

Notes

WHO, WHAT, AND WHERE: A CASE FOR A MULTIFACTOR BALANCING TEST AS A SOLUTION TO ABUSE OF NATIONWIDE INJUNCTIONS

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ABSTRACT—There has been a significant increase in the use of a controversial, dramatic remedy known as the nationwide injunction. This development is worrisome because it risks substantial harm to the judiciary by encouraging forum shopping, freezing the “percolation” of legal issues among the circuits, and undermining the comity between the federal courts. But a complete ban on nationwide injunctions is both impractical and undesirable. This Note proposes a solution to limit the abuse of nationwide injunctions without banning them outright. When fashioning remedies, courts should simplify the sheer number of relevant factors by focusing on three main meta-factors, or categories, that should be used as a balancing test: the identity of the parties before the court, the nature of the claim being litigated, and the effect the remedy would have on the courts where the claim is being litigated—“who,” “what,” and “where,” respectively. The balancing of these three meta-factors will enable district courts to weigh more clearly whether nationwide injunctions are proper and will also give appellate courts a framework for reviewing whether district courts have abused their discretion by issuing this type of relief.

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INTRODUCTION

President Trump caused quite a stir on Twitter on February 4th, 2017, when he called Judge James Robart a “so-called judge”¹ for blocking his recently issued executive order² that became known as the “travel ban.” The travel ban suspended admission of all refugees from Syria for 120 days, reduced the number of refugees admitted each year from 100,000 to 50,000, and called for more careful vetting of immigrants from majority-Muslim countries.³ The President’s statements about Judge Robart drew strong condemnation, even from within his own party.⁴

¹ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:12 AM), <https://twitter.com/realDonaldTrump/status/827867311054974976> [<https://perma.cc/Y4MY-NEGC>].

² Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

³ See Carol Morello, *Trump Signs Order Temporarily Halting Admission of Refugees, Promises Priority for Christians*, WASH. POST (Jan. 27, 2017), https://www.washingtonpost.com/world/national-security/trump-approves-extreme-vetting-of-refugees-promises-priority-for-christians/2017/01/27/007021a2-e4c7-11e6-a547-5fb9411d332c_story.html [<https://perma.cc/EBP9-VRSB>].

⁴ For example, even Justice Neil Gorsuch, then still Trump’s nominee for the Supreme Court, reportedly called Trump’s statements “disheartening.” See Ashley Killough, *Supreme Court Nominee Gorsuch Calls Trump’s Tweets ‘Disheartening,’* CNN (Feb. 9, 2017 12:14 PM),

While the facts surrounding the travel ban and the President’s criticism of the judiciary received substantial attention, considerably less attention was given to what started the controversy—Judge Robart’s use of a “nationwide injunction,”⁵ which enjoined the federal government from enforcing the executive order anywhere in the United States.⁶ Judges did not use this type of remedy until the 1960s,⁷ and some courts still describe it as an “extraordinary remedy.”⁸ Nevertheless, nationwide injunctions are now widely used,⁹ with some courts even issuing them as a matter of course for certain types of cases.¹⁰

The problem with this practice is that the unrestrained use of nationwide injunctions comes with substantial drawbacks. While nationwide injunctions may be more efficient, uniform, and egalitarian, they prevent the government

<http://www.cnn.com/2017/02/08/politics/gorsuch-trump-tweets/index.html> [https://perma.cc/39TS-M6MH].

⁵ Nationwide injunctions are also sometimes called “universal injunctions,” which may be a more precise term because these broad remedies apply to all persons rather than to a geographic area. *See* *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 n.1 (2018) (Thomas, J., concurring) (choosing to use the term “universal injunction” as it is more precise). However, for clarity’s sake this Note opts for the more commonly used term “nationwide injunction.”

⁶ *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017), *stay denied*, 847 F.3d 1151 (9th Cir. 2017).

⁷ *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 428–45 (2017) (discussing the origin of nationwide injunctions).

⁸ *See* *City of Chicago v. Sessions*, No. 17 C 5720, 2017 WL 4572208, at *4 (N.D. Ill. Oct. 13, 2017) (“[I]ssuing a nationwide injunction should not be a default approach. It is an extraordinary remedy . . .”).

⁹ *See, e.g.*, *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017), *vacated*, 138 S. Ct. 353 (2017) (upholding nationwide injunction against Executive Order 13,780); *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007) (upholding nationwide injunction invalidating Forest Service regulation); *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1410 (D.C. Cir. 1998) (upholding nationwide injunction against Army Corps of Engineers’ rule); *Washington v. Reno*, 35 F.3d 1093, 1103–04 (6th Cir. 1994) (upholding nationwide injunction against the use of the prison commissary fund by the Bureau of Prisons); *Bresgal v. Brock*, 843 F.2d 1163, 1168–72 (9th Cir. 1987) (upholding nationwide injunction against an action by the Secretary of Labor); *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 533–35 (D.C. Cir. 1963) (issuing nationwide injunction against Secretary of Labor’s determination under the Walsh-Healey Public Contracts Act); *City of Chicago v. Sessions*, 2017 WL 4572208, at *4 (denying Attorney General’s request to stay nationwide injunction); *Hawai’i v. Trump*, 245 F. Supp. 3d 1227, 1239 (D. Haw. 2017) (granting nationwide injunction against travel ban), *vacated*, 138 S. Ct. 377 (2017); *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 564–65 (D. Md. 2017); *Washington v. Trump*, 2017 WL 462040, at *2 (granting temporary restraining order and temporary nationwide injunction until court could hear issue), *stay denied*, 847 F.3d 1151 (9th Cir. 2017).

¹⁰ For instance, the Administrative Procedure Act (APA) authorizes review of “final agency action” and is frequently involved in challenges to agency actions. *See, e.g.*, *Earth Island Inst.*, 490 F.3d at 699 (holding the language “set aside” in the APA compels nationwide injunctions); *see also* 5 U.S.C. § 704 (2012) (authorizing judicial review of “final agency action[s]” (emphasis omitted)). *See generally* JARED P. COLE, CONG. RESEARCH SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 1–2, 9 (2016), <https://fas.org/sgp/crs/misc/R44699.pdf> [https://perma.cc/VJF4-AKYP] (“The Administrative Procedure Act (APA) is perhaps the most prominent modern vehicle for challenging the actions of a federal agency.”).

from enforcing the policy in question anywhere in the country. This prevents other district courts from reviewing the issue, freezes the law in place, and inhibits circuit splits from developing.¹¹ Nationwide injunctions also run counter to the principle of comity between federal courts and circumvent the rule that the federal government is free to litigate issues that it lost in other cases.¹² Moreover, nationwide injunctions promote forum shopping and may even make class actions a waste of time because they provide for class-wide relief without the trouble and expense of class certification.¹³

While judges have issued nationwide injunctions for decades,¹⁴ scholars¹⁵ and courts¹⁶ have recently begun to give them more careful attention. Some courts realize that issuing a nationwide injunction requires justification,¹⁷ but the scope of an injunction is often dealt with briefly or not at all.¹⁸ This is understandable, because the Supreme Court has offered only clues as to the proper scope of an injunction and has never spoken directly on this issue.¹⁹ To solve this dilemma, some scholars have argued that nationwide injunctions should *never* be available,²⁰ while many courts employ logic that would almost *always* make nationwide injunctions available.²¹ Others offer solutions somewhere in between.²² Who is right, and how can this problem be resolved?

This Note takes a middle path by offering a more complete view of the scope of a court's equitable powers, taking into account both the harms and

¹¹ See *infra* notes 59–63 and accompanying text.

¹² See *infra* notes 69–78 and accompanying text.

¹³ See generally Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487 (2016) (arguing that nationwide injunctions reduce the incentive for class actions).

¹⁴ See Bray, *supra* note 7, at 428.

¹⁵ See *infra* Part II.

¹⁶ See *City of Chicago v. Sessions*, No. 17 C 5720, 2017 WL 4572208, at *4 (N.D. Ill. Oct. 13, 2017) (discussing increased attention to nationwide injunctions).

¹⁷ See *id.*

¹⁸ See, e.g., *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017) (issuing a nationwide temporary restraining order discussing the propriety of a nationwide injunction in two sentences), *stay denied*, 847 F.3d 1151 (9th Cir. 2017).

¹⁹ See, e.g., *Summers v. Earth Island Inst.*, 555 U.S. 488, 500–01 (2009) (“We likewise do not reach the question whether, if respondents prevailed, a nationwide injunction would be appropriate.”). Justice Clarence Thomas also discussed nationwide injunctions in a concurrence. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–29 (2018); see also *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2089–90 (2017) (Thomas, J., dissenting in part and concurring in part) (objecting to the use of a nationwide injunction on the basis that the equities favored the government but taking no position on the propriety of nationwide injunctions in general).

²⁰ See Bray, *supra* note 7, at 471.

²¹ See *supra* note 10 and accompanying text; see also, e.g., *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007).

²² See *infra* Sections II.A and II.C.

benefits of nationwide injunctions. Instead of eliminating the nationwide injunction²³ or imposing a geographical limit,²⁴ this Note advocates for a balancing test, which is rooted in the well-recognized practice of balancing the equities.²⁵ A balancing test rooted in this doctrine therefore promises to rein in the use of this extraordinary²⁶ remedy without sacrificing the discretion that judges have always had in fashioning equitable relief.

This Note proceeds in five parts. Part I compares the benefits and harms of nationwide injunctions and provides an overview of some of the most notable cases discussing the propriety of such injunctions. Part II then surveys the scholarship on this subject and argues that these proposed solutions are unsatisfactory or insufficient. Part III proposes a new framework for analyzing the many factors that courts and scholars have identified as relevant by boiling them down to three meta-factors or categories: (1) “Who,” the parties before the court; (2) “What,” the nature of the claim being litigated; and (3) “Where,” the effects the remedy will have on the judicial system where the claim is being litigated. Part IV argues that a balancing test using these meta-factors is the proper way to determine when nationwide injunctions should be used, even in difficult cases where the abuse of discretion standard cannot be met, and provides two examples of how this test should be applied. This Part also argues that even in difficult cases where the abuse of discretion standard cannot be met, a balancing test still usefully contributes to the common law method of judicial rulemaking by requiring judges to explain their reasoning. Finally, Part V considers and rejects the possible counterarguments that multifactor balancing tests are unworkable and violate the separation of powers; it ultimately concludes that this three-factor test is workable in practice and that balancing tests do not pose the same separation of powers concerns in the remedies context.

I. BENEFITS AND HARMS OF NATIONWIDE INJUNCTIONS

Part of what makes the debate over nationwide injunctions so complex is that there are powerful values on both sides of the debate, any of which could determine the outcome in a given case. This Part examines both the benefits and harms of nationwide injunctions, and in doing so concludes that,

²³ See *infra* Section II.A.

²⁴ See *infra* Section II.C.

²⁵ See, e.g., *Winter v. NRDC*, 555 U.S. 7, 24 (2008) (“[C]ourts ‘must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.’” (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987))).

²⁶ See *id.* at 22 (discussing how preliminary injunctions are “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief” (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam))).

despite their potential harm, nationwide injunctions may still be useful in certain situations.

A. Benefits

Judges and scholars have identified three primary benefits of nationwide injunctions: (1) the rule of law and uniformity, (2) egalitarian concerns, and (3) judicial economy or efficiency.

First, the simple moral intuition that it is wrong to allow illegal—and even more importantly, unconstitutional—conduct to continue unchecked is perhaps the most compelling explanation for the proliferation of nationwide injunctions. While the widespread use of nationwide injunctions is a relatively new phenomenon,²⁷ it follows logically from the concept of judicial review established in *Marbury v. Madison*,²⁸ in which the Supreme Court firmly established that the courts have the power to strike down unconstitutional laws.²⁹ It is only a small step from the concept of judicial review to the nationwide injunction—if it is the job of the courts to declare what the law is, any view that contradicts a judicial opinion is, in a sense, not the law. This is particularly true in constitutional matters because the Constitution is the supreme law of the land,³⁰ rendering all statutes that conflict with it moot.³¹ To allow an agency to continue enforcing a “moot” law arguably violates this basic principle.³²

The rule of law argument in favor of nationwide injunctions also justifies their increasingly widespread use. Because the federal government generally enacts policies and statutes uniformly around the country, if one of those policies or statutes is unconstitutional, the resulting harm is usually

²⁷ Professor Samuel Bray identifies the 1960s as the beginning of the nationwide injunction. See Bray, *supra* note 7, at 437–44.

