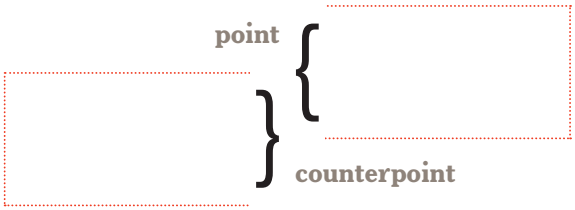

One for all

Are nationwide injunctions legal?

Nationwide injunctions have been much in the headlines in recent years. Since 2008, lower federal courts have issued dozens of injunctions to block government policies from being enforced not just against parties in a specific case but also against anyone else, nationwide. Such orders stymied, among other things, healthcare, immigration, and employee overtime programs under the Obama administration and have thwarted various policies on immigration, transgender people serving in the military, federal funding for sanctuary cities, and more under the Trump administration. In a *National Review* article, Attorney General Jeff Sessions said the Trump administration faced 22 nationwide injunctions in just its first year in office.

But because such injunctions have been aimed at officials on both sides of the political aisle, the debate over their legality seems to be a uniquely scholarly and perhaps even bipartisan one. Critics argue that nationwide injunctions encourage forum-shopping, inhibit the proper development of law, and politicize the judiciary. Others say such injunctions are a critical check on executive authority, which has expanded greatly under both Presidents Barrack Obama and Donald Trump.

For clarity on the arguments, we turned to two leading experts: **PROFESSOR SAMUEL BRAY**, who studies and teaches in the fields of constitutional law, remedies, and civil procedure at the University of Notre Dame Law School, and **PROFESSOR AMANDA FROST**, who studies and teaches in the areas of constitutional and immigration law at the American University Washington College of Law. Their thoughts follow.

Some say the term "nationwide injunction," and others prefer terms such as "national injunction," "universal injunction," or "absent-party injunction." What is the source of confusion? Do you have a term you prefer? *(We'll use nationwide injunction here, because it is the most commonly used term).*

BRAY: All of these terms are describing the same set of injunctions, so it might seem that it doesn't matter much the term that is used. But words can shape how we think. Which term we use will incline us toward different ideas about what is novel and controversial about these injunctions.

"Nationwide" makes it seem that the unusual feature of these injunctions is geographic breadth. But there is nothing unusual about an injunction that has broad geographic scope. A court might enjoin a defendant from infringing a plaintiff's trademark anywhere in the country, indeed anywhere in the world.

What is distinctive about these injunctions is not that they are geographically broad ("nationwide") but that they control the defendant's conduct toward nonparties. So "national," "global," "universal," and "absent-party" are all better terms than "nationwide."

FROST: The terms used are confusing. No one doubts that a court can issue an injunction that prevents the defendant from enforcing the law against the plaintiff anywhere in the United States, or indeed in the world. The debatable question is a court's power to enjoin the defendant from enforcing the law against entities and individuals not before the court. For that reason, I think terms like "defendant-oriented injunction" and "absent-party injunction" are preferable. However, the term "nationwide injunction" is so ubiquitous in the case law that I tend to use that common term in my writing followed by a clear explanation that I am referring to injunctions that bar the defendant from taking action against nonparties.

Why are nationwide injunctions becoming more commonplace?

BRAY: Only in the last three years have national injunctions become commonplace. In 2015, a group of Republican state attorneys general obtained a national injunction to stop the major immigration initiative of President Obama (Deferred Action for Childhood Arrivals, or DACA). Republican state attorneys general kept seeking and obtaining national injunctions to stymie President Obama's policies. Unsurprisingly, Democratic state attorneys general have used the same tactic, repeatedly obtaining national injunctions to thwart the policies of President Trump.

