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STATE STANDING FOR NATIONWIDE INJUNCTIONS AGAINST THE FEDERAL GOVERNMENT

*Jonathan Remy Nash**

Recent years have seen a substantial increase of cases in which states seek, and indeed obtain, nationwide injunctions against the federal government. These cases implicate two complicated questions: first, when a state has standing to sue the federal government, and second, when a nationwide injunction is a proper form of relief. For their part, scholars have mostly addressed these questions separately. In this Essay, I analyze the two questions together. Along the way, I identify drawbacks and benefits of nationwide injunctions, as well as settings where nationwide injunctions may be desirable and undesirable. I present arguments that, although I do not definitively resolve, Article III standing doctrine imposes some limits on the availability of nationwide injunctions. Assuming that to be true, I then argue that, with one possible exception—the setting where only states would have standing to pursue a claim in the first place—states ought to have no greater standing to pursue nationwide injunctions than do private actors.

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INTRODUCTION

Recent years have seen a substantial increase in the number of cases in which states sue the federal government seeking nationwide injunctions, and in which courts award such relief.¹ Cases where states assert standing to obtain nationwide injunctions against the federal government lie at the intersection of two areas of standing law that are already fairly muddled: the question of when a state has standing to sue the federal government, and the question of when a plaintiff has standing to obtain a nationwide injunction against a defendant.

Until this issue of the *Notre Dame Law Review*, the existing literature has taken up each question separately.² Some commentators have devoted themselves to examinations of when states have standing to sue the federal government. Others have focused on the question of the availability of nationwide

1 See *infra* note 10 and the accompanying text. Nationwide injunctions have come sufficiently to the fore that a bill to restrict their availability was introduced in the last Congress. See Injunctive Authority Clarification Act of 2018, H.R. 6730, 115th Cong. (2018).

2 In this issue, Bradford Mank and Michael Solimine also focus on state standing to obtain nationwide injunctions against the federal government, but their analysis differs from mine and they draw different conclusions. See Bradford Mank & Michael E. Solimine, Essay, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955 (2019).

injunctions in federal court; some of these commentators discuss the role of standing.

My ultimate task here is a narrower one: I wish to consider the extent to which Article III standing permits states to pursue nationwide injunctions against the federal government.³ In particular, I am interested in how *state* standing to pursue nationwide injunctions against the federal government may differ from the analogous standing of nonstate plaintiffs.

Even if my ultimate task is narrow, the project has broader implications. In reaching the final focused questions, my analysis addresses larger questions, such as when nationwide injunctions may be proper or improper (joining existing commentary on the subject) and the extent to which Article III standing poses any limitation on the availability of nationwide injunctions (outside of the context of plaintiff states and the federal government as defendant).

In the end, I argue that—with one possible exception: settings where no nonstate plaintiff has standing to sue in the first place—standing should provide plaintiff states with *no greater access* to nationwide injunctions against the federal government. Thus, if a nonstate plaintiff would have standing to pursue a cause of action but not have standing to pursue a nationwide injunction in connection therewith, then neither should a state plaintiff. If by contrast a nonstate plaintiff *would* have standing to pursue a nationwide injunction, then a state plaintiff would have the same opportunity—no greater—to pursue a nationwide injunction. And to the extent that (as I argue below is at least a possibility) Article III precludes federal courts from ever fashioning nationwide injunctions for nonstate plaintiffs against the federal government, the same ought to hold for state plaintiffs.

Along the way, I address the question of whether Article III standing poses any obstacle to the award by federal courts of nationwide injunctions. I take no ultimate position on that question, but I do highlight some arguments in favor of Article III limits on the availability of nationwide injunctions. I also tackle arguments that nationwide injunctions are (beyond the context of state plaintiffs) desirable and undesirable, making the case that nationwide injunctions may sometimes be hierarchically desirable—that is, desirable in light of the judicial hierarchy—and equitably desirable—that is, desirable in settings where the absence of a nationwide injunction would be unseemly.