²⁸ See 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

²⁹ Scholars have noted that others endorsed judicial review even before *Marbury*. See Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 SUP. CT. ECON. REV. 115, 121–32 (2004) (arguing that *Marbury* did not invent judicial review and that various Founders endorsed the concept as an element of the judicial power in Article III).

³⁰ See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . .”).

³¹ See *Marbury*, 5 U.S. (1 Cranch) at 180 (“It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.” (emphasis omitted)).

³² Indeed, in *City of Chicago v. Sessions*, Judge Harry Leinenweber employed exactly this reasoning to justify the use of a nationwide injunction, notwithstanding growing concerns about their propriety. See No. 17 C 5720, 2017 WL 4572208, at *4 (N.D. Ill. Oct. 13, 2017) (“The rule of law is undermined where a court holds that the Attorney General is likely engaging in legally unauthorized conduct, but nevertheless allows that conduct in other jurisdictions across the country.”).

nationwide as well. If the rule of law disallows enforcement against any similarly situated citizen, nationwide injunctions must become the norm.³³

Second, by protecting affected individuals not party to the litigation, nationwide injunctions can also promote equality. In fact, in *Wirtz v. Baldor Electric Company*, which appears to be the first case in which a court issued a nationwide injunction, the court justified the use of the injunction because it promoted equality before the law.³⁴ These concerns about equality are exacerbated when similarly situated plaintiffs have different access to legal resources.³⁵ Because equal treatment before the law is fundamental to a sense of justice and fairness, it may be important to protect nonparties in some instances by using nationwide injunctions.

Lastly, nationwide injunctions can help preserve judicial resources. While a slower, more incremental approach may allow for the “percolation” of the best ideas on a particular subject,³⁶ nationwide injunctions effectively decide the issue immediately for the entire nation, thus preventing duplicative litigation, which reduces courts’ dockets.³⁷ Given widespread concern about the often exorbitant costs of litigation and the costs to society of funding the judicial system,³⁸ it may be most beneficial to have some legal issues decided once and for all.

B. Harms

While nationwide injunctions do afford these benefits, they can also cause at least six distinct harms: (1) increased forum shopping, (2)

³³ See Sam Bray, *Finally, a Court Defends the National Injunction*, WASH. POST: VOLOKH CONSPIRACY (Oct. 14, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/10/14/finally-a-court-defends-the-national-injunction> [<https://perma.cc/AR85-6XZP>] (“Once that proposition is accepted, the national injunction will have become the norm for all challenges to the validity of a federal statute, regulation, or order.”).

³⁴ 337 F.2d 518, 534–35 (D.C. Cir. 1963) (“[Where] a lower court . . . has spoken, that court would ordinarily give the same relief to any individual who comes to it with an essentially similar cause of action . . .”). The court in *City of Chicago v. Sessions* likewise endorsed this reasoning in deciding to issue a nationwide injunction. See 2017 WL 4572208, at *4 (“All similarly-situated persons are entitled to similar outcomes under the law, and . . . an injunction that results in unequal treatment of litigants appears arbitrary.”).

³⁵ See Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J.F. 242, 244 (2017), <http://www.yalelawjournal.org/forum/nationwide-injunctions-venue-considerations> [<https://perma.cc/DME7-JVFN>] (arguing that eliminating nationwide injunctions “might lead to . . . differential access to favorable judgments based on litigant resources”).

³⁶ See *infra* Section I.B.

³⁷ See *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (granting nationwide injunction on the basis that a narrower injunction would lead to a “flood of duplicative litigation” and could overburden the D.C. Circuit).

³⁸ See, e.g., Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855, 855 (2015) (“Because of fears that litigation is too costly, reduction of litigation expenses has been the touchstone of procedural reform for the past thirty years.”).

asymmetric issue preclusion, (3) increased chance and incidences of conflicting injunctions, (4) damage to the Supreme Court's supervisory position, (5) a lack of remedial uniformity, and (6) conflict with precedent.

First, because a nationwide injunction will be equally powerful no matter which court decides the case, broad injunctions encourage plaintiffs to seek out ideologically friendly judges.³⁹ Forum shopping paired with a nationwide injunction can act as a type of veto in the hands of plaintiffs, creating a systematic disadvantage for the government. Furthermore, forum shopping may run the risk of painting the judiciary as just another tool for savvy political actors, endangering public perception of the judicial process as a whole.⁴⁰

This concern also crosses political boundaries. Most recently, members of the Trump Administration objected⁴¹ when judges issued nationwide

³⁹ See Bray, *supra* note 7, at 459–60 (noting that high profile litigation against the Bush and Trump Administrations tended to be brought in the Ninth Circuit, while litigation against the Obama Administration was frequently brought in federal courts in Texas). For example, plaintiffs brought no fewer than six challenges to the Obama Administration's policies in Texas, including challenges to the "Dear Colleague" letter from the Department of Education and an antidiscrimination provision of the Affordable Care Act (ACA). See *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 695 (N.D. Tex. 2016) (issuing nationwide injunction against antidiscrimination provision of the ACA); *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 531, 533–34 (E.D. Tex. 2016) (issuing nationwide injunction against Department of Labor regulation that would have made an estimated 4.2 million workers eligible for overtime pay); *Associated Builders & Contractors of Se. Tex. v. Rung*, No. 1:16-CV-425, 2016 WL 8188655, at *15 (E.D. Tex. Oct. 24, 2016) (issuing injunction against Department of Labor guidance and presidential Executive Order, which required federal contractors to report labor violations); *Texas v. United States*, No. 7:16-cv-00054-O, 2016 WL 7852331, at *2 (N.D. Tex. Oct. 18, 2016) (issuing nationwide injunction against Department of Labor's "Dear Colleague Letter"); *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-cv-00066-C, 2016 WL 3766121, at *46 (N.D. Tex. June 27, 2016) (issuing nationwide injunction against the Department of Labor's "persuader rule"); *Texas v. United States*, 86 F. Supp. 3d 591, 604 (S.D. Tex. 2015) (lawsuit opposing the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.).

⁴⁰ See, e.g., Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), <https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem> [<https://perma.cc/RWE8-CNJD>] ("Most troubling, the forum shopping this remedy incentivizes on issues of substantial public importance feeds the growing perception that the courts are politicized.").

⁴¹ See Kyle Balluck & Rebecca Savransky, *Trump Slams District Court over Travel Ban, Sanctuary Cities Rulings*, THE HILL (Apr. 26, 2017, 6:59 AM), <http://thehill.com/homenews/administration/330589-trump-slams-district-court-over-travel-ban-sanctuary-cities-rulings> [<https://perma.cc/ZLT5-XVSH>] (discussing Trump's criticism of the Ninth Circuit); see also Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 26, 2017, 3:38 AM), <https://twitter.com/realdonaldtrump/status/857182179469774848> [<https://perma.cc/6ZL6-TT29>] (stating that it was no coincidence travel ban and sanctuary cities cases were brought in "the Ninth Circuit . . . They used to call this 'judge shopping!'"). Attorney General Jeff Sessions has also criticized judges issuing nationwide injunctions as "super-legislators." See Melissa Quinn, *Jeff Sessions Slams Federal Judges for Issuing Nationwide Injunctions Hindering Trump's Agenda*, WASH. EXAMINER (Mar. 10, 2018, 10:47 AM), <https://www.washingtonexaminer.com/jeff-sessions-slams-federal-judges-for-issuing-nationwide-injunctions-hindering-trumps-agenda> [<https://perma.cc/Z2T6-66H3>] (quoting Attorney General Sessions, "Today, in effect, single district court

injunctions against the Administration’s “Muslim ban.”⁴² Democrats have also had reasons to be concerned with forum shopping.⁴³ Consider possibly the most obvious case of forum shopping, *Texas v. United States*,⁴⁴ in which Texas and twenty-five other states sued the Obama Administration over its immigration program titled Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).⁴⁵ Plaintiffs brought this case in the Southern District of Texas in the Brownsville division, a district with “only two active federal district judges.”⁴⁶ One of those judges was Judge Andrew Hanen, a known conservative who had publicly criticized the Obama Administration’s immigration policies.⁴⁷ Judge Hanen heard the case and ultimately issued a nationwide injunction.⁴⁸

Second, nationwide injunctions cause asymmetric issue preclusion. If a court rules in favor of the federal government and denies a nationwide injunction, only the parties to that suit are precluded from bringing another suit on the same subject.⁴⁹ If, however, a court rules against the government and issues an injunction, the government is enjoined from enforcing that

judges are going beyond proper adjudicative bounds and making themselves super-legislators for the entire United States”).

⁴² See *Hawai’i v. Trump*, 245 F. Supp. 3d 1227, 1237, 1239 (D. Haw. 2017) (issuing an injunction against other parts of the travel ban); *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 565–66 (D. Md. 2017) (issuing an injunction against the revised version of the travel ban); *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017) (issuing an injunction against the United States from enforcing President Trump’s Executive Order), *stay denied*, 847 F.3d 1151 (9th Cir. 2017).

⁴³ See, e.g., *Costa*, *supra* note 40 (Judge Costa, a Democrat and Obama appointee to the Fifth Circuit, criticizing nationwide injunctions on multiple grounds, including their tendency to politicize the courts and incentivize forum shopping).

⁴⁴ 86 F. Supp. 3d at 604.

⁴⁵ DAPA granted deferred action status to millions of undocumented immigrants, provided that they were parents of children who were either American citizens or lawful permanent residents, allowing them to remain in the United States. *Id.*

⁴⁶ See Andrew Kent, *Nationwide Injunctions and the Lower Federal Courts*, LAWFARE (Feb. 3, 2017, 3:02 PM), <https://www.lawfareblog.com/nationwide-injunctions-and-lower-federal-courts> [<https://perma.cc/F8JN-CC33>].

⁴⁷ See *id.* (“Other rules and institutional features can sometimes make shopping for a particular judge possible. The DAPA litigation, for example, was filed by Texas in the Brownsville division of the Southern District of Texas, where there are only two active federal district judges, including one, Andrew Hanen, who was known to be very conservative and had previously publicly criticized Obama administration immigration policies. Hanen ended up getting the case”); see also *Bray*, *supra* note 7, at 458–59 (noting that district courts in Texas stymied many of Obama’s policies).

⁴⁸ See Kent, *supra* note 46.

⁴⁹ A judgment can only be enforced against a named party because it is a violation of due process to enforce a judgment against a party who has not had an opportunity to be heard. See *Postal Tel. Cable Co. v. City of Newport*, 247 U.S. 464, 476 (1918).

statute anywhere.⁵⁰ This asymmetric issue preclusion could thus unfairly disadvantage the government, as illustrated by the litigation surrounding Trump’s travel ban. While an early challenge to the travel ban in the District of Massachusetts was unsuccessful,⁵¹ other district courts subsequently found that the Executive Order was unconstitutional and enjoined it nationwide, essentially rendering the government’s victory in Massachusetts meaningless.⁵² This result asymmetrically benefitted plaintiffs because the government could not enforce the Executive Order anywhere in the country, despite both losing and winning in the lower courts. Thus, even where defendants have won as many or even more cases than have their plaintiff counterparts, they can still in effect “lose” in the vast majority of circuits.⁵³

Third, nationwide injunctions increase friction between courts, which could result in significant consequences for the court system as a whole. Take, for instance, the Supreme Court’s equally divided affirmation of the Fifth Circuit’s nationwide injunction against DAPA in *United States v. Texas*,⁵⁴ which left the Fifth Circuit’s decision intact. Many plaintiffs attempted to circumvent the Texas district court’s injunction by challenging its scope, and one district judge in New York even signaled his willingness to disregard the injunction entirely.⁵⁵ Though there are now nine Justices on the Court, this case illustrated a possible worst-case scenario, in which two

⁵⁰ Several scholars have noted this asymmetry. See, e.g., Bray, *supra* note 7, at 460 (“The opportunity for forum shopping is extended by the asymmetric effect of decisions upholding and invalidating a statute, regulation, or order.”); Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2020–21 (2015) (“Quasi-individual actions give rise to troubling asymmetries. . . . This . . . potentially expos[es] [defendants] to serial relitigation.”); Morley, *supra* note 13, at 494 (“Defendant-Oriented Injunctions also raise fairness concerns due to asymmetric claim preclusion.”).

⁵¹ See *Louhghalam v. Trump*, 230 F. Supp. 3d 26, 38 (D. Mass. 2017) (denying injunctive relief on the basis that plaintiffs failed to show likelihood of success on the merits).

⁵² See, e.g., *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017) (enjoining Trump’s injunction nationwide), *stay denied*, 847 F.3d 1151 (9th Cir. 2017).