We can also think about national injunctions before they were commonplace. Since the 1970s, they have appeared intermittently. The best explanation for these national injunctions is not a change in controlling legal authority — no statute, rule, or case allowed them. Instead there were slow and subtle changes in how many judges and lawyers think about law. In the traditional conception, what a judge does to an unconstitutional law is simply not apply it (cf. *Marbury v. Madison*). But once we're in the grip of metaphorical language about judges "striking down" statutes, then it's only a short downhill step to the national injunction: If a law is struck down, obliterated we might say, why is it still doing something to someone? Even so, it is important to see just how rapidly the national injunction shifted from the margins of our judicial system to being the default choice in a high-profile suit against a presidential administration. As early as the first term of President Obama, when more than two dozen states challenged the constitutionality of the individual mandate in the Affordable Care Act, the plaintiff states did not even ask for a national injunction.

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FROST: The rise in nationwide injunctions is likely a response to other changes in our legal and political system. Over the last 50-plus years, the federal government has taken a more active role in regulating the economy, the environment, civil rights, health care, education, crime, and immigration. At the same time, courts have increasingly allowed organizations to challenge federal laws on behalf of their members, and states to do so on behalf of their citizens. So it should not come as a surprise that challenges to broad federal laws brought by groups representing a broad constituency have resulted in expansive remedies.

Moreover, the need for such remedies is greater when major, constitutionally questionable policy changes are made

through unilateral executive action, such as President Obama's executive action granting deferred action to millions of undocumented immigrants and President Trump's executive order barring the entry of millions of noncitizens into the United States.

A central question is whether courts have the authority under Article III of the Constitution to issue such injunctions. What are the arguments for and against the constitutionality of nationwide injunctions?

BRAY: The best argument for the constitutionality of national injunctions is that Article III does not define the "the judicial Power." That is, it merely gives the metes and bounds of the disputes in which that power may be exercised. Thus the Constitution does not limit the remedial powers of the federal courts. Subject to regulations and exceptions made by Congress, the federal courts may develop and refine their remedial powers over time. The national injunction is simply an evolution of the judicial power, and as such it should be judged on grounds of coherence and fit.

The best argument against the constitutionality of national injunctions is that Article III offers a concept of the judicial power that is defined by the dispute — a judicial resolution of a case or controversy brought by parties. This is why we have standing doctrines, do not allow advisory opinions, and distinguish between opinions and judgments (only the latter of which bind the parties). And this is why common law courts and equity courts — before the Founding, at the Founding, and for most of U.S. history — would give remedies only for a party to the case. All of these dots are connected in the U.S. Supreme Court's opinion in *Frothingham v. Mellon*. And more recent opinions, including *Lewis v. Casey* and *Gill v. Whitford*, reflect this strongly party-centric understanding of the judicial power.

FROST: Under Article III of the U.S. Constitution, federal courts exercise the "judicial Power," which includes the power to issue equitable remedies for legal violations. Federal courts have long had the authority to issue injunctions that apply to nonparties. For example, historically, the English Chancellor employed the "bill of peace" to issue remedies to individuals closely connected and similarly situated to the plaintiff, even though not plaintiffs to the case, and the federal courts inherited this authority at the time of the Constitution's ratification.

THESE FLEXIBLE DOCTRINES ALLOWING PLAINTIFFS TO FILE SUIT EVEN WHEN THEY HAVE NO INJURY, AND TO ASSERT ANOTHER PERSON'S LEGAL RIGHTS, DEMONSTRATE THAT COURTS HAVE THE POWER TO ISSUE REMEDIES THAT GO BEYOND A PLAINTIFF'S ACTUAL INJURIES.

Some have argued that Article III bars courts from issuing injunctions that apply to nonparties without standing to sue. But courts have long given remedies to parties who have no "actual injury" of their own and thus lack standing. For example, courts will hear cases that have become moot as long as they are "capable of repetition yet evading review." Under the doctrine of associational standing, organizations are permitted to file suit in their own names as long as they can show that some of their members have suffered injury. Similarly, the "one-plaintiff rule" allows a court to issue a remedy to all parties to a case as long as at least one plaintiff in the case has demonstrated standing. These flexible doctrines allowing plaintiffs to file suit even when they have no injury, and to assert another person's legal rights, demonstrate that courts have the power to issue remedies that go beyond a plaintiff's actual injuries.

