

Multiple Chancellors:  
Reforming the National Injunction

Samuel L. Bray<sup>1</sup>  
*Draft of February 9, 2017*

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<sup>1</sup> Professor, UCLA School of Law; Harrington Faculty Fellow, University of Texas, Austin. For comments and criticisms on earlier drafts, I am grateful to Will Baude, Josh Blackman, Bob Bone, Maureen Carroll, Nathan Chapman, Kevin Clermont, Kristen Eichensehr, Richard Fallon, Ranjit Hakim, Andy Hessick, Andrew Kull, Douglas Laycock, Marty Lederman, Michael Morley, Nicholas Parillo, Richard Re, Doug Rendleman, Bertrall Ross, Steve Sachs, Eugene Volokh, Kevin Walsh, Patrick Wooley, Stephen Yeazell, and the participants in the law faculty workshop at the University of Texas, Austin. For helpful conversations and correspondence, I am grateful to Ronen Avraham, Aaron Bruhl, Jud Campbell, Perry Dane, Ward Farnsworth, John Golden, Michael McConnell, Andrew Pincus, Zachary Price, Larry Sager, David Waddilove, and Howard Wasserman. I also thank Lei Zhang for archival and research support.

## Introduction

Federal district judges have taken to an odd practice: issuing injunctions that apply across the nation, controlling the defendant’s behavior with respect to non-parties. A recent example is the preliminary injunction in *United States v. Texas*, which shut down the implementation of the Obama administration’s most important immigration program.<sup>2</sup> More recent still is the preliminary injunction in *Washington v. Trump*, which halted the implementation of President Trump’s order blocking travel from seven countries.<sup>3</sup> How did this practice of issuing national injunctions begin? Is it defensible?

This Article offers a new analysis of the scope of injunctions to restrain the enforcement of a federal statute, regulation, or order. Without much controversy, federal courts have increasingly been acting as if they have the authority to issue “national injunctions.”<sup>4</sup> That is, in non-class actions, federal courts are issuing injunctions that are universal in scope— injunctions that prohibit the enforcement of a federal statute, regulation, or order *against anyone, and not only against the plaintiff*. There is a small but growing literature critical of the national injunction.<sup>5</sup> The criticisms expressed in this literature are essentially correct, including that the national injunction encourages forum-shopping and that it arrests the development of the law in the federal system. But there is a strange disconnect between the diagnosis and the cure. The solutions proposed in

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<sup>2</sup> *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex.), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *aff’d by an equally divided Court*, 136 S.Ct. 2271 (2016).

<sup>3</sup> *Washington v. Trump*, Temporary Restraining Order, No. C17-0141JLR (W.D. Wash. Feb. 3, 2017). The Ninth Circuit treated the district court’s order as an appealable preliminary injunction and denied a stay. *Washington v. Trump*, Order, No. 17-35105 (9th Cir. Feb. 9, 2017) (*per curiam*). For other recent suits seeking national injunctions, see *infra* notes 34-38 and accompanying text.

<sup>4</sup> No term is perfect. “Nationwide injunction” is particularly inapt: it encourages a focus on territorial breadth, when the point of distinction is rather that the injunction applies to non-parties. See *infra* note 143. “Universal injunction” is better, though it does not include the distinctive fact that these injunctions constrain the national government, as opposed to state governments. See *infra* note 32 and accompanying text.

<sup>5</sup> See Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. L. & PUB. POL’Y 487 (2016); Zayn Siddique, Note, *Nationwide Injunctions* (draft of June 1, 2016, available [here](#)); Daniel J. Walker, Note, *Administrative Injunctions: Assessing the Propriety of Non-Class Collective Relief*, 90 CORNELL L. REV. 1119 (2005); 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, 2030-2034 (2015). Professor Laycock has questioned the use of injunctions that run beyond the plaintiffs. See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 276 (4th ed. 2010) (hereafter LAYCOCK, MODERN AMERICAN REMEDIES); Thomas C. Berg & Douglas Laycock, *Protecting Same-Sex Marriage and Religious Liberty*, in RELIGION AND EQUALITY: LAW IN CONFLICT 167, 172 n. 25 (W. Cole Durham, Jr. & Donlu Thayer, eds., 2016).

this literature rely heavily on existing principles and appeals to judicial self-restraint. If these solutions would work, they would already have worked.

This Article shows how we got here, and where we should go next. Its contributions, in other words, are two.

First, it offers a new understanding of the causes of the current problem. It shows that the national injunction is a recent development in the history of equity, traceable to the second half of the twentieth century. The older American practice was that an injunction would restrain the defendant's conduct vis-à-vis the plaintiff, not vis-à-vis the world.<sup>6</sup> Thus, judicial behavior about the scope of injunctions has changed. But more has changed than judicial behavior.

If the English chancellor had given national injunctions, they would not have been particularly problematic.<sup>7</sup> There would have been no forum-shopping and no risk of conflicting injunctions issued to the same defendant. The reason is a structural feature of English equity: there was *one chancellor*. By contrast, in the federal courts of the United States, every judge is a "chancellor" in the sense of having power to issue equitable relief. The current problems from the national injunction are thus a result of two transformations. One involved judicial institutions (the number of chancellors). That transformation was a necessary precondition for the second, which involved judicial behavior (the scope of relief granted). The multiple-chancellor model of the federal courts requires better behavior from judges about the scope of equitable relief, behavior we can no longer count on.

Second, this Article proposes a single clear principle for the scope of injunctions against federal defendants. A federal court should give what might be called a "plaintiff-protective injunction," enjoining the defendant's conduct only with respect to the plaintiff.<sup>8</sup> No matter how important the question and no matter how important the value of uniformity, a federal court should not award a national injunction. This principle, if adopted by the courts or by Congress, would solve the forum-shopping problem. It would restore the percolation of legal questions

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<sup>6</sup> There were exceptions, including *in rem* suits, but they do not offer a basis for national injunctions. An injunction could control the defendant's conduct outside the court's territorial jurisdiction, but it would do so to protect the plaintiff, not to protect non-parties.

<sup>7</sup> The injunction is an equitable remedy, developed primarily in the English Court of Chancery. For a sketch of the history of equity, see J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 97–116 (4th ed. 2002).

<sup>8</sup> A similar principle has been suggested by Professor Laycock: "[T]he court in an individual action should not globally prohibit a government agency from enforcing an invalid regulation; the court should order only that the invalid regulation not be enforced against the individual plaintiff." LAYCOCK, MODERN AMERICAN REMEDIES, at 276.

through the different courts of appeals, allowing each circuit to reach its own conclusion pending resolution by the Supreme Court. It would nearly eliminate the risk of directly conflicting injunctions.

This principle is rooted in the authority of the federal courts. Article III gives the federal courts “the judicial Power.”<sup>9</sup> That is a power to decide cases for parties, not questions for everyone.<sup>10</sup> In addition to Article III, a further source of this principle is traditional equity.<sup>11</sup> The federal courts are obligated to trace their equitable doctrines to that source.<sup>12</sup> In the practice of traditional equity, injunctions did not control the defendant’s behavior against non-parties. Yet traditional equity also lacked the sharply defined principle that is advanced here. Because there was one chancellor, the Chancery never needed to develop rules to constrain the scope of injunctive relief. Translating traditional equity into the present, with sensitivity to the changed institutional setting, requires this principle.

The central objection to the proposal here is that it will lead to disuniformity in the law. That disuniformity will be of two kinds. First, if an injunction protects only the plaintiffs, the federal government may continue to apply the invalidated statute, regulation, or order to other people. Second, once the disuniformity within a circuit is ended, usually but not always by a holding from the court of appeals,<sup>13</sup> the federal government may continue enforcement in other circuits.

Is the bitter worth the sweet? Our system already tolerates a substantial amount of legal disuniformity. Without a decision by the Supreme Court, state and lower federal courts can reach different conclusions on the same

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<sup>9</sup> 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.”).

<sup>10</sup> See *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (“It is the role of the courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.”).

<sup>11</sup> “Traditional equity” and “Traditional equitable principles” are often invoked in the Court’s jurisprudence on equitable remedies. In general, the Court has constructed an artificial history of equity that is not tied to any particular moment. See Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997 (2015).

<sup>12</sup> See *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). *Grupo Mexicano* has been the subject of significant criticism from legal scholars. See, e.g., Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291 (2000); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003). Nevertheless, the emphasis on traditional equity in *Grupo Mexicano* is longstanding, see John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 126-129 (1998), and it has been extended by the Supreme Court in numerous subsequent cases, see Bray, 68 VAND. L. REV. 997.

<sup>13</sup> See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989).

question.<sup>14</sup> The national government is not subject to offensive issue preclusion in later suits with different parties.<sup>15</sup> When federal agencies lose in one circuit, they often continue litigating the question in other circuits.

If this seems like madness, it has a method. If the circuits all agree, their precedents resolve the question; if they disagree, the Supreme Court gains from the clash of opposing views. We sacrifice immediate resolution for what we hope will be better decision-making.<sup>16</sup> The national injunction requires the opposite sacrifice, giving up deliberate decision-making for accelerated resolution. Cases still go to the Supreme Court, but without the benefit of decisions from multiple courts of appeals. If the national injunction issued by the district court is a preliminary one, the Supreme Court might decide a major constitutional question on a motion for a stay. That very nearly occurred with the Take Care Clause claim in *United States v. Texas*, and it may be on the verge of occurring with major questions about executive power, immigrant rights, and religious freedom in *Washington v. Trump*.<sup>17</sup> By returning to the older practice with respect to the scope of injunctions—the practice that obtained for a century and a half, and still is followed in many cases—we choose patience and get better decisions. Measure twice, cut once.

The proposal made here differs sharply from the solutions proposed by most commentators.<sup>18</sup> The limiting principles they have suggested include whether a broad injunction is necessary to provide “complete relief,”<sup>19</sup> whether “the court believes the underlying right is highly significant,”<sup>20</sup> whether the challenge is to “a generally applicable policy or practice maintained by the defendant,”<sup>21</sup> and whether “the challenged provision can coherently be applied just to people other than the plaintiffs.”<sup>22</sup> These approaches and proposals are all indeterminate. Some are question-

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<sup>14</sup> See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997); *Lockhart v. Fretwell*, 506 U.S. 364, 375-76 (1993) (Thomas, J., concurring).

<sup>15</sup> See *United States v. Mendoza*, 464 U.S. 154 (1984).

<sup>16</sup> *But cf.* Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1 (2009).

<sup>17</sup> On the possibility that the outcome of *NFIB v. Sebelius* would have been different if it had been decided on a motion to stay a preliminary injunction, see *infra* note 49.

<sup>18</sup> As noted, see *supra* note 8, Professor Laycock has also questioned the use of injunctions to benefit non-parties.

<sup>19</sup> Siddique, *supra* note 5.

<sup>20</sup> *Zamecnik v. Indian Prairie School Dist. No. 204*, 636 F.3d 874, 879 (7th Cir. 2011) (Posner, J.) (quoting 1 DAN B. DOBBS, *LAW OF REMEDIES* § 2.4(6), p. 113 (2d ed. 1993)). Note that *Zamecnik* did not involve a national injunction, but it did address the scope of the injunction.

<sup>21</sup> AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* § 204(a)–(b) (2010); see also Walker, *supra* note 5, at 1141 (“If a plaintiff successfully challenges a rule of ‘broad applicability,’ then the relief, the invalidation of the rule, will naturally extend to persons beyond the named plaintiffs.”).

<sup>22</sup> Morley, *supra* note 5.

begging.<sup>23</sup> Some are even perverse.<sup>24</sup> They also tend to exhort judges to apply the existing principles in a restrained way. But if the rise of the national injunction was not due to willful judging—if it was latent in the structure of the federal courts and then manifested with changes in ideology<sup>25</sup>—then we must look elsewhere for the answer. Exhortation is not a solution to structural problems and ideological forces.

For the principle proposed here, the historical account of the origins of the national injunction is not mere background. According to current case law, an equitable remedy or doctrine must have a basis in traditional equity.<sup>26</sup> The account here shows that the national injunction lacks the requisite basis. This account also exposes a complexity that scholars and courts need to consider when asking what is part of traditional equity. It is not enough to look at the past to see if some contemporary phenomenon can be spotted there, as if it were a beast in the wild. One must also consider the institutional setting—the *one-chancellor setting*—in which traditional equitable doctrines were fashioned. In that setting, certain powers and limits were developed. Other powers and limits were not developed, because there was no occasion for them. But we live in a multiple-chancellor world. Given the gap between equity’s past and present, sometimes a translation has to be made.<sup>27</sup> Sometimes equity’s principles have to change in order to stay the same.

This point—that the translation of traditional equity into the present needs to take into account the institutional setting—has significance well beyond the national injunction. For example, under present law, the same judge whose injunction was disobeyed can initiate contempt proceedings and then decide both whether to hold the defendant in contempt and what the punishment should be. That striking concentration of powers in a single person is explicable historically, because there was one chancellor. But reforms will eventually need to be made.<sup>28</sup> When that happens, the argument developed here about translating equity with attention to institutional context will be helpful.

Additional points should be noted about the scope of the argument. The assumption made here is that each case discussed is right on the

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<sup>23</sup> E.g., allowing national injunctions only against a “generally applicable policy or practice.”

<sup>24</sup> E.g., allowing national injunctions in “highly significant” cases invites forum-shopping.

<sup>25</sup> Throughout this Article “ideological” is used to refer to intellectual shifts in thinking about law and the nature of the judicial role.

<sup>26</sup> See *supra* note 11.

<sup>27</sup> See Samuel L. Bray, *Form and Substance in the Fusion of Law and Equity* in EQUITY AND LAW: FUSION AND FISSION (John Goldberg, Henry Smith, and Peter Turner eds., forthcoming 2017).

<sup>28</sup> Cf. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 839-44 (1994) (Scalia, J., concurring).

merits; the analysis is about what the court's remedial response should have been. This is a deliberate choice. It is not a naïve choice, as if it rested on a view that merits and remedies are unrelated.<sup>29</sup> Instead, the reason for this assumption is that without it the problem of national injunctions is intractable. It would be easy for a legal scholar, consciously or unconsciously, to think that a "sound" decision on the merits should be paired with a national injunction, while an "unsound" decision should be enforced with an injunction protecting only the plaintiff. But the injunction choice is made by the very same judge who decides the merits. The only way to have any useful guidance about the scope of the remedy is to disentangle it from the correctness of the merits decision.

This analysis considers injunctions that federal courts issue against federal defendants. That question has complications enough without considering other kinds of cases. Even so, the analysis could be applied more broadly. First, in suits between private parties, it is already the case that the practice of the federal courts is generally aligned with the suggestions in this Article.<sup>30</sup> Second, the principle advanced here would logically apply when federal courts enjoin state defendants.<sup>31</sup> That is, federal courts should issue injunctions that control a state defendant's conduct vis-à-vis the plaintiff, not vis-à-vis non-parties. There are pragmatic reasons, though, for distinguishing federal defendants.<sup>32</sup> Finally, the analysis here could be extended to injunctions issued by state courts. Whether it should be, however, depends on whether a state court system prefers speedy resolution of legal questions or an accumulation of multiple judicial opinions (in hope of epistemic advantages).

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<sup>29</sup> See generally Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999). The assumption is clearly fictive, because the risk of error is part of why the national injunction matters. The point is that the remedial rule should not depend on the correctness of any particular merits decision.

<sup>30</sup> For example, when one company is enjoined from using another's patent, even though the territorial scope of the injunction may be universal, the injunction does not prohibit the defendant from infringing the patents of other patent-holders. Rather, it protects only the plaintiff, and only against an almost exact repetition of the previous infringement. See John M. Golden, *Injunctions as More (or Less) Than "Off Switches": Patent-Infringement Injunctions' Scope*, 90 TEX. L. REV. 1399 (2012). There are exceptions, such as some Title VII suits.

<sup>31</sup> By contrast, municipalities have long been subject to broader equitable relief, see *infra* notes 94-98 and 117 and accompanying text. The pragmatic reasons for distinguishing state defendants, discussed in the following note, also apply to municipal defendants.

<sup>32</sup> Because a state government is within only one federal court of appeals, there is less incentive to forum-shop. (It may also be easier to engage in forum-shopping against federal defendants because of broad venue rules.) For the same reason, there is less risk of conflicting injunctions from different courts. The fact that a state government is within only one federal court of appeals also makes it somewhat less likely that a federal circuit split will develop about the meaning of a state law.

The argument proceeds as follows. Part I describes the problems of the national injunction: forum-shopping, worse decision-making, a risk of conflicting injunctions, and tension with other doctrines and practices. Part II shows the failure of what, in existing law, is the primary constraint on national injunctions, namely the “complete relief” principle. Part III describes the origins of the national injunction, showing its absence from traditional equity. Part IV considers the analytical question of what changed to allow the national injunction. The answer is two-fold: the structural shift from one chancellor to multiple chancellors, and ideological changes in how many judges viewed challenges to invalid laws. Finally, Part V proposes a simple principle: federal courts should issue injunctions that control the federal defendants’ conduct with respect to the plaintiffs, but not with respect to non-parties. If adopted, this principle will keep one chancellor’s foot from stepping on another chancellor’s toes.

## I. The problem of the national injunction

The injunction is an equitable remedy that controls the defendant’s conduct. Whenever the court’s *holding* is that a federal statute, regulation, or order is unlawful, the court must decide the scope of the *remedy*. Should it restrain enforcement only against the plaintiffs, or against anyone? The choice to give a national injunction is increasingly shaping the policies of the United States. This Part explores the consequences of the national injunction—in particular the temptation of forum-shopping, the likely impact on judicial decision-making, the risk of conflicting injunctions, and the tension between the national injunction and other doctrines and practices.

### A. The incentive to forum-shop

A prominent recent example of a national injunction came in *United States v. Texas*, a case brought by Texas and a number of other states to challenge an Obama administration immigration program, “Deferred Action for Parents of Americans and Lawful Permanent Residents,” which gave lawful presence to millions of aliens for various federal-law purposes.<sup>33</sup> The district court concluded that the program was likely a violation of the Administrative Procedure Act. The district court also concluded that a preliminary injunction should be issued halting the implementation of the program. But what would be the scope of that

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<sup>33</sup> *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex.), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *aff’d by an equally divided Court*, 136 S.Ct. 2271 (2016).

remedy? The court enjoined implementation for everyone, not just with respect to the twenty-six states that were plaintiffs. That preliminary injunction was affirmed by the Fifth Circuit Court of Appeals, and by an evenly decided U.S. Supreme Court.

*United States v. Texas* was not a unique challenge to the policies of the Obama administration. In 2016, a district court judge issued a preliminary national injunction against a major Department of Labor regulation, the “persuader rule.”<sup>34</sup> Another issued a preliminary national injunction regarding a “Dear Colleague” letter from the Department of Education about gender identity and public school restrooms.<sup>35</sup> Another issued a preliminary injunction against enforcement of a regulation requiring federal contractors to report labor violations.<sup>36</sup> Another issued a preliminary national injunction against the enforcement of a Department of Labor regulation that would have made about 4 million workers eligible for overtime pay.<sup>37</sup> Still another issued a preliminary national injunction against a rule interpreting an antidiscrimination provision in the Affordable Care Act.<sup>38</sup> All of these injunctions were issued by federal district court judges in Texas.<sup>39</sup>

The shoe also fits the other partisan foot. The recent preliminary injunction concerning President Trump’s executive order on immigration was issued by a federal district judge in Washington state, within the Ninth Circuit.<sup>40</sup> When George W. Bush was president, national injunctions against the administration’s regulatory initiatives were issued by district court judges in California. For example, the Sierra Club and other plaintiffs challenged Bush administration Forest Service regulations in *Earth Island Institute v. Pengilly*. The district court held several of the regulations invalid, enjoining their operation.<sup>41</sup> After separate briefing

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<sup>34</sup> National Federation of Independent Business v. Perez, 2016 WL 3766121 (N.D. Tex., June 27, 2016).