⁵³ This asymmetry can also exacerbate the potential for forum shopping, because even if the initial plaintiff does not forum shop and the statute is upheld, future plaintiffs need only find one ideologically aligned judge to defeat the statute in every other jurisdiction. In Professor Bray’s words, “Shop ’til the statute drops.” See Bray, *supra* note 7, at 460.

⁵⁴ *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (mem.). At the time, there were only eight Justices on the Court because Justice Antonin Scalia’s seat had not yet been filled. See Adam Liptak & Michael D. Shear, *Supreme Court Tie Blocks Obama Immigration Plan*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html> [<https://perma.cc/KTG3-7L4C>]; see also *supra* note 39 and accompanying text.

⁵⁵ See Alan Feuer, *Brooklyn Lawsuit Could Affect the Fate of Millions of Immigrants Nationwide*, N.Y. TIMES (Oct. 9, 2016), <https://www.nytimes.com/2016/10/10/nyregion/brooklyn-lawsuit-could-affect-the-fate-of-millions-of-immigrants-nationwide.html> [<https://perma.cc/FW7J-8EFT>]. During the hearing, Judge Nicholas Garaufis stated, “I have absolutely no intention of simply marching behind in the parade that’s going on out there in Texas, if this person has rights here.” *Id.*

or more circuits issue conflicting decisions and the Supreme Court subsequently deadlocks on the constitutionality of the statute.⁵⁶ This could leave a plaintiff in a bind, mandated by one judge to follow a statute but prohibited by another from doing the same.⁵⁷ While conflict on this scale has not occurred recently,⁵⁸ it is likely that more conflicts will occur as nationwide injunctions become more common.

Fourth, nationwide injunctions undercut one widely hailed⁵⁹ benefit of the circuit court system—what Judge Harold Leventhal famously called a “value in percolation among the circuits.”⁶⁰ Under this account, the ability of multiple circuits to review novel issues of law and fashion different solutions provides distinct advantages. Percolation helps filter out the truly difficult cases that would benefit most from Supreme Court review and allows for more judges to lend their voices to the discussion, increasing the diversity of viewpoints presented and ensuring that both sides of an argument are presented in their most compelling form.⁶¹

Nationwide injunctions undercut this feature of our system by preventing the judicial system from effectively screening out meritorious issues for the Supreme Court’s review. A nationwide injunction may increase or decrease the chance of certiorari being granted, but in either case, harm may occur. On the one hand, for most cases involving nationwide injunctions, the chances of certiorari being granted are likely decreased

⁵⁶ See Bray, *supra* note 7, at 462–64.

⁵⁷ Conflicts caused by inconsistent court orders are typically resolved when one court backs down, the circuit court reverses the decision, or one court decides to exclude from the injunction those circuits that have upheld the enjoined policy. See, e.g., *California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 710 F. Supp. 2d 916, 920 (N.D. Cal. 2008) (narrowing the scope of an injunction against the United States Department of Agriculture (USDA) to avoid conflict with the District of Wyoming’s injunction but lamenting “the unfortunate appearance of a lack of judicial comity that has arisen in the wake of the Wyoming court’s decision and the awkward position in which the [USDA] finds itself”). However, conflicting injunctions are much more likely if judges issue broad injunctions.

⁵⁸ Professor Bray points to the Erie Railroad legal battles in the nineteenth century, which involved conflicting injunctions between state judges, as an illustration of how dangerous these conflicts can be. See Bray, *supra* note 7, at 462.

⁵⁹ See, e.g., Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 52 (2017) (“Or take percolation. There is a widely held belief that it is useful, which we share.”).

⁶⁰ Harold Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U. L. REV. 881, 907 (1975).

⁶¹ In Justice Ruth Bader Ginsburg’s words, “[W]hen frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.” *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995).

because no circuit split is able to develop, keeping the law from developing.⁶² On the other hand, if the case is very high-profile, as was DAPA litigation, a nationwide injunction may have the opposite effect, prompting the Supreme Court to grant certiorari as soon as possible to resolve the resulting crisis.⁶³ In both cases, the “percolating” process fails, either by preventing potential circuit splits from developing and revealing important divisions, or by obliging the Court to take cases without having the benefit of insight from the lower courts’ thorough review.

Fifth, the use of nationwide injunctions results in a lack of remedial uniformity among the courts. One of the most frequently articulated advantages of nationwide injunctions is that they promote uniformity;⁶⁴ however, this is often not the case. Contrast, for example, two quotes from the same circuit. In 2011, Judge Posner noted that “[w]hen the court believes the underlying right to be highly significant, it may write injunctive relief as broad as the right itself.”⁶⁵ However, another Seventh Circuit decision—that Judge Posner himself signed onto—stated the exact opposite position: “A wrong done to [a] plaintiff in the past does not authorize prospective, class-wide relief unless a class has been certified. Why else bother with class actions?”⁶⁶ This confusion is not limited to the relationship between class actions and broad injunctive relief—courts are split on whether the Administrative Procedure Act calls for nationwide injunctions,⁶⁷ and whether facial challenges are more deserving of nationwide injunctions.⁶⁸ Judges therefore have virtually complete discretion whether to issue an injunction and can cite authority supporting any decision about the scope of equitable relief.

⁶² See Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1087 n.99 (2017) (“[M]ost nationwide injunctions receive far less attention, and, therefore, likely have a lower chance of receiving certiorari absent a circuit split.”).

⁶³ See Bray, *supra* note 7, at 422 (noting that the nationwide injunction might even force the Supreme Court to review a “major constitutional question on a motion for a stay. In that procedural posture, the Court would be reviewing lower court decisions reached in haste, and without the benefit of a record”).

⁶⁴ See *supra* Section I.A.

⁶⁵ *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 879 (7th Cir. 2011) (quoting 1 DAN B. DOBBS, *LAW OF REMEDIES* § 2.4(6), at 113 (2d ed. 1993)).

⁶⁶ *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997).

⁶⁷ Compare *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007) (holding the language “set aside” in the APA compelled a nationwide injunction), with *Va. Soc’y for Human Life, Inc. v. FEC*, 263 F.3d 379, 394 (4th Cir. 2001) (stating that “[n]othing in the language of the APA” compels nationwide injunctions).

⁶⁸ Compare, e.g., *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 695 (N.D. Tex. 2016) (“A nationwide injunction is appropriate when a party brings a facial challenge to agency action.”), with *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 665 (9th Cir. 2011) (declining to issue a nationwide injunction in spite of a successful facial challenge to a regulation).

Finally, nationwide injunctions conflict with other doctrine, namely the federal government's exemption from nonmutual issue preclusion and intercircuit agency nonacquiescence. Under modern principles of issue preclusion (also known as collateral estoppel) a party cannot relitigate issues that it previously litigated and lost,⁶⁹ even if the party asserting collateral estoppel was not a party to the original litigation.⁷⁰ However, the Supreme Court in *United States v. Mendoza* made an exception to this rule for the federal government, so that the federal government is free to relitigate issues that it previously lost against other parties.⁷¹ The Court noted that to do otherwise would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue."⁷²

Nationwide injunctions attempt to bypass *Mendoza* by effectively preventing the federal government from relitigating issues in other courts, thus subjecting the federal government to a form of de facto claim preclusion. This poses the same harms to the judicial system that the Court noted in *Mendoza*: thwarting percolation among the circuits and putting pressure on the Supreme Court's certiorari process.⁷³ Even though *Mendoza* signaled the importance of the federal government's discretion in relitigating previously decided issues,⁷⁴ nationwide injunctions threaten to render *Mendoza* meaningless.

Intercircuit agency nonacquiescence is a second doctrinal inconsistency with the use of nationwide injunctions. Under the doctrine of intercircuit nonacquiescence, an agency may decide to not be bound by a court's

⁶⁹ See, e.g., *Brockman v. Wyo. Dep't of Family Servs.*, 342 F.3d 1159, 1165–66 (10th Cir. 2003) ("The collateral estoppel doctrine prevents relitigation of issues which were involved actually and necessarily in a prior action between the same parties." (quoting *Kahrs v. Bd. of Trs. for Platte Cty. Sch. Dist. No. 1*, 901 P.2d 404, 406 (Wyo. 1995))).

⁷⁰ See Linda J. Soldo, Note, *Parklane Hosiery: Offensive Use of Nonmutual Collateral Estoppel in Federal Courts*, 29 CATH. U. L. REV. 509, 509–10 (1980) (describing the abandonment of the requirement of mutuality and the difference between offensive and defensive use of nonmutual collateral estoppel); see also *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (endorsing offensive nonmutual issue preclusion); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 333–34 (1971) (endorsing defensive nonmutual issue preclusion).

⁷¹ 464 U.S. 154, 162 (1984).

⁷² *Id.* at 160.

⁷³ Getzel Berger insightfully recognized that both the benefits and harms of nonmutual issue preclusion against the federal government mirror those of nationwide injunctions. See Berger, *supra* note 62, at 1096 ("The systemic policy considerations weighed in *Mendoza* mirror the key policy considerations on nationwide injunctions. The Court's analysis framed the issue as pitting uniformity and efficiency against percolation and intercircuit dialogue.").

⁷⁴ *Mendoza*, 464 U.S. at 160.

decision in other jurisdictions.⁷⁵ While the Supreme Court has never specifically endorsed any form of agency nonacquiescence, intercircuit nonacquiescence has been widely accepted,⁷⁶ as it flows logically from *Mendoza* and the rule against intercircuit stare decisis: If courts of appeals' decisions are only precedential within their respective circuits, and if the federal government should be free to relitigate issues in multiple circuits, then federal agencies should not be bound by a judicial decision nationwide until the Supreme Court resolves the issue.⁷⁷ However, just as nationwide injunctions attempt to circumvent *Mendoza*, they also effectively nullify agency nonacquiescence.⁷⁸ By enjoining agencies from enforcing policies anywhere in the country, nationwide injunctions essentially require agencies to acquiesce to the injunction-issuing district court in every jurisdiction.

In sum, the debate over nationwide injunctions is complex, with a variety of arguments available to both sides. Therefore, any proposed solution must be sure to take into account both the benefits and disadvantages of nationwide injunctions.

II. CURRENT SCHOLARSHIP ON NATIONWIDE INJUNCTIONS

In recent years, a growing number of scholars have attempted to make sense of the benefits and harms of nationwide injunctions in different ways: Professor Samuel Bray argues that nationwide injunctions should never be available; Zayn Siddique defends the “complete relief” principle currently used by courts in a student note; Getzel Berger argues that injunctions should only reach the borders of a circuit; and Daniel Walker identifies nine factors courts should consider. This Note analyzes each of these positions in turn.

⁷⁵ There are two forms of agency nonacquiescence: intercircuit and intracircuit nonacquiescence. See Kevin Haskins, Note, *A Delicate Balance: How Agency Nonacquiescence and the EPA's Water Transfer Rule Dilute the Clean Water Act After Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 60 ME. L. REV. 173, 175 (2008). Intracircuit nonacquiescence occurs when an agency decides to not be bound by a decision *in the same jurisdiction* that issued that decision. See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 743 (1989). In contrast, intercircuit nonacquiescence occurs when an agency decides to not be bound in a different jurisdiction. See *id.* There is debate over whether *intracircuit* nonacquiescence is constitutional. See *id.* (arguing that intracircuit nonacquiescence should only be allowed in limited circumstances).

⁷⁶ See, e.g., *Indep. Petrol. Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1261 (D.C. Cir. 1996) (“[I]ntercircuit nonacquiescence is permissible, especially when the law is unsettled.”); see also Berger, *supra* note 62, at 1099 n.160 (compiling sources recognizing intercircuit nonacquiescence).

⁷⁷ For a summary of the arguments for and against different forms of agency nonacquiescence, see Haskins, *supra* note 75, at 176–83.

⁷⁸ See Berger, *supra* note 62, at 1099 (“Nationwide injunctions flatly prohibit intercircuit nonacquiescence.”).