What are the arguments for and against federal courts' statutory authority to issue nationwide injunctions?

BRAY: The best argument for the federal courts' statutory authority to issue (some of the) national injunctions recently granted is the Administrative Procedure Act (APA), which requires reviewing courts to "set aside" unlawful agency action. But some of the national injunctions have involved executive orders that are not reviewable under the APA. I know of no plausible statutory authority for federal courts to grant these injunctions.

The best argument against statutory authority to grant national injunctions is that neither the APA nor the Judiciary Act of 1789 authorize them. National injunctions are inimical to the traditional powers and constraints of equity, and thus under *Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.* are not within the grant of statutory authority in the Judiciary Act. Nor should the APA be understood as authorizing, much less requiring, national injunctions. When

the APA was enacted, national injunctions were not being given by federal courts. The language used — "set aside" — was typical for reversal of judgments, which is consistent with Congress's expectation that agencies would predominantly make policy through adjudication. And Congress would have needed to speak more clearly in order to depart from long-standing equitable and remedial principles (cf. *Nken v. Holder*, *Weinberger v. Romero-Barcelo*).

FROST: The Judiciary Act of 1789 gave federal courts the same authority to issue equitable remedies as had been enjoyed by the English Court of Chancery. The English Court of Chancery had long exercised the power to issue a "bill of peace" in which it could bar a defendant from taking action against a nonparty closely affiliated with a party to the case, and so the U.S. federal courts inherited that power as well. More specifically, Federal Rule of Civil Procedure 65 permits federal district courts to issue preliminary and permanent injunctions, and places no limit on federal courts' power to issue injunctions that require defendants to cease taking action against nonparties.

The APA also authorizes nationwide injunctions in cases challenging federal agency action. Under 5 U.S.C. § 706(2), courts are required to "hold unlawful and set aside" agency action it finds to be invalid — language that suggests that when a court finds a rule was promulgated in violation of the procedures laid out in the APA, or is contrary to an agency's governing statute, then the rule can no longer apply to anyone.

What are the arguments for and against nationwide injunctions as a matter of policy?

BRAY: Two policy arguments are typically made for the national injunction. One is that it is needed to protect certain rights — that without a national injunction, there could be widespread violation of a constitutional right, yet the right will be vindicated by the courts only in a relatively few particular cases. The other is that the national injunction allows the judicial system to more quickly get to the right answer — in other words, speed and efficiency.

The typical policy arguments against the national injunction are the following: First, it provides a very intense incentive to forum-shop, because so much rides on one judge. Second, it curtails the "percolation" of a legal issue through the lower courts, a lack of percolation that might force the Supreme Court to decide a major constitutional question without a circuit split and in the posture of a motion to stay a preliminary injunction. (This almost happened with the Take Care Clause in *Texas v. United States*.) Third, it risks conflicting national injunctions, something that has been a distinct possibility at least three times in the last three years. Fourth, it is an end-run around the class action (giving its benefits without its requirements), and more generally is inconsistent with the doctrines and practices of the federal courts (e.g., no offensive nonmutual issue preclusion against the national government, no precedential weight for district court opinions). Indeed, the existence of class actions undercuts many of the arguments for national injunctions. For example, the desegregation cases were typically class actions (e.g., *Brown v. Board of Education*), and in none of them did a court give a national injunction.

Admittedly, though, there is something to the policy arguments on each side. We cannot have the virtues of the national injunction without its vices. And these policy points are incommensurable; there is no good way to balance "protecting rights" against "percolation," for example. This is one reason the language of costs and benefits is unhelpful here. Instead, we face a fundamental dilemma about the design of the judicial system.