Part I of this Essay provides an overview of nationwide injunctions. It addresses the proper definition of the term “nationwide injunction.” It then describes how, and why, nationwide injunctions, and in particular nationwide

3 I am concerned with suits where the effect of the injunction will rest on the national government, regardless of who the named defendants are. That said, there may be other factors that constrain who can be named as a defendant. *See, e.g., Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir.) (vacating the district court's award of nationwide injunctive relief against the President because such relief should be awarded “only in the rarest of circumstances”), *vacated in unrelated part and remanded*, 138 S. Ct. 353 (2017) (per curiam).

injunctions in favor of states against the federal government, have become increasingly common in recent years.

Part II highlights positives and negatives of nationwide injunctions. It discusses benefits and drawbacks of the practice. It then identifies settings in which nationwide injunctions may be more, or less, desirable.

Part III turns to the question of state standing and nationwide injunctions. After briefly defending the notion that standing (as opposed to other devices) might properly play some role in policing the availability of nationwide injunctions, Part IV begins with a brief overview of standing in general. It then considers the specific setting of state standing.

I. OVERVIEW OF NATIONWIDE INJUNCTIONS

In this Part, I first discuss the surprisingly disputed definition of the nationwide injunction. I then turn to an examination of the reasons that nationwide injunctions, especially as sought by states against the federal government, have come to the fore in recent years.

A. *What Are Nationwide Injunctions?*

Some of the confusion surrounding nationwide injunctions is a result of disagreement—whether explicit or implicit—over what the term actually connotes. The prevalent definition of a nationwide injunction is an injunction that is enforceable by nonparties as well as parties to the lawsuit.⁴ For this reason, some suggest the alternate appellation, “universal injunction.”⁵ Other commentators understand the modifier “nationwide” to refer to geographic scope.⁶

4 See, e.g., Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1071 (2018) (“This Article uses the term ‘nationwide injunction’ to refer to an injunction . . . that bars the defendant from taking action against individuals who are not parties to the lawsuit in a case that is not brought as a class action.”).

5 See Howard M. Wasserman, “*Nationwide*” *Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 338, 349–53 (2018). As Justice Thomas explained in his concurrence in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (J., Thomas, concurring):

“Nationwide injunctions” is perhaps the more common term. But I use the term “universal injunctions” in this opinion because it is more precise. These injunctions are distinctive because they prohibit the Government from enforcing a policy with respect to anyone, including nonparties—not because they have wide geographic breadth. An injunction that was properly limited to the plaintiffs in the case would not be invalid simply because it governed the defendant’s conduct nationwide.

Id. at 2425 n.1.

6 Jonathan Mitchell refers to “nationwide injunctions” as injunctions that “extend beyond the court’s territorial boundaries.” Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1014 (2018). He refers separately to injunctions that “extend relief beyond the named litigants.” *Id.*

Zayn Siddique refers at some points in her writing to nationwide injunctions that extend to nonparties. See, e.g., Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV.

Based on these distinctions, we may conceive of three variants of injunctions that will be relevant to our analysis. It is well to consider each of these against a baseline “plain vanilla” injunction that can be enforced against the defendant only by the plaintiffs on the claim, and only within the geographic jurisdictional confines of the issuing court.

The first variant is an injunction that is (like our baseline injunction) enforceable only by the plaintiffs on the claim but is enforceable beyond the jurisdictional confines of the issuing court. An example would be an injunction issued by a district court that is enforceable by the plaintiffs beyond the district court’s jurisdictional limit, perhaps to the territorial limit of the state in which the district court sits (a “statewide plaintiff-focused injunction”),⁷ to the geographic limit of the federal circuit in which the district lies (a “circuit-wide plaintiff-focused injunction”), or—in the extreme—throughout the United States (a “nationwide plaintiff-focused injunction”).⁸

The second variant is an injunction that (like our baseline injunction) is enforceable against the defendant only within the jurisdictional confines of the issuing court but is enforceable by nonparties as well as parties. I shall refer to this variant as a “court-wide nonparty injunction”. Court-wide nonparty injunctions go beyond traditional injunctions, which do not ensconce enforcement power in nonparties.

The third variant differs from our baseline injunction along *both* axes. It is an injunction that is enforceable by nonparties as well as parties beyond the jurisdictional limits of the issuing court (depending upon the jurisdictional limit on the injunction, a “statewide nonparty injunction,” a “circuit-wide nonparty injunction,” or a “nationwide nonparty injunction”). In keeping with the more common usage, in this Essay, I often refer to “nationwide nonparty injunctions” simply as “nationwide injunctions.” Nationwide nonparty injunctions are more controversial than court-wide nonparty injunctions; they go beyond traditional injunctions both in terms of vesting enforcement in nonparties, and in terms of asserting national injunctive scope.