A. Professor Bray's Plaintiff-Limited Injunction Rule

In his widely cited article, Professor Samuel Bray argues that, because the role of the courts is solely to do justice to the parties before the court, courts do not have the power to issue nationwide injunctions.⁷⁹ In doing so, Professor Bray lays out three main arguments. First, there can be no support in equity for nationwide injunctions because there were no injunctions against the Crown in traditional courts of equity, as the chancellor spoke on behalf of the king.⁸⁰ Second, because Article III of the U.S. Constitution gives the courts “judicial Power” that is limited to the power to do justice between the parties before the court, any equitable remedy that reaches beyond the named plaintiffs violates Article III.⁸¹ Lastly, limits on traditional equity were historically not necessary because there was only one chancellor in England, compared to what Professor Bray characterizes as the “multiple chancellors” system in the United States.⁸²

While Professor Bray's plaintiff-limited injunction rule is clear and easy to apply, it is inadequate for multiple reasons. Though traditional principles of equity did not often allow for courts to reach nonparties,⁸³ equity constantly evolved to meet new issues of the day that the formalistic and static common law could not meet.⁸⁴ The Supreme Court has made it clear that courts of equity today possess the same equitable powers that courts of equity exercised in England at this country's founding, and therefore this discretion carries over.⁸⁵ To make carefully formalistic

⁷⁹ See Bray, *supra* note 7, at 418 (“A federal court should give what might be called a ‘plaintiff-protective injunction,’ enjoining the defendant’s conduct only with respect to the plaintiff. No matter how important the question and no matter how important the value of uniformity, a federal court should not award a national injunction.”).

⁸⁰ See *id.* at 425 (“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 . . .”).

⁸¹ See *id.* at 421 (quoting U.S. CONST. art. III, § 1).

⁸² See *id.* at 420.

⁸³ Professor Bray himself acknowledges that this was not universally true, because the mechanism of a “bill of peace” allowed the chancellor to resolve multiple claims of a cohesive group all at once, a type of “proto-class action.” See *id.* at 426.

⁸⁴ See, e.g., *The Earl of Oxford's Case in Chancery* (1615) 21 Eng. Rep. 485, 486, 1 Chan. Rep. 1, 6–7 (“The Office of the Chancellor is . . . to soften and mollify the Extremity of the Law . . .”). The idea that equity existed to soften the harsh consequences of the law dates all the way back to Aristotle. Paraphrasing Aristotle, Blackstone once wrote: “For, since in laws all cases cannot be foreseen or expressed, it is necessary that, when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances . . .” 1 WILLIAM BLACKSTONE, COMMENTARIES *61.

⁸⁵ See *Guar. Tr. Co. v. York*, 326 U.S. 99, 105 (1945) (“The suits in equity of which the federal courts have had ‘cognizance’ ever since 1789 constituted the body of law which had been transplanted to this country from the English Court of Chancery.”).

arguments about the extent of a court's equitable powers misunderstands the way that equity actually operated.⁸⁶

Even if Professor Bray were correct about the proper extent of the judiciary's equitable powers, his proposition is inconsistent with the Supreme Court's view of the propriety of injunctions reaching beyond class members. In *Trump v. International Refugee Assistance Project*, the Supreme Court affirmed the practice of issuing injunctions that reach beyond named plaintiffs.⁸⁷ While the Court narrowed the injunction against the travel ban to cover only those with a "credible claim of a bona fide relationship with a person or entity in the United States," the Court still found that, after balancing the equities, some individuals who were not named plaintiffs should be subject to the injunction.⁸⁸ In his dissenting opinion, Justice Thomas made an argument similar to that of Professor Bray, but his dissent garnered only three votes.⁸⁹ Therefore, until Professor Bray's view gains favor among more Justices, those who wish to reduce the number and breadth of nationwide injunctions (as Professor Bray does) will have to argue within the equitable balancing framework the Court currently endorses.

Professor Bray also freely acknowledges one of the most striking negative consequences of his proposal: plaintiff detection.⁹⁰ The example he provides is a good one: fourteen plaintiffs challenged—and won an injunction against—a California Highway Patrol policy of aggressive enforcement of a helmet law, which the court found violated the Fourth Amendment.⁹¹ The Ninth Circuit affirmed the injunction against anyone, not

⁸⁶ Along these lines, in his article, Professor Bray alludes to a possible counterargument. While England had only one chancellor, the Constitution shifted to a multiple-chancellor model of the federal courts, thus decreasing the equitable powers of the courts. See Bray, *supra* note 7, at 472–73. However, Professor Bray does not cite any sources contemporary with the ratification of the Constitution that support this view. It would be surprising indeed for the authors of the Constitution to change the powers of courts of equity without saying so in the Constitution itself. Moreover, Article III only requires the existence of one chancellor: the Supreme Court. The circuit court system was created by statute, not by the Constitution, and therefore does not affect the federal courts' equitable powers.

⁸⁷ 137 S. Ct. 2080, 2087–88 (2017). The Court affirmatively cited the Ninth Circuit's decision to issue a broad injunction and cited a previous Supreme Court case which allowed Americans to challenge the exclusion of a speaker on First Amendment grounds, even though the speaker was not a plaintiff to the case. See *id.* (citing *Kleindienst v. Mandel*, 408 U.S. 753, 763–65 (1972)).

⁸⁸ See *id.* at 2088.

⁸⁹ See *id.* at 2089–90 (Thomas, J., dissenting). In a more recent case, Justice Thomas wrote separately to voice his concerns about nationwide injunctions, but no other Justice joined him. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) ("I am skeptical that district courts have the authority to enter universal injunctions. These injunctions . . . appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts.").

⁹⁰ See Bray, *supra* note 7, at 478–81.

⁹¹ *Id.* at 478; see also *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1502 (9th Cir. 1996).

just the named plaintiffs, reasoning that it would be incredibly impractical for officers to determine whether a given motorcyclist was one of the fourteen named plaintiffs who had won the injunction against the State.⁹² Professor Bray responds to this problem by stating that this does not actually matter, because the burden is on the State to find a way to comply with the injunction and the State could embrace a more “creative option, such as distributing decals to the [plaintiffs]” to assist officers with identification.⁹³ However, this “creative” option borders on the absurd, and judges are generally reluctant to sanction law enforcement agencies.⁹⁴ The simpler, more efficient solution therefore is to enter the injunction vis-à-vis everyone.

Beyond plaintiff-detection issues, there are cases in which the rights of named plaintiffs are bound up with the rights of similarly situated nonparties. Take, for example, civil rights cases such as school desegregation. It is perhaps unsurprising that injunctions against governmental entities changed while these cases were being decided,⁹⁵ because entire groups of African-American citizens felt the harm from segregation and discrimination. As a result, the Supreme Court affirmed complex and far-reaching remedies, including desegregating entire school districts and setting up busing—a complex remedial scheme that reached beyond named plaintiffs.⁹⁶ “Complete relief” could not really be had for a plaintiff if they were the only person of their race admitted into a school, as their interest in equal protection was bound up with the rights of others.

In conclusion, due to its inconsistency with the history of equity, its rejection by the Supreme Court, its potential for absurd results, and the possibility that wide swaths of the population will be left vulnerable, the plaintiff-only rule cannot be the answer.

⁹² *Easyriders*, 92 F.3d at 1502 (“[Because] it is unlikely that law enforcement officials . . . 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.”).

⁹³ See Bray, *supra* note 7, at 479.

⁹⁴ See Daniel J. Walker, Note, *Administrative Injunctions: Assessing the Propriety of Non-Class Collective Relief*, 90 CORNELL L. REV. 1119, 1148 (2005) (“The courts tend to show a high degree of deference to law enforcement agencies, and this deference seems to influence the courts’ decisions to narrow the scope of injunctions . . .”).

⁹⁵ See Bray, *supra* note 7, at 454 (“Yet another change that might have influenced the development of the national injunction was the desegregation cases of the 1950s and 1960s.”).

⁹⁶ See *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (“The judgments below . . . are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”); see also Walker, *supra* note 94, at 1132 (“The extraordinary nature of [school desegregation] required the courts[] to stretch their injunctive powers well beyond their historical limits.”).

B. Siddique's "Complete Relief" Principle

In his note, Zayn Siddique proposes the use of the “complete relief” principle, which states that the scope of an injunction should be “no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”⁹⁷ This test more or less restates the current approach⁹⁸ and has already been adopted by the Supreme Court.⁹⁹ The advantages to this approach are that it already has widespread support in the courts¹⁰⁰ and weighs the interests of both the plaintiff and the defendant.

Despite having already been adopted by the Court, this principle is insufficient for two reasons. First, despite its widespread acceptance by courts, it has thus far been ineffective in successfully constraining judges’ use of nationwide injunctions. As even many supporters of nationwide injunctions agree, nationwide injunctions are “strong medicine” and should be used less often than they are now.¹⁰¹ Therefore, something more than this rule is necessary to constrain their use.

⁹⁷ Zayn Siddique, Note, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2103 (2017) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

⁹⁸ See Bray, *supra* note 7, at 466 (“The [approach] most commonly raised by courts and commentators is the principle of ‘complete relief’”); see also Siddique, *supra* note 97, at 2105 n.54 (explaining that the complete relief principle “is a reiteration of an equally well-established principle that ‘the nature of the violation determines the scope of the remedy’” (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971))).

⁹⁹ See, e.g., *Califano*, 442 U.S. at 702 (“[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”); see also *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (same) (quoting *Califano*, 442 U.S. at 702). While the Court in *Califano* attributed this test to the Secretary of the Department of Health, Education, and Welfare, federal courts quickly adopted the test, and the Supreme Court later clarified that it was the law. See *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2090 (2017). Based on a Westlaw search, *Califano* appears to be the origin of this particular wording of the test.

¹⁰⁰ APA challenges to agency regulations are an exception where this principle is not consistently applied. Siddique and others have identified a split in courts, some of which hold that the APA allows for nationwide injunctions for all offending regulations, while other courts do not. See Siddique, *supra* note 97, at 2100–01 nn.23–28.

¹⁰¹ For example, Judge Leinenweber cautioned that nationwide injunctions should be used rarely, even though he decided it was proper in the instant case. See, e.g., *City of Chicago v. Sessions*, No. 17 C 5720, 2017 WL 4572208, at *4 (N.D. Ill. Oct. 13, 2017) (“Nevertheless, issuing a nationwide injunction should not be a default approach. It is an extraordinary remedy that should be limited by the nature of the constitutional violation and subject to prudent use by the courts.”). In affirming Judge Leinenweber’s decision, the Seventh Circuit also stated that nationwide injunctions should be rare. See *City of Chicago v. Sessions*, 888 F.3d 272, 290 (7th Cir. 2018) (“Certainly, the ability to impose a nationwide injunction is a powerful remedy that should be employed with discretion. . . . Courts must be able to . . . engage in the ‘equitable balancing’ to determine the relief necessary. Rarely, that will include nationwide injunctions.”); see also Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 62 (2017) (conceding the potential harms of nationwide injunctions but concluding that she is “not ready to say that national injunctions that apply to nonparties are *never* appropriate”).

Second, the complete relief principle is often difficult to apply because it works both for and against the cause of reducing judicial discretion with nationwide injunctions, depending on which half of the rule is emphasized.¹⁰² Judges who decide to issue an injunction can emphasize affording “complete relief” to plaintiffs, while those who decide that a nationwide injunction is inappropriate can emphasize fashioning remedies to be “no more burdensome to the defendant than necessary.”¹⁰³ Therefore, this principle does not truly constrain the use of nationwide injunctions.

C. Berger’s Circuit-Border Rule

A third approach to nationwide injunctions created by Getzel Berger would geographically limit a nationwide injunction to the borders of the circuit in which the issuing court resides.¹⁰⁴ Berger argues that this approach is preferable to Professor Bray’s, because even though injunctions sometimes need to be applied more broadly than against just the named parties, nationwide injunctions are nevertheless too extreme of a remedy and should not be used.¹⁰⁵ Berger finds support for his proposal in two places: the congressional policy choice to divide the circuits into geographic units, and the policies underlying the Supreme Court’s decision in *Mendoza* that the federal government is not subject to nonmutual issue preclusion.¹⁰⁶

First, Berger argues that the circuit court system demonstrates Congress’s intention to balance value for uniformity with percolation, and that his circuit-border rule respects this policy choice.¹⁰⁷ Second, with respect to the Court’s holding in *Mendoza*, Berger argues that, because the Supreme Court noted the importance of the circuits’ ability to communicate with one

¹⁰² See Berger, *supra* note 62, at 1080 (“Many courts quote *Yamasaki* to support the issuance of narrow injunctions, emphasizing the ‘no more burdensome to the defendant than necessary’ part. Other courts, however, cite the same language in support of broad injunctions by focusing on the ‘complete relief’ part of the sentence to reason that broad injunctions are permitted if necessary to completely redress the plaintiff’s grievance.” (footnote omitted)).

