶ More to the point, the Court explicitly described the reopening of final judgments as an incursion on the judicial power—“the power, not merely to

⁶⁹ See *id.*, 2 Dall. at 413.

⁷⁰ *Id.*, 2 Dall., at 411 (opinion of Wilson and Blair, JJ., and Peters, D.J.); see also *id.* at 413 (opinion of Iredell, J., and Sitgreaves, D.J.) (“[N]o decision of any court of the United States can, under any circumstances . . . be liable to a revision”); see also James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1432 (2015) (“*Hayburn’s Case* should be read as a precedent that insists on judicial finality.”).

⁷¹ *United States v. Klein*, 80 U.S. 128 (1871). The effect of a presidential pardon was a critical issue for southerners who wanted to use a pardon as evidence that they had “never given any aid or comfort” to the Confederate rebellion, a prerequisite to their reclaiming seized property after the Civil War. *Id.* at 131 (quoting the Abandoned and Captured Property Act of 1863).

⁷² See Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2549 (1998); Amanda L. Tyler, *The Story of Klein: The Scope of Congress’s Authority to Shape the Jurisdiction of the Federal Courts*, in FEDERAL COURTS STORIES 103-010 (Vicki C. Jackson & Judith Resnik eds. 2010); see also Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 910 (1984); Lawrence G. Sager, *Klein’s First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2528 (1998).

⁷³ 514 U.S. 211 (1995).

⁷⁴ See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364, (1991) (dismissing as time barred plaintiffs’ claims under § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5).

⁷⁵ See *Plaut*, 514 U.S. at 214-17 (quoting the Federal Deposit Insurance Corporation Improvement Act of 1991 and describing it as “the reopening of final judgments”).

⁷⁶ *Id.* at 225.

rule on cases, but to *decide* them.”⁷⁷

The lynchpin of what constitutes “judicial power” is thus final decisionmaking authority over a case.⁷⁸ By all appearances, that question has little, if any, bearing on whether a nationwide injunction—or, for that matter, any judgment that directly benefits nonparties—is proper.

2. Cases and Controversies

Determining which disputes qualify as “cases” and “controversies”⁷⁹ for purposes of Article III—including whether someone is a proper party to a lawsuit—is a related but separate problem.⁸⁰ History⁸¹ and the experience of states⁸² suggest that Article III’s case-or-controversy requirement—

⁷⁷ *Id.* at 218-19; *see also id.* at 219 (“a judgment conclusively resolves the case’ because ‘a ‘judicial Power’ is one to render dispositive judgments.”) (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)).

⁷⁸ What counts as finality in a case involving ongoing injunctive relief is different. Congress may change the underlying law, which a court then applies when fashioning or revising prospective relief. *See, e.g.*, *Miller v. French*, 530 U.S. 327, 341-50 (1990). This comports with the longstanding distinction that the Supreme Court has drawn between a situation in which Congress permissibly changes the underlying law versus one in which Congress impermissibly revises a final judgment. *See, e.g.*, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32 (1855). But finality, based on the existing law, is still central to the “judicial power.”

⁷⁹ U.S. Const. art. III, § 2 (listing cases and controversies to which the judicial power extends).

⁸⁰ *See* U.S. Const. art. III, § 2 (“The judicial power shall extend to” enumerated “cases” and “controversies” . . .).

⁸¹ *See Pfander & Birk, supra* note 70, at 1416-25 (arguing that “judicial power” always included power over certain nonadversarial proceedings).

⁸² California, for example, readily allows citizens to bring lawsuits in the “undifferentiated public interest.” *Nat’l Paint & Coatings Assn. v. State of California*, 58 Cal. App. 4th 753, 761, 68 Cal. Rptr. 2d 360, 365 (1997) (permitting a citizen suit to enforce Proposition 65 and holding that “a suit by a citizen in the undifferentiated public interest is ‘justiciable,’ or appropriate for decision in a California Court”). In federal court, such lawsuits would constitute “generalized grievances” that fail to satisfy the case or controversy requirement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–574 (1992); *see also Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.3 (2014). Nevertheless, California has a long tradition of allowing citizens suits to ensure governmental compliance with the law. *See, e.g.*, *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1011-12 (Cal. 2011) (reaffirming “public interest standing”); *White v. Davis*, 533 P.2d 222, 225-27 (Cal. 1975) (upholding permissibility of taxpayer suits, despite absence of concrete injury, and distinguishing federal standing doctrine).

The U.S. Supreme Court itself has recognized that some cases raising federal law questions can be justiciable in state court, even when they do not satisfy the strictures of an Article III case or controversy. *See, e.g.*, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617, 109 S. Ct. 2037, 2045, 104 L. Ed. 2d 696 (1989); *Doremus v. Bd. of Ed. of Borough of Hawthorne*, 342 U.S. 429, 434, (1952). This raises the intriguing, and eminently defensible, possibility that state courts (but not federal courts) might be able to adjudicate certain questions of

including its attendant doctrines, like standing, mootness, and the like—is not a defining feature of the “judicial power.” Rather, the better view, which the Court usually expresses, is that the judicial power is something distinct, and such power *extends to*, and *may be exercised* only in conjunction with, live cases and controversies.⁸³

But regardless of whether the case-or-controversy requirement exists as a distinct concept or is subsumed within the judicial power,⁸⁴ nationwide injunctions are still constitutionally unproblematic. Opponents of nationwide injunctions contend that nonparties do not have standing to pursue or benefit from a given remedy, such as a sweeping injunction.⁸⁵ This argument is unavailing, though, because courts that issue nationwide injunctions indeed have proper cases and controversies before them.

The Supreme Court’s familiar standing jurisprudence requires a proper plaintiff—one with a concrete and particularized injury, which is traceable to the defendant’s conduct and susceptible of judicial remedy.⁸⁶ Furthermore, the Court insists that the plaintiff must have “remedial standing”⁸⁷—that is, not just standing to bring a lawsuit but standing to

federal law. See Zachary D. Clopton, *Justiciability, Federalism, and the Administrative State*, 103 CORNELL L. REV. 1431, 1442-48 (2018) (arguing that states and administrative agencies should embrace the opportunity to adjudicate cases dismissed for lack of federal justiciability).

⁸³ See, e.g., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (“Although the Constitution does not fully explain what is meant by ‘[t]he judicial Power of the United States,’ Art. III, § 1, it does specify that this power extends only to ‘Cases’ and ‘Controversies,’ Art. III, § 2.”); *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 132 (2011) (noting that “a plaintiff who *seeks to invoke* the federal judicial power” must demonstrate more than a generalized grievance) (emphasis added); *United States v. Richardson*, 418 U.S. 166, 171 (1974) (noting that “this Court held that judicial power *may be exercised* only in a case properly before it) (emphasis added).

⁸⁴ See *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (“Article III of the Constitution limits the ‘judicial power’ of the United States to the resolution of ‘cases’ and ‘controversies.’”); see also, e.g., *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 597 (2007) (using exact same language); Bruhl, *supra* note 9, at 517 (arguing that standing doctrine “ensures that the federal courts exercise only properly judicial power” and citing cases)

⁸⁵ See, e.g., Morley, *De Facto Class Actions?*, *supra* note 9, at 516 (arguing that “individual plaintiffs in non-class cases in federal court generally lack Article III standing to seek relief for anyone other than themselves”); see also Bruhl, *supra* note 9, at 519 (“Given that judgments operate for and against specific people, it follows that each person invoking this judgment-issuing power must have standing.”).

⁸⁶ See, e.g., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548-50 (2016); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

⁸⁷ See Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 24 (1984) (describing the Supreme Court’s “premise that article III imposes a stringent standing requirement that the requested remedy, or at least an injunctive remedy, should redress either the actual injury on which standing is

pursue each specific remedy. The classic example of remedial standing problems is *City of Los Angeles v. Lyons*, in which a plaintiff sued the City of Los Angeles and four police officers who had placed him in a chokehold.⁸⁸ The Court held that even if the plaintiff could pursue a damages remedy for *past* harm, he did not have standing to seek an injunction because he could not show a “real or immediate threat” that the police would place him in a chokehold in the *future*.⁸⁹ Furthermore, a plaintiff generally must assert his or her own rights, rather than the rights of others.⁹⁰

Even within this increasingly stringent framework, though, nationwide injunctions still flow from live cases and controversies. Return to the injunction against the Obama administration’s deferred action policies. The state of Texas was able to establish a concrete and particularized injury—and thus standing—by alleging that the new policy would make certain immigrants eligible for state-subsidized driver’s licenses, thus costing Texas money.⁹¹ The harm was substantial, and because it had not abated, Texas also had remedial standing to pursue injunctive relief.⁹² Accordingly, because Texas demonstrated all the prerequisites for standing, the nationwide injunction comported with Article III justiciability requirements.

One might resist this conclusion and raise two potential constitutional objections to the way that the courts adjudicated the deferred action matter.⁹³ First, even though Texas had demonstrated standing, the courts conclusorily bypassed the standing inquiry for all of the other plaintiffs.⁹⁴ The “one-plaintiff rule,” which has become entrenched in recent decades, allows courts to adjudicate the merits of a claim as long as at least one plaintiff has standing. In an incisive article, Aaron Bruhl traces the development of and criticizes this rule.⁹⁵ He makes a compelling argument that only plaintiffs who have affirmatively demonstrated Article III standing

predicated or some other actionable injury”); David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 809 (2016) (describing the “right plaintiff principle” as requiring that “[t]he remedy sought determines a plaintiff’s standing, not just the harm alleged”).

⁸⁸ *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

⁸⁹ *See id.* at 111-13.

⁹⁰ *See, e.g., Hollingsworth v. Perry*, 570 U.S. 693, 708 (2013) (noting the “‘fundamental restriction on our authority’ that ‘[i]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties’”) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)).

⁹¹ *See Texas v. United States*, 809 F.3d 134, 149 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016).

⁹² *See id.* at 186-87.

⁹³ A bevy of prudential objections are also available. This discussion focuses solely on the Article III objections.

⁹⁴ *See id.* at 151; *see also id.* at 162 (“The states have standing.”).

⁹⁵ *See generally* Bruhl, *supra* note 9.

may become parties to a case and thus become subject to a judgment.⁹⁶ So, on this score, the courts were wrong to confer party status on plaintiffs other than Texas, but that mistake does not necessarily speak to the propriety of the nationwide injunction.

A second objection, which is related to but distinct from the first, concerns the scope of the remedy. This, in fact, cuts to the heart of the constitutional objection to nationwide injunctions. Opponents essentially insist that a plaintiff must demonstrate standing (a) to rectify a particular harm (b) through a particular remedy, which (c) is limited in scope to the plaintiff's precise injury. According to this argument, even though Texas had standing to pursue an injunction to abate the harm it experienced, it did not have standing to seek a remedy that benefited other plaintiffs or would-be plaintiffs.

This argument is flawed, though, because standing and the proper scope of an injunction are not coextensive. In fact, since at least the 1960s, the Supreme Court has countenanced prophylactic injunctions that remedy more than the specific harm that a given plaintiff has alleged.⁹⁷ For example, in *Brown v. Plata*, the Supreme Court affirmed an injunction that compelled California to reduce its prison population.⁹⁸ The structural injunction sought to redress not only the harm experienced by prisoners who had actually received constitutionally deficient medical care but to reform the conditions that created an “extensive and ongoing constitutional violation.”⁹⁹ In other words, the injunction swept broadly in order to prevent other prisoners from experiencing the same deprivation.

Although prophylactic injunctions have been controversial, they remain part of the constellation of standing doctrine. While a plaintiff indeed must demonstrate standing to sue regarding a specific injury and standing to seek a particular remedy, it does not follow that courts—as a matter of constitutional imperative—may fashion relief that benefits only that plaintiff.¹⁰⁰ So, even if the courts in the deferred action litigation had

⁹⁶ See *id.* at 507.