2095, 2096–97 (2017) (discussing the “nationwide injunction” issued by a Texas federal district court in the DAPA litigation). But Siddique mostly refers to nationwide injunctions as simply having geographic scope that spans to the nation’s borders. *See id.* at 2112–13 (referring to the “nationwide injunction” that, because of trademark violation, required the defendant to choose a new corporate name on a nationwide basis).

7 This assumes that the federal judicial district in which the court sits constitutes less than the entire area of a state.

8 Though beyond the scope of this Essay, a court conceivably could issue a global plaintiff-focused injunction.

B. *Growth in Nationwide Injunctions in Suits Brought by States Against the Federal Government*

Samuel Bray has documented the sudden and quick rise in the issuance of nationwide injunctions in federal cases writ large.⁹ The same phenomenon is observable in cases filed by states against the federal government.¹⁰ Consider, for example, the setting of state challenges to federal spending conditions. In the 1980s, the State of South Dakota (ultimately unsuccessfully¹¹) challenged the legality of federal legislation that restricted the distribution of federal highway funds to states that permitted alcohol sales to those under the age of twenty-one.¹² The State plaintiff sought only declaratory relief.¹³ In contrast, when the State of California sought to challenge the Trump administration's efforts to defund sanctuary states, the State expressly sought injunctive relief.¹⁴ And many federal courts have awarded nationwide injunctions in cases brought by localities challenging sanctuary city defunding.¹⁵

Several factors seem to have come together to hasten the increase in nationwide injunctions.¹⁶ One is almost certainly the growth in public law

9 See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 437–44 (2017).

10 See Frost, *supra* note 4, at 1071 (“[O]ver the last decade courts have issued nationwide injunctions with increasing frequency, often in cases involving controversial executive branch policies.”); *id.* at 1072–80 (collecting cases); Wasserman, *supra* note 5, at 340–49 (same).

11 *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987).

12 Act of July 17, 1984, Pub. L. No. 98-363, § 6, 98 Stat. 435, 437 (codified as amended at 23 U.S.C. § 158 (2012)).

13 *Dole*, 483 U.S. at 205.

14 See Complaint at 25, *California ex rel. Becerra v. Sessions*, No. 17-cv-4701 (N.D. Cal. Mar. 5, 2018), 2018 WL 1990243.

15 See, e.g., *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1219 (N.D. Cal. 2017) (“Because [the relevant provision of the executive order] is unconstitutional on its face, and not simply in its application to the plaintiffs here, a nationwide injunction against the defendants other than President Trump is appropriate.”), *aff’d in part, vacated in part, and remanded sub nom.* *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018) (“[T]he present record is not sufficient to support a nationwide injunction.”); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 951 (N.D. Ill. 2017) (granting preliminary nationwide injunction, “there being no reason to think that the legal issues present in this case are restricted to Chicago or that the statutory authority given to the Attorney General would differ in another jurisdiction”), *aff’d*, 888 F.3d 272 (7th Cir.), *reh’g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir.), *vacated*, Nos. 17-2991 & 18-2649, 2018 WL 4268814 (7th Cir. Aug. 10, 2018) (per curiam).

16 Professor Bray highlights the empowerment of each federal district judge as a federal chancellor with the full equitable powers of the federal system as necessary “an explanation for the national injunction.” Bray, *supra* note 9, at 445. But it seems quite possible to have nationwide injunctions even with a single trial judge with national jurisdiction. Thus, it seems better to consider the proliferation of district judges not as an explanation for the emergence of nationwide injunction, rather an explanation for the emergence of “the problems associated with the national injunction.” *Id.* (emphasis added).

litigation.¹⁷ The emphasis on public law litigation has served to increase the role and importance of injunctive relief,¹⁸ and in particular injunctive relief that may have an impact on nonparties.¹⁹

Two changes in attitude regarding injunctions²⁰ also correspond with, and may at least in part be due to, the rise in public law litigation. For one thing, we have witnessed a shift in understanding injunctions as largely serving as defensive tools for the plaintiffs who seek them—paradigmatically as “antisuit injunctions”—to offensive tools—paradigmatically injunctions that “invalid[ate]” government statutes, regulations, and programs.²¹ One can see this shift in attitude to result in part from the emergence of the independent category of facial challenges to statutes and regulations.²²