<sup>35</sup> Texas v. United States, No. 7:16-CV-00054-O, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016).

<sup>36</sup> Associated Builders & Contractors of Southeast Texas v. Rung, No. 1:16-CV-425, 2016 WL 8188655 (E.D. Tex. Oct. 24, 2016).

<sup>37</sup> Nevada v. United States Dep’t of Labor, No. 4:16-CV-00731, 2016 WL 6879615 (E.D. Tex. Nov. 22, 2016).

<sup>38</sup> Franciscan Alliance, Inc. v. Burwell, No. 7:16-CV-00108-O, 2016 WL 7638311 (N.D. Tex. Dec. 31, 2016).

<sup>39</sup> In addition, a Sixth Circuit stay of the Clean Water Rule, which was adopted in 2015 by the Environmental Protection Agency, was in effect a national preliminary injunction. *See* In re E.P.A., 803 F.3d 804 (6th Cir. 2015).

<sup>40</sup> As noted, *supra* note 3, the district court gave a temporary restraining order that was subsequently treated by the Ninth Circuit as an appealable preliminary injunction.

<sup>41</sup> *See* Earth Island Inst. v. Pengilly, 376 F. Supp. 2d 994, 999 (E.D. Cal. 2005); Earth Island Inst. v. Ruthenbeck, No. CIV F-03-6386 JKS, 2005 WL 5280466, at \*1-2 (E.D. Cal. Sept. 20, 2005) (discussing geographic scope on motion to clarify or amend). For another national

directly on the geographic scope of the court's order, the court insisted on giving its injunction a nationwide scope. "The appropriate remedy," the court concluded, "is to prevent such injury from occurring again by the operation of the invalidated regulations, be it in the Eastern District of California, another district within the Ninth Circuit, or anywhere else in the nation."<sup>42</sup> The Ninth Circuit upheld the district court's national injunction, and it went even further, concluding that once the district court found the regulations invalid, a national injunction was actually "compelled by the text of the Administrative Procedure Act," because the act requires a court to "hold unlawful and *set aside* agency action" found to be invalid.<sup>43</sup>

It is no accident which courts have given the major national injunctions in the last three administrations. In the George W. Bush administration, it was California courts. In the Barack Obama administration, it was Texas courts. Now, in the Donald Trump administration, a national preliminary injunction was issued by a federal court in Washington state, also in the Ninth Circuit. The forum selection happens not only for the district court, but also for the appellate court (i.e., the Ninth Circuit and the Fifth Circuit). The pattern is as obvious as it is disconcerting. Given the sweeping power of the individual judge to issue a national injunction, and the plaintiff's choice of forum, it is unsurprising that there would be rampant forum-shopping.<sup>44</sup>

The opportunity for forum-shopping is extended by the asymmetric effect of decisions upholding and invalidating statutes.<sup>45</sup> If a plaintiff brings an individual action seeking a national injunction, and the district judge *upholds* the statute, that decision has no effect on other potential plaintiffs. But if one district judge *invalidates* a statute and issues a

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injunction, see *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 468 F. Supp. 2d 1140, 1142-1144 (N.D. Cal. 2006).

<sup>42</sup> *Earth Island Inst. v. Ruthenbeck*, No. CIV F-03-6386 JKS, 2005 WL 5280466, at \*2.

<sup>43</sup> *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007) (quoting 5 U.S.C. § 706) (emphasis added). The Supreme Court reversed on other grounds but took no position on whether "a nationwide injunction would be appropriate." *Summers v. Earth Island Inst.*, 555 U.S. 488, 501 (2009). Judges have reached inconsistent conclusions about whether the Administrative Procedure Act allows for the remand without vacatur, i.e., the return of a regulation to the agency to amend its flaws without vacating it. See Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 CORNELL L. REV. 261 & n.216 (2016).

<sup>44</sup> What does not seem to have happened yet, but may be the next development, will be increasing efforts by potential defendants to bring declaratory judgment actions or to seek anti-suit injunctions in order to do their own forum-shopping.

<sup>45</sup> Other scholars have noted this asymmetry. See Carroll, *supra* note 5, at 2020-2021; Morley, *supra* note 5, at 494 (calling it "asymmetric claim preclusion," though technically the effect is derived from the injunction and not the preclusive effect of the judgment).

national injunction, the injunction controls the defendant's actions with respect to everyone. Shop 'til the statute drops.

Moreover, the potential effect of forum-shopping for national injunctions is even greater than in the cases already described. Consider as well the cases in which district courts did not grant national injunctions but could have, including the challenge to the Affordable Care Act that eventually led to the U.S. Supreme Court decision in *National Federation of Independent Business v. Sebelius*.<sup>46</sup> A federal district court judge in Florida held the individual mandate unconstitutional, and also held that it could not be severed. Having thus decided that the entire statute was unconstitutional, the district court could have enjoined its enforcement. Indeed, the twenty-six plaintiff states requested an injunction, and the court could easily have concluded that the statute should be enjoined throughout the country.<sup>47</sup> Moreover, the court could have been concerned about evasion of its injunction, and thus further enjoined the Department of Health and Human Services from spending money or allocating employees to work on plans for carrying out the putatively unconstitutional act. Holding constant the pace of subsequent appeals, HHS would have lost seven-and-a-half irreplaceable months for preparing to roll out the regulations for the statute. But the district court judge did not enjoin HHS. Instead he granted a declaratory judgment, and he subsequently stayed the judgment until appeals were exhausted.<sup>48</sup> These were acts of judicial self-restraint, not judicial necessity. It is far from clear, given the district court's holding, that it would have been an abuse of discretion to enjoin all preparation for enforcement of the ACA.<sup>49</sup>

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<sup>46</sup> 132 S.Ct. 2566 (2012).

<sup>47</sup> The Second Amended Complaint requested injunctive relief, but only as to enforcement against the twenty-six plaintiff states.

<sup>48</sup> Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services, 780 F.Supp.2d 1256, 1305-1306 (N.D. Fla. 2011). That declaratory judgment was later the subject of a confused Department of Justice motion to clarify, as discussed in Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1092-1093 (2014).

<sup>49</sup> Nor is it clear that the solution would have been stays of the injunction from the court of appeals or the Supreme Court. The court of appeals agreed with the district court's decision about the invalidity of the individual mandate, and even though in time it would find that provision severable, it is not at all certain that it would have found an injunction to be an abuse of discretion. In the Supreme Court, it is also not clear that there were five votes in 2011 to uphold the statute. A majority of the Supreme Court might have declined to stay an injunction against the ACA, and then that provisional commitment by five justices might have led to the Court striking down the ACA on the merits the following year. The psychological premise is simple: once a justice makes a decision about a preliminary injunction, it will be hard to reverse course on the merits. See Jean O. Lanjouw & Josh Lerner, *Tilting the Table? The Use of Preliminary Injunctions*, 44 J.L. & ECON. 573 (2001); cf. In re Opinion of the Justices, 103 Me. 506, 69 A. 627, 631 (1908) (opinion of Savage, J.) (recognizing that the grant of an advisory opinion would not bind the justices in a subsequent case, and adding: "Nevertheless

## B. The effect on judicial decision-making

National injunctions interfere with good decision-making by the federal judiciary. When a district court grants a national injunction, it affects the Supreme Court’s resolution of a legal issue.

The district court’s injunction may halt federal enforcement everywhere. There may be no opportunity, then, for more circuits to express their views. The Supreme Court is thus more likely to hear a case without the benefit of disagreement from the courts of appeals. It is denied what Judge Leventhal famously described as the “value in percolation among the circuits, with room for a healthful difference that may balance the final result.”<sup>50</sup>

Moreover, the Court’s resolution may be accelerated and relatively fact-free. If the district court’s national injunction is a preliminary one (i.e., issued before trial), and the defendant appeals to the Supreme Court for a stay of the preliminary injunction, then the Supreme Court’s decision will be taking place without a record.<sup>51</sup> It is true that the Court, in deciding a motion to stay a preliminary injunction, is usually not deciding the merits, only whether the plaintiff is *likely* to prevail on the merits.<sup>52</sup> But it is natural for a judge, like any other human being, to accept a position and then stick to it.<sup>53</sup>

In a legal system that emphasizes the development of law through cases and through distributed decision-making, it would be unfortunate if the Court began to decide major constitutional questions not in order to resolve circuit splits but instead to address stays of district court preliminary injunctions. Indeed, that is exactly what would have happened in *United States v. Texas* had the Court not been evenly divided, and it could have happened in *NFIB v. Sebelius*.<sup>54</sup> Indeed, it may soon happen that the Court decides important questions about executive power, immigration exceptionalism, religious classifications, and state standing in a preliminary posture—all of these questions are at least

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it is my belief that, while human and judicial nature remain as we know them to be, the opinion of the justices will quite likely be the judgment of the court.”).

<sup>50</sup> Harold Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM U. L. REV. 881, 907 (1975).

<sup>51</sup> Cf. Dan B. Dobbs, *Should Security Be Required as a Pre-Condition to Provisional Injunctive Relief?* 52 N.C. L. REV. 1091, 1111 (1974) (“Procedure in provisional relief cases, far from providing a rational process for development of, and reflection upon, law and fact, forces immediate decisions without the light of fact or the delineation of policy.”).

<sup>52</sup> In some cases an appellate court even renders a final judgment while reviewing a preliminary injunction. See LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 18, at 469.

<sup>53</sup> See *supra* note 49.

<sup>54</sup> See *supra* notes 46-49 and accompanying text.

potentially at issue in the litigation over President Trump's recent executive order blocking travel to the United States from seven countries.

A world of national injunctions is one in which the Supreme Court decides major questions more quickly, with fewer facts, and without the benefit of contrary opinions by lower courts.

### C. The risk of conflicting injunctions

The incentives for forum-shopping and impact on judicial decision-making can obscure a less common but also potentially serious problem, namely conflicting injunctions. The most colorful example involves state courts, and it comes from the legal battles between robber barons over control of the Erie Railroad in the late nineteenth century. There were repeated instances of conflicting injunctions, as multiple judges wielding equitable powers would give diverging commands to litigants, one judge mandating the sale of stock and another judge prohibiting it.<sup>55</sup>

Nor are all the examples historical. At the very end of the Obama administration, two lawsuits were filed by undocumented immigrants in the United States challenging the scope of the district court injunction in *United States v. Texas*.<sup>56</sup> The plaintiffs in these two suits, one filed in the Eastern District of New York,<sup>57</sup> the other in the Northern District of Illinois,<sup>58</sup> sought declaratory judgments that the Texas injunction did not apply in New York and Illinois, respectively. The plaintiffs also sought injunctions requiring the federal government to ignore the Texas injunction in their cases. The judge in the New York case even signaled his willingness to order the federal defendants to disregard the injunction from the district court in Texas.<sup>59</sup> If that had happened, it might have been *Erie Railroad* all over again.

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<sup>55</sup> Charles F. Adams, Jr., *A Chapter of Erie*, in CHARLES F. ADAMS, JR., & HENRY ADAMS, CHAPTERS OF ERIE AND OTHER ESSAYS 1, 22ff. (1886). I am grateful to Andrew Kull for directing me to *A Chapter of Erie*.

<sup>56</sup> Daniel Denvir, *New hope for undocumented immigrants: DAPA might not be dead—a bold legal strategy could protect millions from deportation*, SALON.COM (Oct. 13, 2016).

<sup>57</sup> *Batalla Vidal v. Baran*, Complaint, 1:16-cv-04756 (E.D.N.Y., Aug. 25, 2016).

<sup>58</sup> *Lopez v. Richardson*, Complaint, 1:16-cv-09670 (N.D. Ill., Oct. 12, 2016).

<sup>59</sup> Denvir, *supra* note 56:

Judge Garaufis seems inclined to Vidal's argument. In a pre-motion conference in late September, he announced that he had "absolutely no intention of simply marching behind in the parade that's going on out there in Texas, if this person has rights here."

"I sympathize with your problem," he told the government, "but I do not sympathize with the idea that I am hamstrung in dealing with an issue involving individual rights and including the right to go make a living and have a life as an immigrant in the United States." How, he asked, could a judge in one jurisdiction "issue a nationwide injunction if someone comes to him with a claim that affects the rights of people in" another jurisdiction "who have not been before the court?"

In less dramatic cases there have also been conflicting injunctions issued to the same parties. Typically one judge or the other backs down, narrowing or staying one of the issued injunctions, or else an appellate court reverses one of them.<sup>60</sup> But those decisions are exercises of self-restraint. The risk of conflicting injunctions is still there, lurking in the background, and perhaps it will move quickly to the foreground.

A doomsday scenario can be noted in passing: a district court in one circuit issuing an injunction requiring the president to do  $x$ , a district court in another circuit issuing an injunction requiring the president not to do  $x$ , both appellate courts affirming, and an evenly divided Supreme Court denying both of the contending motions for an emergency stay—which would leave the president potentially liable to contempt proceedings no matter what the course of action.<sup>61</sup> The doomsday scenario is unlikely, of course. But avoiding it depends on judicial restraint and good luck, and neither one is sure to last forever.<sup>62</sup>

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<sup>60</sup> See *Feller v. Brock*, 802 F.2d 722, 727-728 (4th Cir. 1986) (reversing a preliminary injunction that directly conflicted with another court’s injunction, on the grounds that the injunction under review failed to preserve the status quo, failed to correctly apply the balance of hardships doctrine, and disserved the public interest); *Lockyer v. U.S. Dept. of Agriculture*, 710 F.Supp.2d 916 (N.D. Cal. 2008) (partially staying an injunction that reinstated an agency rule, to reduce the conflict with with a subsequently issued injunction by the District Court for the District of Wyoming that forbade the use of the rule); see also *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir. 1987) (“Where different outcomes would place the defendant under inconsistent legal duties, the case for the second court’s not going into conflict with the first is particularly strong.”); *National Union Fire Insurance Co. of Pittsburgh, Pa. v. Payless ShoeSource, Inc.*, 2012 WL 3277222, at \*9 n.4 (N.D. Cal. Aug. 9, 2012) (declining to issue an injunction against litigation in another federal district court, out of concern, perhaps misplaced, that “conflicting injunctions [could] make compliance with both an impossibility for the parties affected”).

<sup>61</sup> Whether the president can be enjoined is not a settled question. Compare *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867)); and *Injunctions—Public Officers—Immunity of President and His Agents*, 47 HARV. L. REV. 138 (1933); with RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1059 (7th ed. 2015) (“Several habeas corpus cases litigated in the Supreme Court have included the President as a named respondent, apparently without triggering any immunity-based objection. See *Rasul v. Bush*, 542 U.S. 466 (2004); *Boumediene v. Bush*, 553 U.S. 723 (2008).”). Nor is it settled whether the president may use the pardon power to intervene in contempt proceedings. See *Ex parte Fisk*, 113 U.S. 713, 714 (1885); see also Will Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1835-1836 (2008) (raising the question “whether contempt was supposed to be the court’s chief or only weapon to enforce the efficacy of its judgments”).

<sup>62</sup> Charles F. Adams, Jr., made exactly this point about the Erie Railroad litigation:

Such a system can, in fact, be sustained only so long as co-ordinate judges use the delicate powers of equity with a careful regard to private rights and the dignity of the law, and therefore, more than any which has ever been devised, it calls for a high average of learning, dignity, and personal character in the occupants of the bench. When, therefore, the ermine of the judge is flung into the kennel of party politics and becomes a part of the spoils of political victory; when by any chance partisanship, brutality, and corruption become the

## D. The doctrinal inconsistencies

There are a number of doctrines and patterns of judicial decision-making that assume that there will not be national injunctions. The availability of national injunctions allows a plaintiff suing a federal defendant to make an end-run around them. Briefly consider four:

First, the doctrine of nonmutual offensive issue preclusion does not apply against the federal government.<sup>63</sup> That exception to ordinary preclusion rules for the federal government is meaningful as long as the remedy in a particular case protects only the plaintiffs. But if national injunctions were to become the norm, this doctrine would be vestigial.<sup>64</sup>

Second, Rule 23(b)(2) provides for class actions for injunctive and declaratory relief.<sup>65</sup> In some cases the decision to bring a suit as a class action under 23(b)(2) will prevent its being moot, and the certification of a class can increase the number of plaintiffs who are empowered to enforce the injunction.<sup>66</sup> Nevertheless, the need for and value of this class action provision is diminished if plaintiffs can get the same relief in an individual suit that they can in a class action.<sup>67</sup>

Third, there is the power of plaintiffs to initiate contempt proceedings. When a defendant violates an injunction, the plaintiff who succeeded in

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qualities which especially recommend the successful aspirant to judicial honors, then the system described will be found to furnish peculiar facilities for the display of these characteristics.

ADAMS, *supra* note 55, at 23.

<sup>63</sup> United States v. Mendoza, 464 U.S. 154 (1984). “Offensive non-mutual collateral estoppel is a version of the doctrine that arises when a plaintiff seeks to estop a defendant from relitigating an issue which the defendant previously litigated and lost *against another plaintiff*.” *Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 775 (9th Cir. 2003) (emphasis added).

<sup>64</sup> When issuing a national injunction, some courts explicitly distinguish *Mendoza* as pertaining to preclusion, not injunctions. *See California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 468 F. Supp. 2d 1140, 1144 (N.D. Cal. 2006); *cf. Nat’l Min. Ass’n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (recognizing that national injunctions “diminis[h] the scope of the [*Mendoza*] doctrine, under which the government may normally relitigate issues in multiple circuits,” but affirming one anyway); *but see Virginia Soc’y for Human Life, Inc. v. Fed. Election Comm’n*, 263 F.3d 379, 393-394 (4th Cir. 2001) (rejecting a national injunction in part because of the concerns raised in *Mendoza*).

<sup>65</sup> Fed. R. Civ. P. 23(b)(2) (allowing class actions, assuming other requirements are met, if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole”). On the background of the provision, see David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011).

<sup>66</sup> Carroll, *supra* note 5, at 2038.

<sup>67</sup> *Accord* John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1433-34 (2003). One could make this point even more strongly: Rule 23(b)(2) makes a class-wide injunctive remedy available if certain conditions are met; by implication, this remedy is available only if those conditions are met.

getting the injunction can try to enforce it with contempt.<sup>68</sup> That rule is well-suited to injunctions that protect only the plaintiff. But it sits uneasily with injunctions that control the behavior of the defendant toward non-parties. Non-parties cannot initiate civil contempt proceedings to enforce the injunction.<sup>69</sup>

Fourth, there are limitations on the power of a federal district court to establish the law. A federal district judge's decision does not bind other district courts.<sup>70</sup> Indeed, it is not even a binding precedent for other judges in the same district court.<sup>71</sup> Nor can a federal district court decision assure "clearly established law" for purposes of qualified immunity.<sup>72</sup> Given these limitations on a federal district judge's authority to determine the law for anyone but the parties, it is odd for a district judge to be able to achieve much the same effect by means of a national injunction.

## II. The failure of existing limits

Judicial decisions on when an injunction should be issued are recognized by scholars to be a muddle of inconsistent generalizations. There are relevant principles, but they are indeterminate and mutually inconsistent.<sup>73</sup> The permissibility of injunctions protecting non-parties has never been squarely addressed by the Supreme Court.<sup>74</sup> Among lower court decisions, to the extent that there is a theme, it is that federal trial

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<sup>68</sup> Contempt proceedings may also be initiated by the federal court issuing the injunction or by a federal prosecutor.

<sup>69</sup> *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444–45 (1911) ("Proceedings for civil contempt are between the original parties"); Carroll, *supra* note 5, at 2038 ("[A] defendant in an individual case might refuse to apply a system-wide remedy to anyone other than the plaintiff; under those circumstances, the other potential claimants (as nonparties) would have no power to enforce the injunction or declaration."); *see also* Ahearn ex rel. N.L.R.B. v. Int'l Longshore & Warehouse Union, Locals 21 & 4, 721 F.3d 1122, 1130 (9th Cir. 2013) (reversing award of compensatory civil contempt to non-parties while raising qualifications to the general rule).