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We can have a system that gets to an answer very quickly, erring on the side of expansive remedies. Or we can have a system that emphasizes the individual case and the parties before the court. In this latter system we do get to a decision for everyone — but it takes time, and deliberation, and the decisions of different courts in different parts of the country. It is open for debate which kind of system is better. But the design of the federal judiciary and the judicial power exercised by the federal courts over more than two centuries strongly suggest the latter is the kind of system we have. And in this kind of system, the national injunction is an aberration.

FROST: Nationwide injunctions should be issued with caution and only in cases where the benefits outweigh those costs. That said, there are at least three types of cases in which nationwide injunctions are a vital tool with which to protect the public from illegal policies.

First, nationwide injunctions can be the only means of providing complete relief to the plaintiffs. School desegregation cases are a paradigmatic example. If an African American plaintiff challenges a segregated public school system, granting an injunction requiring the defendant school system to admit the plaintiff only, and no other African American child, would not alleviate the plaintiff's injury. Likewise, challenges to policies that cross state lines — such as regulations concerning clean air and water, as well as some immigration policies — also require broad injunctions to remedy the plaintiffs' injuries.

Class actions are not an option in some of these cases. A class can only be certified if it satisfies the requirements of Federal Rule of Civil Procedure 23, which is time consuming and difficult. Certification is now even more difficult after Supreme Court decisions such as *Rodriguez v. Jennings* and *Walmart v. Dukes*. Accordingly, in some cases a nationwide injunction may be the only means of protecting constitutional rights and keeping the federal government within the bounds of the law.

Recent challenges to federal immigration policies are examples of cases in which class certification would have been very difficult, and yet the plaintiff needed a nationwide injunction to obtain complete relief. The state of Texas challenged the Obama administration's policy of granting deferred action to certain undocumented immigrants, claiming injury because it would be forced to provide recipients of deferred action with state-subsidized driver's licenses. The Obama administration argued that any injunction of its deferred action initiative should be limited to the state of Texas alone. But the Fifth Circuit affirmed the district court's nationwide injunction on the ground that anything less would fail to alleviate Texas' injury, because recipients of deferred action in other states could move to Texas any time and apply for driver's licenses, causing Texas the same injury. Likewise, when Hawaii challenged President Trump's travel ban, it argued that restrictions on the entry of foreign nationals anywhere in the United States would impede tourism and harm recruitment of faculty and students to its state university, and so it claimed a nationwide injunction essential to provide it with complete relief. Neither of these states could have easily brought their cases as class actions.

RECENT CHALLENGES TO FEDERAL IMMIGRATION POLICIES ARE EXAMPLES OF CASES IN WHICH CLASS CERTIFICATION WOULD HAVE BEEN VERY DIFFICULT, AND YET THE PLAINTIFF NEEDED A NATIONWIDE INJUNCTION TO OBTAIN COMPLETE RELIEF.

Second, nationwide injunctions are at times the only way to prevent irreparable injury to individuals who cannot easily or quickly join in litigation. For example, in cases challenging a new obstacle to voting enacted on the eve of an election, or an exemption allowing industry to begin drilling or logging in a previously protected area, or an immigration policy that will immediately change immigration status, a large group of individuals face imminent and irreparable injury and yet are incapable of quickly bringing their individual cases before courts. Again, class actions are not always available in light of the many obstacles to class certification, making a nationwide injunction an essential tool with which to protect rights of the many who cannot quickly file an individual lawsuit.

Third, nationwide injunctions are sometimes the only practicable method of providing relief, and they can avoid the cost and confusion of piecemeal injunctions. Before issuing an injunction, courts are required to take into account its effect on the "public interest" — that is, its effect on third parties, including those required to obey and administer the law. If a federal court finds that a federal policy concerning air or water pollution violates the law, it makes no sense to issue a patchwork of injunctions preventing implementation of the policy in some states or regions and not others — particularly considering that water and air pollution travel across state boundaries.