Another change in attitude that corresponds with the growth of public law litigation is a shift toward understanding an injunction of a statute or regulation as not just precluding application of the statute or regulation, but rather as striking the statute or regulation altogether.²³ Jonathan Mitchell chronicles the growth in what he describes as the “writ-of erasure fallacy”—that is, the notion that an injunction enjoining enforcement of a statute actually eliminates the statute from legal existence.²⁴

The increase in public law litigation just described goes a way in explaining the growth in state lawsuits against the federal government,²⁵ and concomitantly the grant of nationwide injunctions in those cases. But other factors doubtless have further augmented the trend. The increase in political polarization across the nation has resulted in some states being solidly “red” or Republican, while other states being solidly “blue” or Democratic.²⁶ It has not been surprising to see “blue” states sue the administration of Republican President Donald Trump, just as it was not surprising to see “red” states challenge the administration of Democratic President Barack

17 See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288–304 (1976).

18 See *id.* at 1292 (“[S]urely, the old sense of equitable remedies as ‘extraordinary’ has faded.”).

19 See *id.* at 1292, 1294 (“[B]y issuing the injunction [in public law litigation], the court takes public responsibility for any consequences of its decree that may adversely affect strangers to the action.”).

20 Professor Bray characterizes these as “ideological” shifts, “in the sense of changes in thinking about law.” Bray, *supra* note 9, at 449.

21 See *id.* at 449–50; Wasserman, *supra* note 5, at 355.

22 See Bray, *supra* note 9, at 450.

23 See *id.* at 451–52.

24 See Mitchell, *supra* note 6, at 951–68 (identifying origins of the fallacy in the constitutional debates, but also discussing how the age of legal realism hastened the expansion of the fallacy by “induc[ing] . . . courts to claim that the judiciary itself ‘strikes down’ or ‘invalidates’ statutes, rather than simply finding laws to be ‘void’ and announcing that fact” (footnotes omitted)).

25 See Tara Leigh Grove, *When Can A State Sue the United States?*, 101 CORNELL L. REV. 851, 853 (2016).

26 See Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 60–62 (2018).

Obama.²⁷ Indeed, it has become more common for “coalitions” of like-minded states to join forces in suits against the federal government.²⁸

Finally, beyond political polarization, the individual who directs state litigation—the state’s attorney general—has political incentives to file lawsuits against federal government actions and programs with which she and her constituents disagree. Most state attorneys general are elected by the public in each state,²⁹ and they tend to have higher political ambitions.³⁰ A high-profile lawsuit against the federal government might help to make those political ambitions a reality.³¹ Indeed, given the heightened polarization in the country today, state attorneys general have more incentives to file suits against the federal government than they have had in the past.³²

II. POSITIVES AND NEGATIVES OF NATIONWIDE INJUNCTIONS

In this Part, I elucidate some drawbacks, and then some benefits, of nationwide injunctions. I then identify certain settings in which nationwide injunctions may be more likely to be desirable, or undesirable.

A. Drawbacks

Courts’ issuance of nationwide injunctions can generate problems. First, to the extent that litigants have a choice among courts that might rule differently on the merits,³³ litigants and lawyers may have an opportunity, and indeed an incentive, to forum shop.³⁴

27 See, e.g., *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015) (noting that twenty-six states had joined forces to challenge a federal program governing enforcement of the federal immigration laws), *aff’d per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

28 See *id.*; Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 616, 618 (2017).

29 See William P. Marshall, Essay, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 n.3 (2006) (noting that “[t]he Attorney General is independently elected in forty-three states”).

30 See Grove, *supra* note 25, at 896–97 (observing that state attorneys general are “often politically ambitious,” and noting that “one political scientist has suggested that ‘AG’ is often short for ‘aspiring governor’” (quoting Colin Provost, *When Is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 PUBLIUS 597 (2009))).