<sup>70</sup> Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1340 (2000) (noting that "even if the district court purported to hold the statute invalid on its face, its holding would not bind other federal district courts in cases involving other parties").

<sup>71</sup> *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991).

<sup>72</sup> *See* Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 160 (2009).

<sup>73</sup> Carroll, *supra* note 5, at 2033 ("In light of the variations and inconsistencies in the case law . . . a plaintiff will likely be able to find authority supporting a grant of system-wide relief in a non-class case, and a defendant will likely be able to find authority opposing it. The same will be true of the district and appellate courts.").

<sup>74</sup> The Court reserved the question in *Summers v. Earth Island Inst.*, 555 U.S. 488, 501 (2009). Some cases, such as *Lewis v. Casey*, 518 U.S. 343 (1996), and *Horne v. Flores*, 557 U.S. 433 (2009), are suggestive about the need to match the remedy to the plaintiff's harm, but they are not decisive. On *Horne v. Flores*, *see infra* note 88.

courts have broad discretion to award national injunctions whenever they seem warranted. A trial court's decision to issue (or not issue) a national injunction is then reviewed on appeal for abuse of discretion.

Before considering doctrinal limits, it is important to start with the logic of the national injunction. It does have a logic. When a plaintiff claims that a statute, regulation, or order is, in some sense, *not the law*, and seeks an injunction restraining its enforcement, what is a district court to do? If the district court agrees on the merits with the challenge, and holds the statute unconstitutional or the regulation or order unlawful, should the district court allow the executive to continue enforcing this non-law against other persons? What if the very same executive agency that was a defendant announces its plans to spend millions of federal dollars elsewhere in the country on the basis of this (now purportedly) non-law? What if federal prosecutors want to seek convictions in other parts of the country under this (now purportedly) non-law? A district court can certainly stop short and refuse to give a national injunction; equity has reasons for the remedy to fall short of the right.<sup>75</sup> But the point is that giving something less than a national injunction in these circumstances will seem to be a stopping short. For a successful facial challenge to a nationally effective statute, regulation, or order, a national injunction is a logical remedy.

To be sure, the existing case law does have apparent constraints on the granting of national injunctions. The one most commonly raised by courts and commentators is the principle of “complete relief”: “injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”<sup>76</sup> This principle suggests that when a national injunction is needed for “complete relief” a district court *should* award one, and when it is not needed for “complete relief” a district court *should not* award one. It is thus two-sided, by turns a shield for

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<sup>75</sup> See Bray, *supra* note 48, at 1131 & n.197; *cf.* Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) (plurality opinion) (“[I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable.”).

<sup>76</sup> Califano v. Yamasaki, 442 U.S. 682, 702 (1979); see LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 18, at 275-276; Morley, *supra* note 5, at 510; *but cf.* Walker, *supra* note 5, at 1135-1137 (noting that *Califano* was a class action, and thus not entirely on point for the scope of injunctions in non-class cases). Although *Califano* attributes this statement to one of the litigants, it has been widely accepted as an endorsement by the Court. For further invocation of “complete relief” as a principle for the scope of an injunction, see, e.g., Lewis v. Casey, 518 U.S. 343, 359-360 (1996); Los Angeles Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 664 (9th Cir. 2011); United States v. AMC Entertainment, Inc., 549 F.3d 760, 775 (9th Cir. 2008) (Wardlaw, J., dissenting); Meinhold v. U.S. Dept. of Defense, 34 F.3d 1469, 1480 (9th Cir. 1994). In a perceptive student note, Zayn Siddique has recently argued that the muddled and inconsistent decisions could be resolved if “courts [would] expressly adopt the requirement that a nationwide injunction should not issue unless it is necessary to provide complete relief to the plaintiffs.” Siddique, *supra* note 5.

defendants and a sword for plaintiffs depending on the case.<sup>77</sup> The “complete relief” principle is intuitively appealing, and it suits the most basic aim of the law of remedies: to put the plaintiff in her rightful position.<sup>78</sup>

Nevertheless, despite its acceptance by courts and commentators, the “complete relief” principle is problematic. Complete relief is useful as an aim. But it fails as a legal principle intended to have outcome-determinative force. This conclusion is supported by three reasons.

First, the “complete relief” principle actually contributes to the general availability of the national injunction. What counts as “complete relief” will often be indeterminate, as even supporters of this principle acknowledge.<sup>79</sup> To get past this indeterminacy, a frequent move in the case law is to look to the “extent of the violation.”<sup>80</sup> That inquiry seems innocuous, for it is a truism that the remedy should match the violation.<sup>81</sup> But the move is actually consequential, because it drains the “complete relief” principle of any limiting power. The question of whether to issue a national injunction arises precisely because “the extent of the violation”—the unconstitutional statute or the unlawful regulation or executive order—is national. In such a case, the “complete relief” principle works not as a constraint on national injunctions but instead as a reason to give them.<sup>82</sup> It is part of the problem.<sup>83</sup>

<sup>77</sup> Cf. Carroll, *supra* note 5, at 2031 n. 71 (noting this two-sided quality for the idea that the remedy should “be commensurate with the scope of the violation”).

<sup>78</sup> LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 18, at 14-15; see Lewis v. Casey, 518 U.S. 343, 358 (1996) (finding the harm to a “plaintiff in this lawsuit,” rather than to other people, to be “the proper object of this District Court’s remediation”); Frothingham v. Mellon, 262 U.S. 447, 488-489 (1923).

<sup>79</sup> See Siddique, *supra* note 5.

<sup>80</sup> See, e.g., Nat’l Federation of Indep. Bus. v. Perez, No. 5:16-CV-00066-C, 2016 WL 3766121, at \*46, ¶¶183-189 (N.D. Tex. June 27, 2016); Texas v. United States, No. 7:16-CV-00054-O, 2016 WL 4426495, at \*17 (N.D. Tex. Aug. 21, 2016); United States v. AMC Entertainment, Inc., 549 F.3d 760, 775 (9th Cir. 2008) (Wardlaw, J., dissenting in part) (“[D]istrict courts within our circuit commonly issue nationwide injunctions where the ‘injunction . . . is tailored to the violation of law that the Court already found—an injunction that is no broader but also no narrower than necessary to remedy the violations.’” (quoting *California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 468 F.Supp.2d 1140, 1144 (N.D.Cal.2006))); see also Davis v. Astrue, 874 F. Supp. 2d 856, 868-869 (N.D. Cal. 2012). The same consideration is invoked in cases involving statewide injunctions against state officers. See, e.g., Clement v. California Department of Corrections, 364 F.3d 1148, 1152-1154 (9th Cir. 2004).

<sup>81</sup> See Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 16 (U.S. 1971) (“As with any equity case, the nature of the violation determines the scope of the remedy.”). On the human impulse behind that doctrinal norm, see WILLIAM IAN MILLER, EYE FOR AN EYE (2006).

<sup>82</sup> Compare Bresgal v. Brock, 843 F.2d 1163, 1170-1171 (9th Cir. 1987) (affirming national injunction, and concluding that “an injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled”) with Zepeda v. U.S. I.N.S., 753 F.2d 719, 728ff. n.1 (9th Cir. 1983) (vacating

Second, by the point in time at which the court decides what might be needed for “complete relief,” there is already a tilt to the analysis. An injunction is often drafted in the first instance by the prevailing party, and though it should be scrutinized and revised by the judge, in this practice there is a bias toward broader relief. Moreover, the judge will be deciding the scope of a permanent injunction only after finding that the defendant was liable. It is probably unavoidable that remedial decisions should be made after liability decisions, but that fact again means that a judicial decision about “complete relief” has a skewing toward a broader injunction.

Finally, the “complete relief” principle hardens the remedial choices of equity, treating the equitable remedy as corresponding precisely to the underlying right. To the contrary, the scope of an equitable remedy is not at all automatic. There are a number of situations in which equitable remedies go beyond, or stop short of, the strict right of the plaintiff.<sup>84</sup> Equity is concerned with justice not only for the plaintiff but also for the defendant.<sup>85</sup> “Complete relief” is thus the starting point for equitable relief, but it is not and never has been the sole desideratum for the scope of equitable remedies.<sup>86</sup>

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preliminary national injunction because “[s]uch broad relief is not necessary to remedy the rights of the individual plaintiffs”). For recognition that the same indeterminate principles are invoked for and against injunctions that control the defendant’s conduct against non-parties, see Walker, *supra* note 5, at 1142.

<sup>83</sup> In addition, even when the “complete relief” principle might be a limitation, it can be evaded by artfully choosing the plaintiffs and drafting the complaint. As long as the suit can be brought on behalf of an organization with a wide membership, a court may be inclined to grant universal relief in order to protect all of the members. A state example is *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486 (9th Cir. 1996). This scenario is infrequent now, but that is only because the “complete relief” requirement is so porous: plaintiffs don’t need to go around it, because they can just go through it.

<sup>84</sup> See, e.g., Golden, *supra* note 30 (injunctions in patent law); David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627 (1988) (injunctions generally); Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301 (2004) (prophylactic injunctions); see also *Truax v. Corrigan*, 257 U.S. 312, 343 (1921) (Holmes, J., dissenting) (“without legalizing the conduct complained of the extraordinary relief by injunction may be denied”). Nevertheless, influential scholarship has treated injunctions as if they were effectively automatic in scope, being coextensive with the plaintiff’s right. E.g., Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). For critique, see Samuel L. Bray, *Remedies, Meet Economics; Economics, Meet Remedies*, OXFORD J. LEG. STUD. (forthcoming 2017).

<sup>85</sup> See *Bush v. Gaffney*, 84 S.W.2d 759, 764 (Tex. Civ. App. 1935).

<sup>86</sup> See, for example, the discussion of equity’s traditional focus on the defendant in Richard Hedlund, *The Theological Foundations of Equity’s Conscience*, 4 OXFORD J. L. & RELIGION 119 (2015).

For these reasons it should be unsurprising that the “complete relief” principle can coexist easily with national injunctions. It is not an effective limit. This is not to say it is a misguided idea. The “complete relief” principle would be reasonable if it were treated as an equitable maxim. Like other equitable maxims, it could focus judicial attention on an important aim for remedies.<sup>87</sup> But a useful maxim is not the same thing as a limiting principle. Existing doctrine cannot solve the problem of the national injunction.<sup>88</sup>

### III. The origins of the national injunction

In the federal courts, case law requires that equitable doctrines and remedies find some warrant in the traditional practice of equity, especially as it existed in the Court of Chancery in 1789.<sup>89</sup> This Part shows the absence of the national injunction from traditional equity, and locates its origin in the second half of the twentieth century.

#### A. The absence of the national injunction from traditional equity

There is an easy, uncomplicated answer to whether the national injunction is traceable to traditional equity: *no*.

In English equity before the Founding of the United States, there were no injunctions against the Crown. No doubt part of the explanation was the identification of the chancellor with the king,<sup>90</sup> an identification that

<sup>87</sup> On this understanding of the equitable maxims, see Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 584-586 (2016). On equitable maxims, see R. P. MEAGHER, W. M. C. GUMMOW, & J. R. F. LEHANE, *EQUITY: DOCTRINES AND REMEDIES* 71-100 (3d ed. 1992); Roger Young & Stephen Spitz, *SUEM—Spitz’s Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S.C. L. REV. 175 (2003).

<sup>88</sup> When questioning the use of injunctions to benefit non-parties, Professor Laycock has pointed to some cases that might be thought to limit the use of national injunctions. See LAYCOCK, *MODERN AMERICAN REMEDIES*, *supra* note 18, at 275-276. These limits are open to question. In *Horne v. Flores*, 557 U.S. 433 (2009), for example, it is true that the Court urged the district court not to give a statewide injunction on remand but to instead give an injunction tailored to the plaintiffs. *Id.* at 470-472. Even so, the Court included an exception that may swallow the rule: “the District Court should vacate the injunction insofar as it extends beyond Nogales *unless the court concludes that Arizona is violating the EEOA on a statewide basis.*” *Id.* at 472 (emphasis added). Another optimistic view of the current doctrine can be found in Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CON. L. Q. 243, 250 (2016), which sharply distinguishes injunctions and precedent, and asserts that only precedent affects non-parties. That assertion requires qualification, given the muddle of the existing case law. See *infra* Part III.B.3.

<sup>89</sup> See, e.g., *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999); see also Bray, *supra* note 11.

<sup>90</sup> J. D. HEYDON, M. J. LEEMING, & P. G. TURNER, MEAGHER, GUMMOW & LEHANE’S *EQUITY: DOCTRINES AND REMEDIES* § 21-510, p. 787 (5th ed. 2015) (“Under the general law the Court

was important in the early development and self-understanding of the Court of Chancery. (That identification later made American colonists skeptical of equity.) With no injunctions against the Crown, there were no injunctions against the enforcement of statutes.<sup>91</sup>

Equity would sometimes resolve a number of claims at once. To get into equity, a plaintiff needed to show that her case fit under one of several “heads” of equitable jurisdiction, one of which was “multiplicity of suits.” This head of jurisdiction could be invoked when the equity plaintiff wanted to avoid repeated instances of litigation with the same opposing party (e.g., repeated trespass).

In addition, to avoid a multiplicity of suits, equity would give what was called a “bill of peace.”<sup>92</sup> With this device, the chancellor would consolidate a number of suits that would not be sequential between two parties. These might be suits involving some kind of common claim the plaintiff could have against multiple defendants (e.g., a lord suing all of his tenants, a vicar suing all of his parishioners). Or these might be suits involving some kind of common claim that multiple plaintiffs could have against a single defendant (e.g., the tenants suing the lord, the parishioners suing the vicar).<sup>93</sup>

A bill of peace with multiple plaintiffs who represented the whole set of possible plaintiffs—all of the tenants, or all of the parishioners—is probably the closest analogy to the national injunction in traditional equity. But the analogy is not that close. A bill of peace was not used to resolve a question of legal interpretation for the entire realm. It was not enough that many people were interested in or affected by the outcome. It

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of Chancery had no jurisdiction to issue injunctions against the Crown, since the court was itself an emanation of the Crown.”).

<sup>91</sup> On the absence of such suits in American equity, see *infra* Part III.B.1. On English equity, see LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 466 & n.31 (1965) (“English history is sparse and obscure with respect to bills of equity by taxpayer or citizen”). The same point could be made about mandamus and other prerogative writs. See JAFFE, at 462 (“The prerogative writs, in their origin and until the middle of the Nineteenth Century, were used primarily to control authorities below the level of the central government. The King and his ministers were controlled, if at all, by Parliament.”). Meagher, Gummow & Lehane cites later authority that allows suits against officers of the Crown on the theory that they are acting in a personal capacity. HEYDON, LEEMING, & TURNER, *supra* note 90, at § 21-510, pp. 787-788.

<sup>92</sup> See SPENCER W. SYMONS, 1 *POMEROY’S EQUITY JURISPRUDENCE* §§ 256-246, pp. 464-468 (5th ed. 1941).

<sup>93</sup> Chancery suits involving these different uses of a bill of peace are cited in 2 JAMES BARR AMES, *A SELECTION OF CASES IN EQUITY JURISDICTION* 55 (1904 repr. 1929). On the “impersonal” nature of many of these representative suits in equity, see Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990) (reviewing STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION*).

was instead a kind of proto-class action. The group was small and cohesive; its interest was common. One could think of the chancellor as hearing the plaintiffs' claim, which was identical to the claims of others within a preexisting social group, and then rounding up the scope of the decision (e.g., from most tenants to all tenants).<sup>94</sup> The chancellor would then control the defendant's conduct with respect to this rounded-up group of plaintiffs and non-plaintiffs. The chancellor would not control the defendant's conduct against the world, or against other potential plaintiffs who might bring other kinds of claims.

These traditional principles were carried over into American equity.<sup>95</sup> One application and extension came in suits by taxpayers against tax-collectors. Beginning in the mid-nineteenth century, some state courts were willing to enjoin the collection of an illegal tax, not only with respect to the plaintiffs but with respect to any taxpayer. Other state courts disagreed, and would give relief only as to the plaintiffs. Note, however, that when courts did give broader relief it was in cases involving municipal or county taxes.<sup>96</sup> The theory was still that the bill of peace, or the injunction by analogy to a bill of peace, was resolving the common claims of a cohesive group, what might be called a micro-polity.<sup>97</sup>

Late in the nineteenth century there is evidence that courts extended this reasoning from suits to enjoin tax collection to other challenges, allowing a successful plaintiff to obtain an injunction protecting all similarly situated persons. But again what was challenged were not federal or state laws but municipal ordinances.<sup>98</sup>

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<sup>94</sup> Cf. JOSEPH STORY, 2 COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 857, p. 193 (4th ed. rev., corr., enlarg. 1846) (noting that for a bill of peace to be maintained "a suitable number of parties in interest" must be "brought before the Court").

<sup>95</sup> See *id.* at §§ 854-857, pp. 190-193.

<sup>96</sup> E.g., *McTwiggan v. Hunter*, 18 R.I. 776 (1892-1893) (municipal tax); *Carlton v. Newman*, 1 Atl. Rep. 194 (Me. 1885) (municipal tax); see generally SYMONS, 1 POMEROY'S EQUITY JURISPRUDENCE, *supra* note 92, § 260, pp. 526-537.

<sup>97</sup> Cf. SYMONS, 1 POMEROY'S EQUITY JURISPRUDENCE, *supra* note 92, § 260, p. 534 ("[C]omplete and final relief may be given to *an entire community* by means of one judicial decree . . . ." (emphasis added)). Note that a related question is the ability of a taxpayer to get an injunction restraining not the illegal *collection* of money but its illegal *expenditure*. That kind of suit, which is usually called a "taxpayer's suit," also seems to be traceable to the mid-nineteenth century in municipal cases. See JAFFE, *supra* note 91, at 470-71. Courts were slower to allow suits enjoining the collection of a *state* tax with respect to non-plaintiffs. That development was almost entirely confined to the twentieth century, and as late as 1960 there were many states that either did not allow taxpayer suits (e.g., New York), or had not resolved the question (e.g., California). *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895, 901 & nn. 31, 33 (1960); JAFFE, *supra* note 91, at 470-471.

<sup>98</sup> See *City of Chicago v. Collins*, 175 Ill. 445, 459, 51 N.E. 907, 911 (1898); see generally SYMONS, 1 POMEROY'S EQUITY JURISPRUDENCE, *supra* note 92, § 261b, pp. 540-541. Professor Bone has said, of the late nineteenth and early twentieth century courts: "Furthermore, the

## B. The changing scope of injunctions against federal defendants

There were apparently no national injunctions against federal defendants for the first century and a half of the United States. They seem to have been rejected as unthinkable as late as *Frothingham v. Mellon*,<sup>99</sup> and to have been conspicuously absent as late as *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>100</sup> They did not remain so. By the 1960s and 1970s, there was a moment of flux about the scope of national injunctions—they seemed to be within the power of a federal district court, but there was some uncertainty or discomfort about using them. By the 1980s and 1990s, to some judges they were an ordinary part of the remedial arsenal of the federal courts. There was no major case. No statute altered the powers of the federal courts. Instead, the changes seem to have been gradual and more driven by ideological shifts in how some judges thought about preventive suits and invalid laws.