⁹⁷ See Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 312-15 (2004).

⁹⁸ See 563 U.S. 493 (2011).

⁹⁹ See *id.* at 545.

¹⁰⁰ See *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978) (“Once invoked, ‘the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.’”) (quoting *Milliken v. Bradley*, 433 U.S. 267, 281 (1977)).

Professors Coan and Marcus argue that the logic of the Supreme Court’s opinion in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), linked a plaintiff’s standing with the scope of appropriate relief. See Andrew Coan & David Marcus, *Article III, Remedies, and*

scrupulously adhered to standing principles (say, by recognizing Texas as the only proper plaintiff), they still had power to issue a sweeping injunction.¹⁰¹

So too, in other contexts, courts frequently take cognizance of nonparties when they issue rulings and order relief. For example, they create precedent that very clearly—and quite intentionally—governs the rights and obligations of nonparties.¹⁰² Furthermore, nonmutual preclusion often allows someone to take advantage of a judgment in an earlier case in which that person did not participate.¹⁰³

Part II explores these parallels more fully, but for present purposes it suffices to note that a plaintiff's standing does not delimit the scope of a court's injunctive power. Indeed, there are critical differences between an actual party (who may, for example, enforce an injunction through contempt proceedings) and a nonparty who benefits from an injunction more indirectly (whether through precedent, preclusion, or a nationwide injunction). Accordingly, even though standing requires a plaintiff to assert his or her own interests, a court's remedial power may extend beyond the plaintiff without impinging on Article III's case or controversy requirement.

3. Law Declaration versus Dispute Resolution

Representation, 9 CONLAWNOW 97, 101-02 (2018). In *Summers*, a plaintiff had standing to seek an injunction against a salvage-timber sale in a forest that he visited. Because the parties settled their dispute with respect to *that* forest, the Court found that the plaintiff could not then challenge timber sales in *other* forests. *See id.* at 494. A plausible reading of *Summers* is that the extent of a plaintiff's standing-conferring injury necessarily determines both the *kind* and *extent* of relief that a plaintiff may pursue. Indeed, Justices Scalia and Thomas have understood *Summers* to stand for that proposition. *See Salazar v. Buono*, 559 U.S. 700, 731 (2010) (Scalia, J., concurring in the judgment) (“A plaintiff cannot sidestep Article III’s requirements by combining a request for injunctive relief for which he *has* standing with a request for injunctive relief for which he *lacks* standing.”).

Although the argument that Coan and Marcus proffer and that Justice Scalia similarly advocated might make good theoretical sense, it is hard to reconcile with prophylactic injunctions. Justice Scalia's response likely would have been: “Exactly my point!” *See Brown v. Plata*, 563 U.S. 493, 554-59 (2011) (Scalia, J., dissenting) (criticizing structural injunctions). But such injunctions remain part of the remedial landscape. Moreover, a majority of the Court seems to square this circle by insisting that while a plaintiff must have standing to seek a particular kind of relief (e.g., an injunction), the extent of relief that a court may grant remains far more flexible. *See, e.g., Salazar*, 559 U.S. at 713 (plurality) (arguing that extent of relief concerned the merits, not standing). Thus, in *Salazar v. Buono*, Justices Scalia and Thomas were alone in reading *Summers* to demand that a plaintiff demonstrate standing to justify the extent of relief sought.

¹⁰¹ *See Bruhl*, *supra* note 9, at 513. In fact, the actual injunction was truly nationwide in scope, applying everywhere, not just in Texas or the other states that had challenged the policy.

¹⁰² *See Coan & Marcus*, *supra* note 100, at 105-06.

¹⁰³ *See infra* Part II.A.

Another way to appreciate that nationwide injunctions do not run afoul of the “judicial power” is to situate them within a familiar theoretical debate about two models of adjudication. The dispute resolution model is party-driven and posits that a court’s proper role is to resolve the parties’ concrete dispute, such that any pronouncements of law are merely incidental to that task. By contrast, the law declaration model is more focused on the courts—the Supreme Court, in particular—and treats the parties’ dispute as a vehicle for declaring and clarifying law.¹⁰⁴

Those who argue that nationwide injunctions transgress the judicial power quite clearly invoke the principles of the dispute resolution model. They understand the judicial power to permit courts to adjudicate the parties’ actual disputes. Concomitantly, they suggest that courts have “no constitutional basis to decide disputes and issue remedies for those who are not parties.”¹⁰⁵

Although the dispute-resolution and law-declaration models are not hermetically sealed categories, the Supreme Court has conspicuously embraced important tenets and attributes of law declaration.¹⁰⁶ The Court never addresses the distinction directly. Nonetheless, even though it continues to talk the talk of dispute resolution—insisting, for example, that plaintiffs present disputes that are “both ‘concrete *and* particularized”¹⁰⁷—the Court for decades implicitly (and sometimes explicitly) has embraced a more capacious role.

Partly driving the move toward law declaration was the evolving nature of law that courts adjudicated. The expansion of both the administrative state¹⁰⁸ and constitutional rights shifted the nature of adjudication from a purely private enterprise to a more public, “‘political-legal’ undertaking.”¹⁰⁹ Partly, the move owed to the expanded mechanisms

¹⁰⁴ See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 73-75 (7th ed. 2015); Henry Paul Monaghan, *On Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668 (2012).

¹⁰⁵ See Bray, *supra* note 2, at 471; see also Bruhl, *supra* note 9, at 519 (similarly arguing that courts properly exercise judicial power only when according relief to actual parties).

¹⁰⁶ See Monaghan, *supra* note 104, at 668-69, 683.

¹⁰⁷ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545 (2016) (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180–181 (2000) and adding emphasis).

¹⁰⁸ Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1282-84 (1961).

¹⁰⁹ Henry P. Monaghan, *Constitutional Adjudication: The Who and the When*, 82 YALE L.J. 1363, 1369 (1973).

by which citizens could enforce should public law, including a revitalized § 1983¹¹⁰ and the modern class action.¹¹¹

In recent years, the Supreme Court has embraced more fully its power to declare the law by exercising even greater control over its agenda, rather than simply adjudicating cases as the parties have presented them. It selectively enforces issue-forfeiture rules so that it can adjudicate precisely what it wants to decide¹¹² and requires parties to brief new issues that the Court itself has added.¹¹³ Perhaps nowhere is this tendency toward agenda control more evident than the Court's willingness to appoint amicus curiae to argue matters that the parties themselves do not actually contest.¹¹⁴

While some commentators might quibble that federal courts (and the Supreme Court, in particular) should be more attentive to resolving actual disputes, such criticisms neglect the broader phenomenon that much of constitutional and administrative adjudication is inherently an act of law declaration. Admittedly, not every federal court should view its primary task as law declaration, which might be the unique province of the Supreme Court. The point is not that law declaration describes how every court approaches every case. Rather, “judicial power” is not, by definition, synonymous with dispute resolution.

To the extent that courts are issuing nationwide injunctions too profligately, they are still exercising the “judicial power.” The problem is simply that courts have not shown good prudential restraint.

II. The Preclusion Model

The ultimate normative question raised by the current debate is when, if ever, courts should issue nationwide injunctions. If I am correct that there are no constitutional or structural constraints, the question becomes entirely prudential.

This Part briefly addresses why preclusion is uniquely suited to provide useful answers and then lays out the essential analogy between nationwide injunctions and preclusion (specifically, offensive nonmutual issue preclusion). It then considers the extent to which *United States v.*

¹¹⁰ 42 U.S.C. § 1983.

¹¹¹ See FED. R. CIV. P. 23.

¹¹² See Monaghan, *supra* note 104, at 680.

¹¹³ See *id.*; Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447 (2009).

¹¹⁴ See Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1953 (2016); Monaghan, *supra* note 104, at 680.

Mendoza,¹¹⁵ in which the Supreme Court disapproved certain uses of preclusion against the government, constrains both of these doctrines. This Part draws on the logic underlying *Mendoza* as well as the practice of nonacquiescence—when the government disagrees with a judicial interpretation of the law and declines to abide by it prospectively. In doing so, it demonstrates that preclusion principles suggest a coherent theory of when nationwide injunctions are appropriate. Part III then applies that theory to concrete examples, showing how the various strands of the theory fit together cohesively.

A. Why Preclusion?

Drawing on the theory and doctrine of preclusion, rather than equity itself, might seem counterintuitive at first. After all, equity long has called for providing “complete relief” to an aggrieved party, even when doing so requires injunctions that apply beyond the actual parties to a lawsuit.¹¹⁶ Moreover, since the 1960s, courts have routinely issued prophylactic injunctions that protect people who have not yet suffered harm from the defendant’s conduct.¹¹⁷ “Complete relief” and prophylactic injunctions are an important part of the story about nationwide injunctions and help explain why injunctions sometimes are appropriately directed at nonparties.¹¹⁸ But they are not the whole story.

The “complete relief” doctrine justifies an injunction that benefits a nonparty when it is necessary to fully vindicate a plaintiff’s rights. For example, if an employee complains that she has been illegally underpaid, and the reason for that illegal conduct is a widespread practice rather than an isolated event, an injunction might direct the employer to fix that practice. A broad injunction is proper to remedy the precise source of harm, even though

¹¹⁵ 464 U.S. 154 (1984).

¹¹⁶ See *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (“injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs”); see also *Madsen v. Women’s Health Ctr., Inc.* 512 U.S. 753, 765 (1994) (quoting same language from *Yamasaki*); Siddique, *supra* note 20, at 2102-06 (explaining “complete relief” principle).

¹¹⁷ See, e.g., Thomas, *supra* note 97, at 102; see also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292-1302 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 46-50 (1979); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 635 (1982).

¹¹⁸ See, e.g., Siddique, *supra* note 20, at 2128-35 (applying complete “complete relief” doctrine to the public law context); see also *supra* notes 97-101 and accompanying text (discussing prophylactic injunctions and scope of relief).

the injunction benefits all employees, not just the specific plaintiff.¹¹⁹ But “complete relief” does not address the converse question that nationwide injunctions often raise: May an injunction ever benefit a nonparty if such relief is *not* necessary to give a plaintiff complete relief?¹²⁰

Similarly, while some scholars have carefully theorized prophylactic injunctions and identified situations in which they are most legitimate,¹²¹ such injunctions are not precisely on point. A prophylactic injunction regulates conduct that, strictly speaking, is lawful, but the injunction is arguably necessary to prevent certain harm from recurring.¹²² For example, a court might direct an employer that has maintained a hostile work environment to adopt anti-harassment policies or a complaint procedure in order to prevent future sexual harassment.¹²³ The injunction regulates affiliated lawful conduct rather than the direct source of the harm. In the case of nationwide injunctions, though, a court enjoins conduct that it has already found to be *unlawful*. So, while prophylactic injunctions and nationwide injunctions are related, they actually raise different concerns as to their purpose, scope, and legitimacy.

Preclusion, by contrast, addresses the fundamental problem of nationwide injunctions head on. Its singular purpose is to determine who is and is not bound by the results of litigation. And it grapples directly with the circumstances under which a nonparty may take advantage of a judgment, irrespective of whether a party has already received complete relief.

B. Nonmutual Preclusion and Its Limits

One way to conceptualize a nationwide injunction is that when a court rules in favor of a plaintiff who has sued the government, the court grants relief to everyone else who could have been (but was not) a plaintiff in that lawsuit. This is strikingly similar to how nonmutual preclusion works. *A* sues the government (say, alleging that a statute is unconstitutional) and

¹¹⁹ See *id.* at 2117-19 (explaining why “incidental” nationwide injunctions are often appropriate when plaintiffs bring claims under the Equal Pay Act, the Fair Labor Standards Act, and the Age Discrimination in Employment Act).