31 See *id.* at 897–98.

32 See, e.g., F. Andrew Hessick & William P. Marshall, *State Standing to Constrain the President*, 21 CHAP. L. REV. 83, 99 (2018); James Rainey, *Xavier Becerra, California’s Top Lawyer, Emerges as Trump Nemesis*, NBC NEWS (Mar. 13, 2018), <https://www.nbcnews.com/news/us-news/xavier-becerra-california-s-top-lawyer-emerges-trump-nemesis-n856381>.

33 It is on this basis that Professor Bray describes a “multiple-chancellor system” as “a necessary precondition” to “problems such as forum shopping and conflicting injunctions.” Bray, *supra* note 9, at 448.

34 See *id.* at 457–61. For the argument that venue statutes should take the availability of the nationwide injunctions into account, see Kate Huddleston, Essay, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J.F. 242 (2017).

Second, to the extent the first court to rule on an issue binds later courts on that issue, the availability of nationwide injunctions might lead to a race to the courthouse—or, more accurately, to a courthouse that will yield a favorable final judgment.³⁵ Combined with the incentive to forum shop, one could imagine different litigants rushing to different courts to obtain the first final judgment.

Third, in the alternative where courts are not bound by other courts' rulings, one can readily imagine different courts issuing conflicting nationwide injunctions.³⁶ In the setting in which we are interested—where states sue the federal government—this could result in the federal government being “whipsawed” between conflicting nationwide injunctions. Societal actors on opposing sides of an issue could seek to enforce conflicting injunctions, or an actor seeking to enforce an injunction against the federal government could find the government responding by citing an injunction issued by a different court.

Fourth, the availability of nationwide injunctions might short-circuit the ordinary “percolation” of issues up to the United States Supreme Court.³⁷ Percolation tees up issues for the Court, and is seen to improve the Court's resolution of cases.³⁸ Percolation allows the Court to consider an issue once numerous lower courts have had a chance to weigh in. Whether they agree or not, the Court benefits from the input of the lower courts: if the lower courts largely agree, then the Court has a strong suggestion that the shared resolution enjoys considerable support.³⁹ On the other hand, to the extent that the lower courts disagree, the Court receives the benefit of the lower courts having engaged the issue and debated one another over the proper outcome.⁴⁰

The issuance of a nationwide injunction may tend to reduce the opportunity for percolation, perhaps especially cases brought by states against the federal government. On the one hand, if an initial decision by one court to issue a nationwide injunction binds other courts, then the decision by the lower courts is set inexorably in stone with no opportunity for percolation. Indeed, the Court relied on precisely this consideration to conclude that another procedural device—offensive nonmutual collateral estoppel—

35 See Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1091–92 (2017).

36 See Bray, *supra* note 9, at 462–64.

37 See *id.* at 461–62 (quoting Harold Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U. L. REV. 881, 907 (1975)).

38 See Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 719 (1984).

39 Cf. Jonathan Remy Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*, 56 STAN. L. REV. 75, 112–13 nn.130, 132 (2003) (discussing the possible applicability of the Condorcet Jury Theorem, under which one can conclude that an option that receives more votes from multiple voters is more likely the “correct” result, to appellate court decisionmaking).

40 See Estreicher & Sexton, *supra* note 38, at 716.

should not apply in suits against the federal government.⁴¹ On the other hand, even if other lower courts remain free to disagree with the first lower court's ruling, still in the context in which we are interested—states suing the federal government—it may likely be that the issuance of a nationwide injunction raises such important stakes that percolation is not a practical option. (One should note, however, that that well may be the case even if the injunction the court issues is *not* nationwide.)

Fifth, commentators assail nationwide injunctions as effecting mass aggregation outside the legally authorized paths for such aggregation.⁴² This has important rule-of-law ramifications, not least because it risks rendering redundant existing regimes validating claim aggregation.

Sixth, even beyond rule-of-law concerns, the fact that nationwide injunctions in effect bind numerous nonparties who have no opportunity to opt out is problematic. The value of a legal right generally includes the ability *not to exercise* that right.⁴³ By binding nonparties to a legal judgment, a nationwide injunction reduces the value of that right.⁴⁴

B. Benefits

While many commentators have tended to emphasize the downsides to nationwide injunctions, they offer their share of benefits as well.⁴⁵ First,

41 In *United States v. Mendoza*, 464 U.S. 154, 160 (1984), the Court explained:

A rule allowing nonmutual collateral estoppel against the Government . . . would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.