### 1. No national injunctions (to the 1960s)

In the nineteenth century, federal courts would issue injunctions that protected the plaintiff from the enforcement of a federal statute, regulation, or order—not injunctions that protected all possible plaintiffs throughout the United States.<sup>101</sup> For example, in *Georgia v. Atkins* (1866),<sup>102</sup> the state of Georgia sued in federal court for an injunction against James Atkins, a federal tax collector. Georgia’s claim was that it was illegal to impose a federal corporate tax upon a state (in this case, a tax on the Western & Atlantic Railroad that was owned and operated by the state of Georgia). The court agreed and issued an injunction, not

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importance of conclusively establishing the legality of official acts as well as the desirability of preventing burdensome repetitive litigation were strong affirmative reasons to bar subsequent suits by nonparty class members, whether the plaintiff won or lost her first suit.” Bone, *supra* note 93, at 275. That does not appear to contradict the point made here: the support for that proposition is a federal equity case from 1901 involving a challenge to a municipal ordinance. *Id.* at 275 n. 151.

<sup>99</sup> 262 U.S. 447 (1923).

<sup>100</sup> 343 U.S. 579 (1952).

<sup>101</sup> Note that before 1875 the federal courts lacked statutory federal-question jurisdiction, apart from a brief period from 1800 to 1801. Without federal-question jurisdiction, the federal courts would still have had the opportunity to restrain the enforcement of a federal statute, regulation, or order in the following circumstances: (a) an injunction issued by the U.S. Supreme Court itself; (b) an injunction in a diversity suit that somehow managed to include a federal officer or agency; (c) a suit by an alien; (d) a suit by the United States (against its own officers?); (e) a suit in admiralty; (f) a suit brought by a federally chartered corporation, such as the Bank of the United States; and (g) a suit brought by a state. I am grateful to Will Baude and Stephen Sachs for discussion of this list.

<sup>102</sup> 1 Abb. U.S. 22 (Cir. Ct. N.D. Ga. 1866, bill in equity). This is an example of category *g* in the preceding footnote.

against the enforcement of the tax upon states generally, nor even against the enforcement of the tax upon Georgia generally, but rather to restrain Atkins “from further proceeding in the collection of the sum of six thousand and four dollars and fifty-six cents, claimed to be due to the United States.”<sup>103</sup> The scope of the injunction matched what the court perceived as the scope of its authority: “jurisdiction or power . . . , if the tax sought to be collected is illegal, unwarranted by the act of congress, *to interpose by writ of injunction, and arrest the threatened invasion of the property of the complainant.*”<sup>104</sup>

In fact, in the nineteenth century, the idea of suing to restrain the enforcement of a federal statute everywhere in the nation seems not to have found any acceptance, and it may never even have been raised. Consider, for example, a suit against a state. In 1895, James Donald sued the state of South Carolina, arguing that the confiscation of alcohol that he imported for his own private consumption was a violation of the U.S. Constitution. The U.S. Supreme Court held the state statute unconstitutional.<sup>105</sup> Donald asked for damages, and he also asked for an injunction restraining the enforcement of the statute by any state executive officer against Donald or anyone else. The Court’s reasoning would apply *a fortiori* to a plaintiff seeking a national injunction:<sup>106</sup>

But while we think that the complainant was entitled to an injunction against those defendants who had despoiled him of his property, and who were threatening to continue so to do, we are unable to wholly approve the decree entered in this case.

The theory of the decree is that the plaintiff is one of a class of persons whose rights are infringed and threatened, and that he so represents such class that he may pray an injunction on behalf of all persons that constitute it. It is, indeed, possible that there may be others in like case with the plaintiff, and that such persons may be numerous; but such a state of facts is too conjectural to furnish a safe basis upon which a court of equity ought to grant an injunction.<sup>107</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (emphasis added).

<sup>105</sup> *Scott v. Donald*, 165 U.S. 58 (1897).

<sup>106</sup> On this point the Court was seemingly unanimous. Justice Brown dissented without an opinion. But because he dissented with an opinion in the counterpart case on the Court’s law side, which resolved Donald’s challenge to constitutionality of the statute, it seems almost certain that his dissent had more to do with the merits than with the remedy—he would not have been wanting an even broader injunction. Justice Brewer did not participate in the resolution of the case.

<sup>107</sup> *Scott v. Donald*, 165 U.S. 107, 115 (1897). There is no reason to think *Scott v. Donald* was unusual. In a leading article on the first century of federal administrative law, Ann Woolhandler cites it and its counterpart law case as exemplary for the proposition that:

Beginning in 1906, Congress gave the federal courts power to review the orders of the Interstate Commerce Commission (ICC).<sup>108</sup> The reason for this grant of jurisdiction was “because then, for the first time, the ratemaking power was conferred upon the commission and then disobedience of its orders was first made punishable.”<sup>109</sup> When shippers challenged these ratemaking orders from the ICC in federal court, and succeeded, the injunction would be limited in scope to the parties. For example, the ICC’s order setting the shipping rate at  $x$  for this shipper was invalid.<sup>110</sup> (This power was constrained in various ways, including the requirement of a three-judge court and direct appeal as of right to the U.S. Supreme Court.<sup>111</sup>)

Or consider a challenge to a federal agency rule on the grounds that it exceeded the agency’s jurisdiction. In *Waite v. Macy*,<sup>112</sup> tea importers sought to enjoin the federal Tea Board from applying to their teas a regulation blocking the import of any tea containing artificial coloring. The Court held the regulation invalid, as exceeding the statute that gave the Tea Board its authority, but the injunction the Court affirmed seemingly protected only the plaintiffs.<sup>113</sup>

A case worth considering in detail is *Frothingham v. Mellon*. It is now generally considered to be a case about “taxpayer standing,”<sup>114</sup> but that is not how it was decided by the Supreme Court. The case looks quite different when seen through the lens of equity. The individual plaintiff, Harriet Frothingham, brought a suit to enjoin various federal officers from spending money under the authority of the Maternity Act, on the

“Threatened governmental invasions that might lead to irreparable harms similarly gave rise to actions in equity for injunctions, or at law for mandamus.” Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197 (1991).

<sup>108</sup> F. TROWBRIDGE VOM BAUR, 2 FEDERAL ADMINISTRATIVE LAW: A TREATISE ON THE LEGAL PRINCIPLES GOVERNING THE VALIDITY OF ACTION OF FEDERAL ADMINISTRATIVE AGENCIES, AND OF STATE AGENCIES ON FEDERAL QUESTIONS (1942), referring to the Hepburn Act of 1906, section 5 (34 Stat. 584, 590, 592).

<sup>109</sup> *Id.* at § 634, p. 635.

<sup>110</sup> *Arrow Transp. Co. v. Southern Ry. Co.*, 372 U.S. 658, 663–64 (1963) (“Even when a large shipper secured an injunction, the scope of its relief often protected only that particular shipper, leaving his weaker competitors at the mercy of the new rate.”).

<sup>111</sup> VOM BAUR, *supra* note 108, at § 634, pp. 615-16.

<sup>112</sup> 246 U.S. 606 (1918). A coincidence, it seems, but the coloring at issue was “Prussian Blue.”

<sup>113</sup> *See id.* at 396 (“This is a bill brought by importers of tea to prevent the appellants, a board of general appraisers known as the Tea Board, from applying to tea imported by the plaintiffs tests which, it is alleged, are illegal and if applied will lead to the exclusion of the tea.” (emphasis added)). I have not yet verified that the complaint or eventual decree were limited to protecting the parties, but at every stage of the litigation that was the apparent reach of the case.

<sup>114</sup> *See, e.g.*, Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131 (2009) (referring to “the prohibition on taxpayer standing established in 1923 in *Frothingham v. Mellon*”).

ground that the statute exceeded the power of the national government. The complaint was for what plainly seems to be a national injunction.<sup>115</sup> Indeed, if Ms. Frothingham was to have any remedy, it would have to be a national injunction: a prohibition on using *her* tax money for the Maternity Act would have been wholly ineffectual, because of the fungibility of money. The district court denied the injunction; the court of appeals affirmed *pro forma*.<sup>116</sup> In an opinion for a unanimous Court, Justice Sutherland made three arguments for why Ms. Frothingham could not receive an injunction against the funds.

First, the Court distinguished the cases allowing one person to sue on behalf of others. The Court noted that individual taxpayers could sue municipal corporations (i.e., a city), and that the relationship of the individual to a municipal corporation resembled the relationship of a stockholder to a private corporation.<sup>117</sup> For a reader steeped in the bill of peace precedents from English and American equity, Judge Sutherland was making a point about equitable jurisdiction. Equity allowed certain kinds of representative suits, and in nineteenth-century American law the prototypical examples were suits against municipal corporations and public corporations by one or more individual plaintiffs (taxpayers and stockholders, respectively). But the scale and relationship of the individual to the national government were very different. In a case like this, “no basis is afforded for an appeal to the preventive powers of a court of equity.”<sup>118</sup>

Second, the Court invoked logistical problems—“inconveniences”—that would be caused by letting individual taxpayers bring suits like this one. “If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statute

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<sup>115</sup> Transcript of Record, *Frothingham v. Mellon*, p. 6 (“Wherefore the plaintiff prays that said Sheppard-Towner Act be declared unconstitutional and void, and that the Defendants their assistants, agents and servants be enjoined and restrained from acting or proceeding under the alleged authority of said Act to carry its provisions into effect, or to expend the public monies for that purpose, and that the Plaintiffs may have such other and further relief as to this Court may seem just and equitable.”).

<sup>116</sup> This was done to speed the case to the Supreme Court, so it could be paired with a case in the Court’s original jurisdiction, *Massachusetts v. Mellon*.

<sup>117</sup> 262 U.S. at 486-487. *Cf.* *Hill v. Wallace*, 259 U.S. 44 (1922) (allowing eight members of the Chicago Board of Trade to sue the Secretary of Agriculture, on behalf of all 1,610 members, seeking an injunction that would restrain the enforcement against the Board of an allegedly unconstitutional statute).

<sup>118</sup> 262 U.S. at 487. The Court also described the relationship of the municipal taxpayer to the corporation in terms of “reasons which support the extension of the equitable remedy.” *Id.* For a different view, more critical of the Court’s failure to extend the municipal cases to the national government, see Richard A. Epstein, *Standing and Spending—the Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1, 34-35 (2001).

whose administration requires the outlay of public money, and whose validity may be questioned.”<sup>119</sup> Here the Court emphasized that “no precedent sustaining the right to maintain suits like this has been called to our attention.”<sup>120</sup>

Finally, the *Frothingham* Court suggested that the plaintiffs had fundamentally misunderstood our constitutional system and the role of the federal courts. The Court carefully distinguished suits to have executive officers perform ministerial duties. Then the Court rebuked the very notion that it could give relief, in words that had nothing to do with the fact that Ms. Frothingham was a taxpayer and everything to do with the fact that she sought a national injunction. The federal courts could not decide a free-standing challenge to a statute, only a suit to prevent an enforcement action.<sup>121</sup> What they could do with respect to an invalid statute “amounts to little more than the negative power to disregard an unconstitutional enactment.”<sup>122</sup> The Court then proceeded to what it saw as the fundamental problem with the case, one that is now thought of in terms of “standing” but for the Court involved not only standing but the kind of remedy equity could afford:

The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be, not to decide a judicial controversy, but to assume a position of authority over the

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<sup>119</sup> 262 U.S. at 487.

<sup>120</sup> *Id.*

<sup>121</sup> In the Court’s words: “We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy.” *Id.* at 488.

<sup>122</sup> *Id.*

governmental acts of another and coequal department, an authority which plainly we do not possess.<sup>123</sup>

In short, to call *Frothingham* a case about “standing” misunderstands the way its analysis intertwines concepts of equity, remedies, and the judicial power. The Court was being asked to “prevent” (i.e., enjoin) the enforcement of the statute, not just against a plaintiff who was threatened with direct injury, but against “people generally.” And that, the Court concluded, was beyond the powers conferred by Article III.

More examples of the traditional pattern can be given. In *Adkins v. Children’s Hospital of the District of Columbia*,<sup>124</sup> a challenge was brought to a federal statute establishing a minimum wage for women in the District of Columbia. The challenge succeeded, and an injunction issued. The plaintiff hospitals sought and received an injunction that prohibited the enforcement of the law only against themselves.

In *Panama Refining Co. v. Ryan*,<sup>125</sup> the plaintiffs challenged a statutory provision allowing the president to restrict interstate shipment of oil, as well as regulations promulgated by the Department of the Interior under the statutory provision. The provision was part of the National Industrial Recovery Act, a central piece of New Deal legislation. It was exactly the kind of case that today would feature a request for a national injunction. But the plaintiffs did not seek one. Instead they sought an injunction against three federal officers—all then residing in Texas—to keep them from enforcing the law against the plaintiffs.<sup>126</sup> In particular, they sought an injunction that would keep “the defendants from further coming upon the refining plant of the plaintiff, Panama Refining Company, or interfering with it in any manner” in its refining, purchasing, and disposing of oil; restrain the defendants “from coming upon the property of the plaintiff, A. F. Anding”; prohibit them “from further demanding of either of the plaintiffs reports called for” in regulations promulgated under the act; and restrain them “from instituting any criminal proceedings against these plaintiffs because of the violation” of the regulations.<sup>127</sup> The district court proceeded to enjoin the defendants “from enforcing any rule or regulation . . . under the National Recovery Act

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<sup>123</sup> 262 U.S. at 488-489.

<sup>124</sup> 261 U.S. 525 (1923).

<sup>125</sup> 293 U.S. 388 (1935).

<sup>126</sup> Amended Bill of Complaint, in Transcript of Record, *Panama Refining Company et al., Petitioners vs. A. D. Ryan, S. D. Bennett and J. Howard Marshall*, No. 135, Supreme Court of the United States, October Term, 1934, pp. 1-23 [hereinafter *Panama Refining Company Record*]. J. Howard Marshall was an assistant to the attorney general of the United States, “temporarily residing in Smith County, Texas.” Sixty-one years later he gained a measure of notoriety from marrying Anna Nicole Smith.

<sup>127</sup> *Id.* at 8-9.

insofar as the same applies to . . . petroleum,” and from “going upon or about the premises of complainants or in any wise interfering with them.”<sup>128</sup> To a reader today, the first part of the injunction quoted might seem to reach beyond the parties. But there is no evidence it was understood that way at the time, and there is considerable evidence that everyone recognized that the district court gave the plaintiffs what they sought, a plaintiff-protective injunction.<sup>129</sup>

Indeed, the litigation resulting in *Panama Refining Co. v. Ryan* was only part of a larger challenge to New Deal legislation. As Robert Jackson described it, after the Supreme Court’s decisions holding unconstitutional various New Deal acts, “‘hell broke loose’ in the lower courts.”<sup>130</sup> And the precise form that hell took was the grant of “injunctions restraining officers of the Federal Government from carrying out acts of Congress.”<sup>131</sup> How many injunctions were there? Against the enforcement of just one statutory provision, the processing tax in the Agricultural Adjustment Act, there were 1600 injunctions.<sup>132</sup> Attorney General Homer Cummings released a report in 1937 called *Injunctions in Cases Involving Acts of Congress* (1937),<sup>133</sup> which reviewed and tabulated all of these injunctions with an

<sup>128</sup> Decree (Feb. 21, 1934), in *Panama Refining Company Record*, at 133-134.

<sup>129</sup> The reasons are: (a) the district court’s injunction ran only against these three federal defendants, and the district court specifically held that the Secretary of the Interior was not an indispensable party, Findings of Fact and Conclusions of Law (Mar. 17, 1934), in *Panama Refining Company Record*, at 137; (b) the district court’s legal conclusions focus on the defendants’ authority vis-à-vis the plaintiffs, not others, *id.* at 137-138; (c) the defendants found many faults in the injunction, *see* Assignment of Errors, in *Panama Refining Company Record*, at 142-144, including the first part of the injunction, but without any suggestion it erroneously protected non-parties; and (d) the Panama Refining Co.’s brief in the Supreme Court describes the injunction it won in plaintiff-protective terms:

an injunction against the further enforcement of said regulations against them, and the further interference by the agents of the Department of the Interior, acting under the purported authority of said regulations, with the appellants in carrying on their business of producing, storing, and refining oil, and the transportation thereof in intrastate commerce.

Brief for Appellants, *Panama Refining Co. v. Ryan*, 1934 WL 60152 (U.S.), 8 (U.S., 2006).

Moreover, it does not appear to have been understood by other district courts as having broader effect. *See* *United States v. Mills*, 7 F. Supp. 547, 553 n.2 (D. Md. 1934).

<sup>130</sup> ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 115 (1949). The book was published in 1941, the year Jackson was confirmed to the Supreme Court.

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

<sup>132</sup> INJUNCTIONS IN CASES INVOLVING ACTS OF CONGRESS, LETTER FROM THE ATTORNEY GENERAL TRANSMITTING IN RESPONSE TO SENATE RESOLUTION NO. 82, REPORTS OF THE DEPARTMENT OF JUSTICE AND THE TREASURY DEPARTMENT, CONCERNING INJUNCTIONS OR JUDGMENTS ISSUED OR RENDERED BY FEDERAL COURTS SINCE MARCH 4, 1933, IN CASES INVOLVING ACTS OF CONGRESS, TOGETHER WITH A STATEMENT CONCERNING THE NATIONAL BITUMINOUS COAL COMMISSION, SEN. DOC. NO. 42, 75TH CONG., 1ST SESS., 1 (Mar. 25, 1937) [hereinafter *Injunctions in Cases Involving Acts of Congress*].

<sup>133</sup> *Id.*

eye toward their effect on the national government. I have not reviewed these thousands of decrees, but the report itself makes no mention of any of one of them having national scope. This is a dog that didn't bark: if the district courts had been issuing national injunctions, the silence of the report would be inexplicable.<sup>134</sup> To the contrary, the report repeatedly describes injunctions as restricting the application of a statute to a particular party.<sup>135</sup> The injunctions did severely impede the national government's efforts to enforce New Deal legislation. But that impediment came from the quantity of injunctions, the quantity of the plaintiffs in some individual cases, and the force of precedent dissuading federal officers from enforcing a statute.<sup>136</sup> Even at this point in American constitutional history—a point at which lower courts were famously “reckless, partisan, and irresponsible” in their award of injunctions against the national government<sup>137</sup>—the pattern remained one of plaintiff-protective injunctions.

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<sup>134</sup> The same potent argument from silence holds for Jackson. He severely criticizes the lower federal courts for their overreaching, *see* JACKSON, *supra* note 130, at 115-123, but he never raises an objection to the scope of the injunctions.

<sup>135</sup> *See* Injunctions in Cases Involving Acts of Congress, *supra* note 132, at 3 (describing injunctions against the processing tax under the Agricultural Adjustment Act); *id.* at 40 (“The effect of the injunctions or restraining orders granted by the district courts of California and in the District Court for the Southern District of Ohio is to relieve those particular taxpayers from paying taxes presumably due on their processing of coconut oil.”); *id.* at 45 (“The effect of such injunctive relief as has been granted on the operation and enforcement of the internal-revenue law has been confined to restraining that enforcement only as to the particular complainant bringing the suit.”); *id.* at 52 (“The effect of the injunctions [against enforcement of the Kerr-Smith Tobacco Act] . . . was to relieve those particular taxpayers from paying the taxes imposed.”); *id.* at 63 (noting that, suits challenging loans for municipal power plants made pursuant to the National Industrial Recovery Act, “[t]he effect of the restraining orders and injunctions issued in these cases has been to delay or impede the construction of the particular projects concerned”); *id.* at 88-89 (noting that three federal district courts issued 69 injunctions restraining the collection of the Windfall Taxes, which “relieved these plaintiffs from filing their returns”).

<sup>136</sup> *See, e.g., id.* at 37 (in suit to enjoin collection of tax under the Bankhead Act, by approximately 2200 cotton producers, “[t]he granting of the injunctions paralyzed the Government’s efforts to enforce the Bankhead Act in Georgia”); *id.* at 38 (granting of injunctions in more than a hundred cases challenging the tax under the Bituminous Coal Conservation Act “made it impossible to enforce the act, and no effort was made to enforce it even against companies which had not brought suit”); *id.* at 59 (attributing the lack of enforcement of the National Industrial Recovery Act in the months preceding *Schechter Poultry* to the fact that “a number of lower courts had held the act unconstitutional,” and noting that cause may be attributable “as much to the decisions denying the constitutionality of the act as to the fact that injunctions were granted restraining its enforcement”); *see also id.* at 59 (noting that when a district court enjoined a prosecution under the National Industrial Recovery Act, federal prosecutors would not engage in “further prosecution in that district”).