¹²⁰ For example, if one plaintiff who challenged the Trump administration’s first travel ban receives a favorable judgment, complete relief arguably requires only that the plaintiff (but no one else) receive permission to enter the country.

¹²¹ See, e.g., Fletcher, *supra* note 117, at 637; David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 671-94 (1988); Thomas, *supra* note 97, at 122-62.

¹²² See Thomas, *supra* note 97, at 114-15; see also Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 936-37 (1999); Schoenbrod, *supra* note 121, at 678.

¹²³ See Thomas, *supra* note 97, at 115.

wins. *B*, who was not a plaintiff in the first lawsuit, then sues the government and argues that issue preclusion prevents the government from relitigating the constitutionality of the statute.

Under both scenarios—a nationwide injunction and nonmutual preclusion—*B* does not actually have to litigate whether the statute is constitutional but simply piggybacks on *A*'s victory. From *B*'s perspective, the result is the same. The most significant difference between the two scenarios is that in one (preclusion), *B* eventually becomes a party to a lawsuit; in the other (nationwide injunctions), *B* is never a party. As discussed later, this difference is not a basis for categorically rejecting nationwide injunctions.¹²⁴ Nonparties often benefit from legal proceedings.

Unpacking the analogy in a careful way involves parsing some of the particulars of preclusion, including certain limitations that complicate the basic analogy between preclusion and nationwide injunctions. Specifically, this requires attention to the old rule of mutuality and the move away from it; the difference between defensive and offensive nonmutual issue preclusion (including the unique problems that the latter presents); and the distinct concerns that arise in the public law setting (that is, the *Mendoza* problem).

1. Mutuality and Its Demise

At heart, the preclusion model of nationwide injunctions rests on the core rule of issue preclusion that someone who had a full and fair opportunity to litigate a matter may not relitigate that matter in a subsequent lawsuit. As typically articulated, issue preclusion binds a party when an issue was actually litigated, actually decided, and essential to the judgment.¹²⁵

Traditionally, courts also insisted on “mutuality,” meaning that only the actual parties to a lawsuit, or their privies, could invoke preclusion against one another in a subsequent lawsuit.¹²⁶ But now courts overwhelmingly embrace the logic of nonmutual preclusion—the idea that someone who was not a party to an initial lawsuit may invoke preclusion against someone who was a party. The mutuality requirement has never made much sense, given that the primary concern is whether the party to be bound, colloquially speaking, already had a fair shake.

¹²⁴ See *infra* Part III.C.

¹²⁵ See RESTATEMENT (SECOND) OF JUDGMENTS §§ 27, 29 (AM. LAW INST. 1982).

¹²⁶ See *supra* Part I.A.

In the middle of the twentieth century, scholars and courts gradually came to appreciate both the inefficiency and unfairness of rigidly adhering to mutuality.¹²⁷ For example, suppose that *A* and *B* litigate a particular question (say, whether *A* was negligent), and *A* loses. In a second lawsuit—this time between *A* and *C*—a nonparty (*C*) wants to use preclusion against *A*. Why should *A* get a second chance to litigate whether he was negligent?¹²⁸ After all, *A* already had a full and fair opportunity to contest the matter. The key, for due process purposes, is whether the party *against whom* preclusion is invoked already had his day in court.¹²⁹ In this hypothetical, *A* did.

So far, the analogy between nationwide injunctions and preclusion is straightforward. In both scenarios, the government has had a full and fair opportunity to litigate a matter, and so it may be bound by an adverse judgment. Because courts sensibly have moved away from the mutuality requirement, a nonparty may benefit from both preclusion and a nationwide injunction.

2. The Problems of Offensive Nonmutual Issue Preclusion

The analogy becomes more complicated because courts do not always permit nonmutual preclusion. These limitations on preclusion are actually quite productive in identifying when nationwide injunctions are also inappropriate.

As courts gradually relaxed the mutuality requirement, they often distinguished between *defensive* and *offensive* nonmutual issue preclusion. The defensive variety allows a defendant, who was not a party to the initial lawsuit, to invoke preclusion as a shield against a plaintiff who did participate in the first litigation.¹³⁰ Defensive nonmutual issue preclusion is largely

¹²⁷ See, e.g., *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 328 (1971); Allan D. Vestal, *Res Judicata/Preclusion By Judgment: The Law Applied in the Federal Courts*, 66 MICH. L. REV. 1723, 1724 (1967).

¹²⁸ See, e.g., *Bernhard v. Bank of Am. Nat. Tr. & Sav. Ass'n*, 122 P.2d 892, 895 (Cal. 1942) (“No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as *res judicata* against a party who was bound by it is difficult to comprehend.”).

¹²⁹ See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) (“It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.”).

¹³⁰ Take a simplified version of *Blonder-Tongue*, the first case in which the U.S. Supreme Court approved nonmutual preclusion. *A* supposedly owns a patent and sues *B* for infringement. *B* prevails on the ground that the patent is invalid. *A* then sues *C*, alleging that *C* violated the same (but now invalid) patent. *C* wants to invoke issue preclusion against *A*—that is, prevent *A* from relitigating whether the patent is valid. See 402 U.S. 313 (1971).

unproblematic because it does not create perverse and inefficient incentives. But it is not especially relevant for present purposes.

Offensive nonmutual issue preclusion is the closest analogue to nationwide injunctions, but it is fraught with a number of difficulties. In this scenario, a plaintiff in a second lawsuit, who had not participated in the first round of litigation, wants to use preclusion as a sword against a defendant who already lost once before. This form of preclusion is problematic in many of the same ways that nationwide injunctions can be.

To begin to see the potential pitfalls, consider Professor Currie's famous example of a train crash that gives rise to lawsuits by fifty passengers against the railroad.¹³¹ Passenger *A* sues for negligence, and *A* loses. Then *B* sues and loses. And so on down the line until the tenth passenger, *J*, manages to win. All of the remaining passengers (*K*, *L*, *M*, etc.) then will want to take advantage of the single favorable verdict that *J* won—in an offensive nonmutual posture—to argue that preclusion prevents the company from relitigating whether it was negligent.

Note the asymmetry here.¹³² The railroad is never allowed to invoke preclusion based on the first nine lawsuits, all of which it won. The passengers whom the company would want to preclude did not participate in the earlier lawsuits, and, again, preclusion may not apply *against* someone who has not yet had a day in court. Yet in theory those same passengers are able to invoke preclusion based on the judgment that they like (namely, *J*'s victory in establishing the company's liability) because the company had participated in that lawsuit.

The train crash hypothetical illustrates three major problems with offensive nonmutual issue preclusion and, by extension, a nationwide injunction. First, offensive nonmutual preclusion encourages a wait-and-see approach. Passengers who do not participate in the early lawsuits can never be bound by adverse judgments to which they were not parties, yet they can wait to take advantage of a favorable judgment against the railroad.¹³³ Second, this form of preclusion can exacerbate inconsistent results. In the hypothetical, the railroad won nine lawsuits, but preclusion would entrench the result of the tenth lawsuit, which the company lost. This seems perverse

¹³¹ See Currie, *supra* note 26, at 285-86.

¹³² See Michael A. Berch, *A Proposal to Permit Collateral Estoppel of Nonparties Seeking Affirmative Relief*, 1979 ARIZ. ST. L.J. 511, 530-31; Lawrence C. George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 STAN. L. REV. 655, 660 (1980).

¹³³ See *Parklane Hosiery*, 439 U.S. at 329; Currie, *supra* note 26, at 299.

when nine of the ten lawsuits resulted in verdicts favoring the railroad.¹³⁴ Finally, offensive nonmutual issue preclusion leads to preclusive asymmetry. The defendant can never use preclusion against the nonparty passengers, but those nonparty passengers may invoke preclusion to bind the defendant to the result of the tenth lawsuit.¹³⁵

Although these obstacles initially led some courts and commentators to reject offensive nonmutual issue preclusion altogether,¹³⁶ the better view is that it is permissible when the potential problems are absent. To put the point at a high level of abstraction, courts should ensure that applying preclusion is actually consistent with preclusion's overarching goals, including fairness and efficiency.

The *Restatement (Second) of Judgments* reflects the majority rule that allows offensive nonmutual issue preclusion.¹³⁷ At the same time, it highlights circumstances that counsel strongly against applying preclusion. Most importantly, courts should not allow preclusion if, as in the train crash hypothetical, there are actually inconsistent judgments.¹³⁸ Courts also should consider whether parties have explicitly adopted a wait-and-see approach in order to take advantage of preclusion¹³⁹ or if a second proceeding affords different procedural opportunities (for example, more extensive discovery).¹⁴⁰

The majority approach to offensive nonmutual issue preclusion is eminently sensible. It is attuned to the various ways that such preclusion might be fundamentally unfair. But if circumstances do not suggest any inherent unfairness, there are compelling reasons to prevent someone who has already had a full and fair opportunity to litigate an issue from getting a second shot at litigating the same issue.

¹³⁴ See *Parklane Hosiery*, 439 U.S. at 330; see also Herbert Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1466 (1968).

¹³⁵ See *supra* notes 28-29 and accompanying text.

¹³⁶ See, e.g., Currie, *supra* note 26, at 294; Michael Kimmel, Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1009, 1032-37 (1967).

¹³⁷ See RESTATEMENT (SECOND) OF JUDGMENTS § 27, § 29, Reporter's Note (AM. LAW INST. 1982).

¹³⁸ See *id.* § 29(4).

¹³⁹ See *id.* § 29(3) (“[t]he person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary”); see also *Parklane Hosiery*, 439 U.S. at 331.

¹⁴⁰ See *id.* § 29(2) & cmt. d. The Restatement lists seven specific considerations as well as a catch-all reference to “[o]ther compelling circumstances” that justify relitigation. See *id.* § 29(8).

Return to the train hypothetical, but this time imagine that the first three passengers (A, B, and C) all win their respective lawsuits.¹⁴¹ The results are consistent, and the railroad has had its day in court (in fact, three times). This presents a situation in which the remaining passengers arguably should be able to take advantage of nonmutual issue preclusion and prevent the company from relitigating whether it was negligent.

All of this continues to support the analogy between nationwide injunctions and preclusion, and it begins to suggest appropriate limits on when nationwide injunctions should be available. Specifically, the analysis leads to the conclusion that in both scenarios courts should remain cognizant of factors that counsel against preclusion, such as inconsistent judgments. Just as offensive nonmutual issue preclusion never applies automatically, so too nationwide injunctions should not issue as a matter of course.

3. *Mendoza*

The biggest challenge for the model is the extent to which the Supreme Court has circumscribed courts' power to bind the government through offensive nonmutual issue preclusion. The policy concerns just discussed always have to be at the forefront of judges' thinking, but these concerns have even greater resonance when the government is a defendant. I argue, though, that a thorough understanding of the doctrine actually suggests that preclusion—and, by extension, nationwide injunctions—can be viable under certain circumstances. In fact, the challenges to applying preclusion against the government further crystallize the factors that courts should consider when contemplating whether to issue a nationwide injunction.

In *United States v. Mendoza*, the Supreme Court rejected a private party's attempt to invoke issue preclusion against the government.¹⁴² Sixty-eight Filipino veterans had alleged in an initial lawsuit that the U.S. government's suspension of certain naturalization proceedings in the Philippines violated their constitutional due process rights.¹⁴³ The plaintiffs prevailed, and the government declined to appeal. Sergio Mendoza then brought a separate lawsuit and sought to invoke issue preclusion against the

¹⁴¹ To avoid complications, also imagine that party joinder is not feasible. Ideally, if it were feasible, the passengers would simply bring a single lawsuit.

¹⁴² 464 U.S. 154 (1984).