¹⁰³ See *id.*; Bray, *supra* note 7, at 444 (“When courts want to grant injunctions that go beyond protecting the plaintiffs, they point to . . . the need for complete relief. When courts want to grant injunctions that protect only the plaintiffs, they point to . . . the principle that equitable remedies should be no more burdensome than necessary.” (footnote omitted)); see also *Va. Soc’y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (“This injunction is broader than necessary to afford full relief to [the plaintiff].”); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1502 (9th Cir. 1996) (“[T]he plaintiffs would not receive the complete relief to which they are entitled without statewide application of the injunction.”); *Meinhold v. U.S. Dep’t of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994) (denying nationwide injunction and noting that “[a]n injunction ‘should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs’” (quoting *Califano*, 442 U.S. at 702)).

¹⁰⁴ See Berger, *supra* note 62, at 1100–06.

¹⁰⁵ See *id.* at 1100.

¹⁰⁶ See *id.* at 1101; see also *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

¹⁰⁷ See Berger, *supra* note 62, at 1101.

another, precedent thus supports the circuit-border rule because the rule promotes the same value.¹⁰⁸

While Berger's thesis is an admirable attempt to solve a complex problem, it has three notable shortcomings. First, his thesis purports to rest on the implied congressional intent to limit the reach of courts to the borders of their respective circuits. However, courts of equity have always been able to enjoin acts committed outside of the court's territorial jurisdiction.¹⁰⁹ Indeed, language in *Califano* specifically denies that equity is limited by geography.¹¹⁰ Given the long, unbroken history of equity acting in personam¹¹¹ regardless of geographical lines, Congress would need to be far more explicit in order to geographically restrict courts' authority in this way.

Second, while the circuit borders are a useful way of breaking up the nation for injunctions or other jurisprudential purposes, the choice of where to draw the circuit lines is a policy choice that has no equitable "pedigree." One could arguably use any other formulation of jurisdictional boundaries to which injunctions apply, such as the borders of the ninety-four district courts. This division would be no less arbitrary than the current circuit court divisions and would remain a policy choice made for pragmatic reasons, not equitable purposes.

Third, in a few rare cases, the circuit-border rule could actually be more restrictive than Professor Bray's proposal because some cases necessarily involve issues that cross circuit lines. For example, environmental litigation concerning Great Smoky Mountains National Park would, under Berger's framework, have to be conducted in two parallel proceedings. The park is partially in both Tennessee and North Carolina, which are in the Sixth and

¹⁰⁸ See *id.* ("The nature of the regional circuits features prominently in *Mendoza*, which focused on the ability of the regional courts of appeals to disagree with each other.").

¹⁰⁹ See Bray, *supra* note 7, at 422 n.19 ("On the other hand, to protect the plaintiff, equity was willing to enjoin acts committed outside of the Chancellor's territorial jurisdiction. . . . Geographical lines are simply not the stopping point.").

¹¹⁰ See *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("Nor is a nationwide class inconsistent with principles of equity jurisprudence, since the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class."). It could be argued, as Berger does, that the court in *Califano* was speaking about the propriety of injunctions in class actions, not equity in general. See Berger, *supra* note 62, at 1102–03. However, the context of the quote seems to be "principles of equity jurisprudence" in general, not Rule 23 of the Federal Rules of Civil Procedure specifically.

¹¹¹ The phrase "equity acts in personam" is an ancient maxim of equity, which meant that (among other things) courts of equity could enforce their judgments in other jurisdictions. See, e.g., Horace Stringfellow, *Equity Acts in Personam*, 2 ALA. LAW. 230, 230 (1941) ("[Because equity acts in personam,] courts of equity, having jurisdiction of the parties, are enabled to adjudicate and settle matters affecting property situated in other States and countries . . .").

Fourth Circuits, respectively.¹¹² Under Professor Bray's framework, courts would be free to issue injunctions that apply across circuit borders so long as they only apply to named parties and would therefore allow for broader injunctions in these cases. Requiring parallel federal litigation for a single issue simply because the problem in question occurs across circuit borders would be inefficient and is not required by law.

In sum, while legal problems are often limited to small geographic areas and a court can tailor its injunction to the smallest geographical area possible, a firm rule against issuing any injunction outside of circuit borders is inconsistent with fundamental rules of equity and existing jurisprudence and is ultimately an arbitrary distinction.

D. Walker's Nine Factors

In his note, Daniel Walker compiled a list of nine factors that he argues judges should evaluate when considering the proper scope of an injunction: (1) the type of parties; (2) whether the defendant is a government agency; (3) whether the challenge is facial or as applied; (4) the nature of the right; (5) the type of injunction sought (mandatory versus prohibitory and preliminary versus permanent); (6) the type of agency being enjoined; (7) restriction on venue statutes; (8) whether a narrower injunction would effectively result in legislating by the judiciary; and (9) the boundaries of the affected class.¹¹³

While Walker addresses several important factors that courts consider, all nine factors can be consolidated into three main categories: Walker's first, second, sixth, and ninth factors all concern the same basic question: the type of parties involved in the litigation; factors three and four both concern the nature of the claim being asserted; and factors seven and eight both concern judicial economy. This Note ultimately consolidates Walker's nine elements into a three-factor test along these same lines.¹¹⁴ Further, this Note also adds to the list of factors,¹¹⁵ and makes a normative argument for why balancing tests are appropriate in the context of nationwide injunctions.¹¹⁶

¹¹² See *Great Smoky Mountains*, NAT'L PARK SERV., <https://www.nps.gov/grsm/index.htm> [<https://perma.cc/ZF9Y-H29V>].

¹¹³ See Walker, *supra* note 94, at 1144–51.

¹¹⁴ See *infra* Section III.A.

¹¹⁵ The factors not present in Walker's note that are discussed here include: federalism and abstention issues, the *Mendoza* precedent, plaintiff-detection issues, the asymmetric effects of res judicata from multiple litigation, comity and conflicting injunctions, the likelihood of forum shopping, and percolation. See *infra* Section III.A.

¹¹⁶ See *infra* Part V.

E. Other Approaches

Various scholars have advanced other recommendations for constraining the nationwide injunction. Professor Michael Morley suggests that courts apply an equal protection and severability analysis before issuing a nationwide injunction, thereby requiring plaintiffs who are seeking broad remedies to seek certification as a class under Rule 23(b)(2) of the Federal Rules of Civil Procedure.¹¹⁷ Professor Maureen Carroll recommends a similar but softer approach: a set of changes to make class action lawsuits more appealing.¹¹⁸ Lastly, Professor Michelle Slack argues that courts should employ a presumption against class action certification where the government is a party to the lawsuit.¹¹⁹ While valid, this Note does not extensively discuss these perspectives because they are ultimately compatible with this Note's proposed multifactor balancing test.¹²⁰

III. WHO, WHAT, AND WHERE: TRIANGULATING EQUITABLE REMEDIES

Courts of equity possess the power and discretion to apply injunctions in novel ways to novel problems. This is a feature of, not a “bug” in, the system of equity. However, the system is not without drawbacks—namely the indeterminacy and inconsistency inherent in any system of standards and rules. This Note suggests that the solution to the indeterminacy and inconsistency of the equitable system is an obvious and time-tested one: equitable balancing. The concept of “balancing the equities” is hardly new, and courts already use it to determine when injunctions are proper.¹²¹ Moreover, equitable balancing is consistent with equity's history.¹²² Balancing tests are beneficial because they prompt judges to adequately justify their choice of remedies, an important feature of the common law system.

¹¹⁷ See Morley, *supra* note 13, at 549–50.

¹¹⁸ See Carroll, *supra* note 50, at 2017, 2074–81 (proposing changes that include expedited timelines, reforming the “necessity” doctrine, and making class actions more financially attractive to attorneys).

¹¹⁹ See Michelle R. Slack, *Separation of Powers and Second Opinions: Protecting the Government's Role in Developing the Law by Limiting Nationwide Class Actions Against the Federal Government*, 31 REV. LITIG. 943, 987–95 (2012).

¹²⁰ However, Professor Slack's idea appears to conflict with Professor Morley's and Professor Carroll's ideas, because a court cannot logically encourage or require plaintiffs to certify as a class while simultaneously employing a presumption against certifying classes where the government is a defendant.

¹²¹ See, e.g., *Breswick & Co. v. United States*, 75 S. Ct. 912, 915 (1955) (“Where the question is whether an injunction should be granted the irreparable injury facing the plaintiff must be balanced against the competing equities before an injunction will issue.”).

¹²² As discussed above, equity has a long history of providing courts with discretion. See *supra* notes 83–85 and accompanying text.

Ultimately, it seems inevitable that courts will have a great deal of discretion when fashioning equitable remedies, because discretion has been a feature of equity for centuries. Therefore, absent congressional attention, the best solution is a return to the roots of equity by engaging in a multifactor balancing test to determine if a nationwide injunction is an appropriate remedy.¹²³ A system of multifactor balancing allows for that discretion while still imposing some necessary limits.

The biggest roadblock to the use of a balancing test in the context of nationwide injunctions, however, is the sheer number of relevant factors. Unfortunately, previous scholars have not fully appreciated this problem, and a thorough examination shows that there are far too many factors to construct a simple balancing test. This Part proceeds by first examining these factors and then proposing a more workable three-factor balancing test. This proposed framework provides a means for evaluating and critiquing different cases.

A. *Relevant Factors*

While scholars have attempted to evaluate the factors that courts should consider when deciding whether to issue a nationwide injunction,¹²⁴ any list will almost certainly be incomplete because it is impossible to consider, *ex ante*, every relevant factor. Nevertheless, this Section attempts to collect the most important factors that courts have, and should, consider when fashioning an injunctive remedy.

1. *Abstention*

Under the abstention doctrine of “Our Federalism,” federal courts should not enjoin an ongoing state prosecution out of concern for states’ interest in enforcing their laws.¹²⁵ This theme of deference to state

¹²³ This Note leaves to one side the discussion of whether balancing of the equities or tailoring the remedy is the more appropriate approach. While there may be some instances where Congress has clearly stated its intent about the proper scope of a remedy, *see supra* note 10 (comparing cases discussing whether the APA requires a nationwide injunction against illegal agency actions with constitutional remedies and many statutory schemes), Congress is largely silent on the issue of remedies and has not signaled a movement away from traditional principles of equity. For a comparison of balancing of the equities with tailoring the remedy, see David Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 633–36 (1988).

¹²⁴ *See* Walker, *supra* note 94, at 1144–51.

¹²⁵ *See* *Younger v. Harris*, 401 U.S. 37, 44–45 (1971) (“[Our Federalism] represent[s] . . . a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, ‘Our Federalism,’ born in the early struggling days of our Union of States, occupies a highly important place in our Nation’s history and its future.”).

institutions is also present in the line of Tenth Amendment anti-commandeering cases established by the Rehnquist Court, starting with *New York v. United States*¹²⁶ and *Printz v. United States*.¹²⁷ There are a number of other abstention doctrines, including *Pullman*,¹²⁸ *Colorado River*,¹²⁹ *Burford*,¹³⁰ and *Rooker–Feldman*¹³¹ abstention, which are similar in that they often consider issues of comity between the courts. However, unlike Tenth Amendment cases, these doctrines of abstention leave discretion to the judge applying them. While the details of injunctions will vary from doctrine to doctrine, the existence of a state as a party, especially as a defendant, may make the case more analogous to Tenth Amendment cases and, thus, may counsel toward a narrower injunction or even no injunction at all.¹³²

2. *Intercircuit Nonacquiescence*

Following the Court's holding in *United States v. Mendoza*,¹³³ the presence of an agency as a defendant is a significant factor for judges in weighing whether to issue a nationwide injunction. As discussed in the previous Part, a nationwide injunction can effectively subject an agency to de facto issue preclusion and render intercircuit agency nonacquiescence moot.¹³⁴ If the defendant (against whom an injunction is sought) is an agency, then this factor counsels toward applying a narrowing presumption to mitigate issue preclusion and preserve intercircuit nonacquiescence.

3. *Type of Agency*

The type of agency against which an injunction is sought can also affect whether a court will defer to that agency when balancing the equities and

¹²⁶ 505 U.S. 144, 149 (1992) (invalidating a portion of the Low-Level Radioactive Waste Policy Amendments Act of 1985 on the grounds that it violated principles of federalism by unfairly coercing states into taking title to radioactive waste).

¹²⁷ 521 U.S. 898, 933–35 (1997) (holding that provisions of the Brady Act violated principles of federalism by compelling state officers to enforce federal law).

¹²⁸ See *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941) (holding that federal courts may stay a claim until a state's supreme court has a chance to review the constitutionality of the act itself).