<sup>137</sup> *Id.* at 115 (denouncing this “picture of judicial supremacy at work in the district courts of the United States”).

Almost two decades later, in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>138</sup> the district court issued a preliminary injunction that did not restrain the seizure of all steel mills. In fact, the preliminary injunction protected all the plaintiffs save one.<sup>139</sup>

One case from the federal courts' first century and a half does not fit this pattern. In *Hammer v. Dagenhart*,<sup>140</sup> corporations opposed to the federal child labor statute brought a challenge in the Western District of North Carolina.<sup>141</sup> The plaintiffs they selected were two brothers, one fifteen and one thirteen. The federal district judge held the law unconstitutional and granted the injunction the plaintiffs requested—an injunction restraining the enforcement of the statute within the Western District of North Carolina.<sup>142</sup> The injunction thus went further than merely prohibiting enforcement against the plaintiffs.<sup>143</sup> Outside the Western District of North Carolina, the attorney general directed federal district attorneys to continue to bring prosecutions under the act.<sup>144</sup> The case was appealed directly to the U.S. Supreme Court, which affirmed, but without discussing the remedy.

At least in theory, the injunction in *Hammer v. Dagenhart* was a substantial deviation from equity practice. Once an injunction is not limited to protecting the plaintiffs, but can instead protect non-parties, it is a matter of judicial grace how far it extends. The territorial boundaries of the court are not a sound limit, for it has long been established that equity can enjoin extra-territorial acts.<sup>145</sup> Nevertheless, the injunction in *Hammer v. Dagenhart* seems to have been an aberration more than the start

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<sup>138</sup> 343 U.S. 579 (1952).

<sup>139</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 577 (D.D.C 1952). That one plaintiff was the United States Steel Company, because it had sought a narrower injunction that would, the court thought, in effect authorize the federal action. *Id.*

<sup>140</sup> 247 U.S. 251 (U.S. 1918).

<sup>141</sup> See STEPHEN B. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW 81-99 (1968).

<sup>142</sup> *Id.* at 107-108.

<sup>143</sup> Some scholars have been attracted to a geographical solution to the national injunction, such as limiting the scope of an injunction to the territorial jurisdiction of the appellate court. See Morley, *supra* note 5, at 535-538, 554; see also Siddique, *supra* note 5, at 6 (treating the relevant question as “the geographic scope of injunctions”). Such a solution could be adopted by legislation. But it has no basis in traditional equity. On the one hand, equity confined itself to controlling the defendant’s behavior vis-à-vis the plaintiff. On the other hand, to protect the plaintiff, equity was willing to enjoin acts committed outside of the chancellor’s territorial jurisdiction. Geographical lines were not the stopping point. See sources cited *infra* note 244; see also *Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875, 888 (3d Cir.), *on reh’g*, 809 F.2d 979 (3d Cir. 1986) (reversing injunction that controlled federal defendants’ behavior within the District of New Jersey, in favor of an injunction controlling their behavior only against the plaintiff).

<sup>144</sup> See WOOD, *supra* note 141, at 109.

<sup>145</sup> See *infra* note 244.

of a new practice. The district court proceedings were sloppy; despite the importance of the case, the judge did not even issue a written opinion.<sup>146</sup> Subsequently, when Congress passed a tax on child labor and it was challenged—not coincidentally—before the same district judge, he issued an injunction restraining the collection of the tax only as to the plaintiffs.<sup>147</sup> Moreover, it is worth emphasizing that the plaintiffs in *Hammer v. Dagenhart* did not seek, and the court did not award a national injunction. This seems clearly to be because the corporate funders of the litigation did not think a national injunction was possible: mill-owners from out of state, including South Carolina, would have wanted a national injunction.<sup>148</sup>

There is a coda to the story of *Hammer v. Dagenhart*. Counsel for Ms. Frothingham argued that in previous cases the Court had “permitted a proceeding to be maintained by one of a large class affected by a law alleged to be invalid, for the purpose of enjoining a public officer.”<sup>149</sup> Of the authority cited by Ms. Frothingham’s counsel, only one case involved a federal statute operative outside the District of Columbia: *Hammer v. Dagenhart*.<sup>150</sup> If there was any chance that *Hammer v. Dagenhart* could be extended to support a national injunction, the idea was decisively rejected in *Frothingham v. Mellon*.

## 2. The possibility of national injunctions (the 1960s and 70s)

Through the middle of the twentieth century, there do not appear to have been any national injunctions. Soon the national injunction would seem possible, though not yet decisively accepted. Consider three cases in this in-between time: *Wirtz v. Baldor Electric Company* (1963), *Flast v. Cohen* (1967, 1968), and *Harlem Valley Transportation v. Stafford* (1973, 1974).

In *Wirtz*, a panel of the D.C. Circuit enjoined a determination by the Secretary of Labor about the prevailing wage in the electrical promoters and generators industry.<sup>151</sup> The court, consisting of Chief Judge Bazelon

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<sup>146</sup> See WOOD, *supra* note 141, at 105.

<sup>147</sup> *Id.* at 230.

<sup>148</sup> *Id.* at 83 (noting concentration in North and South Carolina of “aggressively active opposition” to the child labor statute).

<sup>149</sup> 247 U.S. at 447 (argument of William L. Rawls).

<sup>150</sup> Two other cases were cited by counsel. *Truax v. Raich* was a constitutional challenge to a state statute with a prayer for injunctive relief that protected only the plaintiff. See *Truax v. Raich*, Transcript of Record, Supreme Court of the United States, October Term 1915, No. 361 (Feb. 25, 1915), pp. 18-19. *Millard v. Roberts* was a constitutional challenge to the expenditure of federal taxpayer money in the District of Columbia, which the Court resolved even while expressly reserving whether “a taxpayer of the District of Columbia, can raise the questions we have considered,” 202 U.S. 429, 438 (1906).

<sup>151</sup> *Wirtz v. Baldor Electric Co.*, 337 F.2d 518, 533-535 (1963).

and Judges Washington and Wright, had found the Secretary's determination invalid. It was less clear that any of the plaintiffs had standing, so the court remanded for further proceedings on that point in the district court. But the D.C. Circuit panel nevertheless went ahead and resolved the scope of the injunction, conditional on the district court finding standing.<sup>152</sup> The D.C. Circuit's conclusion was clear: even though the suit was not certified as a class action,<sup>153</sup> the Secretary should be enjoined from relying on his determination of the industry wage as to any business in the industry, not merely as to the three plaintiffs. Strikingly, the court cited no previous example of such an injunction. Instead, it offered four arguments:

First, the rule of law required inter-case consistency: "a court would ordinarily give the same relief to any individual who comes to it with an essentially similar cause of action against the administrator."<sup>154</sup> True, but beside the point. That the court would give an injunction to protect someone else, *if that person sued and won*, does not establish the correctness of giving that person a remedy in the absence of suit.

Second, the court noted the potential for the Secretary to apply inconsistent standards, giving some firms a competitive advantage. The risk was real, but the court assumed an inert and unresponsive agency.

Third, the court pointed to the Administrative Procedure Act's language instructing a court to "hold unlawful and set aside" agency actions it finds to be invalid. Yet the court seemed to recognize that the argument proved too much; it quickly retreated to emphasizing its discretion about the scope of relief, which was to be determined by various "legal and equitable considerations."<sup>155</sup>

Fourth, the court analogized the Secretary's determination to a statute held unconstitutional, which it noted would "*be regarded as unconstitutional* as to all persons similarly situated." But this argument side-stepped a key point: "regarding a statute as unconstitutional" is not the same thing as enjoining its application as to everyone.<sup>156</sup>

*Wirtz* appears to have been the first national injunction in the United States.<sup>157</sup> Several points about it are especially remarkable. One is that the court cited no prior cases that offered support for the scope of the remedy. Another is that it anticipated the arguments that continue to be invoked in

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<sup>152</sup> *Id.* at 535.

<sup>153</sup> *Id.* at 533 & n. 34.

<sup>154</sup> *Id.* at 534.

<sup>155</sup> *Id.* at 534.

<sup>156</sup> In support of this strained argument, the best the court could do was to cite two cases that allowed third-party standing, *Truax v. Raich*, 239 U.S. 33, 38-39 (1915) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>157</sup> I am grateful to Michael Morley for bringing the case to my attention.

favor of the national injunction—arguments about inter-case consistency, about fragmentation in the law, and about the APA. Finally, *Wirtz* seems to have had no ripples: no subsequent cases noted the scope of the remedy.

Later in the 1960s came *Flast v. Cohen*, a suit challenging the federal government’s expenditure of tax money. As in *Frothingham*, the complaint requested a national injunction.<sup>158</sup> Also as in *Frothingham*, because the suit was about federal expenditure of tax money, it would not be possible to give the plaintiffs relief that involved only their taxes. By the time the case arrived in the Supreme Court, however, the plaintiffs seem to have conceded that a national injunction would not be appropriate and were suggesting that they wanted an injunction only for New York City.<sup>159</sup> But the Supreme Court did not hold them to that concession, and expressly contemplated that the injunction might be broader than New York City programs.<sup>160</sup>

In *Flast*, the Court never endorsed a national injunction, but it certainly did not reject the possibility out of hand, as *Frothingham* had done. The mention of the scope of the injunction came in the Court’s discussion of the procedural posture of the case (and whether a three-judge district court was properly convened). In deciding the substantive issue in the case—whether plaintiffs could sue in federal court—the justices treated the question as entirely one about “standing.” In fact, how the Court read *Frothingham* was telling. The Court divvied up different parts of *Frothingham*, allocating them to buckets of “justiciability” and “pure policy,” but ignoring all questions of federal power to grant equitable remedies. Indeed, *Flast* almost entirely ignored questions of remedy. It no longer seemed unthinkable that there would be a national injunction.

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<sup>158</sup> Appendix, *Flast v. Cohen*, at 5a (“This is a civil action brought by the plaintiffs, on their own behalf and on behalf of all others similarly situated, for a temporary and permanent injunction against the allocation and use of the funds of the United States to finance, in whole or in part, instruction in sectarian schools, and to declare such use violative of the First and Fifth Amendments to the Federal Constitution.”).

<sup>159</sup> See *Flast v. Cohen*, 392 U.S. 83, 89 (1968) (“[N]oting that appellants have conceded that the case should be deemed one limited to the practices of the New York City Board of Education, the Government contends that appellants wish only to forbid specific local programs which they find objectionable and not to enjoin the operation of the broad range of programs under the statutory scheme.”).

<sup>160</sup> See *id.* (“It is true that the appellants’ complaint makes specific reference to the New York City Board of Education’s programs which are funded under the challenged statute, and we can assume that appellants’ proof at trial would focus on those New York City programs. However, we view these allegations of the complaint as imparting specificity and focus to the issues in the lawsuit and not as limiting the impact of the constitutional challenge made in this case. The injunctive relief sought by appellants is not limited to programs in operation in New York City but extends to any program that would have the unconstitutional features alleged in the complaint.”).

The next example of a national injunction seems to have come in *Harlem Valley Transportation Association v. Stafford*.<sup>161</sup> The National Resources Defense Council and other plaintiffs sued several government defendants, including the Interstate Commerce Commission (ICC), about precisely when the ICC needed to produce environmental-impact statements in railroad-abandonment proceedings. The plaintiffs argued that the ICC was failing to comply with its legal duties by waiting to produce an environmental-impact statement until the hearing itself, at which point environmentalist intervenors were not in a position to effectively challenge the conclusions in the statement.

As the case unfolded, there was some confusion about what the scope of the relief would be. The plaintiffs emphasized environmental harms in the Northeast, and in particular in the Harlem Valley. The plaintiffs also asked for class certification on behalf of all who would be harmed by the ICC's failure to timely produce the required statements. Judge Frankel was obviously concerned about whether he had power to issue a broad injunction if a class was not certified, but then the government defendants conceded the point. As Judge Frankel said in his opinion accompanying the preliminary injunction:

One of the court's main concerns during the hearing of the motion for a preliminary injunction was the question whether the plaintiffs, if they could prove entitlement to any relief, could legitimately seek a restraint of nationwide effect when their alleged interests might be of narrower geographic scope. Both the United States and the ICC have now not only conceded, but insisted, that a preliminary injunction in this case would "affect the agency in the entire scope of its authority and jurisdiction."<sup>162</sup>

Given this concession, Judge Frankel decided that "[i]n these circumstances, it becomes unimportant to decide at this early stage whether the action may proceed as a class suit."<sup>163</sup> He granted a preliminary injunction, and the Second Circuit affirmed with no further discussion of the scope of injunctive relief. That was that.

The court had backed into a national injunction without any real consideration. Multiple points made the decision an odd formative moment. One is the government concession, which should not have been

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<sup>161</sup> 360 F.Supp. 1057 (S.D.N.Y. 1973).

<sup>162</sup> *Id.* at 1060 n.2. Judge Frankel added the following quotation from the brief of the government defendants: "Any action by this Court based on plaintiffs' individual interests and the public interest will affect the agency's procedures and the application of said procedures anywhere within the scope of the agency's jurisdiction."

<sup>163</sup> *Id.*

decisive. The scope of the court's equity powers is not determined by the concessions of the parties, and many equitable doctrines protect the public and the court itself.<sup>164</sup> Moreover, the case was not even an appropriate one for an injunction in the first place. Because the government defendants had indicated they would comply and there was no need to manage that compliance, the court should have granted a declaratory judgment instead of an injunction.<sup>165</sup>

The decision by the district court in *Stafford* was affirmed the next year by the Second Circuit, but there were intervening developments that help explain the court's willingness to affirm a national injunction. In particular, there were two opinions by Judge Friendly. First, there was a case that had been brought by five plaintiffs against the Civil Service Commission of the City of New York, alleging that its requirements for new firefighters were racially discriminatory.<sup>166</sup> Second, a case had been brought by two applicants for unemployment benefits challenging a New York state agency's rule that no benefits could be paid to those who moved to a place with "persistent high unemployment" (in this case, Puerto Rico).<sup>167</sup> In neither case was class certification appropriate, in one case because of the inadequacy of the representatives and in the other case because of the difficulty of administering the restitutionary relief on a class basis.

Aware that these suits were imperfect vehicles, Judge Friendly nevertheless strongly encouraged the municipal and state defendants to give up the discriminatory rules. In doing so, however, he blurred the distinction between what the court's decree *required* the defendant to do

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<sup>164</sup> See Seana Valentine Shiffrin, *Remedial Clauses: The Overprivatization of Private Law*, 67 HASTINGS L.J. 407, 411 (2016) (referring to "the public's interest in reserving remedial decisionmaking to impartial adjudicators who are positioned to tailor remedies with sensitivity to the details of the circumstances and significance of a breach"); Bray, *supra* note 87, at 572-586.

<sup>165</sup> In other ways, too, the case was unusual. The merits of the question had been already decided in a previous Second Circuit case—and the ICC had previously admitted as much but was now trying to evade that case with implausible distinctions. Moreover, the Department of Justice was also a defendant, and it actually agreed on the merits with the plaintiffs.

<sup>166</sup> *Vulcan Society of New York City Fire Department v. Civil Service Commission of City of New York*, 490 F.2d 387 (2d Cir. 1973). The requirements challenged by the plaintiffs included some that affected them (e.g., a written examination), and some that did not affect them (e.g., diploma requirement, conviction bar). *Id.* at 399. The district judge himself said there was "serious question as to whether any of the plaintiffs have standing to challenge the educational requirement and prior conviction bar." *Vulcan Society of New York City Fire Department v. Civil Service Commission of City of New York*, 360 F.Supp. 1265, 1277 n.35 (S.D.N.Y. 1973). The district judge decided the written examination was unconstitutional and enjoined its use by the city. *Id.* at 1277-1278. The district judge reached the merits without deciding the motion for class certification.

<sup>167</sup> *Galvan v. Levine*, 490 F.2d 1255 (2d Cir. 1973).

and what the defendant *chose* to do. In the firefighter case, Judge Friendly said it would be “unthinkable” for a losing municipality to “insist on other actions being brought.”<sup>168</sup> Judge Friendly also advised the plaintiffs about how to perfect their case, suggesting, if class certification were denied on remand, that the complaint be amended to include other plaintiffs, in order to ensure that there were some plaintiffs affected by each of the challenged requirements. He added, now advising the city of New York: “If we may be pardoned for speaking practically, we cannot understand why the municipal defendants should resist such an amendment. Much work has already been done on these points. It is evident that they will be raised sooner or later, and . . . it is in everyone’s interest that questions about them should be promptly resolved.”<sup>169</sup> In the employment benefits case, Judge Friendly treated the *judgment* as running to the benefit of similarly situated parties merely because the state defendants chose to comply.<sup>170</sup>

Once the distinction between legal and practical effect was collapsed, and once the state defendants had signaled they would acquiesce, it no longer seemed to matter who the plaintiffs were, and one plaintiff could get a universal injunction. As Judge Friendly said, “insofar as the relief sought is prohibitory, an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality, at least for the plaintiffs.”<sup>171</sup> All of these assertions from Judge Friendly were dicta, and if read carefully they did not sharply contradict the traditional equitable practice. “Practical” advice about what a government defendant should do is one thing, and the “legal” effect of a remedy or judgment is another. Even Judge Friendly’s reference to the class action designation being a “formality” was given two careful qualifications: “*largely a formality, at least for the plaintiffs.*”<sup>172</sup> That is denotatively true, because named plaintiffs do typically receive the same injunctive relief regardless of whether a class is certified. But for

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<sup>168</sup> 490 F.2d at 399.

<sup>169</sup> *Id.* at 400.

<sup>170</sup> 490 F.2d at 1261 (“The State has made clear that it understands the judgment to bind it with respect to all claimants; indeed even before entry of the judgment, it withdrew the challenged policy even more fully than the court ultimately directed and stated it did not intend to reinstate the policy.”).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* (emphases added). Note that Judge Friendly similarly hedged a conclusion in the firefighter case: “[The district judge] was entirely right in thinking it unnecessary, *from the plaintiffs’ standpoint*, for him to decide on class action designation in order to pass upon the issues raised in regard to Exam 0159.” 490 F.2d at 399 (emphasis added). For that proposition, Judge Friendly cited two Fifth Circuit cases, one of which, *Bailey v. Patterson*, is discussed below at note 226.

defendants and non-parties, it matters what the scope of the injunction is. The hedges and qualifications were oversubtle.

Unsurprisingly, these opinions by Judge Friendly were taken to stand for the proposition that class certification does not matter for injunctive relief.<sup>173</sup> One plaintiff can get the same universal injunction that a class of plaintiffs would. Once that proposition was accepted, it was an easy matter to apply it in a suit against the national government. That is what the Second Circuit did the next year—implicitly and without any express discussion—when it affirmed the national injunction in *Harlem Valley Transportation Association v. Stafford*.