¹⁴³ See *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931, 948-51 (N.D. Cal. 1975).

government on the question of whether the government's actions were unconstitutional.¹⁴⁴

Although the Supreme Court had approved offensive nonmutual issue preclusion just a few years earlier,¹⁴⁵ it held that such preclusion was not available to *Mendoza*. The Court identified several potential concerns with nonmutual preclusion when the government is a party.¹⁴⁶

First, it pointed to the sheer volume of litigation in which the United States is involved, suggesting that the government could be subject to preclusion far too readily, given its caseload.¹⁴⁷ Second, and most important for present purposes, the Court expressed concern that offensive nonmutual issue preclusion “would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.”¹⁴⁸ One loss by the government would then allow every other person to bring a subsequent lawsuit and invoke preclusion. Moreover, a significant consequence of “freezing” the law based on a single decision would be that issues could no longer percolate through the various federal courts of appeals.¹⁴⁹ Third, the Court observed that freezing the law in place would force the Solicitor General to appeal every adverse decision, even though prudential considerations normally guide which matters the government appeals. Finally, and relatedly, the Court noted that if the government did have to appeal every adverse ruling, then different administrations would not have latitude to take different enforcement positions.¹⁵⁰

The dominant view of *Mendoza* is that it categorically rejected any application of nonmutual preclusion against the government.¹⁵¹ Scholars,

¹⁴⁴ See *Mendoza*, 464 U.S. at 156-58.

¹⁴⁵ See *Parklane Hosiery*, 439 U.S. at 329-31.

¹⁴⁶ See *Mendoza*, 464 U.S. at 162-63.

¹⁴⁷ See *id.* at 160.

¹⁴⁸ *Id.* at 160.

¹⁴⁹ See *id.* (“Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.”).

¹⁵⁰ See *id.* at 161.

¹⁵¹ See, e.g., *Harrell v. U.S. Postal Serv.*, 445 F.3d 913, 921 (7th Cir. 2006) (“the Supreme Court has established that nonmutual offensive collateral estoppel does not extend to litigation against the United States”); *Burlington N. R. Co. v. Hyundai Merch. Marine Co.*, 63 F.3d 1227, 1232 n.7 (3d Cir. 1995) (“[*Mendoza*] limited the application of offensive nonmutual collateral estoppel by concluding that it could not be applied against the federal government.”); *Kennedy v. C.I.R.*, 876 F.2d 1251, 1257 (6th Cir. 1989) (“non-mutual offensive collateral estoppel . . . is not permitted against the United States government”); *Hercules Carriers, Inc. v. Claimant State of Fla., Dep’t of Transp.*, 768 F.2d 1558, 1578 (11th Cir. 1985) (describing *Mendoza* as having held that “nonmutual collateral estoppel should not

especially when arguing against the propriety of nationwide injunctions, often describe *Mendoza*'s holding in similarly unconditional language¹⁵² and contend that if nonmutual issue preclusion against the government is forbidden, so too nationwide injunctions are inappropriate.¹⁵³ The logic is that in both situations, only an actual party (but not a nonparty) to a lawsuit against the government may directly benefit from the government's loss. Occasionally, courts make a similar move of rejecting nationwide injunctions in light of *Mendoza*.¹⁵⁴

The better reading of *Mendoza*, however, is that it did not categorically prohibit using nonmutual preclusion against the government. Rather, it identified a further set of policy considerations that courts should take into account when assessing whether preclusion—and similarly a nationwide injunction—is appropriate.

First, *Mendoza* itself lends credence to the idea that the Court was not articulating a categorical rule but instead was focused on the specific problems in the case at hand. For example, the Court held that “the United States may not be collaterally estopped *on an issue such as this*, adjudicated against it in an earlier lawsuit brought by a different party.”¹⁵⁵ In concluding its analysis, the Court yet again remarked that “nonmutual offensive collateral estoppel simply does not apply against the government in such a way as to preclude relitigation of issues *such as those involved in this case*.”¹⁵⁶ Despite this cagey language, the Court did little to clarify why certain issues might not lend themselves to nonmutual preclusion but others might.¹⁵⁷ Nor has the

be applied against the government”); *Sun Towers, Inc. v. Heckler*, 725 F.2d 315, 322–323 (5th Cir. 1984) (“nonmutual offensive collateral estoppel cannot be used against the government”); see also 18A WRIGHT ET AL., *supra* note 25, § 4465.4 (noting that even though *Mendoza* likely did not articulate a categorical rule, “[a] uniform rule, however, may already be upon us”).

¹⁵² See, e.g., *Bray*, *supra* note 2, at 464 (“the doctrine of nonmutual offensive issue preclusion does not apply against the federal government”); *Morley, Nationwide Injunctions*, *supra* note 9, at 623–29; see also *Frost*, *supra* note 19, at 1112 (rejecting the analogy of nationwide injunction to *Mendoza* but describing *Mendoza* as having held “that offensive nonmutual collateral estoppel did not apply in litigation against the federal government”).

¹⁵³ See *Bray*, *supra* note 2, at 464; *Morley, Nationwide Injunctions*, *supra* note 9, at 623–29.

¹⁵⁴ See, e.g., *State of California v. Little Sisters of the Poor*, 911 F.3d 558, 583 (9th Cir. 2018); *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664–65 (9th Cir. 2011); *Virginia Soc’y for Human Life, Inc. v. Fed. Election Comm’n*, 263 F.3d 379, 392–94 (4th Cir. 2001); see also *City of Chicago v. Sessions*, 888 F.3d 272, 296–97 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part).

¹⁵⁵ *Mendoza*, 464 U.S. at 155.

¹⁵⁶ *Id.* 162.

¹⁵⁷ See 18A WRIGHT ET AL., *supra* note 25, § 4465.4; A. Leo Levin & Susan M. Leeson, *Issue Preclusion Against the United States Government*, 70 IOWA L. REV. 113, 121 (1984).

Court revisited the substance of *Mendoza* since then.¹⁵⁸

Second, and far more significantly, the inherent logic of *Mendoza* tracks the way that courts long have approached nonmutual preclusion questions. Even as courts abandoned the mutuality requirement and increasingly embraced nonmutual preclusion, they were careful to identify circumstances that militate against preclusion. For example, as discussed above, courts are attuned to gamesmanship by plaintiffs and inconsistent results from earlier lawsuits.¹⁵⁹ *Mendoza* identified several other concerns that are unique to litigation involving the government, but these considerations should not absolutely foreclose the availability of preclusion. Rather, as with nonmutual preclusion writ large, courts should be attentive to them. If the concerns are absent, then preclusion at least should be a possibility.

Several lower courts have embraced this underlying logic of *Mendoza*. For instance, the Second Circuit in *Benjamin v. Coughlin* observed that *Mendoza*'s principal policy rationales were "avoidance of premature estoppel and assurance of an opportunity for the government to consider the administrative concerns that weigh against initiation of the appellate process."¹⁶⁰ The Second Circuit noted that the issue before it, unlike in *Mendoza*, had percolated through various lower courts and that the government had, in fact, chosen to appeal earlier adverse judgments.¹⁶¹ Nonmutual preclusion against the government was thus appropriate because the *Mendoza* concerns had been allayed. Other courts also have embraced the idea that *Mendoza* did not articulate an absolute rule, and they too have applied nonmutual preclusion against the government.¹⁶²

Opponents of nationwide injunctions are right to draw on the logic of *Mendoza*, but they have drawn the wrong inference. *Mendoza* does not reflect a categorical approach to nonmutual preclusion against the

¹⁵⁸ The Court seemed poised to consider whether an exception to the overarching *Mendoza* rule should apply in original jurisdiction cases, but it ultimately sidestepped the question. *See* *United States v. Alaska*, 521 U.S. 1, 13-14 (1997).

¹⁵⁹ *See supra* notes 137-140 and accompanying text.

¹⁶⁰ 905 F.2d 571, 576 (2d Cir. 1990).

¹⁶¹ *See id.* In *Benjamin*, the question pertained to preclusion of a state government, but the court did not rest its decision on that distinction.

¹⁶² *See* *DeCastro v. City of New York*, 278 F. Supp. 3d 753, 764 n.13 (S.D.N.Y. 2017); *Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 666 F. Supp. 1475, 1478-79 (D. Colo. 1987); *Stormont-Vail Reg'l Med. Ctr. v. Bowen*, 645 F. Supp. 1182, 1192 (D.D.C. 1986); *see also* *Disimone v. Browner*, 121 F.3d 1262, 1267-68 (9th Cir. 1997) (applying nonmutual issue preclusion against the government but without discussing *Mendoza*); *McQuade v. Comm'r of Internal Revenue*, 84 T.C. 137, 145 (1985) (applying nonmutual preclusion against government because the party invoking preclusion had been "a 'party' in all but the technical sense" to the initial litigation).

government. So too nationwide injunctions are not categorically forbidden. Rather, the same concerns that animated the actual *Mendoza* case—not wanting to freeze the law after a single lawsuit, facilitating percolation, and not forcing the government to appeal every adverse decision—should inform whether a nationwide injunction is proper.

At this point, the analogy is crystallizing. Nonmutual preclusion (especially when invoked against the government) and nationwide injunctions both begin with the fundamental premise that the government has already had at least one day in court to try to vindicate its position. If the government loses, due process allows the government to be bound by the adverse result. But a host of concerns arise when new plaintiffs seek to invoke preclusion nonmutually or when nonparties benefit from a nationwide injunction. Those concerns are overwhelmingly the same in the two contexts. Roughly speaking, they track the considerations that the *Restatement (Second) of Judgments* identifies, including a fear of gamesmanship and inconsistent results,¹⁶³ as well as the *Mendoza* problems just discussed.

These considerations help identify when a nationwide injunction is *not* appropriate. But they do not identify the standard that should affirmatively guide courts in deciding that a nationwide injunction *is* appropriate. That standard derives from the doctrine and theory of nonacquiescence.

C. Nonacquiescence

The final piece of the argument in understanding the circumstances under which nationwide injunctions are appropriate is the practice of nonacquiescence—when the government refuses to abide by a judicial interpretation of law prospectively. *Mendoza* enabled, but did not necessarily require, this practice.¹⁶⁴ Even though the Supreme Court did not absolutely prohibit nonmutual preclusion against the government, it did make clear that in the mine run of cases, the government should not be subject to preclusion in this manner. Thus, the government generally has discretion to relitigate issues that it has lost. Because of that latitude, the government may decline

¹⁶³ RESTATEMENT (SECOND) OF JUDGMENTS § 29 (AM. LAW INST. 1982).

¹⁶⁴ Estreicher & Revesz, *supra* note 22, at 685 (“One can well imagine a legal regime under which the agency must internalize the relevant judicial decisions, but where it can challenge the precedent through a declaratory judgment action.”).

to conform its conduct to judicial precedent and instead craft policies and practices that accord with its contrary view of the law.¹⁶⁵

Nonacquiescence is understandably controversial, particularly in certain manifestations, because it seriously challenges separation-of-powers ideals and seems to allow the government to flout judicial interpretations of law.¹⁶⁶ Some scholars have offered a qualified defense of nonacquiescence in its most problematic variant, and that defense can guide judges as they grapple with nationwide injunctions.¹⁶⁷ Specifically, this theory can train judges' thinking on whether law is settled and whether the government is behaving in good faith.

Scholars who have written about nonacquiescence generally focus on federal administrative agencies, although the concept usefully applies more broadly. The practice comes in several variants, but two are most relevant here. First, with *intercircuit* nonacquiescence, the government pursues its preferred policies and interpretation of law in one circuit, even though the court of appeals for another circuit has rejected the government's position. Second, *intracircuit* nonacquiescence entails the government's refusal to abide by the case law of the court that will review the government's actions.¹⁶⁸

Intercircuit nonacquiescence is overwhelmingly uncontroversial.¹⁶⁹ Under the current organization of regional federal circuits, the notion that each court of appeals is allowed to develop its own case law and is not bound to follow the precedents of sister circuits has become almost axiomatic.¹⁷⁰

¹⁶⁵ See Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. 1339, 1341-42 (1991); Ross E. Davies, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65, 67 (2003); Estreicher & Revesz, *supra* note 22, at 681.