¹²⁹ See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 819–20 (1976) (holding that abstention is appropriate in certain circumstances where there is parallel litigation in the state and federal courts).

¹³⁰ See *Burford v. Sun Oil Co.*, 319 U.S. 315, 317–18 (1943) (holding that a federal court may abstain from deciding complex issues of state law).

¹³¹ See *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983) (holding that federal courts are not to review state court decisions without direction from Congress); *Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 416 (1923) (holding that the federal courts are not, absent direction from Congress, to sit in review of state court decisions).

¹³² See *Walker*, *supra* note 94, at 1145 (discussing the first factor).

¹³³ 464 U.S. 154, 162–63 (1984).

¹³⁴ See *supra* Section I.B.

choose not to issue an injunction in close cases.¹³⁵ For instance, courts may be more likely to defer to law enforcement agencies than to other types of agencies.¹³⁶ As with issues of comity, federalism, and separation of powers, courts try to avoid unduly hampering law enforcement's ability to carry out its legal duties while simultaneously continuing to protect the rights of persons with whom law enforcement interacts.

4. *Substantive Area of Law and Scope of the Injury*

One of the most important factors courts consider is the substantive area of law giving rise to the claim.¹³⁷ As noted above, civil rights cases likely require more complex and systemic remedies than, for example, breach of contract cases, even those involving the federal government.¹³⁸ Likewise, a First Amendment case may be a candidate for broader injunctions because the harm experienced through a chilling of speech is diffuse and difficult to trace entirely to one particular plaintiff or group of plaintiffs.¹³⁹ Professor Morley's recommendation that courts conduct a type of severability analysis addresses exactly this consideration.¹⁴⁰ Relatedly, some claims by their very nature require "indivisible relief," where failing to enjoin related parties could subject defendants to incompatible standards of conduct.¹⁴¹ In contrast, if the harm to particular plaintiffs can be addressed by enjoining enforcement of only some parts of the statute, then a nationwide injunction overturning the entire statute is unnecessary. By examining how localized the harm is—

¹³⁵ See Walker, *supra* note 94, at 1148.

¹³⁶ See *id.* ("[C]ourts tend to show a high degree of deference to law enforcement agencies, and this deference seems to influence the courts' decisions to narrow the scope of injunctions that might otherwise be acceptable."). For example, the Supreme Court has approved some restrictions on inmate behavior by prison administrators, such as limits on contact with the outside world, which would not be permissible in another context. See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) ("To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights.").

¹³⁷ See Walker, *supra* note 94, at 1146 ("The fourth consideration that courts should take into account is the nature of the right being vindicated.").

¹³⁸ See *supra* notes 101–02 and accompanying text.

¹³⁹ See Walker, *supra* note 94, at 1146.

¹⁴⁰ See Morley, *supra* note 13, at 551 ("Generally, a court severs the invalid provision . . . unless: (i) the remaining sections cannot operate coherently as a law, or (ii) the court concludes that the entity that enacted the statute or regulation would not have intended for its remaining sections to be enforced without the invalidated portions.").

¹⁴¹ Professor Martin Redish and William Katt explore the concept of indivisible relief in the context of the virtual representation debate. See Martin H. Redish & William J. Katt, *Taylor v. Sturgell, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1879 (2009) ("The concept of indivisible relief refers to cases in which the relief sought by multiple parties from the same defendant demands that the defendant take singular action—in other words, that the defendant cannot, either legally or physically, provide wholly separate, disjointed, or inconsistent relief to the various plaintiffs.").

geographical, statutory, or otherwise—courts have an indication of how broad the injunction may need to be to remedy the violation.

5. *Facial vs. As-Applied Challenges*

While some courts have arguably gone too far in treating the existence of a facial challenge as prima facie support for a nationwide injunction,¹⁴² the nature of the challenge is nonetheless important. An influential opinion in this regard is Justice Harry Blackmun’s dissent in *Lujan v. National Wildlife Federation*,¹⁴³ in which he stated that as-applied challenges generally justify narrow remedies, while facial challenges generally justify remedies that benefit nonparties.¹⁴⁴ While broad remedies are not necessarily mandated in facial challenges, they are nevertheless an important factor to consider.

6. *Type of Injunction*

The type of injunction sought can materially affect the scope of that injunction. For example, mandatory injunctions compel the defendant to act, while prohibitory injunctions prohibit an action but leave the defendant otherwise free.¹⁴⁵ The stage of the litigation is also important—for instance, judges issue temporary restraining orders or preliminary injunctions before parties have fully conducted discovery and argued their cases. Because the claim has not been fully litigated, courts should consider whether they can narrowly tailor the remedy.¹⁴⁶

7. *Judicial Resources and Venue Considerations*

The conservation of judicial resources was an important consideration weighing in favor of an injunction in *National Mining Association v. United States Army Corps of Engineers*,¹⁴⁷ a case involving the propriety of class-wide relief in the absence of a class action lawsuit.¹⁴⁸ While the court in *National Mining Association* did argue that the APA mandated broad

¹⁴² See, e.g., *City of Chicago v. Sessions*, No. 17 C 5720, 2017 WL 4572208, at *2 (N.D. Ill. Oct. 13, 2017) (justifying a nationwide injunction because “[t]his case . . . implicates a facial challenge to a federal statute; the Attorney General’s authority to impose Byrne JAG conditions on the City will not differ from his authority to do so elsewhere”); see also *supra* notes 20, 51 and accompanying text.

¹⁴³ 497 U.S. 871, 900 (1990) (Blackmun, J., dissenting).

¹⁴⁴ See *id.* at 913 (stating that “[i]n some cases the ‘agency action’ will consist of a rule of broad applicability; and if the plaintiff prevails,” the plaintiff “may obtain ‘programmatic’ relief that affects the rights of parties not before the court.”). The Seventh Circuit also endorsed this dichotomy as a method of limiting use of nationwide injunctions. See *City of Chicago v. Sessions*, 888 F.3d 272, 291 (7th Cir. 2018) (“A narrow question of law such as is present here is more likely to lend itself to broader injunctive relief . . . Accordingly, this does not present the situation in which the courts will benefit from allowing the issue to percolate through additional courts . . .”).

¹⁴⁵ See Walker, *supra* note 94, at 1147–48.

¹⁴⁶ See *id.*

¹⁴⁷ 145 F.3d 1399 (D.C. Cir. 1998).

¹⁴⁸ *Id.* at 1409–10.

injunctions, it also noted its concern that a plaintiff-focused injunction would merely “generate a flood of duplicative litigation,” costing both the parties and the courts valuable resources.¹⁴⁹ The fact that the parties conducted much of this “duplicative litigation” in the D.C. Circuit also factored into the court’s prediction.¹⁵⁰ The pressures each circuit faces are different, and the potential for duplicative litigation is unique to each case, so articulating an abstract principle is difficult; however, the conservation of judicial resources may sometimes weigh toward issuing a broad injunction.

8. *Affected Class Boundaries and Asymmetric Effects of Res Judicata*

The boundary of potentially affected nonparties influences whether a broad remedy is appropriate absent a class action suit. There are two main reasons for this. First, if the affected class of nonparties is very small and cohesive, an injunction reaching nonparties clearly falls within a court’s equitable powers because it approximates the English concept of a “bill of peace.”¹⁵¹ Even Professor Bray acknowledges that this may be an appropriate use of the judicial power.¹⁵²

Second, allowing for a single class member to win an injunction that affects a large class puts defendants at a systematic disadvantage.¹⁵³ In a class action, defendants benefit from *res judicata* against all members of the class if they win, but face an equally large liability toward each member of the class if they lose. Hence, with a class action, the risks and rewards are equally great for both sides. In contrast, if a single plaintiff can win class-wide relief, the defendant’s liability approximates that of a class action lawsuit. If the defendant wins, however, the *res judicata* effect of that decision affects only one plaintiff, leaving an almost infinite number of other plaintiffs to bring the same lawsuit.¹⁵⁴

¹⁴⁹ See *id.* at 1409.

¹⁵⁰ See *id.* (“Moreover, if persons adversely affected by an agency rule can seek review in the district court for the District of Columbia, as they often may, see 28 U.S.C. § 1391(e), our refusal to sustain a broad injunction is likely merely to generate a flood of duplicative litigation. Even though our jurisdiction is not exclusive, an injunction issued here only as to the plaintiff organizations and their members would cause all others affected by the *Tulloch* Rule . . . to file separate actions for declaratory relief in this circuit.” (emphasis omitted)).

¹⁵¹ A bill of peace was a type of “proto-class action” which allowed the chancellor to consolidate a small, cohesive group of duplicative suits into a single proceeding. See Bray, *supra* note 7, at 427.

¹⁵² See *id.* at 427 (justifying the use of equity in the nineteenth century to enjoin collection of illegal municipal taxes on the basis that the relevant classes were small, representing the type of “micropolity” characteristic of a bill of peace).

¹⁵³ See Walker, *supra* note 94, at 1149–51.

¹⁵⁴ See *id.* at 1150.

9. *Miscellaneous Factors*

In addition to the eight factors discussed above, there are five other factors that are relevant to determining the proper scope of equitable relief: uniformity,¹⁵⁵ plaintiff detection,¹⁵⁶ egalitarian concerns,¹⁵⁷ forum shopping,¹⁵⁸ comity concerns surrounding conflicting injunctions,¹⁵⁹ and percolation.¹⁶⁰

In sum, no fewer than thirteen factors are relevant when determining the proper scope of an injunction. This Note proposes consolidating these factors into three meta-factors that judges can more uniformly and effectively apply in cases involving nationwide injunctions.

B. Simplifying Balancing Through a “Triangulation” of Equitable Remedies

This Note’s first contribution is a new framework for categorizing and evaluating the factors that affect nationwide injunctions. While all thirteen factors discussed above are deserving of individual consideration, an analysis of the key characteristics of each factor reveals three overarching categories of factors: (1) the identity of the parties before the court; (2) the nature of the claim being litigated; and (3) the effect of the remedy on the judicial system where the claim is being litigated. These three factors can be thought of as asking “who,” “what,” and “where,” respectively.

The first category, the “who,” concerns the nature of the parties before the court. This category includes six subfactors: (a) the type of party involved (state, federal, and private parties); (b) federalism and abstention issues associated with state defendants; (c) the precedent of *Mendoza* and intercircuit agency nonacquiescence; (d) the type of agency being sued (including whether it is a law enforcement agency); (e) the presence of a certified class (or conversely, the size of the nonparty beneficiaries); and (f) plaintiff-detection issues.

The second category, the “what,” concerns the nature of the claim being litigated. This category includes three subfactors: (a) the substantive area of law/scope of the injury; (b) facial versus as-applied challenges; and (c) the type of injunction sought (mandatory versus prohibitory and preliminary versus permanent).

¹⁵⁵ See *supra* Section I.A.

¹⁵⁶ See *supra* text accompanying notes 90–94.

¹⁵⁷ See *supra* Section I.A.

¹⁵⁸ See *supra* Section I.B.

¹⁵⁹ See *supra* Section I.B.

¹⁶⁰ See *supra* Section I.B.

The third category, the “where,” looks at the court deciding the case and the effects on the court system as a whole. This category includes six subfactors: (a) boundaries of the class and asymmetric effects of *res judicata*; (b) conservation of judicial resources and venue considerations; (c) uniformity in application of the law; (d) comity and conflicting injunctions; (e) forum shopping; and (f) percolation.

This framework demonstrates how certain factors interrelate, and in doing so, simplifies the inquiry, making a balancing test more manageable. Not every subfactor will be relevant in each case—for instance, federalism or abstention issues are only applicable where a state is a party. Each meta-factor, however, will always be relevant to the inquiry. The next Part argues that these three meta-factors can and should be used in a multifactor balancing test in order to determine whether a nationwide injunction is appropriate in a given circumstance.

IV. “HOT AND COLD”: EASY AND DIFFICULT CASES FOR EQUITABLE BALANCING AND A PATH FORWARD

In order to determine when a nationwide injunction is appropriate, courts should analyze the three meta-factors described in the previous Part as a multifactor balancing test. This Part first discusses how judges should apply the balancing test to both easy and hard cases, and then explores how this balancing test would apply in practice by examining a test case: the litigation surrounding President Trump’s travel ban.