Hard procedural cases make bad law. Judge Friendly recognized this in the firefighters case, when he noted that the district court judge had decided the case without even ruling on the motion for class certification, adding that “the judge’s commendable desire to get at the heart of the complaint seems to have created a bit of a procedural impasse.”<sup>174</sup> Yet Judge Friendly’s opinions also created an impasse. Stripped of the hedges and qualifications, the principle is that an injunction can protect non-parties. It is true that one could draw a line after municipal defendants, given the history of broad equitable relief against them;<sup>175</sup> or one could draw a line after state defendants, for pragmatic reasons.<sup>176</sup> But if those lines are not drawn, a national injunction is simply a matter of carrying the principle to its logical conclusion. That is what courts have done over the subsequent decades as they have issued national injunctions.<sup>177</sup>

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<sup>173</sup> See, e.g., *McDonald v. McLucas*, 371 F.Supp. 831 (S.D.N.Y. 1974). In *McDonald v. McLucas*, five relatives of servicemen who were missing in action in Vietnam sued the secretaries of the Air Force, Army, and Navy, challenging the statutes that determined when missing servicemen were declared dead. The district court denied class certification on the ground that it would be “largely a formality” because “[t]he court can properly assume that an agency of the government would not persist in taking actions which violate the rights of a service member’s next of kin, if the statutes are declared unconstitutional.” *Id.* at 833, 834. The authority cited? The two Friendly opinions and a district court opinion relying on one of the Friendly opinions. The result in *McDonald v. McLucas*? The district court held two provisions of the U.S. Code unconstitutional and issued a national injunction against their enforcement. *Id.* at 837.

<sup>174</sup> 490 F.2d at 399.

<sup>175</sup> See *supra* notes 94-98 and 117 and accompanying text.

<sup>176</sup> See *supra* note 32 and accompanying text.

<sup>177</sup> This is not to say that the practice immediately and thoroughly followed through on the logic. For example, in 1977, a law review article could treat federal agencies’ practice of nonacquiescence—accepting defeat one circuit at a time, while continuing to apply and defend a challenged regulation in other circuits—without ever discussing the possibility that an injunction might bind the agency throughout the United States. Allan D. Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence, and Synthesis of Judicial Policies*, 55 N.C. L. REV. 123 (1977).

### 3. The acceptance of national injunctions (to the present)

Federal courts have issued national injunctions in a number of cases.<sup>178</sup> In other cases, they have declined to give national injunctions.<sup>179</sup> There is no rule against national injunctions; nor is there a rule requiring them.

In fact, a district judge can find authority supporting any possible decision about the scope of the injunction. When courts want to give an injunction that goes beyond protecting the plaintiffs, they point to the extent of the violation,<sup>180</sup> the permissibility of injunctions benefitting non-parties,<sup>181</sup> the impracticality of giving an injunction only for the benefit of the plaintiffs,<sup>182</sup> and the need for complete relief.<sup>183</sup> When courts want to give an injunction that protects only the plaintiffs, they point to the importance of allowing other federal courts to reach their own decisions<sup>184</sup> and the principle that equitable remedies should be no more burdensome than necessary.<sup>185</sup> As with Karl Llewellyn's famous dueling canons,<sup>186</sup> there is always a principle on both sides.<sup>187</sup>

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<sup>178</sup> *E.g.*, *Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409-1410 (D.C. Cir. 1998) (affirming national injunction against agency rule under Clean Water Act); *Bresgal v. Brock*, 843 F.2d 1163, 1168-1172 (9th Cir. 1987) (affirming with revision a national injunction requiring the Secretary of Labor "to cease refusing to enforce the Migrant and Seasonal Agricultural Workers Protection Act" with respect to forestry workers); *see also* *Davis v. Astrue*, 874 F. Supp. 2d 856, 868-869 (N.D. Cal. 2012) (deferring ruling about whether individual plaintiffs could obtain "systemwide" relief in suit against the Social Security Administration, but noting its availability). Other examples are cited in Part I.A and here in Part III.B.3. Courts routinely reach similar decisions in suits against state and municipal government officers. *See, e.g.*, *Clement v. California Department of Corrections*, 364 F.3d 1148, 1152-1154 (9th Cir. 2004) (state); *Soto-Lopez v. New York City Civil Service Commission*, 840 F.2d 162, 168-169 (2d Cir. 1988) (municipality).

<sup>179</sup> *Virginia Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 393-394 (4th Cir. 2001); *Meinhold v. U.S. Dept. of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994); *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 728ff. n.1 (9th Cir. 1983).

<sup>180</sup> *E.g.*, *Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 4426495, at \*17 (N.D. Tex. Aug. 21, 2016).

<sup>181</sup> *E.g.*, *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1987).

<sup>182</sup> *E.g.*, *id.* at 1169-1172 (issuing declaratory judgment and permanent national injunction in non-class action requiring the Secretary of Labor to apply the Migrant and Seasonal Agricultural Workers Protection Act to commercial forestry workers).

<sup>183</sup> *E.g.*, *Washington v. Reno*, 35 F.3d 1093, 1103-1104 (6th Cir. 1994) (upholding preliminary national injunction against the Bureau of Prisons, which had been issued before class certification, on the grounds that "[t]he named plaintiffs' gains in obtaining an injunction . . . would be illusory" if it was limited to controlling the actions of the Bureau of Prisons only at their own prison); *Davis v. Astrue*, 874 F. Supp. 2d 856, 867-869 (N.D. Cal. 2012) (denying motion to dismiss non-class action against the Social Security Administration, and noting the possibility of a national injunction where necessary "for the plaintiffs to get effective relief").

<sup>184</sup> *E.g.*, *Virginia Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 393-394 (4th Cir. 2001).

<sup>185</sup> *E.g.*, *id.* at 393; *see also* Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 650-651 (2015).

## IV. What changed?

This Part offers an explanation for the national injunction. The explanation is historical, and it blends doctrine, the institutional structure of courts, and ideology (in the sense of changes of intellectual fashion regarding law and the judicial role). The necessary condition for the problems associated with the national injunction was a structural change, the shift from a one-chancellor system to a multiple-chancellor system. For the federal courts, that shift occurred in 1789. The shift to multiple chancellors was necessary but not sufficient to create the forum-shopping and conflicting-injunction problems.

What made the vulnerabilities of the multiple-chancellor system manifest were two ideological shifts. The first was a shift in the conception of injunctions against federal officers, from thinking of them as essentially anti-suit to thinking of them as free-standing challenges to a statute, regulation, or order. The second was a shift in the conception of legal invalidity, from an invalid law being one a judge merely failed to apply, because a higher law controlled, to the conception of a judge “striking down” and thus removing from operation an invalid law. In addition to these two ideological shifts, there were other changes that might have made national injunctions seem more natural: familiarity with statutes that concentrated judicial review in a single court, greater use of federal agency rulemaking, and renewed judicial confidence after *Brown v. Board of Education*.

The account given here—an institutional shift followed much later by ideological changes that exploited its vulnerability—matters in several ways, even apart from its intrinsic interest. One is that it suggests the national injunction is relatively entrenched. It rests on structural and ideological forces that will not soon be leaving the scene. That suggestion will in turn shape the solution proposed in Part V. Another way the explanatory account matters is that it exposes a difficulty in translating traditional equitable doctrines for the present. Those doctrines were developed in a very different institutional setting—a one-chancellor system—and so they need to be developed and refined with awareness of the multiple-chancellor system of the federal courts.

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<sup>186</sup> Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons of About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950).

<sup>187</sup> See Carroll, *supra* note 5, at 2033; see, e.g., *Davis v. Astrue*, 874 F. Supp. 2d 856, 868 (N.D. Cal. 2012) (finding the conflicting authority about the scope of an injunction “difficult to square”).

## A. The structural precondition: multiple chancellors

Although Chancery began sometime around the Norman invasion,<sup>188</sup> only gradually did the chancellor take on duties that were recognizably judicial. By the fifteenth century it was clear that the Chancery had become a court—a one-judge court. True, the chancellor was assisted by various officers, with names like “masters” and “registers.” But for judicial decision-making purposes the Chancery was a unitary institution. It was the chancellor who had to sign all of the decrees; they were his decrees.<sup>189</sup> There was no appeal from the chancellor; his jurisdiction thus resembled, in more familiar terms, the original jurisdiction of the U.S. Supreme Court. This sense of Chancery as a unitary institution is captured, in this Article, by the shorthand of saying that there was one chancellor.<sup>190</sup>

The fact that there was one chancellor was burdensome to those who sought the chancellor’s aid, and to the chancellor himself. For example, the chancellor had to make allowance for those who lived in distant parts of England, because it would take so long for them to reach the capital after being served with a subpoena.<sup>191</sup> And to ease the burden on the chancellor, the early modern Chancery adopted many rules that constrained or channeled would-be plaintiffs.<sup>192</sup>

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<sup>188</sup> See BAKER, *supra* note 7, at 99 & n.15.

<sup>189</sup> For example, when Francis Bacon was chancellor (1617–1621), he instructed the registers, who drafted the decrees, that when they gave decrees to him for his signature, they “ought to give him understanding which are [the] decrees of weight, that they may be read and reviewed before his lordship sign them.” Francis Bacon, *Ordinances in Chancery*, in 7 THE WORKS OF FRANCIS BACON 765 (James Spedding, Robert Leslie Ellis, and Douglas Denon Heath eds., 1859) (Ordinance 41). Thus the press of Chancery business meant the chancellor would issue more decrees than he could read, but he was still responsible for every decree. For a recent case emphasizing that federal judges should not cede to masters the power to fill in the details of an injunction, see *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 145-146 (2d Cir. 2011).

<sup>190</sup> Qualifications could be added. For example, there were other equitable courts, including the Court of Exchequer and the Court of Requests. And the chancellor retained his administrative duties, which means that one could say that instead of one chancellor there was only three-eighths of a chancellor.

<sup>191</sup> *Cases in Tempore Egerton (Ch. c. 1559 x c. 1604)*, reprinted in 1 CASES CONCERNING EQUITY AND THE COURTS OF EQUITY 1550-1660, at 337, no. 120-[104] (W.H. Bryson ed., 2001) (“If a subpoena be sued forth against one that dwells two hundred miles from London, let the plaintiff have this care, that the subpoena be returnable so as he may have the defendant come to London after the rate of twenty miles a day.”). Centuries later, in 1858, the cost and difficulty of traveling to see the one chancellor would again be raised when there was a proposal to allow county courts to exercise equitable jurisdiction. 5 Law Mag. & L. Rev. Quart. J. Juris. 3d ser. 342 (1858) (“[I]t cannot be doubted that distance from the metropolis often entails on suitors, in many parts of the country, a denial of justice in matters taken cognizance of by a Court of Equity alone.”).

<sup>192</sup> Many of Bacon’s ordinances are instructions to the parties to avoid burdening the court. The grounds for a bill of review (in essence a motion for reconsideration of a Chancery decision)

As England grew, and as the common law courts grew, and as the various other equitable courts grew, there remained only one chancellor.<sup>193</sup> Not until the nineteenth century, when Chancery was nearing the end of its life as an independent judicial institution, did it receive vice-chancellors who could also hear and decide cases.<sup>194</sup> At that point Chancery did have multiple judges, but it remained a small, unified, and distinctive institution, and the power to issue equitable remedies was not distributed throughout the English courts.

In colonial America, the one-chancellor system was imitated. In colonies with a chancellor, there was only one. In colonial America, “equity courts sat, as a rule, only in the capital; unlike the common law, it was not brought to every man’s doorstep.”<sup>195</sup> That pattern continued in the early republic; a plaintiff who wanted to see Chancellor Kent had to go to Albany.

The late eighteenth century and the nineteenth century saw a shift to multiple-chancellor systems. In federal courts of the new United States, from the beginning every judge was a chancellor (i.e., every judge could resolve equitable claims on the court’s equity side).<sup>196</sup> Most of the states subsequently distributed equitable powers throughout the judiciary.<sup>197</sup>

In the New York state courts, it was the change to multiple chancellors that allowed the Erie Railroad fiasco. In the standard account, by President John Quincy Adams’s grandson, the blame is squarely put on

were narrowly specified, and any party seeking a bill of review had to first obey the chancellor’s decree and obtain sureties for any “costs and damages for the delay” that might result. Bacon, *supra* note 189, at 759-60. Moreover, litigants were warned about filing papers of “immoderate length,” Ordinance 55, *id.* at 767; offering evasive answers, Ordinances 61 and 63, *id.* at 767-68; introducing decrees from unrelated litigation, Ordinance 71, *id.* at 769; and attacking the credibility of witnesses, Ordinance 72, *id.* at 769. Any plaintiff who brought a suit in Chancery without having *probabilem causam litigandi* had to “pay unto the defendant his utmost costs.” Once the chancellor decided, there was to be no “troubling the lord chancellor, by any private attending of him, to explain his meaning.” Ordinance 37, *id.* at 764.

<sup>193</sup> As with many aspects of the English political order, there was an exception during the Interregnum between Charles I and Charles II, when the Puritans abolished the chancellor but could not rid themselves of Chancery; then equity was administered by a commission. Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in *LAW IN AMERICAN HISTORY* 257, 260-61 (Donald Fleming & Bernard Bailyn eds. 1971).

<sup>194</sup> Vice-chancellors were added only after the Chancery was presided over by the most dilatory chancellor in its history, Lord Eldon, the inspiration for the caricature in *Bleak House*.

<sup>195</sup> LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 48 (1973).

<sup>196</sup> In states without courts of equity at the Founding, the federal courts would have been the only source of equitable relief. See Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 *COLUM. L. REV.* 1254, 1277 ((1961).

<sup>197</sup> A summary of the current state of merger of legal and equitable courts in the states can be found in Bray, *supra* note 87, at 538. For an exemplary study of merger, see Kellen Funk, *Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846-76*, 36 *J. LEGAL HIST.* 152 (2015).

the multiple chancellors of 1860s New York. The state was divided into eight districts, each with four or five elected judges.

These local judges, however, are clothed with certain equity powers in actions commenced before them, which run throughout the State. As one subject of litigation, therefore, might affect many individuals, each of whom might initiate legal proceedings before any of the thirty-three judges; which judge, again, might forbid proceedings before any or all of the other judges, or issue a stay of proceedings in suits already commenced, and then proceed to make orders, to consolidate actions, and to issue process for contempt,—it was not improbable that, sooner or later, strange and disgraceful conflicts of authority would arise, and that the law would fall into contempt.<sup>198</sup>

What Charles F. Adams, Jr., describes was not inevitable. The multiple-chancellor system does not lead inexorably to national injunctions and the problems such as forum-shopping and conflicting injunctions. But it is a necessary precondition.

#### B. Two ideological shifts

Why did it take a century and a half after the establishment of the federal courts—in which every judge had the powers of a chancellor—before the national injunction arrived? The question is difficult, and the answer here is tentative. It seems that having multiple chancellors makes it possible to have national injunctions. The possibilities are latent in the structure. When there is a crisis and opportunistic behavior by judges—as in the New York railroad litigation chronicled by Adams—then not only system-wide injunctions but even conflicting injunctions are possible. With enough judicial restraint or with certain ideological views about courts and law, it is possible to avoid exposing the vulnerabilities of the multiple-chancellor structure. Two ideological shifts (in the sense of changes in thinking about law) made it easier for federal judges to give national injunctions.<sup>199</sup>

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<sup>198</sup> ADAMS, *supra* note 55, at 22–23. Although not exactly a case of conflicting *injunctions*, in *Ex Parte Young*, after a federal court issued a temporary injunction prohibiting the Minnesota attorney general from enforcing the rate regulation against plaintiffs, that attorney general obtained a writ of mandamus requiring the corporation to comply.

<sup>199</sup> In addition to the explanations given in this subpart, a number of others could be given. These might include the adoption of the Federal Rules of Civil Procedure, as well as the 1962 statute authorizing mandamus for federal district court judges.

First, the federal courts once thought of injunctions against enforcement not as challenges to the validity of a statute (something offensive) as much as as *anti-suit injunctions* (something defensive).<sup>200</sup> A plaintiff seeking an injunction against public officials would be trying to forestall an enforcement action in which the parties would be reversed (i.e., the plaintiff seeking an injunction would otherwise have been the defendant in the hypothetical future enforcement action). A court would decide the validity of a law being applied, but only when there was, and to the extent that there was, a threatened enforcement action.<sup>201</sup> To the extent federal courts thought of injunctions against the enforcement of statutes in those terms,<sup>202</sup> it is easy to see why they would not give national injunctions. The suit anticipates an enforcement action against these plaintiffs; the injunction should protect these plaintiffs from that enforcement action.

No one has yet charted exactly when the shift occurred, this shift in thinking of an injunction against enforcement of a federal law as anti-suit to thinking of it as a challenge to the law itself.<sup>203</sup> It is possible that the adoption of the federal Declaratory Judgment Act, enacted in 1933, encouraged this change in thinking.<sup>204</sup> If it did, then it had the effect of

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<sup>200</sup> “Anti-suit injunction” is the conventional terminology, *see, e.g.*, John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989 (2008), and so it is used here. It is not quite precise, as the *Georgia v. Atkins* case shows. *See supra* text accompanying notes 102-104. In that case the injunction did not restrain Atkins from bringing a *suit*, but rather from “further proceeding in the collection of the tax,” which he planned to do by means of a distress warrant. A broader term such as “anti-enforcement injunction” might be more precise, though it would lose the connotation of particular proceedings implicit in *suit*.

<sup>201</sup> *Cf.* *White v. Johnson*, 282 U.S. 367, 373 (1931) (“An answer [to the fourth certified question] would involve merely an examination of the Act and a determination whether on its face it violates the Fifth Amendment. Neither this Court nor the court below is authorized to answer academic questions. The constitutionality of a statute is not drawn into question except in connection with its application to some person, natural or artificial.”); *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471, 481 (1896) (“If an ordinance be passed, and is invalid, the jurisdiction of the courts may then be invoked for the protection of private rights that may be violated by its enforcement.”); *Fitts v. McGhee*, 172 U.S. 516, 529–30 (1899) (“There is a wide difference between a suit against individuals, holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state.”).

<sup>202</sup> For recent literature on anti-suit injunctions and *Ex Parte Young*, *see* Harrison, *supra* note 200; David L. Shapiro, *Ex Parte Young and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69 (2011); Stephen I. Vladeck, Douglas *and the Fate of Ex Parte Young*, 122 YALE L.J. ONLINE 13 (2012).

<sup>203</sup> The older view can be seen in *Frothingham*. *See supra* text accompanying note 122.

<sup>204</sup> By its own terms, the Declaratory Judgment Act should not have had this effect. *Cf.* John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56, 82 n.130 (2014).

broadening federal standing, exactly as Justice Brandeis feared. And its timing would fit the change in thinking from *Frothingham* to *Flast*. It may also be that this shift was related to the development of the idea that there is an independent category of “facial challenges.”<sup>205</sup>

Second, there has been a change for some judges in their self-conception of what they are doing vis-à-vis an unconstitutional statute. The traditional conception is that judges do not so much strike down an unconstitutional law as refuse to apply it.<sup>206</sup> A judge has a duty to follow the law.<sup>207</sup> Where there is a conflict among legal authorities, that duty compels the judge to follow the higher law. When a statute is “repugnant” to the Constitution, that is, inconsistent with the Constitution, what a judge does is simply not apply it. This view is represented by *Marbury v. Madison*.<sup>208</sup>

A different view is common today, and it can be found in the metaphorical language of courts and commentators. We speak of a statute, regulation, or order being “struck down,” words that are physical and violent.<sup>209</sup> Another description, less violent but still suggestive of physical dislocation, is found in the Administrative Procedure Act, which says that federal courts are to “set aside” unlawful agency action.<sup>210</sup> Such language has accompanied a shift in the idea of what courts do with an unconstitutional statute: instead of courts remedying or preventing a specific wrong to a person, and only incidentally determining the constitutionality of a law, now many see courts as determining the

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<sup>205</sup> For qualified critique, see Fallon, *supra* note 70.

<sup>206</sup> See generally Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006); Harrison, *supra* note 204; Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738 (2010). *E.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 296–97 (1936) (stating that a federal court, being “required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the supreme law and reject the inferior statute whenever the two conflict”); *Howard v. Illinois Cent. R. Co.*, 207 U.S. 463, 504 (1908) (*The Employers’ Liability Cases*) (“we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution and nonenforceable”).

<sup>207</sup> See PHILIP HAMBURGER, *LAW AND THE JUDICIAL DUTY* (2008).