For similar reasons, enjoining federal immigration policy only in certain geographic regions is often impracticable. When the state of Texas challenged Obama's policy of granting deferred action to undocumented immigrants, it argued that the policy must be enjoined nationwide because immigrants receiving deferred action in other states could travel to Texas. When Hawaii sued to enjoin Trump's travel ban, it made the similar point that an injunction limited

to the state of Hawaii was unworkable in a system in which immigrants lawfully entering one state can then freely travel to all the other states. In short, in some cases a geographically-limited injunction is simply unworkable, even when the plaintiff represents a particular state or region.

As their critics have correctly pointed out, nationwide injunctions also come with costs. They can promote forum shopping, politicize the judiciary, lead to conflicting injunctions, prevent percolation of the law, and allow a single federal district court judge to control policy for the nation. But these costs are not all present in every case, and should not be overstated. For example, the risk of conflicting injunctions is quite low. Despite 50 years of experience with nationwide injunctions, courts have managed to work together to avoid direct conflicts between their decisions. Nor do nationwide injunctions always freeze the law or stymie percolation of legal questions throughout the circuits. The recent litigation challenging President Trump's travel ban and the Department of Justice's policy of denying funds to sanctuary cities demonstrates that different district and circuit courts can, and do, continue to hear and decide cases on these questions even after one court issues a nationwide injunction. If forum shopping is the main concern, then Congress can pass legislation limiting the venue for such cases, as it has considered doing in the past. Finally, although nationwide injunctions give a single district court temporary power to halt federal policy, such injunctions will be quickly reviewed by a panel of three appellate court judges and by the U.S. Supreme Court.

Nonetheless, the costs of nationwide injunctions are real, which is why district courts should carefully weigh the costs against benefits before issuing them.

What do you foresee as the future for nationwide injunctions? Do you expect the courts or Congress to address the legality of these orders anytime soon?

BRAY: Because the national injunction is aberrational, I do not expect it to last. What I do not know, however, is the likely endgame. The courts of appeals could end the national injunction, but so far they have not. The Supreme Court could end the national injunction, and Justice Clarence Thomas has signaled his concern on the subject. But the Court has so far passed on its opportunities to decide the question directly, even while its standing cases have continued to emphasize that remedies should be focused on the parties themselves (e.g., *Gill v. Whitford*). Another possibility is that Congress could end national injunctions, and a bill to that effect was recently reported out of the House Judiciary Committee (the Injunctive Authority Clarification Act of 2018). In short, I am unsure of exactly how the story will end, but I would be very surprised if we continue for long to allow a single court to issue an injunction controlling the behavior of the United States toward everyone in the country.

FROST: Over the past few years, members of Congress have introduced bills that would limit or prohibit nationwide injunctions, and the House Subcommittee on Courts, Intellectual Property, and the Internet held hearings on the propriety of nationwide injunctions in 2017. But the issue has yet to gain much political traction. Nationwide injunctions are attractive to whatever political party does not control the presidency, and so both Democrats and Republicans may hesitate to eliminate them entirely.

In his concurrence in *Trump v. Hawaii*, Justice Thomas criticized nationwide injunctions and declared that "[i]f their popularity continues, this Court must address their legality." But federal courts are now more educated about the costs of nationwide injunctions and approach such injunctions more thoughtfully than in the past. For example, in *City of Chicago v. Sessions*, a case challenging the Department of Justice's decision to withhold funding from jurisdictions that do not cooperate in federal immigration enforcement, a Seventh Circuit panel discussed the propriety of a nationwide injunction in detail. The Seventh Circuit then agreed to review the scope of the injunction en banc (though argument in that case was recently postponed).

Going forward, it seems likely that courts will be more cautious in issuing these injunctions, which in turn may take away the incentive for Congress or the Supreme Court to address the issue. But of course, it is always difficult to predict what the future will hold.

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