A. Applying the Balancing Test to “Hot,” “Cold,” and “Warm” Cases

One general objection to use of a balancing test is that it renders district court opinions effectively unreviewable, because a balancing test leaves too much discretion in the hands of judges. Professor Bray argues that this is a fundamental flaw of using a standard rather than a rule.¹⁶¹ However, this danger is overstated. At the very least, this Note argues that there are two categories of “easy” cases, or cases in which the propriety of injunctions that reach beyond named plaintiffs is clear. Some cases are “hot,” where all three meta-factors point toward issuing a broad injunction. Other cases are “cold,” where all three meta-factors point against issuing a broad injunction, and doing so would be an abuse of discretion by the trial court. The difficult, or “warm,” cases are those in which the factors are split.¹⁶²

¹⁶¹ See Bray, *supra* note 7, at 480 (“[A] district court selected through forum shopping will apply a relatively indeterminate standard, which will then be leniently reviewed by a court of appeals . . .”).

¹⁶² It is no answer to say that the factors will always point at least 2–1 in one direction, because each factor will vary in importance based on the circumstances. For example, in applying a multifactor balancing test for compulsory joinder under Federal Rule of Civil Procedure 19(b), courts have come to

A flexible standard utilizing a multifactor balancing test affords a way to curb the greatest errors in “hot” and “cold” cases without prohibiting injunctions from ever reaching nonparties. Even in those “warm” cases, where the categories are split, applying a balancing test still affords a benefit over the status quo because it prompts judges to justify their reasoning. At minimum, this creates an opportunity for increased dialogue among courts about the proper scope of injunctive relief, which is the ordinary conception of how the common law works.¹⁶³ Legal rules are made to apply to real circumstances, and by testing out different approaches, courts are able to develop more nuanced rules that solve difficult cases. Injunctions should be no exception.

B. *Applying the Multifactor Balancing Test*

While many nationwide injunctions have been controversial, none received as much attention as Executive Order 13,769¹⁶⁴ and its successor, Executive Order 13,780,¹⁶⁵ popularly referred to as the “travel bans” or “Muslim bans.”¹⁶⁶ This Note applies the three-factor balancing test to the litigation surrounding President Trump’s travel ban.¹⁶⁷ In doing so, this Note argues that the travel ban was a “cold” case, in which all three meta-factors counseled against an injunction.

1. *“Who”—the Identity and Nature of the Parties Before the Court*

The first category, the identity and nature of the parties before the court, counsels against issuing a nationwide injunction. The federal government—more specifically the Department of Homeland Security, the Secretary of

a consensus that one factor—the availability of another forum for the plaintiff to assert their claim—is more important than the other two. *See infra* note 195 and accompanying text.

¹⁶³ There are many different justifications and accounts for the common law method. *See generally* R. L. Brilmayer, *Judicial Review, Justiciability and the Limits of the Common Law Method*, 57 B.U. L. REV. 807 (1977) (discussing the value of justiciability requirements in preserving a common law method of legal interpretation).

¹⁶⁴ Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

¹⁶⁵ Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

¹⁶⁶ *See* Melanie Zanona, *Timeline: Trump Travel Ban’s Road to the Supreme Court*, THE HILL (Sept. 17, 2017, 8:30 AM), <http://thehill.com/homenews/administration/350932-timeline-trump-travel-bans-road-to-the-supreme-court> [<https://perma.cc/HS9Y-M2ZQ>].

¹⁶⁷ While litigation surrounding the first and second Executive Orders differed with respect to liability, the two were essentially identical from a remedies perspective and will therefore be analyzed together. *See* *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (enjoining portions of the travel ban), *stay denied*, 847 F.3d 1151 (9th Cir. 2017); *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570 (D. Md. 2017) (issuing a nationwide injunction against the president’s revised travel ban); *Hawai’i v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017) (enjoining other parts of the revised travel ban).

State, and the President—was the defendant in this case.¹⁶⁸ The relevant subfactors here include: the type of agency being sued, the value of percolation amongst the courts, and the breadth of the affected class.¹⁶⁹ First, the presumption that broad injunctions against law enforcement agencies should be avoided counsels against a nationwide injunction.¹⁷⁰ The severe consequences of enjoining the President are analogous to the dangers of enjoining a law enforcement agency, because the President must oversee enforcement of the laws under the Take Care Clause of the Constitution.¹⁷¹ Enjoining a president directly is arguably even more dangerous than enjoining a law enforcement agency—indeed, both the Fourth and Ninth Circuits, while keeping the rest of the injunctions intact, reversed the district courts’ injunctions against the President for precisely this reason.¹⁷² Moreover, the Department of Homeland Security and State Department (led by the Secretary of State) are also law enforcement agencies. Therefore, this subfactor weighs against issuing an injunction.

The last relevant subfactor—the breadth of the affected class¹⁷³—also weighs strongly against issuing an injunction. While it is difficult to say how many people the first or second travel bans would have affected, the revised travel ban limited the number of refugees per year to 50,000, half the number President Obama had planned to admit.¹⁷⁴ Therefore, the number of unnamed, affected plaintiffs would be in the tens of thousands, which means that a nationwide injunction affects many more plaintiffs than “bills of peace” ever did, putting defendants at a systematic disadvantage.¹⁷⁵ Putting the pieces together, each of these three relevant subfactors counsels against issuing an injunction, and thus the broader “who” meta-factor ultimately counsels against issuing a nationwide injunction.

¹⁶⁸ See *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

¹⁶⁹ Other subfactors in this category include: federalism and abstention issues associated with state defendants, *Mendoza* precedent and intercourt agency nonacquiescence, the presence of a certified class, and plaintiff-detection issues. See *supra* Section III.A.

¹⁷⁰ See *supra* Section III.A.3.

¹⁷¹ U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”).

¹⁷² See *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017) (“We recognize that ‘in general, this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties . . .’” (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992))).

¹⁷³ See *supra* Section III.A.8.

¹⁷⁴ See Alexander Burns, *2 Federal Judges Rule Against Trump’s Latest Travel Ban*, N.Y. TIMES (Mar. 15, 2017), <https://www.nytimes.com/2017/03/15/us/politics/trump-travel-ban.html> [<https://perma.cc/X4VS-CLLA>] (“[The travel ban] would have also . . . limited refugee admissions to 50,000 people in the current fiscal year. Mr. Obama had set in motion plans to admit more than twice that number.”).

¹⁷⁵ See *supra* Section III.A.8.

2. “What”—the Nature of the Claim

While more balanced (or “warmer”), this category also ultimately counsels against issuing an injunction in this case. Relevant subfactors here include: the substantive area of law, the fact that the challenge was a facial challenge, and the type of injunction being sought. First, the substantive area of law at issue—immigration law—does not have the same spill-over effects associated with, for example, a free speech claim. The Fourth Circuit argued that because the challenge involved an Establishment Clause violation, language in *Santa Fe Independent School District v. Doe*¹⁷⁶ indicated that a broad injunction was justified.¹⁷⁷ This language stated that allowing a discriminatory policy to be enforced against some, but not all, citizens would send a message that the plaintiffs were “outsiders” and “not full members of the political community.”¹⁷⁸

Yet the Fourth Circuit’s reliance on *Santa Fe* seems misplaced, as the language cited concerned liability, not the appropriate scope of the remedy. More importantly, in the travel ban cases, it is possible to distinguish between the injury felt by each individual plaintiff seeking entry to the United States, because one plaintiff could be let in while another is not. In contrast, the issue of allowing prayer in school (the issue in question in *Santa Fe*) is an example of “indivisible relief”¹⁷⁹ as prayer would either be allowed or not allowed at football games. The nature of the claim at issue in *Santa Fe* therefore had to be litigated all at once to avoid conflicting judgments. Because the travel ban cases did not involve indivisible relief, this subfactor counsels against issuing an injunction. The fact that the challenge is a facial challenge, however, cuts in the other direction. The type of injunction sought is also prohibitory (not allowing Executive Order 13,780 to take effect), which is less onerous than a mandatory injunction.

On balance, this meta-factor counsels against issuing an injunction, because if the mere fact that a challenge is facial and prohibitory—which characterizes many constitutional suits against enforcing a law—were sufficient to justify an injunction, then injunctions would nearly always issue. The type of injury involved in suits challenging enforcement of a law is therefore a subfactor that should be accorded less weight than the other “what” subfactors. With respect to the “what” factor, then, the injury

¹⁷⁶ 530 U.S. 290, 309 (2000) (holding that policy of allowing students to initiate prayer at football games violated the First Amendment).

¹⁷⁷ See *Int’l Refugee Assistance Project*, 857 F.3d at 605.

¹⁷⁸ See *id.* (emphasis omitted) (quoting *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309 (considering whether student-led prayer at football games was constitutional)).

¹⁷⁹ For a discussion of indivisible relief, see *supra* Section III.A.4.

involved in the travel ban does not justify a broad injunction because it is not associated with the type of inseparable harm present in other areas of the law.

3. “Where”—the Effect on the Court System

The third and final category likewise counsels against a nationwide injunction in this context. Relevant subfactors here include: the boundaries of the affected class and the asymmetric effects of *res judicata*; conservation of judicial resources and venue considerations; uniformity in application of the law; forum shopping; and percolation.¹⁸⁰

First, the boundaries of the class size were very large, so the asymmetric effects of *res judicata* against the government were correspondingly large. Only one affected immigrant had to prevail for every class member to benefit, while the government had to win every case. Next, regarding judicial resources and venue considerations, there does not appear to be a court crowding issue like in *National Mining Association*,¹⁸¹ because none of the travel ban cases had to be filed in a specific circuit. Third, forum shopping was also certainly a potential problem in this case, because those opposing the Executive Order could focus their efforts on cases in ideologically friendly districts.¹⁸² Fourth, the preliminary injunction also prevented percolation among the courts as it always does,¹⁸³ and this effect was pronounced because the Supreme Court had not yet ruled on a similar legal issue.¹⁸⁴ While most of the subfactors weigh against a nationwide injunction, uniformity in application of the law counsels toward broad relief, which both the Fourth and Ninth Circuits specifically mention as a justification for their decision.¹⁸⁵ Lastly, efficiency also counsels toward issuing an injunction, as it always does, because it prevents duplicate litigation.

Ultimately, the direction in which this third meta-factor ought to lean depends on the weight a judge puts on each of these subfactors. As discussed above, the only subfactors that counsel toward a nationwide injunction are

¹⁸⁰ Another subfactor in this category not discussed is the risk of conflicting injunctions. See *supra* Section I.B.

¹⁸¹ See *supra* text accompanying notes 147–50.

¹⁸² President Trump even took to Twitter to specifically decry “judge shopping” after the Ninth Circuit’s decision. See Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 26, 2017, 3:38 AM), <https://twitter.com/realDonaldTrump/status/857182179469774848> [<https://perma.cc/EP57-XKJA>].

¹⁸³ For a discussion of the importance of percolation, see *supra* Section I.B.

¹⁸⁴ However, concerns over shortcutting the “percolation” process were somewhat ameliorated given that a district and circuit court had already reviewed Executive Order 13,769, see *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), and two district courts and two courts of appeals had reviewed revised Executive Order 13,780, see *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017); *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570 (D. Md. 2017); *Hawai’i v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017).

¹⁸⁵ See *Hawaii*, 859 F.3d at 787–88; *Int’l Refugee Assistance Project*, 857 F.3d at 605.

uniformity and efficiency. However, those factors *always* counsel toward disposing of an issue once and for all, and as Professor Bray eloquently argues, Congress’s choice to break up the courts into circuits was itself a policy decision that sacrificed uniformity and efficiency in favor of more incremental, stable change.¹⁸⁶ When uniformity and efficiency are the only reasons to issue a broad injunction, a narrower injunction should issue, because otherwise nationwide injunctions will always be issued, frustrating Congress’s policy decision and violating comity amongst the courts. Therefore, this third meta-factor ultimately counsels against issuing an injunction in the travel ban cases.

In sum, the application of this Note’s three-factor balancing test finds that a nationwide injunction was not proper in the travel ban cases because all three meta-factors point against broad relief, and the only two subfactors weighing toward a nationwide injunction—uniformity and efficiency—always counsel toward broad relief. This case therefore presents one of the clearest possible examples of where an injunction should not issue.

V. WHY A BALANCING TEST WILL BE WORKABLE IN PRACTICE

While the three-factor balancing test discussed above may sometimes allow courts of appeals to conclude the district courts abused their discretion in issuing a nationwide injunction, there are at least two counterarguments to the use of multifactor balancing tests: First, balancing tests are unworkable in practice and fail to give parties adequate notice as to what the law is; and second, they violate separation of powers by reevaluating policy choices made by Congress (or by “the people” in the case of constitutional claims). In analyzing these counterarguments, this Part concludes that over time, the common law method will cause courts to come to a greater consensus as to which factors are most important, just as they have with the necessary parties doctrine. Next, this Part argues that even if one concedes the objection to the use of balancing tests for determining liability, balancing tests are proper for determining remedies.