<sup>208</sup> See *Muskrat v. United States*, 219 U.S. 346, 357–58 (1911) (describing *Marbury* as recognizing “that the authority to declare an act unconstitutional sprang from the requirement that the court, in administering the law and pronouncing judgment between the parties to a case, and choosing between the requirements of the fundamental law established by the people and embodied in the Constitution and an act of the agents of the people,” must “enforce the Constitution as the supreme law of the land”); Bilder, *supra* note 206, at 560; Harrison, *supra* note 204, at 85–86.

<sup>209</sup> *Cf.* Leonard Cohen, *I’m Your Man* (“[I]f you want to strike me down in anger / Here I stand”).

<sup>210</sup> It was not the first time this language had been used in a federal statute, for it goes back at least to the Hepburn Act (1906).

constitutionality of a law and only incidentally remedying or preventing a specific wrong to a person.<sup>211</sup>

That shift matters for the logic of the national injunction. If a court considers a statute inconsistent with the Constitution, and thus *does not apply it*, nothing follows about the remedy. The court has not done anything to the statute. It remains undisturbed. But on the newer conception of what a court does—striking down or setting aside an unconstitutional statute or unlawful regulation—a national injunction begins to have a relentless logic.<sup>212</sup> If a court strikes down a statute, regulation, or order, why should it give it respect by allowing its continued enforcement? Would any enforcement, anywhere, offend the court’s determination that it was invalid, struck down, *obliterated*? If a law is unconstitutional in all its applications,<sup>213</sup> why should the court permit it to be applied to anyone? Again, reasons can be given for stopping short—ones grounded in equitable remedies, judicial competence, humility, separation of powers, federalism, and so on. But the logic of the national injunction is certainly strengthened by the newer view of what judges do when one law is inconsistent with a higher one, as well as by the metaphorical language used to express that view.

### C. Other changes?

In addition to these ideological shifts, there are other changes in the twentieth century that might have made the national injunction begin to seem natural. Three are considered here: the statutes concentrating judicial power in a single court or circuit, greater use of rulemaking by federal agencies, and renewed judicial confidence after *Brown v. Board of*

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<sup>211</sup> *Compare* *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (“The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law.”) *with* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365-71 (1973).

<sup>212</sup> *See* Fallon, *supra* note 70, at 1339 (making a similar point about the misleading implications of saying that courts “invalidate” unconstitutional statutes). An example is Justice Blackmun’s dissent in *Lujan*. From the premise of what a judge does to an agency action—“the rule is invalidated”—Justice Blackmun moved quickly to the scope of the remedy: “Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain ‘programmatic’ relief that affects the rights of parties not before the court.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting). The majority’s response is opaque. *Id.* at 890 n.2 (majority opinion); *see also* *Nat’l Min. Ass’n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (per Williams, J.) (concluding that Justice Blackmun was “apparently expressing the view of all nine Justices on this question”).

<sup>213</sup> The conventional definition of facial challenges is that they are “ones seeking to have a statute declared unconstitutional in all possible applications,” while all other challenges are considered as-applied. Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CAL. L. REV. 915, 923 (2011). Other definitions are possible, but the conventional one is used here.

*Education* and *Cooper v. Aaron*. These changes may offer explanation and context for the development of the national injunction, but none offers justification.

First, in the twentieth century, a number of statutes concentrated judicial review in a single court or circuit.<sup>214</sup> It could be that these statutes led judges, lawyers, and scholars to think of a single court's decree as controlling the federal government's conduct against everyone.<sup>215</sup> Moreover, the consequences of national injunctions are much less dire if they are issued by a single court in which judicial review has been concentrated: no forum-shopping, because the cases must be brought in that court; no lost percolation, because the choice has already been made against percolation with the one-court structure; and little risk of conflicting injunctions, because all of the injunctions will issue from the same court.

But the concentration of judicial review does not neatly explain the rise of the national injunction. Review of the orders of the Interstate Commerce Commission was concentrated in a single court from 1910 to 1913, long before there were national injunctions. And the national injunctions issued by the Second Circuit in the 1970s, which seem to have been the breakthrough in judicial practice, were the work of a generalist court. Nor do these statutes support an inference that federal district courts should now issue national injunctions. In fact, the reverse is true. Congress knows how to concentrate judicial review in a single court; when it has not chosen to do so, a district court should not act as if Congress had made that choice.

Another change that might have led to national injunctions was an increase in federal rulemaking. A number of statutes enacted in the 1960s and 1970s authorized national rulemaking, such as the National Highway Traffic Safety Act, the Clean Air Act, and the Clean Water Act. At roughly the same time, Judge Wright and Judge Friendly offered revisionist statutory interpretations that gave several federal agencies legislative rulemaking powers.<sup>216</sup> Meanwhile, as federal rulemaking expanded, the Supreme Court revised its ripeness doctrines, making it easier to bring

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<sup>214</sup> David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 62 (1975).

<sup>215</sup> Similarly, Congress required certain kinds of cases to be heard by three-judge courts. See generally David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964). For roughly the middle third of the twentieth century, a constitutional challenge to a federal statute was heard by a three-judge court, with a right of immediate appeal to the Supreme Court, under a statute adopted in response to the myriad injunctions against enforcement of New Deal statutes. See *id.* at 10-11. Three-judge courts were abolished for most cases in the 1970s.

<sup>216</sup> Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002).

preenforcement challenges to agency action.<sup>217</sup> And Congress joined in, encouraging preenforcement review of agency actions.<sup>218</sup> The total effect was to markedly increase the number of preenforcement challenges.

Even so, it is not obvious that more rulemaking and more preenforcement challenges have any logical implication for the scope of injunctions. It does seem that agency action more often resembled statutes, in the sense of being general rules, not relatively specific actions like setting rates for a railroad operating between Shreveport and New Orleans. But before the shift to national injunctions, there were many statutes. Those statutes could be challenged before enforcement, with the litigant seeking an anti-suit injunction or what might be called an anti-suit declaratory judgment. There were the many such challenges to New Deal legislation—yet without national injunctions. There is no logical or practical inconsistency between plaintiff-protective injunctions and a large quantity of preenforcement challenges to general rules.<sup>219</sup>

Yet another change that might have influenced the development of the national injunction was the desegregation cases of the 1950s and 60s. The impact of *Brown v. Board of Education*<sup>220</sup> and *Cooper v. Aaron*<sup>221</sup> in dismantling Southern *de jure* segregation has been the subject of revisionist histories.<sup>222</sup> As an idea, however, the influence of these cases is hard to overestimate. That idea includes not only the principle of racial equality, but also the fact that it was federal judges who declared that

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<sup>217</sup> See Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 CARDOZO L. REV. 2241, 2252 & n.43 (2011) (characterizing *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) as the “seminal case” that established the general proposition “that preenforcement review of rules in an appellate form is appropriate general practice”).

<sup>218</sup> See Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733 (1983).

<sup>219</sup> One way to distinguish challenges to agency rules from challenges to statutes might be the Administrative Practice Act, and in particular its statement that a federal court should “hold unlawful and *set aside*” an invalid agency action. Whatever view should be taken of that provision, compare Duffy, *supra* note 12, with Ronald M. Levin, “*Vacation*” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003), it does not explain the rise of the national injunction. The acceptance of the national injunction by the federal courts seems not to have occurred until the 1970s, nearly three decades after the enactment of the APA. As discussed above, when the D.C. Circuit gave what was apparently the first national injunction, in *Wirtz v. Baldor Electric Company*, it did cite the APA. See *supra* note 155 and accompanying text. Yet even that case was nearly two decades after the APA’s enactment.

<sup>220</sup> 347 U.S. 483 (1954).

<sup>221</sup> 358 U.S. 1 (1958).

<sup>222</sup> See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d. ed., 2008); cf. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2006). Moreover, much of the civil rights movement happened outside the courts. See, e.g., TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011).

principle. The moral rightness of the desegregation cases seemingly reshaped federal judges' self-conception of their remedial role. After the *Brown* era, judges became more willing to give commands to federal and state officers. After the *Brown* era, those officers became more willing to follow the judges' commands.

Moreover, the desegregation decrees gave federal judges more experience with broad injunctions. As Southern officials engaged in "massive resistance" to *Brown*, the personal cost of being a plaintiff was high.<sup>223</sup> One solution was class actions; these may have encouraged judges to think of desegregation injunctions in systemic terms. Another solution was an injunction—in an individual suit—that went beyond the plaintiff and desegregated the entire school district.<sup>224</sup> Indeed, by 1972, the second edition of Wright and Miller's treatise on federal courts could say:

In most civil rights cases plaintiff seeks injunctive or declaratory relief that will halt a discriminatory employment practice or that will strike down a statute, rule, or ordinance on the ground that it is constitutionally offensive. Whether plaintiff proceeds as an individual or on a class suit basis, the requested relief generally will benefit not only the claimant but all other persons subject to the practice or the rule under attack.<sup>225</sup>

To be certain, the authority Wright and Miller cited for this proposition was rather thin.<sup>226</sup> Still, some desegregation decrees went beyond protecting the plaintiff.

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<sup>223</sup> See Marcus, *supra* note 65, at 680 n.134.

<sup>224</sup> A series of cases held that for challenges to racial discrimination, the injunctive relief granted would be the same regardless of whether a class was certified. See, e.g., *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Florida*, 493 F.2d 799, 812 (1974) ("[R]acial discrimination is by definition class discrimination.")

<sup>225</sup> WRIGHT & MILLER, 7 FEDERAL PRACTICE & PROCEDURE § 1771, pp. 663-664 (1972); see also *Sandford v. R. L. Coleman Realty*, 573 F.2d 173, 178 (4th Cir. 1978) (quoting the last sentence of the block quote from Wright and Miller, and calling it "the settled rule").

<sup>226</sup> Of the five cases cited by Wright and Miller, the oldest and most important was *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963). *Bailey* was a transportation desegregation case challenging two Mississippi statutes and a Jackson, Mississippi ordinance. It was decided almost a decade after *Brown*, and it had already been to the U.S. Supreme Court, which had remanded "for expeditious disposition." See *Bailey v. Patterson*, 369 U.S. 31, 34 (1962) (per curiam). On remand, the Fifth Circuit recognized that the U.S. Supreme Court "specifically noted that this is a class action," 323 F.2d at 206, yet the Fifth Circuit thought it "unnecessary to determine, however, whether this action was properly brought under Rule 23(a)." *Id.* Any injunction would have the same scope, the court said, because of the right at issue: "Appellants . . . seek the right to use facilities which have been desegregated, that is, which are open to all persons, appellants and others, without regard to race. The very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated." *Id.* Of four other cases cited by Wright and Miller, three were class actions and one was an individual action under Title VII.

Yet there are also reasons to doubt that desegregation decrees led directly to national injunctions. The geographic scope of the injunctions, when they went beyond the plaintiffs, was usually the school district, not anything like national scope. An injunction against a school or school district has a much firmer basis in traditional equity; it is easier to analogize such an injunction to the bill of peace, given its small scale, the preexisting social group, and the impersonal quality of the claims.<sup>227</sup> Moreover, when courts gave these injunctions, the details of the particular school district's history of legal segregation mattered, a fact which is hard to square with a relatively course-grained national injunction. Finally, there is the impact of the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure. Among the changes was the addition of the Rule 23(b)(2) class action—a class action for injunctive and declaratory relief that has been called the civil rights class action.<sup>228</sup> There is something logically odd about Rule 23(b)(2) leading to greater scope of injunctions in individual actions. One could have thought the implication was the reverse: because there was express authorization for class actions that could secure injunctive relief for a class of plaintiffs, there was *less* need for broad injunctions in individual actions. Nevertheless it is at least possible that the practical effect of the 1966 amendments was to make judges more familiar with injunctions that protected a large class of plaintiffs, and then, more familiar with such injunctions, judges were willing to give them even in non-class actions.

In short, the rise of the national injunction seems to have been gradual and unplanned. That conclusion might change if I find evidence that it was a conscious innovation of lawyers. But the best understanding of the evidence so far is that the national injunction gradually went from being unthinkable to being thinkable, without any sharp turns or decisive moments. What made it thinkable were shifts in how judges thought about legal challenges and invalid laws, and perhaps also changes in judicial structure, agency rulemaking, and judicial confidence.

One implication of this account, contrary to the recent ALI *Principles of the Law of Aggregate Litigation*, is that there is nothing “indivisible” about an injunction restraining the enforcement of a statute, regulation, or order.<sup>229</sup>

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<sup>227</sup> On the bill of peace, see *supra* notes 92-98 and accompanying text. Some courts and commentators emphasize, for suits to remedy racial discrimination, the distinctive “group character of the underlying substantive claim.” OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 15 (1978).

<sup>228</sup> See generally Marcus, *supra* note 65.

<sup>229</sup> *Contra* AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* § 204 *cm.* a (2010); Walker, *supra* note 5, at 1141 (“If a plaintiff successfully challenges a rule of ‘broad applicability,’ then the relief, the invalidation of the rule, will naturally extend to persons beyond the named plaintiffs.”).

Protecting non-parties with an injunction is a remedial choice. It is a relatively new choice, and like all remedial choices, it needs to be justified.

V. Where should we go from here?

The status quo on national injunctions is not a very good translation of traditional equity. The injunction retains its potency, but without the institutional facts that made it intelligible to have such a concentration of powers in the hands of a single judge. These powers remain concentrated but are now *duplicated* (one judge has them, and another, and another, and so on). Moreover, older notions about challenges to invalid laws have lost force, and practices of restraint have broken down. Some compensating adjustments in the translation are needed. This Part proposes a solution, a principle for the scope of injunctions against federal defendants. This principle should be articulated by the federal courts. If it is not, it could be enacted by statute. Nevertheless, it is good for the federal courts themselves to recognize limits on their authority, instead of being required to do so by Congress.

A. A simple principle for the scope of injunctions restraining federal enforcement

Given that national injunctions are problematic, and that the existing doctrine is inadequate, what can be done? Let's begin with a simple rule: injunctions should not protect non-parties. Of course, in many cases involving federal law there will need to be some sort of injunction, so the simple rule can be specified a little further:

A federal court should give an injunction that protects the plaintiff vis-à-vis the defendant, wherever the plaintiff and the defendant may both happen to be. The injunction should not constrain the defendant's conduct vis-à-vis non-parties.

A rule of thumb for carrying this principle into effect might be that an injunction should be no broader than what the plaintiffs—not in any kind of representative capacity, but solely for themselves—should logically be able to bring contempt proceedings to enforce.

How would this principle work in practice? When a plaintiff sued to restrain the enforcement of a federal statute, regulation, or order, and won, the national government would be unable to enforce the challenged law as to the plaintiff. Given the number and identity of the plaintiffs, the result might be broad but still partial non-enforcement.

For example, in *United States v. Texas*<sup>230</sup> there were twenty-six state plaintiffs. The states sued in their own capacity, alleging that they would suffer injuries such as financial costs from issuing driver's licenses on the basis of the federal grant of lawful presence. Thus, in *United States v. Texas*, a more sound injunction would have prohibited the federal government from enforcing its statutes and regulations so as to require the states to grant drivers' licenses on the basis of the federally granted lawful presence. Beyond their alleged injuries, the states had no basis for securing a remedy from the court. All other states—and even private parties within the geographic borders of the twenty-six plaintiff states—had no claim to an injunction against the Obama administration's immigration policy.

Or consider the case of President Trump's executive order blocking entry to the United States from seven nations. For an individual litigant seeking entry to the United States, a successful challenge should bring an injunction forbidding the officers of the United States from denying her that entry. A federal court should not award that litigant a national injunction controlling the government's conduct toward those who are not parties before the court.

In *Washington v. Trump*, the plaintiffs who have obtained the preliminary injunction are the states of Washington and Minnesota.<sup>231</sup> Although the states allege various kinds of injury, in denying a stay the Ninth Circuit relied on the states' strongest claim of irreparable injury, namely their claim on behalf of students and faculty affiliated with their state universities who are injured by denial of entry to and from the United States.<sup>232</sup> That basis for the preliminary injunction points the way to its proper scope.<sup>233</sup> The injunction should have restrained the federal government from enforcing the executive order against students and faculty affiliated with the state universities of Washington and Minnesota.<sup>234</sup>

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<sup>230</sup> *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *aff'd by an equally divided Court*, 136 S.Ct. 2271 (2016).

<sup>231</sup> *Washington v. Trump*, Order, No. 17-35105 (9th Cir. Feb. 9, 2017) (per curiam).

<sup>232</sup> *Id.* at \*8-13.

<sup>233</sup> The Ninth Circuit declined to reach the states' other arguments for standing. *Id.* at \*13 n.5. Most of the alleged injuries are claims to *parens patriae* standing, which the Supreme Court rejected in *Massachusetts v. Mellon*, 262 U.S. 447, 485-486 (1923). See generally FALLON ET AL., *supra* note 61, at 283-286 (discussing subsequent case law and qualifications).

<sup>234</sup> The Ninth Circuit offered no affirmative argument for the national injunction, instead suggesting that the government had failed to show the legality of a "fragmented immigration policy" and failed to propose "a workable alternative." These are familiar but unpersuasive arguments for a national injunction. See *infra* Part V.B.2 ("Regulatory disruption") and V.B.3 ("Plaintiff detection"). On litigant arguments and the scope of an injunction, see *supra* note 164 and accompanying text.

In short, no matter whether the challenge is to the immigration policy of the Obama administration or that of the Trump administration, the courts should issue injunctions that protect the plaintiffs, not injunctions that protect non-parties.

To be sure, an injunction need not be a mere prohibition. Equitable remedies are flexible, and their scope is not automatic. The court can impose additional requirements on the defendant to ensure the plaintiff's rights are adequately protected, especially where the defendant has shown a propensity to disregard those rights. But there should be no term or breadth that is not for the protection of the plaintiff but is instead for the protection of non-parties.

The basis for the principle advanced here is two-fold.

First, Article III of the U.S. Constitution confers “the judicial Power.”<sup>235</sup> This is a power to decide a case for a particular claimant. Indeed, “all challenges to statutes arise when a particular litigant claims that a statute cannot be enforced against her.”<sup>236</sup> This claimant-focused understanding of the judicial power has implications not only for who can sue in federal court, but also for what remedies the federal courts have authority to give. Article III reflects the understanding of the judicial role as “redress[ing] an injury resulting from a specific dispute.”<sup>237</sup> Once a federal court has given an appropriate remedy to the plaintiffs, there is no longer any case or controversy left for the court to resolve. The parties have had *their* case or controversy resolved. There is no other. The court has no constitutional basis to decide disputes and issue remedies for those who are not parties.<sup>238</sup>

Nor can this conclusion be avoided by saying that the limits of Article III control “standing” but not “remedies.” In decision after decision, the Supreme Court has understood Article III as giving shape and definition to the remedial authority of the federal courts.<sup>239</sup> Much of this case law has

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<sup>235</sup> 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.”).

<sup>236</sup> Fallon, *supra* note 70, at 1324. Cf. Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough* (draft of Jan. 27, 2017, available [here](#)) (critiquing the idea that standing needs to be established by only one of several plaintiffs).

<sup>237</sup> *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 132 (2011); *see also* *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (“It is the role of the courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.”).

<sup>238</sup> *See* *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (“The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court’s judgment may benefit others collaterally.”).

<sup>239</sup> *E.g.*, *Muskrat v. United States*, 219 U.S. 346 (1911); *Frothingham v. Mellon*, 262 U.S. 447 (1923); *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70 (1927); *Aetna Life Ins. Co. v.*

been about equitable remedies, with the Court requiring that the plaintiff show standing that is specifically correlated with the requested injunction.<sup>240</sup> This intertwining of who can sue and what a court is willing to do on that person's behalf is supported by good reasons.<sup>241</sup>

In short, Article III gives the judiciary the authority to resolve the disputes of the litigants, not the disputes of others. Article III gives the judiciary authority to remedy the wrongs done to those litigants, not the wrongs done to others.