¹⁶⁶ See Coenen, *supra* note 165, at 1357-61; Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801, 822-25 (1990); Joshua I. Schwartz, *Nonacquiescence*, *Crowell v. Benson*, and *Administrative Adjudication*, 77 GEO. L.J. 1815, 1830-32 (1989).

¹⁶⁷ See Estreicher & Revesz, *supra* note 22, at 743-53.

¹⁶⁸ Berger, *supra* note 9, at 1098; Estreicher & Revesz, *supra* note 22, at 687. A third variant is particular to administrative law—venue-choice nonacquiescence—which essentially involves an agency's refusal to abide by one circuit's case law when there is uncertainty whether the court of appeals for that circuit or some other circuit will review the agency's actions. See Estreicher & Revesz, *supra* note 22, at 687.

¹⁶⁹ See, e.g., Davies, *supra* note 165, at 71 (noting that “[p]ractically no one objects” to intercircuit nonacquiescence and calling the practice “little more than a fancy term to describe the routine behavior of anyone whose actions are subject to review in federal court?”); see also Estreicher & Revesz, *supra* note 22, at 735-41; Berger, *supra* note 9, at 1098-99.

¹⁷⁰ See *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488-89 (1900). Cf. Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 686 (1984) (arguing that Congress might not have expressly intended for courts to create independent law of the circuit).

That each circuit may create its own precedents is unexceptional, as evidenced by the ubiquity of circuit splits.¹⁷¹ Indeed, the Supreme Court explicitly relies on such splits in identifying issues that merit the Court's attention.¹⁷² So, the idea that the government might conform its actions to the law in one circuit but pursue a competing vision of the law in another circuit is unobjectionable, perhaps to the point of banality. Even scholars who object to other forms of nonacquiescence essentially concede the point.¹⁷³

Intracircuit nonacquiescence is a different beast altogether. Expressly ignoring circuit law—especially when the government is acting within that very circuit—raises the specter of lawlessness.¹⁷⁴ A prominent example that several commentators have discussed¹⁷⁵ involved the Social Security Administration's policy of terminating recipients' benefits, even if the agency did not marshal evidence that the recipients' medical conditions had improved. The agency explicitly acknowledged that its policy contravened two Ninth Circuit opinions;¹⁷⁶ nonetheless, it asserted the right not to abide by the court's interpretation of the relevant statute, even when administering the program in the Ninth Circuit.¹⁷⁷

Courts have tended to react with umbrage when an agency, despite repeated losses before a court of appeals, continues to reject—and fails to conform to—that court's interpretation of the law.¹⁷⁸ Similarly, most scholars

¹⁷¹ See, e.g., Mary Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605, 614-18 (2003); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 719-20 (1984); Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1143-47 (2012).

¹⁷² See SUP. CT. R. 10.

¹⁷³ See Diller & Morawetz, *supra* note 166, at 802 n.8 (noting that “[i]ntercircuit nonacquiescence has not been very controversial and has not led to criticism from the courts”); Deborah Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471, 490 (1986) (“To a large extent, the structure of American appellate courts appears to approve of and even demand intercircuit nonacquiescence . . .”).

¹⁷⁴ The government, of course, must abide by the judgment of cases in which it loses. Nonacquiescence involves how the government conducts itself prospectively.

¹⁷⁵ See, e.g., Estreicher & Revesz, *supra* note 22, at 699-700; Maranville, *supra* note 173, at 486-88;

¹⁷⁶ See *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982); *Finnegan v. Matthews*, 641 F.2d 1340 (9th Cir. 1981).

¹⁷⁷ *Lopez v. Heckler*, 572 F. Supp. 26 (C.D. Cal. 1983) (detailing Secretary's explicit nonacquiescence), *aff'd in part, rev'd in part*, 725 F.2d 1489 (9th Cir. 1984), *cert. granted, judgment vacated*, 469 U.S. 1082 (1984)

¹⁷⁸ See Estreicher & Revesz, *supra* note 22, at 711-12 (noting that nearly every court of appeals has disapproved intracircuit nonacquiescence); Schwartz, *supra* note 166, at 1823

who have addressed the issue regard intracircuit nonacquiescence as illegitimate.¹⁷⁹

In one of the seminal discussions of nonacquiescence, though, Samuel Estreicher and Richard Revesz offer a rare and insightful defense of intracircuit nonacquiescence. Some of their arguments rest on factors unique to federal agencies, including agencies' responsibility to adopt and implement nationwide policies as well as their singular power to create and adjudicate law.¹⁸⁰

The core of their qualified defense, though, turns on factors that apply to the government's litigation choices more broadly and should inform the parameters of nationwide injunctions. In essence, the government may justifiably choose not to acquiescence¹⁸¹ when the law is unsettled and the government genuinely seeks to vindicate its position. More concretely, the government must have a "justifiable basis" for believing that its interpretation of the law ultimately will prevail.¹⁸² Furthermore, the government must actively seek such vindication, for example by candidly articulating its view of the law and appealing adverse decisions.¹⁸³

The converse of this defense is critical. When the government is not acting in good faith to vindicate its view of the law, failing to abide by judicial precedent becomes an act of bad faith. Thus, if the law is no longer in flux, the government must conform its actions to settled law.

III. A Preclusion-Based Theory of Nationwide Injunctions

Based on the theory and doctrine of preclusion and nonacquiescence, this Part articulates and defends a theory of nationwide injunctions that comprises two mirror-image standards. 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

n.23 (collecting cases); Davies, *supra* note 165, at 76 (observing that courts of appeals "expect obedience" to their interpretations and regard intracircuit nonacquiescence as "lawlessness").

¹⁷⁹ See Coenen, *supra* note 165, at 1432-34; Diller & Morawetz, *supra* note 166, at 802-11; Schwartz, *supra* note 166, at 1330.

¹⁸⁰ See Estreicher & Revesz, *supra* note 22, at 753-54 (discussing agencies that have nationwide policymaking authority and *Chevron* deference flowing from organic statutes).

¹⁸¹ I firmly reject using "nonacquiesce" as a verb. "Nonacquiescence" is clunky enough as a noun.

¹⁸² *Id.* at 754-55.

¹⁸³ See *id.* at 755-56.

behaving in bad faith, most notably when government officials fail to abide by settled law.

Although I focus on the symbiosis between nationwide injunctions and preclusion, this Part also situates nationwide injunctions within several other important developments. Most importantly, it defends the preclusion-based theory of nationwide injunctions against the most trenchant criticism of the analogy—namely, that there is a fundamental difference parties and nonparties.

A. The Standard to Govern Nationwide Injunctions

The two-part standard that should determine when a nationwide injunction is appropriate derives from preclusion and, in particular, the theory of nonacquiescence. When the government loses a single case, it does not have to capitulate at once but instead may actively relitigate unsettled legal questions. One lower court decision typically does not resolve a matter forever after, and the government may, in good faith, advance its alternative view of the law in future litigation.

Accordingly, when a court finds that a statute, regulation, or policy is unlawful, it should not immediately resort to a nationwide injunction. Presumptively, any relief should benefit only the parties to the case. This presumption gives the government an opportunity to vindicate its interpretation of a given statute, regulation, or policy. It also affords different courts an opportunity to consider the matter and thus facilitates the percolation of the issue.

Conversely, when the government acts in bad faith, a nationwide injunction is entirely appropriate in order to vindicate equality and rule-of-law norms.¹⁸⁴ The usual way that plaintiffs can demonstrate governmental bad faith is by showing that the law is no longer in flux—most obviously, when the Supreme Court has conclusively resolved a particular question—yet the government fails to abide by that settled law.

Other avenues for demonstrating bad faith are also available. Probably the clearest example of this is when the government does not actively seek to vindicate its position in the courts. Thus, the government's consistent failure to appeal adverse trial court decisions—and instead just

¹⁸⁴ See *infra* notes 204-212 and accompanying text.

absorb relatively minor losses—can be evidence of bad faith.¹⁸⁵ Such a situation could arise when the government is indifferent to whether a policy is lawful (or perhaps even knows that it is unlawful) and is essentially trying to run out the clock on legal challenges. In that scenario, the government is not actively litigating its legal position but instead is simply waiting until the policy becomes effectively entrenched.

Nationwide injunctions might also be appropriate even when the government is not, strictly speaking, acting in bad faith. If the quintessential example of bad faith in this context is flouting clearly established law, such as binding Supreme Court precedent, a broad injunction might also be justifiable when the law is, so to speak, settled enough.¹⁸⁶ The government could still genuinely try to vindicate its view of the law in other courts, but the law becomes sufficiently clear that the onus should be on the government to prove that its view is correct. One such example, discussed in greater detail below, involves the litigation over the first travel ban.¹⁸⁷ Every court to consider the matter concluded that certain parts of the ban were blatantly illegal, as the White House eventually conceded. A nationwide injunction was appropriate, even though the Supreme Court had not stepped in. The law was sufficiently settled—against the government—such that the burden then fell appropriately on the government, rather than those affected by the travel ban, to defend the ban’s legality.

1. Settled Law and Bad Faith

The most conspicuous example of bad faith—and thus the touchstone for when a nationwide injunction is most appropriate—is when the government fails to abide by settled law.¹⁸⁸ This raises the critical question of how courts should operationalize the theory proposed here. In other words, how settled is “settled”?

¹⁸⁵ See Estreicher & Revesz, *supra* note 22, at 756 (“an agency that persistently declines to seek appellate review in circuits that have not yet ruled on the legality of its position is not reasonably seeking to vindicate that position in the courts of appeals”).

¹⁸⁶ See *id.* at 727 (“even in the absence of Supreme Court review, at some point the law in a particular circuit and across circuits will no longer be in flux”).

¹⁸⁷ See *infra* notes 208-213 and accompanying text.

¹⁸⁸ “Bad faith” is notoriously difficult to define and remains largely unexplored in the public law setting. See David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 890-92 (2016). David Pozen has explored various conceptions of constitutional bad faith, including subjective and objective versions. See *id.* at 918-34. The example of bad faith with which I am primarily concerned, failure to abide by settled law, fits comfortably into what he describes as one paradigm of subjective bad faith—“usurpation of another actor’s constitutional prerogatives by deliberately violating constitutional constraints or disregarding constitutional duties.” *Id.* at 922.

There are various ways to approach this question, but a useful starting point is to think about situations in which the law is *unsettled*—that is, when a nationwide injunction is inappropriate. Earlier, I discussed several factors that should give courts pause before they apply nonmutual issue preclusion generally as well as additional policy considerations that are specific to the government (that is, the *Mendoza* factors). These considerations help identify scenarios when shutting down litigation might be premature. In other words, they are the prudential concerns that indicate when the law is not settled and that militate in favor of a narrow, rather than a nationwide, injunction.

Chief among these prudential concerns is whether different courts that have considered the same matter have reached different results. To my mind, this is the core concern with offensive nonmutual issue preclusion.¹⁸⁹ In the face of actually inconsistent results (as, for example, in the train crash hypothetical discussed earlier), nonmutual preclusion is acutely problematic because it would entrench only one of those outcomes. Actually inconsistent results are probably the single best indicator that the law remains unsettled.

Another situation in which courts and scholars justifiably worry that the law is still in flux is the one-and-done scenario—when only a single court has considered a particular question and that court’s decision becomes binding everywhere. This was the central fear in *Mendoza*. The Court explicitly observed that allowing nonmutual preclusion against the government “would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.”¹⁹⁰ Opponents of nationwide injunctions similarly have expressed concern that such injunctions entrench the first decision that results in a loss for the government.¹⁹¹ At its core, the one-and-done problem is that a single lower court’s ruling does not genuinely settle an issue.