A. *The Necessary Parties Balancing Test and the Common Law Method*

Many scholars and judges have decried balancing tests as unworkable and as undermining the rule of law. Notably, Justice Scalia often opposed balancing tests in the law, because he viewed “The Rule of Law as a Law of

¹⁸⁶ See Bray, *supra* note 7, at 481–82. As Professor Bray argued, “[e]ach legal system can pick its poison, tending toward the vices of immediate, final resolution or the vices of slow, provisional resolution.” *Id.* at 482.

Rules¹⁸⁷ and not of standards.¹⁸⁸ This core objection to the use of balancing tests is that, because they afford judges substantial discretion, the tests are unworkable, and their results are simply a function of a judge's intuitions and personal policy preferences. Those who defend a balancing test tend to argue that a rule may prove undesirable in some instances,¹⁸⁹ and the common law method will adequately allow judges to eventually reach a workable rule. This is an empirical question that demands specific examples to see if balancing tests are successful in practice, a question that is outside the scope of this Note. Balancing tests are used in a variety of contexts, including the Fourth Amendment,¹⁹⁰ procedural due process,¹⁹¹ "dormant" Commerce Clause cases,¹⁹² the First Amendment,¹⁹³ and the decision to issue a permanent injunction.¹⁹⁴ To illustrate, consider one example of a balancing test in further detail: the compulsory joinder of parties under the Federal Rules of Civil Procedure Rule 19(b).¹⁹⁵

¹⁸⁷ See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

¹⁸⁸ For a discussion on the difference between rules and standards, see generally Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 379 (1985).

¹⁸⁹ See *id.* (discussing a dispute between Justice Benjamin Cardozo and Justice Oliver Wendell Holmes in which Justice Holmes endorses a rule while Justice Cardozo endorses a standard).

¹⁹⁰ See, e.g., *New York v. Class*, 475 U.S. 106, 118 (1986) (reasonableness of a search); *United States v. Place*, 462 U.S. 696, 706–07 (1983) (definition of a search).

¹⁹¹ See Scalia, *supra* note 187, at 1182 (“[A]t the point where an appellate judge says that the remaining issue must be decided . . . by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law.”); see also T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 965–66 (1987) (listing areas where the Supreme Court uses balancing tests).

¹⁹² See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”).

¹⁹³ See, e.g., *FCC v. League of Women Voters*, 468 U.S. 364, 380–81 (1984) (“Making that judgment requires a critical examination of the interests of the public and broadcasters in light of the particular circumstances of each case.”). Balancing tests are perhaps most controversial with respect to the First Amendment and have a long history of use in that context. See Aleinikoff, *supra* note 191, at 966–68 (summarizing the history of balancing tests in the First Amendment context); see also Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159, 1186–87 (1982) (endorsing a balancing test for the First Amendment, stating that “[b]ecause . . . an inflexible test cannot allow a court to fit its rule to the unique circumstances of a case, it is likely to become a procrustean bed that will often prove to be either overprotective or underprotective in individual instances”).

¹⁹⁴ See, e.g., *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (adopting a four-factor test for issuing a permanent injunction).

¹⁹⁵ Rule 19(a) describes “required” parties who must be joined if feasible, while Rule 19(b) lays out four factors that courts must balance to determine if the claim should be permitted to proceed without a Rule 19(a) party. FED. R. CIV. P. 19.

Compulsory joinder began as an equitable doctrine created to address the inefficiency of multiple litigation.¹⁹⁶ There is substantial similarity between the balancing test courts use to determine whether someone is a necessary party under Rule 19 and the balancing test this Note endorses.¹⁹⁷ Both tests focus on the parties to the case, the nature of their claims (under the Rule 19 test, the prejudicial effect of a judgment given the type of rights that are affected), and concerns for judicial economy. Given time, there is reason to believe that the common law method will work as well for injunctions as it has for compulsory joinder, provided that judges explain their reasoning as balancing tests require.¹⁹⁸

As is true with equitable doctrines in general, the rule against proceeding without interested parties is not an inflexible rule but is one that gives courts discretion to apply the law sensitively to the facts of each case.¹⁹⁹ After the influential case *Shields v. Barrow*,²⁰⁰ the doctrine became mired in the sometimes-hazy distinction between “common” and “joint” rights, which Professors Charles Wright and Mary Kane decried as a “jurisprudence of labels.”²⁰¹ Congress rejected *Shields*’s formalistic approach and instead adopted a four-factor test.²⁰² The four factors the Court now applies to determine if joinder of parties is “indispensable” are: (1) the plaintiff’s interest in having a forum, (2) the defendant’s interest, (3) the interest of the

¹⁹⁶ See *Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 120 (1968) (discussing how compulsory joinder was created in equity to address “the inefficiency of litigation involving only some of the interested persons”).

¹⁹⁷ The similarity is closest with the three-factor test recommended by Professor John Reed, whose 1957 law review article was influential in the 1966 amendment to Rule 19. See John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 330 (1957) (laying out his test that balances: (1) the interest of the present defendant, (2) the interest of the absent plaintiff(s) or defendant(s), and (3) the courts’ interest in the efficient resolution of litigation).

¹⁹⁸ See *supra* notes 161–62 and accompanying text.

¹⁹⁹ See *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 166–67 (1825) (“This equitable rule, however, is framed by the Court itself, and is subject to its discretion. It is not . . . an inflexible rule . . . but, being introduced by the Court itself, for the purposes of justice, is susceptible of modification for the promotion of those purposes.”).

²⁰⁰ 58 U.S. (17 How.) 130 (1854).

²⁰¹ CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 70, at 498 (6th ed. 2002).

²⁰² As it was passed in 1966, Rule 19 stated, in relevant part:

The factors to be considered by the court include: first, to what extent a judgment rendered in the person’s absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person’s absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FED. R. CIV. P. 19 (1966) (amended 2007). For reasons not important here, the factors laid out by the Court in *Provident Tradesmens* differ somewhat from the factors listed in Rule 19.

absent party, and (4) the interest of the courts and the public in the complete and efficient resolution of litigation.²⁰³ As with any balancing test, the Court noted that conflict between the factors will often occur.²⁰⁴

In applying this test, courts have frequently found that in a given case all relevant factors point toward²⁰⁵ or against²⁰⁶ dismissing for nonjoinder of an indispensable party. These are analogous to the “hot” and “cold” cases previously discussed in this Note. In the close, or “warm,” cases where a conflict in the factors exists, some courts have proceeded despite prejudice to the absent party in so proceeding,²⁰⁷ while others have dismissed despite some factors counseling toward allowing the claim to proceed.²⁰⁸ But while *Provident Trademens* remains the only major Supreme Court case interpreting Rule 19(b), lower courts have come to a consensus on the primary importance of the plaintiff’s interest in having a forum, allowing cases where a plaintiff would have no other forum to proceed despite the other three factors pointing toward dismissal.²⁰⁹ Therefore, while not perfect, Rule 19(b)’s multifactor balancing test appears to be a functioning and generally coherent body of law that has “worked itself pure”²¹⁰ since 1966. Over time, provided that courts fully explain their choice of remedy, they should come to a consensus as to which factors matter most.

²⁰³ *Provident Trademens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 109–12 (1968). This four-factor test was influenced by Professor Reed’s three-factor test. *See supra* note 197.

²⁰⁴ *See Provident Trademens*, 390 U.S. at 118–19 (“The decision whether to dismiss (*i.e.*, the decision whether the person missing is ‘indispensable’) must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against *opposing interests*.” (second emphasis added)).

²⁰⁵ *See, e.g.*, *B. Fernández & Hnos., Inc. v. Kellogg USA, Inc.*, 516 F.3d 18, 24 (1st Cir. 2008) (“[A]ll four 19(b) factors still militate in favor of finding Kellogg Caribbean indispensable . . .”).

²⁰⁶ *See, e.g.*, *Trans Energy, Inc. v. EQT Prod. Co.*, 743 F.3d 895, 902 (4th Cir. 2014) (“[W]e are satisfied that there is no reason to believe that any party will be harmed by REV’s absence, or that the plaintiffs received an improper ‘tactical advantage’ by including REV as a party.”).

²⁰⁷ *See Bennie v. Pastor*, 393 F.2d 1, 3–4 (10th Cir. 1968) (allowing case to proceed despite the fact that the absence of the defendant’s daughter could prejudice the defendant by subjecting her to multiple liability, because other factors counseled against a finding of indispensability).

²⁰⁸ *See generally* Jean F. Rydstrom, Annotation, *Validity, Construction, and Application of Rule 19(b) of Federal Rules of Civil Procedure, as Amended in 1966, Providing for Determination to be Made by Court to Proceed With or Dismiss Action When Joinder of Person Needed for Just Adjudication is Not Feasible*, 21 A.L.R. Fed. 12, § 8 (1974) (citing *McKenna v. Udall*, 418 F.2d 1171 (D.C. Cir. 1969), as an example of a case dismissing for nonjoinder despite the fact that some factors counseled toward allowing the case to proceed).

²⁰⁹ *See generally* Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1078 (1985) (“Though this is but one factor in a multifactor balancing test, federal courts have elevated it to primary importance by their reluctance to dismiss in the absence of an adequate alternative forum.” (footnote omitted)).

²¹⁰ *Omychund v. Barker* (1744) 26 Eng. Rep. 15, 23 (Ch.) (“[T]he common law . . . works itself pure by rules drawn from the fountain of justice.”).

B. The Rules vs. Standards Debate in the Equity Context

The second major objection to balancing tests is that they effectively allow the judiciary to eliminate an individual's rights—be they constitutional, common law, or statutory in nature—in the name of “balancing.” Justice Hugo Black was most closely aligned with this argument. He objected to the emerging use of balancing tests for constitutional rights because “the Framers themselves did this balancing when they wrote the Constitution and the Bill of Rights.”²¹¹ To balance interests in determining the scope of a constitutional right, therefore, was to usurp the Article V amendment process and second-guess the democratic will of those who ratified the constitutional provision in question.

Even for an absolutist like Justice Black, the use of balancing tests is less problematic when used to determine remedies than when used to determine rights (or violations). Indeed, even Justice Black used the balancing of the equities test for equitable remedies.²¹² Equitable balancing in the remedies context does not change the contours of a constitutional right. Balancing tests, like the one this Note endorses, would not allow a judge to enjoin a policy for purely utilitarian reasons but would instead first require a finding of unconstitutionality. Balancing tests in the remedies context are not triggered unless a determination has been made that a violation, constitutional or otherwise, has taken place, in which case the court can decide how it should use its equitable powers. Therefore, one may concede the general truth of the objection to balancing tests while still adopting the test this Note recommends.²¹³

CONCLUSION

The use of the nationwide injunction has gained substantial notoriety, and cases like President Trump's travel ban will continue to present themselves. In an effort to protect similarly situated nonparties from harm, courts have sometimes gone too far by issuing nationwide injunctions in situations that do not warrant such an extreme remedy. While the courts have always had substantial discretion in fashioning equitable relief, the

²¹¹ Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 879 (1960).

²¹² *See, e.g.*, *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 165 (1946) (Justice Black, writing for the Court, endorsing a balance of the equities test between creditors and debtors in a bankruptcy proceeding); *United States v. City & County of San Francisco*, 310 U.S. 16, 30 (1940) (opinion of Justice Black holding that balancing of equities did not apply, but implicitly assuming its legal validity elsewhere).

²¹³ Balancing tests in matters of procedure, like in Rule 19(b) for compulsory joinder of parties, may also be less troubling from this perspective because they only affect how and where rights are adjudicated, not the substance of the rights themselves.

widespread use of broad injunctions can cause great harm to the federal government and the judicial system as a whole. A complete elimination of this remedy is likewise problematic because it is inconsistent with the history of equity and runs counter to precedent.

Hope for the future lies in a return to the past, namely the time-tested method of equitable balancing. While there are dozens of potentially relevant factors in this balancing, all of them boil down to three metafactors: the type of parties before the court, the nature of the claim involved, and the effect the remedy would have on the court system as a whole. If all three of these factors point against issuing an injunction, it is abuse of discretion for a court to do so. Even in the difficult cases where the factors are split, the common law method will facilitate invention of more nuanced standards and rules, provided that judges explain their reasoning. While the system of remedies may seem to be in chaos right now, equity has always innovated to compensate for new problems. A three-factor balancing test will help to accomplish that goal.