A second basis is the Judiciary Act of 1789, which has been interpreted as requiring the federal courts to trace their equitable doctrines to traditional equity.<sup>242</sup> The principle advanced here can be supported by traditional equitable practice, with the caveat that traditional equity needs to be translated for present-day institutions.

In the practice of traditional equity, injunctions did not control the defendant's behavior against non-parties. To that extent, the principle here carries over the traditional equitable practice. Yet traditional equity never condensed its practice into a sharply defined principle like the one advanced here. It never needed to. With only one chancellor, and with a modest conception of what equitable relief was supposed to do, traditional

Haworth, 300 U.S. 227 (1937); O'Shea v. Littleton, 414 U.S. 488 (1974); City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Lewis v. Casey, 518 U.S. 343 (1996); *cf.* Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.").

<sup>240</sup> *E.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009); Lewis, 518 U.S. at 357; Lyons, 461 U.S. 95; *see also* Lewis, 518 U.S. at 395 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). For older examples intertwining what would now be called standing and the appropriateness of equitable relief, *see, e.g.*, State of Mississippi v. Johnson, 71 U.S. 475, 501 (1866) ("this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties"); Jacob Hoffman Brewing Co. v. McElligott, 259 F. 525, 531 (2d Cir. 1919) ("The right to maintain the suits, i.e., to give the injunctive relief prayed for"). How exactly to characterize this connection between "standing" and "remedy" is not always clear. *See* FALLON ET AL., *supra* note 61, at 232-234.

<sup>241</sup> On the functional argument for "equitable ripeness," *see* Bray, *supra* note 87, at 549 & n.85, 578-579. As a matter of historical development, at law, each of the forms of action was a bundle of what we would now call standing, merits, and remedies. Equity did not have the same sharply defined bundles. The equitable remedies could be complex, time-consuming, and expensive, and there was only one chancellor. Thus equity could not have a policy that once a plaintiff had passed some threshold of "standing," any equitable remedy, no matter how involved, would be available. Instead the chancellor would look forward to the remedy in considering "equitable jurisdiction," a concept that overlapped with what we would now call "standing" or "cause of action."

<sup>242</sup> *See* Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999) (describing what the federal courts have as "an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." (quoting *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939))). For scholarship on the reception of traditional equity in federal law, *see supra* note 11.

equity did not need to develop rules to constrain the scope of injunctive relief. Indeed, even the traditional equitable practices and principles that might seem to support national injunctions—such as the bill of peace<sup>243</sup> and the extraterritorial force of equitable decrees<sup>244</sup>—do not really do so once the facts of one chancellor and equitable restraint are taken into account. This principle is a modest, subtle translation of traditional equity into the present, done with sensitivity to institutional and ideological changes.

## B. Objections

Against this principle at least four objections can be raised, one about differential treatment, one about complex regulatory systems, one about hard-to-detect plaintiffs, and one about the choice of a rule over a standard. Working through them will show the contours and the limits of the principle.

### 1. Differential treatment

The first objection is that the successful plaintiff will be treated differently from others. This objection can be put in the language of treating like cases alike, or of equality, or of disuniformity in the law.<sup>245</sup> In each guise the point is the same.

One answer is that the differential treatment is grounded in differential actions. 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).<sup>246</sup>

More generally, the evaluation should be made in light of the broader disuniformity in the law. In our system of courts—both federal and state,

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<sup>243</sup> See *supra* notes 92-98 and accompanying text.

<sup>244</sup> See STORY, *supra* note 94, at 230-232 & n.1, § 899; *id.* at 723-729, §§ 1290-1300; *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) (“[T]he District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction.”); *New Jersey v. City of New York*, 283 U.S. 473, 482 (1931) (“The situs of the acts creating the nuisance, whether within or without the United States, is of no importance. Plaintiff seeks a decree in personam to prevent them in the future.”); *Cole v. Cunningham*, 133 U.S. 107, 116-121 (1890) (reviewing English and American cases).

<sup>245</sup> See, e.g., *Carroll*, *supra* note 5, at 2033 (“When a court determines that the defendant’s unlawful conduct is harming a large number of people, but orders the defendant to cease that conduct only as to one (or a handful) of them, allowing the violation to continue undermines the rule of law.”); *Morley*, *supra* note 5, at 490 (referring to “the unfairness that could result from enforcing certain plaintiffs’ rights while allowing the challenged provision to otherwise remain in effect, violating the rights of others”).

<sup>246</sup> For this point and its pithy expression, I thank Douglas Laycock.

and with the federal courts divided among circuits—the choice has been made to allow some disuniformity in the law. The only way to avoid it entirely is to have a single court for the United States. Failing that, the next closest thing would be to have lots of courts and allow whichever one takes the case first to decide it for the nation.<sup>247</sup> Once we are committed to allowing disuniformity and seeking only *eventual* uniformity, then it is not a knock-out objection that the principle advanced here allows for disuniformity.

The question should be about the right moment to achieve uniformity—at what point should the uncertainty be liquidated, by what legal actor, and in what posture? With the question posed that way, it is impossible to think the best legal actor is a single district judge selected through forum-shopping. Nor is the best posture a decision by the Supreme Court on a motion to stay the preliminary injunction issued by a district court selected thus. The better way to resolve the question is either through the unanimous alignment of lower courts or through disagreement among the lower courts followed by a series of decisions of the Supreme Court. In other words, the way to resolve legal questions for non-parties is through precedent, not through injunctions.

Precedent should be the ordinary way one case ripples out to others.<sup>248</sup> What that means, in practical terms, is that a single plaintiff could win an injunction that protects her from the enforcement of a statute, regulation, or order. The government is likely to appeal, and if the appellate court affirms, its decision will be binding precedent within the circuit. There will be no need for dozens of other suits in the circuit; the law has been settled and will apply to every potential plaintiff.

At this point, the depth and durability of the legal uncertainty depend on the actions of the national government, of other circuits, and of the Supreme Court. Current research suggests that when circuit splits emerge, they tend to emerge quickly. That is, when one circuit decides a question, if a circuit split is likely to emerge, it will emerge in the next one or two circuits to consider the question—not after half a dozen circuits have agreed about the resolution. What that means is that disagreement among the circuit precedents is likely to happen relatively soon. If it does happen, the likelihood is high that the Supreme Court would take the case and

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<sup>247</sup> For a vivid cautionary tale, see Thomas O. McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. PA. L. REV. 302, 320-322 (1980).

<sup>248</sup> See generally Randy J. Kozel, *Stare Decisis in a Second-Best World*, 103 CAL. L. REV. 1139 (2015).

resolve the circuit split.<sup>249</sup> In the meantime, circuit precedents apply only in each circuit.<sup>250</sup>

Such disuniformity is not merely tolerable; it is good. The possibility that the federal government would apply a rule in some circuits but not others was blessed in *United States v. Mendoza*,<sup>251</sup> the decision holding that nonmutual offensive issue preclusion does not apply against the United States. The Court said:

A rule allowing nonmutual collateral estoppel against the government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari. Indeed, if nonmutual estoppel were routinely applied against the government, this Court would have to revise its practice of waiting for a conflict to develop before granting the government's petitions for certiorari.<sup>252</sup>

It is true, of course, that right now the U.S. Supreme Court has only eight members, and thus it is less able to resolve circuit splits in the most politically charged cases. Indeed, the preliminary injunction in *United States v. Texas* was affirmed without opinion by an evenly divided Court. The same could happen in *Washington v. Trump*. But a principle for the scope of the injunction needs to be determined based on the ordinary functioning of the Court, not the unusual situation of its being short-handed. Moreover, if circuit splits last a little longer because the Court lacks a full complement of justices, the disuniformity in the law is no different in quality than the disuniformity the day after a circuit split happens.

Admittedly, there may be cases in which an injunction protecting only the plaintiff proves too narrow. But in such cases there is an obvious answer: a class action. Nothing about the analysis here precludes a Rule 23(b)(2) class action (i.e., a class action for injunctive or declaratory

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<sup>249</sup> STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE ch. 4.4, 243-250 (10th ed. 2013).

<sup>250</sup> *E.g.*, *Right to Life of Dutchess Cty., Inc. v. Fed. Election Comm'n*, 6 F. Supp. 2d 248, 252-253 (S.D.N.Y. 1998); *see also* *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1122-1124 (7th Cir. 1987). A possible further implication, if the trend toward state-initiated litigation continues, is that states may succeed with challenges to the national regulations, but those regulations would still be enforceable in the District of Columbia, which would then be a site of experimentation for federal regulatory policy.

<sup>251</sup> 464 U.S. 154 (1984).

<sup>252</sup> *Id.* at 160 (citations omitted).

relief). Indeed, if federal courts were to end the practice of issuing national injunctions, and instead were to issue only plaintiff-protective injunctions, it would become easier to see the rationale for the Rule 23(b)(2) class action as a means of achieving broad injunctive relief.<sup>253</sup>

In short, there is already ample disuniformity. It is intrinsic in having multiple federal courts, in having a federal system, and for that matter in having a large country. What changes with the principle proposed here is a shift in how, and how quickly, that disuniformity is resolved. It is resolved not through the single thunderbolt of a national injunction, but through the steady accumulation of precedent throughout the system of federal courts.

## 2. Regulatory disruption

A second objection is that a plaintiff-protective injunction, as opposed to a national injunction, will disrupt complex regulatory systems. Put more colloquially, regulation should not be piecemeal, but it will be piecemeal if the court gives one plaintiff a get-out-of-jail-free card. This point can be disposed of more quickly. Agencies are likely to prefer narrow injunctions to national injunctions. If the agency wants to respond to a narrower injunction by adopting the district court's resolution as a rule for the nation, it can do so. If the agency wants to keep its regulation, however, it can. If an appellate court affirms the ruling against the agency, thus setting circuit precedent, the agency can continue to enforce its rule in the other circuits. Again the scenario is not a nightmare: it was expressly contemplated and endorsed by *United States v. Mendoza*.<sup>254</sup>

## 3. Plaintiff detection

Another objection is that in some cases it will be impractical to have an injunction benefitting only the plaintiff, because it may be hard for the federal defendant to distinguish the plaintiff from other persons. The classic case on this question involves an injunction not against a federal agency but against the California Highway Patrol. The plaintiffs were "Easyriders Freedom F.I.G.H.T.," an unincorporated association of motorcyclists, and fourteen individual motorcyclists. The case involved the California Highway Patrol's aggressive enforcement of a state motorcycle helmet law, and in particular the stopping of motorcyclists

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<sup>253</sup> For the difficulty in justifying the Rule 23(b)(2) class action if the same relief is available to an individual litigant, see *supra* note 67 and accompanying text. On the Rule 23(b)(2) class action, see generally Marcus, *supra* note 65; Carroll, *supra* note 5.

<sup>254</sup> See *supra* text accompanying note 252.

who were not actually in violation of the helmet law (because the motorcyclists lacked subjective knowledge that their helmets were out of compliance with federal safety standards). The Ninth Circuit affirmed the holding that stopping the motorcyclists was a Fourth Amendment violation, and it also affirmed the injunction protecting all motorcyclists, not just the plaintiffs. Its analysis here has influenced a number of subsequent courts, and the key passage is worth quoting:

While there are only fourteen named plaintiffs in this case, spread among San Diego, Orange, Los Angeles, and Ventura counties, and an unknown number of members of Easyriders, an injunction against the CHP statewide is appropriate. Because the CHP policy regarding helmets is formulated on a statewide level, other law enforcement agencies follow the CHP's policy, and it is unlikely that law enforcement officials who were not restricted by an injunction governing their treatment of all motorcyclists would inquire before citation into whether a motorcyclist was among the named plaintiffs or a member of Easyriders, the plaintiffs would not receive the complete relief to which they are entitled without statewide application of the injunction.<sup>255</sup>

Here the court is advancing two reasons for the statewide injunction: the California Highway Patrol's policy is statewide, and officers do not know which motorcyclists on the California roads were plaintiffs in the case (either individual plaintiffs or members of Easyriders). The first reason has already been discussed above, and should be rejected.<sup>256</sup> The second is more interesting, and it has been widely embraced by commentators, including some who are generally skeptical of national injunctions, such as Professor Laycock.<sup>257</sup>

Nevertheless, there are two good reasons not to make an exception in a case like *Easyriders*, instead sticking to the general rule that an injunction should issue only to protect the plaintiffs from the defendant.

First, an *Easyriders* exception allows the circumvention of the general rule. If organizations with numerous members can get national injunctions, then a rule against national injunctions can be evaded with artful selection (or construction) of plaintiffs.

Second, the difficulty for the defendant is overstated. The key is that if the court gives a plaintiff-protective injunction, the burden is on the defendant to figure out how to comply. In the *Easyriders* case the court

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<sup>255</sup> *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1502 (9th Cir. 1996).

<sup>256</sup> See *supra* Part II (discussing "complete relief" principle).

<sup>257</sup> See LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 18, at 276; David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 800-801 (2016).

made this assumption: “it is unlikely that law enforcement officials who were not restricted by an injunction governing their treatment of all motorcyclists would inquire before citation into whether a motorcyclist was among the named plaintiffs or a member of Easyriders.”<sup>258</sup> But why is it unlikely? If the court issues an injunction protecting the plaintiffs, and stresses the certainty of contempt enforcement for any violations, why wouldn’t the California Highway Patrol require officers to make exactly that inquiry? Or why couldn’t the California Highway Patrol decide on a more creative option, such as distributing decals to the Easyriders? And if the California Highway Patrol makes the considered judgment that it would rather extend to all motorcyclists the protections in the court’s injunction, why is that a problem? The court does not need to decide for the government defendant between these options.<sup>259</sup>

#### 4. A standard, not a rule

There are competing policy considerations in the choice between a plaintiff-protective injunction and a national injunction. On the one hand, a plaintiff-protective injunction has advantages on forum-shopping, percolation, and conflicting injunctions. On the other hand, there are policy concerns that will in some circumstances favor a national injunction. These include concerns about the executive branch continuing to enforce unconstitutional statutes and unlawful regulations, inequality in the administration of the law, and administrability.

These countervailing policy considerations seem to invite the use of a standard, not a rule.<sup>260</sup> A standard would offer a middle ground between two opposite rules: a rule that says *every* injunction restraining the enforcement of a federal law should be a national injunction, and the rule proposed here (i.e., no national injunctions). If we set aside the questions of positive law<sup>261</sup> and coherence with other legal rules and practices,<sup>262</sup> and merely ask a direct policy question, why is the proposal here a rule and not a standard?

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<sup>258</sup> 92 F.3d at 1502.

<sup>259</sup> *Accord Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 728ff. n.1 (9th Cir. 1983) (“The individual plaintiffs need not take any action to identify themselves to make it easy for the INS to comply with the injunction. Rather, the burden is on the INS to comply . . .”). Note that phrasing in the injunction can allow the defendant time to work out a method for complying (where the defendant has not proved recalcitrant). In some cases, if a plaintiff-protective injunction really is hopelessly impractical, that is a reason not to give an injunction.

<sup>260</sup> I am grateful to Bob Bone for raising this objection.

<sup>261</sup> I.e., whether a proposed legal norm has a basis in existing constitutional law, statutory law, or case law. On the basis for the rule proposed here, see *supra* notes 235-244 and accompanying text.

<sup>262</sup> See *supra* Part II; see *infra* text accompanying note 266.

The answer lies in the domain of the second-best. Although in theory a standard would allow for the possibility of national injunctions in an appropriate situation,<sup>263</sup> in practice the use of a standard would be seriously deficient. The initial problem is that it seems inevitable that any standard for when national injunctions should issue would be highly indeterminate. Existing doctrine already contains a standard for when national injunctions should issue: the “complete relief” requirement. It should in theory offer a middle ground—national injunctions when necessary for complete relief, but no national injunctions when unnecessary for complete relief. But in practice the middle position is not stable. Whenever a plaintiff challenges a federal statute, regulation, or order, the “complete relief” principle allows the judge to award or not award a national injunction—it is almost wholly indeterminate.<sup>264</sup> Other standards that might be proposed, such as the value of uniformity or the importance of the right, are also highly indeterminate. Remember, too, that any standard would be applied to grants of preliminary injunctions, a point at which there has been no trial, with only a judicial surmise about the relevant policy considerations.

Related to the indeterminacy of a standard for injunctions are two further problems. First, the standard will be applied by a district judge selected through forum-shopping. Second, that district judge’s application of the standard will be reviewed only for abuse of discretion. Indeed, the forum-shopping extends not only to the district court but to the court of appeals. Thus, the problem with a standard can be stated starkly: A district court selected through forum-shopping will apply a relatively indeterminate standard, which will then be leniently reviewed by a court of appeals also selected through forum-shopping. (These arguments against a standard would also hold against a rebuttable presumption, either for or against a national injunction.)

In short, the principle advanced here is a rule, but not because a rule captures all of the competing policy considerations. It does not. But for the system of federal courts as it actually exists, this rule is an achievable second-best. It is therefore superior as a matter of policy to a standard like “complete relief.”

## Conclusion

The national injunction has a distortive effect on the decision-making of the federal courts, and on the enactment and enforcement of law in the

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<sup>263</sup> One example is the preliminary injunction in *Youngstown*. See *supra* note 139 and accompanying text.

<sup>264</sup> See *supra* Part II.

United States. A reader who started with Part I might have been convinced of this point, and then skipped to Part V and found the cure. If read that way, the Article has a pleasing sense of finality. The problem would appear isolated, an irruption of irrationality. It would be solved.

The complexity and depth of the problem come into view, however, once its historical and institutional aspects are recognized. The national injunction is a relatively new innovation, without any basis in traditional equity. What makes it problematic is a structural shift that happened when the federal courts were first established: the shift from the one-chancellor model of the English Chancery to the multiple-chancellor model of the federal courts.

For the federal courts, there is no going back to a one-chancellor model. Nor will the ideological changes that permitted the national injunction soon fade away. Yet it is valuable to understand where the national injunction came from, because having this understanding encourages us not to think the solution is exhorting judges to behave better. This understanding also helps us think more carefully about the “traditional equity” that the federal courts look to when fashioning the principles of equity in the present. Traditional equitable doctrines were developed in a one-chancellor system. Equitable powers do not work the same way when the institutional setting changes dramatically; they cannot be carried over, all intact, to the present. A translation has to be made,<sup>265</sup> and translation is a practice marked not only by fidelity but also by subtlety and creativity.

It is possible, in a sense, to solve the problem of the national injunction. But the national injunction is intimately connected to another, deeper problem, namely the speed at which legal questions are answered. Imagine that legal questions were resolved quickly, comprehensively, and with immediate finality. That system would be criticized as rash, perhaps even as an illegitimate exercise of authority. Imagine, by contrast, that legal questions were resolved slowly, piecemeal, and with a resolution that was only eventually final. That system would also be open to criticism. For one person it might offer justice, but for others it might offer only justice delayed or outright denied.

This choice is a deep problem that will never be solved.<sup>266</sup> Each legal system can pick its poison, tending toward the vices of immediate, final resolution or the vices of slow, provisional resolution. In this regard, there is a sharp contrast between the English Chancery and the federal courts. A medieval chancellor spoke on behalf of God and king. An early modern

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<sup>265</sup> See Bray, *supra* note 27.

<sup>266</sup> See EDWARD SHILS, TRADITION 323 (1981) (“There is no permanent solution to any important problem in human life. Only transient and minor problems have solutions . . .”).

chancellor spoke on behalf of conscience and king; this claim of epistemic certainty and political authority fit hand-in-ermine-lined-glove with the existence of a single chancellor. But the authority of federal judges is different. Power in the American political system is pervasively divided—through federalism, through the separation of powers, and through the sprawling system of federal courts. A legal question is resolved through patience and the consideration of many minds. Which system is better, if starting from scratch, is a difficult question. The question of which system obtains in the United States is easy to answer: a fragmented, many-minds system. In a system like ours, there is no room for the national injunction.