Relatedly, to the extent that the first court’s decision of an issue can become widely binding through either preclusion or a nationwide injunction, plaintiffs have an incentive to engage in forum shopping.¹⁹² In fact, strong evidence suggests that litigants challenging Bush- and Trump-era policies channeled cases to courts in the Ninth Circuit, whereas challenges to Obama

¹⁸⁹ See RESTATEMENT (SECOND) OF JUDGMENTS § 29(4) (AM. LAW INST. 1982) (noting that preclusion is contraindicated when “[t]he determination relied on as preclusive was itself inconsistent with another determination of the same issue”).

¹⁹⁰ *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

¹⁹¹ See Bray, *supra* note 2, at 419, 462-65; Morley, *De Facto Class Actions?*, *supra* note 9, at 533-34; Berger, *supra* note 9, at 1072-73.

¹⁹² See Bray, *supra* note 2, at 457-61; Berger, *supra* note 9, at 1071-72; see also Frost, *supra* note 19, at 1104-06 (noting the forum shopping objection); Malveaux, *supra* note 19, at 57 (same).

administration policies not only proceeded in Texas courts but sometimes before specifically targeted judges.¹⁹³ Although it has become fashionable for courts and scholars to inveigh against forum shopping as an inherent evil,¹⁹⁴ without more forum shopping is no better or worse than other litigation tactics.¹⁹⁵ Sometimes it is completely benign.¹⁹⁶ Forum shopping becomes objectionable only to the extent that it is a symptom of a deeper problem.¹⁹⁷

In the case of nationwide injunctions, the deeper problems ultimately come back to a reluctance to entrench results before the law is truly settled. If everyone knows, for example, that the first court's decision of a particular issue will become widely binding, litigants understandably forum shop because the stakes are so high. In many ways, the fear of a race to the courthouse explains two concerns that the Court expressed in *Mendoza*—the prospect that the Solicitor General would have to appeal every adverse decision and that different presidential administrations would no longer have latitude to adopt different interpretations of law.¹⁹⁸ When litigants forum shop and in effect deprive the government of its normal discretion—with respect to both litigation and enforcement decisions—this is strong evidence that the law is not yet settled.

Finally, the problem of asymmetric preclusion and the strategic behavior that it can foster also indicate when the law is not yet settled. The asymmetry comes from the fact that a nonparty may not be bound by an unfavorable judgment but nonetheless may invoke a favorable one. (Think once again about the train passengers who are not parties to the initial

¹⁹³ See Berger, *supra* note 9, at 1092; see also Adam Liptak, *Trump Takes Aim at Appeals Court, Calling It a 'Disgrace'*, N.Y. TIMES (Nov. 20, 2018).

¹⁹⁴ See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 468 (1965); Stephen B. Burbank, *Semtek, Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1054–55 (2002); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology As "Law" and the Erie Doctrine*, 120 YALE L.J. 1898, 1935, 1982 (2011); see also Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 336–37 (2006) (noting that “Congressional efforts to limit forum shopping have portrayed the practice as abusive, devious, and unethical”).

¹⁹⁵ See, e.g., Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990); see also Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, 582–83 (arguing that global forum shopping can promote access to justice, facilitate substantive enforcement, and facilitate legal reform).

¹⁹⁶ For example, a lawyer might prefer federal court because of familiarity with the uniform rules of federal procedure. Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with the Recent Erie Decisions*, 92 VA. L. REV. 707, 747 (2006). Perhaps most significantly, the entire concept of diversity jurisdiction is predicated on forum shopping and the idea that federal court offers a more hospitable forum to adjudicate certain controversies. See U.S. CONST. art. III, § 2, cl. 1.

¹⁹⁷ See Alan M. Trammell, *Toil and Trouble: How the Erie Doctrine Became Structurally Incoherent (And How Congress Can Fix It)*, 82 FORDHAM L. REV. 3249, 3272–73 (2014).

¹⁹⁸ See *United States v. Mendoza*, 464 U.S. 154, 160–61 (1984).

lawsuits. They aren't subject to preclusion if the railroad wins, but they can try to take advantage of cases that the company loses.) This asymmetry can lead potential plaintiffs not to join early lawsuits and, instead, adopt a wait-and-see approach.¹⁹⁹ When plaintiffs do this, they arguably are trying to take advantage of a single favorable judgment, which likely reflects an unsettled vision of the law.

To put all of this succinctly, the various factors that should lead courts to be chary of permitting nonmutual preclusion (including inconsistent judgments and wait-and-see gamesmanship) as well as the *Mendoza* factors (including whether issues have percolated and whether the government has chosen to appeal adverse judgments) all elucidate whether the law is settled or not. When these considerations from the preclusion realm suggest that the law is unsettled, nationwide injunctions are inappropriate.

Conversely, other indicators affirmatively suggest when the law *is* settled. Perhaps the most obvious situation is when the Supreme Court has conclusively resolved a matter. If the law is clear and an official knowingly ignores that settled law, he is acting in bad faith.²⁰⁰ This is the paradigmatic situation in which a nationwide injunction should issue.

But nationwide injunctions can also be appropriate even if an official is not technically behaving in bad faith. If settled law is the driving force behind the most conspicuous form of bad faith, there are arguably situations in which the law can be settled enough to justify a broad injunction. The question is not whether all doubt ceases to exist. Rather, the law must be sufficiently clear to demand that the government conform its behavior and enforcement positions to that settled law, even if the government continues to pursue its alternative view of the law in court. Nationwide injunctions can be especially appropriate when various courts rule in favor of plaintiffs challenging governmental action and grant the same provisional relief. As discussed below, litigation over the first travel ban offers a nice example. In this situation, the injunction effectively shifts the burden to the government

¹⁹⁹ See RESTATEMENT (SECOND) OF JUDGMENTS § 29(3) (AM. LAW INST. 1982) (noting that preclusion is contraindicated when “[t]he person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary”).

²⁰⁰ See Pozen, *supra* note 188, at 922-25 (describing examples of bad faith situations in which officials knowingly overstep their bounds and usurp other officials’ or institutions’ authority).

to demonstrate why, pending resolution of the merits questions, it should be allowed to continue enforcing a statute or policy.

Reasonable people can differ about the degree of clarity that is necessary within lower courts before a nationwide injunction should issue, but a good rule of thumb is a “rule of three.” The Department of Justice apparently has adopted an unofficial house rule that if at least three courts of appeals have considered a given question and all reached the same result, then the government treats the law as settled and conforms to those rulings nationwide.²⁰¹ The D.C. Circuit similarly has found this to be useful rule of thumb.²⁰² Adapting the rule of three to the context of nationwide injunctions, a court could conclude that the law is sufficiently settled when three different district courts, ideally in different circuits, have adopted the same view of the law.

A rule of three allays nearly all of the concerns discussed above. Most obviously, insisting that at least three courts rule on a question before a nationwide injunction may issue obviates the one-and-done problem that has animated *Mendoza* and scholarly objections to the nationwide injunction. If three different district courts in different circuits have ruled on a question, then there is the potential for percolation. Even if the government has to conform its (nationwide) conduct to the rulings, it still has the opportunity to pursue appeals, including to the Supreme Court. In other words, this rule of thumb consciously facilitates percolation, such that there is little risk of prematurely freezing the law.

Relatedly, a rule of three significantly reduces (even if it does not eliminate) the extreme pressure to forum shop. True, a plaintiff might still try to select an especially favorable court or judge to rule on a question. The stakes are much lower, though, if courts may not issue a nationwide injunction until something of a judicial consensus has emerged. Similarly,

²⁰¹ See Paul D. Carrington, *United States Appeals in Civil Cases: A Field and Statistical Study*, 11 HOUS. L. REV. 1101, 1104 (1974) (noting that while the government “does not regard a decision of the United States Court of Appeals as authoritative . . . [i]t appears to be the house rule of the Justice Department that three unanimous Courts of Appeals decisions are sufficient to establish authoritatively that a government position is wrong”). Relatedly, Judge Posner has argued that “when the first three circuits to decide an issue have decided it the same way, the remaining circuits should defer to that decision.” RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 381 (1985).

²⁰² See *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1093 (D.C. Cir. 1992) (“[N]ow that three circuits have rejected the Board’s position, and not one has accepted it, further resistance would show contempt for the rule of law. After ten years of percolation, it is time for the Board to smell the coffee.”). Cf. Samuel Figler, *Executive Agency Nonacquiescence to Judicial Opinions*, 61 GEO. WASH. L. REV. 1664, 1684-87 (1993) (criticizing the “three-strike rule” as arbitrary and problematic).

because everything no longer rides on a single district court's decision, the Solicitor General will retain discretion to choose whether to appeal some adverse decisions.

In a subtle but important way, a rule of three alleviates preclusive asymmetry—the problem that no matter how many times a defendant wins individual cases, those wins can never apply universally, but even a single loss can become entrenched nationwide.²⁰³ The rule of three would not necessarily allow the government-defendant to shut down challenges based on its legal victories, but it would prevent a nationwide injunction from issuing if the government's position has prevailed in at least one case. Another way to put the point is that a rule of three is sensitive to the problem of actually inconsistent results and prevents one plaintiff-friendly ruling from becoming entrenched in the face of actual victories by the government.

2. Applying the Theory

The following four scenarios illustrate how the theory developed here can and should apply in practice.

First, consider the case of Kim Davis, the local clerk in Rowan County, Kentucky, who refused to issue marriage licenses to same-sex couples on account of her religious objections to same-sex marriage. The Supreme Court had recently decided *Obergefell v. Hodges*, which clearly articulated that same-sex couples enjoy an equal constitutional right to marry.²⁰⁴ True, Kim Davis had not been an actual party to the *Obergefell* lawsuit, but the Supreme Court's holding was clear beyond peradventure. Accordingly, four couples sued Davis, and the district court granted a preliminary injunction in favor of the plaintiffs.²⁰⁵ Several weeks later, the court clarified that the injunction applied to *everyone* in Rowan County, Kentucky, including those who were not parties to any lawsuits.

The court explained its reasoning as follows:

[I]t soon became apparent that Davis denied marriage license requests submitted by other couples, including, but not limited to, Plaintiffs in two companion cases before this Court. Had the Court declined to clarify that its ruling applied to all eligible couples seeking

²⁰³ At the risk of flogging a dead horse: Think once more about the railroad in the train crash hypothetical.

²⁰⁴ 135 S. Ct. 2584, 2607 (2015) (“The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States.”).

²⁰⁵ *Miller v. Davis*, 123 F. Supp. 3d 924, 929, 944 (E.D. Ky. 2015).

a marriage license in Rowan County, it would have effectively granted Plaintiffs' request for injunctive relief and left other eligible couples at the mercy of Davis' "no marriage licenses" policy, which the Court found to be in violation of the Supreme Court's decision in *Obergefell v. Hodges*. Such an approach would not only create piecemeal litigation, it would be inconsistent with basic principles of justice and fairness.²⁰⁶

The Davis episode is a classic example involving settled law and a government official who was behaving in bad faith by knowingly refusing to apply that law. An injunction that expressly benefited all similarly situated nonparties was entirely appropriate. In some ways, this is the quintessential scenario of when a broad injunction is most appropriate.²⁰⁷

Second, the initial version of the so-called travel ban that President Trump promulgated a week after his inauguration led to litigation that quickly gave rise to consensus, at least with respect to certain issues.²⁰⁸ Most famously, the executive order suspended entry into the United States by any national of Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.²⁰⁹ Various plaintiffs, including several lawful permanent residents ("green card" holders), challenged the executive order. Five courts quickly granted nationwide injunctions in the form of temporary restraining orders or stays, which prevented the Trump administration from enforcing the order.²¹⁰ The President's legal authority to ban green card holders from returning to the United States was especially dubious, as even the administration soon recognized.²¹¹

²⁰⁶ *Miller v. Davis*, No. CV 15-44-DLB, 2015 WL 9460311, at *2 (E.D. Ky. Sept. 23, 2015) (citations omitted).

²⁰⁷ Note that, strictly speaking, it is not an injunction that literally extends everywhere in the nation, because the purview of Davis's authority was only within Rowan County, Kentucky. As explained in the introduction, though, this is still within the rubric of the injunctions denominated as "nationwide injunctions" because it is directed at the defendants and expressly applies to nonparties.

²⁰⁸ *See* Exec. Order No. 13,769, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977 (2017).

²⁰⁹ *See id.* § 3(c).

²¹⁰ *See* *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017); *Mohammed v. United States*, No. CV1700786ABPLAX, 2017 WL 438750 (C.D. Cal. Jan. 31, 2017); *Tootkaboni v. Trump*, No. 17-CV-10154, 2017 WL 386550, at *1 (D. Mass. Jan. 29, 2017); *Aziz v. Trump*, No. 1:17-CV-116, 2017 WL 386549 (E.D. Va. Jan. 28, 2017); *Darweesh v. Trump*, No. 17 CIV. 480 (AMD), 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017).

²¹¹ *Louhghalam v. Trump*, 230 F. Supp. 3d 26, 32 (D. Mass. 2017) ("On February 1, 2017, the White House distributed a memorandum to the Acting Secretary of State, the

The courts were unanimous in determining that an injunction restraining enforcement of the first iteration of the travel ban was appropriate, particularly as applied to lawful permanent residents. This is a situation in which the rule of three suggested that the law was settled as to the appropriateness of a temporary restraining order. Although the first and second courts to consider the question probably should not have issued nationwide injunctions, by the time that the third, fourth, and fifth courts reached the same conclusion, broad relief was proper, particularly given the provisional nature of the relief. It allowed even nonparties to benefit from the judicial consensus. By the same token, the multiplicity of live lawsuits also ensured that the issue could percolate through the courts of appeals.

Recognizing that the first executive order was legally problematic, President Trump revised the order twice.²¹² Although most courts continued to find that injunctions were appropriate, they did not reach the same degree of consensus that courts had when considering the first travel ban. Moreover, the Supreme Court ultimately determined, against the weight of the lower courts' conclusions, that a preliminary injunction was inappropriate.²¹³ The lack of consensus with respect to the second and third iterations of the travel ban suggested that nationwide injunctions were inappropriate in those situations.

Third, consider the first challenge to President Trump's directive that prohibited transgender persons from joining the military and called for the dismissal of transgender persons who were already serving.²¹⁴ Eight plaintiffs brought suit in the District Court for the District of Columbia.²¹⁵ In finding that the plaintiffs were likely to succeed on the merits of their constitutional challenges to certain facets of the policy, the judge issued a preliminary injunction.²¹⁶ Rather than granting relief only to the eight plaintiffs in the lawsuit, the judge issued a nationwide injunction, preventing the administration from enforcing the key aspects of the policy against *anyone*.

Acting Attorney General and the Secretary of Homeland Security clarifying that Sections 3(c) and 3(e) of the EO do not apply to lawful permanent residents.”)

²¹² See Presidential Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45161 (2017); Exec. Order No. 13,780, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13209 (2017).

²¹³ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

²¹⁴ See *Doe v. Trump*, 275 F. Supp. 3d 167, 175-76 (D.D.C. 2017).

²¹⁵ See *id.* at 185-90.

²¹⁶ See *id.* at 207 (preliminarily enjoining enforcement of the Accession and Retention Directives).

This is a classic example of what the Court in *Mendoza* and opponents of nationwide injunctions feared—that the first court to resolve a matter against the government could freeze the law and thwart percolation. Under the theory developed here, a nationwide injunction was premature. Thus, the court should have granted relief only to the eight actual plaintiffs in the lawsuit and given other courts an opportunity to weigh in.

Subsequent developments, though, illustrate exactly how the “rule of three” can apply most fruitfully. Three other lawsuits also challenged the transgender service ban, and in each case, federal courts in Maryland, Washington, and California issued nationwide preliminary injunctions.²¹⁷ The four lawsuits did not definitively settle the question of whether the transgender service ban was constitutional. Far from it, particularly in light of the Supreme Court’s interest in the matter.²¹⁸ But the law was settled enough to put the onus on the government to justify why it should be able to continue enforcing a policy that four courts had determined was probably unconstitutional. Because the district courts were in three different circuits (the D.C., Fourth, and Ninth Circuits), there remained ample opportunity for percolation and for the government to choose which cases to appeal. Moreover, the precise nature of the relief (preliminary injunctions) allayed concerns that the law was being frozen prematurely. The district courts, the reviewing courts of appeals, and the Supreme Court all retained the ability to rule on the merits of the ultimate constitutional questions.

Finally, I offer some preliminary thoughts on how a plaintiff might demonstrate governmental bad faith, even in the absence of truly settled law. As noted earlier, if the government consistently declines to appeal its losses, it arguably is not seeking to vindicate its vision of the law.²¹⁹ Why would the government take this approach? Even if the losses build up, but relief extends only to the individual plaintiffs, the government can win by losing—over time, a regulatory regime (regardless of its legality) becomes increasingly difficult to dismantle. Moreover, by declining to appeal, the government avoids any binding precedent from higher courts.

One of the clearest modern examples of regulatory entrenchment is the Affordable Care Act (“Obamacare”). By 2017, it had gained such a strong

²¹⁷ See *Stone v. Trump*, 280 F. Supp. 3d 747, 772 (D. Md. 2017); *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017); *Stockman v. Trump*, No. EDCV171799JGBKKX, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017).

²¹⁸ See *Trump v. Stockman*, No. 18A627, 2019 WL 271946 (U.S. Jan. 22, 2019) (granting government’s application for stay pending disposition); *Trump v. Karnoski*, No. 18A625, 2019 WL 271944 (U.S. Jan. 22, 2019) (same).

²¹⁹ See *Estreicher & Revesz*, *supra* note 22, at 756-57.

foothold that President Trump and a Republican Congress, which had long evinced hostility to the regime, could not muster the votes to repeal it. This is an example of regulatory entrenchment but not bad faith because the Obama administration had actively defended its position, including twice before the Supreme Court.²²⁰

Identifying situations in which the government declines to appeal adverse lower court rulings with the clear intention of entrenching a regime, rather than actually defending its legality, is difficult. In part, this is because courts are increasingly willing to grant nationwide injunctions, which are justifiable precisely to avoid this kind of bad faith. Samuel Bray has suggested one such example, though, in which the Supreme Court issued a rare stay pending disposition while lower courts considered challenges to President Obama's Clean Power Plan.²²¹ This well could have been a situation in which the court foresaw that if the plan remained in place long enough, the regime would become entrenched regardless of how courts ultimately ruled on the challenges.

B. Nationwide Injunctions and Public Rights Litigation

Not only are nationwide injunctions an essential tool for ensuring governmental good faith, but they also fit comfortably within several developments surrounding public rights litigation. In particular, nationwide injunctions are part of the broader phenomenon of aggregate litigation, which can take many forms that do *not* involve class actions. Relatedly, they are largely consistent with the expanding role of precedent, which nearly always applies to people who were not parties to the precedent-creating lawsuit.

Some have argued that nationwide injunctions are improper because there is a superior mechanism that can provide broad relief to people who are similarly situated—a properly certified class action.²²² The class certification process tests whether plaintiffs indeed share certain commonalities, whether the named plaintiffs are adequate class representatives, and whether lawyers are sufficiently representing the group's interests.²²³ But class actions are not a panacea to the problems of group

²²⁰ See *King v. Burwell*, 135 S. Ct. 2480 (2015); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

²²¹ See Bray, *supra* note 2, at 476-77; see also *Chamber of Commerce v. EPA*, 136 S. Ct. 999 (2016).

²²² See Bray, *supra* note 2, at 475-76; see also Letter from Law Professors to Members of Congress Regarding H.R. 6730 (Sept. 10, 2018) (endorsing courts' power to accord broad relief in conjunction with a properly certified class).

²²³ See FED. R. CIV. P. 23(a), (g).

litigation. Focusing too much on class actions runs the risk of glossing over the complex ways that aggregate litigation—and, specifically, public rights litigation—can play out.

First, there is no hard and fast division between class actions and other forms of aggregate litigation.²²⁴ Many cases contain an “inherently aggregate dimension,” even when a plaintiff is nominally litigating on an individualized basis.²²⁵ Certain cases that in theory could proceed as a class action rarely do so when a class action offers no advantages over individual lawsuits.²²⁶ This frequently happens when a plaintiff alleges that a statute or regulation is facially unconstitutional,²²⁷ but the phenomenon is manifest in other public rights lawsuits. For example, when one person seeks a document from the government under the Freedom of Information Act (“FOIA”),²²⁸ the request and any resulting lawsuits can effectively make a document available not simply to the individual, but instead to the entire world.²²⁹

In these situations, class actions are largely unnecessary,²³⁰ and for precisely that reason, judges sometimes decline to certify classes in such cases.²³¹ Moreover, individual plaintiffs often have an incentive *not* to seek class certification because if a class is certified and the plaintiffs lose, then that adverse judgment binds all of them. By contrast, if the group members proceed one at a time in individualized suits, then an adverse judgment affects only the one losing plaintiff; the other members of the group remain free to bring their own lawsuits.²³²

Second, class actions are often ineffectual in dealing with “embedded aggregation,” which Richard Nagareda described as individual litigation that “gives rise to demands for the suit to bind nonparties in some fashion.”²³³

²²⁴ See Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 624 (2011).

²²⁵ Carroll, *supra* note 43, at 2019.

²²⁶ See Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 207.

²²⁷ See, e.g., *All. to End Repression v. Rochford*, 565 F.2d 975, 980 (7th Cir. 1977) (“[I]t is important to note whether the suit is attacking a statute or regulation as being facially unconstitutional. If so, then there would appear to be little need for the suit to proceed as a class action.”).

²²⁸ 5 U.S.C. § 552(a)(3).

²²⁹ Under FOIA, the government technically discloses the document only to the requesting party, but that party may then make the document available to the entire public.

²³⁰ See Marcus, *supra* note 87, at 822-23

²³¹ See, e.g., *Kan. Health Care Ass’n v. Kan. Dep’t of Soc. and Rehab. Servs.*, 31 F.3d 1536, 1548 (10th Cir. 1994); *Davis v. Smith*, 607 F.2d 535, 540 (2d Cir. 1978); *Mills v. D.C.*, 266 F.R.D. 20, 22 (D.D.C. 2010).

²³² See Trammell, *supra* note 40, at 572.

²³³ Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1108 (2010).

Return to the FOIA request, which nicely illustrates the problem. Assume that one person requests a document, the government denies the request, and an ensuing lawsuit vindicates the government's position. A second person comes along and requests the same document, but he also loses a lawsuit. And so on until one person prevails against the government. Note that this does not simply lead to inconsistent results. The government's one loss effectively nullifies all of its earlier victories because the document is now available to the whole world. So, there is obviously an aggregate dimension to each individual lawsuit in this scenario. But as much as the government would like to resolve once and for all whether the document is available, there currently is no good way to do that under FOIA. Moreover, a class action does not solve the problem precisely because the plaintiffs have no incentive to proceed on a class-wide basis.²³⁴

Third, a class action does not necessarily obviate the concerns about nationwide injunctions. Imagine that a court certifies a nationwide class of plaintiffs, as for example one court in California did when considering President Trump's family separation policy.²³⁵ If that court is the first to consider the matter and then issues a broad injunction, the one-and-done problem remains. That is, one court's decision, even in the context of a properly certified class action, can freeze the law after only a single lawsuit, thereby thwarting percolation of the issue through the courts.²³⁶ Moreover, insisting on class actions does nothing to curtail the plaintiffs' incentive to forum shop.

A distinct but related development is the manner in which precedent increasingly binds people who did not participate in the precedent-creating lawsuit. The standard account of precedent in a common law system is that it concerns pure legal questions, and when it applies, it operates with a degree of flexibility.²³⁷ In recent years, though, scholars have documented how precedent has become increasingly rigid, at times verging on absolute.²³⁸ Moreover, precedent has begun to apply not just to large legal questions but also to mixed questions of law and fact as well as intensely factual questions.²³⁹ When this happens, the first person to litigate a matter can wind

²³⁴ See *Taylor v. Sturgell*, 553 U.S. 880 (2008).

²³⁵ See *Ms. L. v. U.S. Immigration & Customs EnFt* ("ICE"), 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

²³⁶ See Morley, *De Facto Class Actions?*, *supra* note 9, at 540-44.

²³⁷ ROBERT C. CASAD & KEVIN M. CLERMONT, *RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE* 15 (2001).

²³⁸ See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1043-47 (2003); Max Minzner, *Saving Stare Decisis: Preclusion, Precedent, and Procedural Due Process*, 2010 BYU L. REV. 597, 606-09.

²³⁹ See Trammell, *supra* note 40, at 583-91.

up creating sweeping precedent that becomes binding on people who did not have notice of the precedent-creating lawsuit or have an opportunity to participate in it. Thus, in a subtle way, the surreptitious expansion of precedent is essentially another example of aggregate litigation that binds nonparties.

I am not endorsing all of the various ways that aggregate litigation can take place and the ways that nonparties can be bound by lawsuits. Rather, these developments highlight the fact that aggregate litigation often poses difficult and nuanced problems that will vary from context to context. Nationwide injunctions are very much part of that conversation. While some scholars have convincingly argued that class actions can usefully address certain aggregate litigation problems,²⁴⁰ class actions are not always the solution. Instead, judges and scholars should think systematically about the nature of the problems and the best ways to address them. This Article's discussion of nationwide injunctions has aspired to do that by identifying the specific concerns that inhere in nationwide injunctions and offering ways to ameliorate those concerns.

C. The Role of Party Status

Finally, the most trenchant criticism of the preclusion model—that it elides a critical distinction between parties and nonparties—merits brief discussion. Part I showed that there are no constitutional or structural constraints on courts' power to issue nationwide injunctions that benefit nonparties. I respond here to more conceptual concerns.

Critics of nationwide injunctions would argue that the analogy between such injunctions and preclusion is fundamentally flawed because whether someone is an actual party to litigation makes all the difference. Assume that *A* sues the government and wins; *B* then sues the government and invokes preclusion, essentially piggybacking on *A*'s victory. In this scenario—the critics say—*B* indeed might be able to take advantage of preclusion, but only because *B* actually brought her own lawsuit. That is, unlike in the nationwide injunction context, *B* became a party to a lawsuit.

In this telling, a lawsuit results in a *judgment*, which only parties may enforce.²⁴¹ By contrast, nonparties to a lawsuit may not directly benefit from the judgment but instead may indirectly take advantage of the *precedent* that

²⁴⁰ See, e.g., Carroll, *supra* note 43, at 2022, 2075-79; Marcus, *supra* note 87, at 821-33.

²⁴¹ Bruhl, *supra* note 9, at 517 (“Judgments are specific to the parties before the court.”); Blackman & Wasserman, *supra* note 9, at 244 (arguing that a “court’s judgment and injunction compel conduct by the named defendants as to the named plaintiffs”).

the court creates (and even then, only when the nonparty eventually brings her own lawsuit).²⁴²

The critics' observation is true, so far as it goes—in one scenario (the preclusion context), *B* eventually becomes a party; in another scenario (the nationwide injunction), *B* always remains a nonparty. Sometimes party status is quite significant. For example, if someone who is subject to an injunction flouts it, then the opposing party may enforce the injunction through a contempt proceeding.²⁴³ A nonparty, by contrast, has no such power at his disposal. But the distinction between parties and nonparties cannot bear the weight of explaining why, as the critics contend, nationwide injunctions may *never* directly benefit nonparties.

Consider how two of the most forceful and eloquent advocates of this argument, Josh Blackman and Howard Wasserman, describe their alternative vision. They focus on the marriage equality litigation, which is a useful way to illustrate their essential arguments as well as the flaws of rejecting nationwide injunctions.

Begin with the litigation in California over Proposition 8, which prohibited same-sex marriage. Two couples successfully challenged the constitutionality of the provision, and the resulting injunction enjoined California officials from enforcing the marriage ban against *anyone*, not just the plaintiffs.²⁴⁴ This case predated both *United States v. Windsor*²⁴⁵ and *Obergefell v. Hodges*,²⁴⁶ which together announced a constitutional right to same-sex marriage. Moreover, for various procedural reasons, no one actually had standing to appeal the Prop 8 decision.²⁴⁷ Blackman and Wasserman argue that the injunction was overbroad and should have benefited only the actual plaintiffs.²⁴⁸ Based on the theory that I have developed here, I agree with their conclusion, but not because of an inviolable distinction between

²⁴² See Blackman & Wasserman, *supra* note 9, at 250 (“As to nonparties, the force of the judgment and opinion justifying the judgment derives entirely from the doctrine of precedent.”); *id.* at 251 (“Precedent can be enforced as to those new parties only through that additional step of new litigation.”); see also Bray, *supra* note 2, at 474 (“Because the plaintiff is the one who took the initiative and sued, it is the plaintiff who is protected. Others can receive the same protection if they take the same action by bringing their own suits (invoking the authority of the earlier decision).”); Bruhl, *supra* note 9, at 506 (“Everyone gets the decision’s precedential value . . . but only the parties get the judgment that definitively decides their rights and liabilities.”).

²⁴³ See JOHN DOBBYN, INJUNCTIONS IN A NUTSHELL 223 (1974).

²⁴⁴ See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010).

²⁴⁵ 570 U.S. 744 (2013).

²⁴⁶ 135 S. Ct. 2584 (2015).

²⁴⁷ See *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013).

²⁴⁸ See Blackman & Wasserman, *supra* note 9, at 249.

parties and nonparties. Rather, the law regarding same-sex marriage simply was not yet settled.

Now return to a very different scenario mentioned earlier—Kim Davis’s intransigence in refusing to issue marriage licenses, even in the wake of the Supreme Court’s *Obergefell* decision. Based on the theory embraced by many scholars that a judgment, strictly speaking, applies only to the actual parties to a lawsuit,²⁴⁹ Kim Davis technically was not bound by the judgment in *Obergefell*. On this view, when couples who were not parties to the *Obergefell* lawsuit sought marriage licenses from Kim Davis, nothing formally compelled her to issue licenses. In order to take advantage of *Obergefell*, nonparties would have to bring their own lawsuits, and only by securing their own judgments could they compel Davis (by virtue of the judgment itself or an injunction to enforce it) to issue a license.

Blackman and Wasserman partially ground their argument in departmentalism—the idea that courts do not decide what “the Constitution means *for everybody*,”²⁵⁰ but rather that federal and state officials “wield independent power to interpret the Constitution and to act on their constitutional understandings.”²⁵¹ Thus, Kim Davis had a right to interpret the Constitution as she saw fit and behave accordingly. This is supposedly true, even in the face of *Obergefell*, unless and until another judgment from another lawsuit compelled her to issue a marriage license to specific parties. Blackman and Wasserman are admirably candid about the import of their theory. Even those who aren’t thoroughgoing departmentalists essentially invite the same official intransigence when they insist that an injunction may *never* benefit a nonparty. The only palliative is an appeal to practicality and civic virtue—the aspiration that most officials don’t behave like Kim Davis.²⁵²

This view essentially leads to government by litigation. Law is never settled, and (absent voluntary compliance) it never applies to anyone who has not brought her own lawsuit. Every parent must sue school boards that disagree with *Brown v. Board of Education* and seek to maintain segregated

²⁴⁹ See, e.g., Bray, *supra* note 2, at 244; Bruhl, *supra* note 9, at 507-08, 517; Morley, *De Facto Class Actions?*, *supra* note 9, at 516.

²⁵⁰ Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1715 (2017).

²⁵¹ Blackman & Wasserman, *supra* note 9, at 252.

²⁵² See *id.* at 257 (arguing “that state officials can, and usually will, conform their conduct to precedent as to similarly situated persons”); see also Bruhl, *supra* note 9, at 550 (“Today it is only barely conceivable that government officials would treat a Supreme Court decision as applicable only to the named plaintiffs while continuing to act on their own contrary understanding of the law as to all other persons similarly situated.”).

schools. Every person must initiate a lawsuit to avoid having to pay a tax that courts have declared unconstitutional. Every same-sex couple that wants to marry must sue clerks, emboldened by Kim Davis's example, who disagree with *Obergefell*.

But this is not how government does or should work. Sometimes disuniformity and legal uncertainty are unavoidable.²⁵³ Moreover, as I have emphasized, different courts should have an opportunity to weigh in on a particular legal question. At some point, though, the law can become settled.

This is true when the Supreme Court conclusively resolves a matter, but it can happen even short of that level of clarity.²⁵⁴ The idea that law can become broadly settled and enforceable is most evident in light of the modern interpretation of § 1983,²⁵⁵ which permits damages actions against state officials who violate people's federal civil rights.²⁵⁶ Modern civil rights litigation rests on the idea that law indeed becomes settled, for without that predicate, § 1983 would be a dead letter. Citizens may rely on the eminently reasonable assumption that officials will abide by settled law, and they may seek compensation when officials fail to do so.²⁵⁷

In other words, the argument that officials are bound only by the literal words of a judgment (and only with respect to the actual parties to a lawsuit) is antithetical to the entire governance structure in which courts and officials operate.²⁵⁸ Law can be settled—for *everybody*—including for those who never participated in a lawsuit. When it is, various mechanisms exist to ensure that government complies with that law, and nationwide injunctions, when deployed to this end, are both sensible and consistent with modern jurisprudence.

²⁵³ See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1570-72 (2008).

²⁵⁴ One might quibble with whether the “rule of three” draws the line in the correct place, but this does not undermine the idea that the law can become clear.

²⁵⁵ 42 U.S.C. § 1983.

²⁵⁶ See *Monroe v. Pape*, 365 U.S. 167 (1961).

²⁵⁷ The extent to which the law is sufficiently settled to justify a nationwide injunction is not necessarily coextensive with the degree to which law is settled for purposes of § 1983. The purposes of the two devices are very different. Nonetheless, both rest on the concept that law indeed can be settled at some point.

²⁵⁸ Blackman and Wasserman argue that mere precedent, even binding precedent, never obligates an official to act because a nonparty may not enforce precedent through a contempt action. Nonetheless, they concede that a nonparty may bring a § 1983 action against an official who fails to respect binding precedent. See Blackman & Wasserman, *supra* note 9, at 251-52. To argue that binding precedent, even in the face of a § 1983 action, does not create an “obligation” seems semantic and unhelpful.

Conclusion

Scholars justifiably have become concerned that courts are issuing nationwide injunctions too often and too quickly. Such behavior risks enshrining one judge's idiosyncratic view of the law and preventing the government from engaging in a good-faith effort to craft and defend complex policies. But the other extreme is equally unattractive. A rule that absolutely prevents courts from demanding compliance with well established law would invite a government of men, not laws.

At first blush, the nuts and bolts of preclusion seem to lie at the opposite end of the spectrum from heady political debates about immigration, LGBT equality, and environmental protection. The doctrine and theory of preclusion, though, can explain why nationwide injunctions are neither constitutionally problematic nor always prudent. Moreover, preclusion reveals the precise circumstances in which courts may demand that the government broadly comply with settled law, even for the benefit of nonparties. In short, the preclusion model of nationwide injunctions can chart a careful and systematic course between two unappealing extremes.