For discussion, see Morley, *supra* note 28, at 627–30. Some commentators argue that *Mendoza* should be read narrowly, see Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. (forthcoming 2019) (manuscript at 32), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3290838 (“The better reading of *Mendoza* . . . is that it did not categorically prohibit using nonmutual preclusion against the government.”), or overruled altogether, see Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3290345##.

42 See Bray, *supra* note 9, at 464–65.

43 See Eugene Kontorovich, *What Standing Is Good for*, 93 VA. L. REV. 1663, 1695–96 (2007).

44 See *id.* at 1716–18 (discussing how narrowing injunctive relief can preserve rights for nonparties).

45 Numerous scholars have highlighted the benefits that can arise from lack of cooperation between the federal and state governments. See Robert B. Ahdieh, *The Dialectical Regulation of Rule 14a-8: Intersystemic Governance in Corporate Law*, 2 J. BUS. & TECH. L. 165, 166 (2007); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258 (2009); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1036 (1977); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 284 (2005); Ronald F. Wright & Marc Miller, *In Your Court: State Judicial Federalism in Capital Cases*, 18 URB. LAW. 659, 660, 693–94 (1986); see also William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory*

nationwide injunctions offer the possibility of national resolution of issues (matters that well might be especially important in the context of states suing the national government).⁴⁶ Second, that national resolution might—beneficially—arrive very quickly without the ordinary process of percolation of issues before Supreme Court review.⁴⁷ Third, even if there is no Supreme Court review, it may be that national resolution of issues nevertheless obtains quickly—whether because the first court to decide has binding effect, or because all the lower courts that decide the question are in agreement.⁴⁸

Fourth, some commentators argue that nationwide injunctions may be more administrable than a collection of individual injunctions.⁴⁹ In com-

Gaps, 89 IOWA L. REV. 1 (2003); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1099–103 (2009); Jonathan Remy Nash, *Doubly Uncooperative Federalism and the Challenge of U.S. Treaty Compliance*, 55 COLUM. J. TRANSNAT'L L. 3, 63 (2016) [hereinafter Nash, *Doubly Uncooperative Federalism*]; Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1053–57 (2010). Along these lines, some scholars have suggested that state public law litigation against the federal government is beneficial in that it validates state sovereignty interests and may contribute positively to our federal system of governance. See Daniel Francis, *Litigation as a Political Safeguard of Federalism*, 49 ARIZ. ST. L.J. 1023, 1039–41 (2017) (highlighting state litigation against the federal government as a “safeguard of federalism”); Lemos & Young, *supra* note 26, at 62–65, 117–19 (discussing the “litigation safeguards of federalism”). Other scholars question whether litigation is the best avenue to achieve these goals. See Hessick & Marshall, *supra* note 32, at 99–100; Michael E. Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355, 384–85 (2012) (arguing that state attorney general litigation positions may not always accurately represent state interests); see also Nash, *Doubly Uncooperative Federalism*, *supra*, at 60–63. However, even assuming that litigation is in general beneficial along these lines, it does not follow that nationwide injunctions necessarily contribute meaningfully to that benefit, or that the marginal benefits of such injunctions (whatever they may be) necessarily outweigh their drawbacks. See Mank & Solimine, *supra* note 2 (manuscript at 14–16). Indeed, to the extent that state litigation is a useful response to unilateral executive branch action, see Hessick & Marshall, *supra* note 32, at 86–88, it is questionable whether that response should itself include unilateral action by some states to effectively bind the entire nation.

46 See *City of Chicago v. Sessions*, 888 F.3d 272, 288 (7th Cir.) (“[F]or issues of widespread national impact, a nationwide injunction can be beneficial in terms of . . . certainty in the law . . .”), *reh'g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir.), *vacated*, Nos. 17-2991 & 18-2649, 2018 WL 4268814 (7th Cir. Aug. 10, 2018) (per curiam).

47 See *id.* at 291–92.

48 See, e.g., GERHARD CASPER & RICHARD A. POSNER, *THE WORKLOAD OF THE SUPREME COURT* 86 (1976) (“One may doubt whether there is, in general, an acute need for further appellate review of cases in which the circuits (or, where appropriate, state supreme courts) are in agreement. All of the circuits might, of course, be wrong on a question, but it is unlikely that there are many questions on which Supreme Court review is necessary that would not provoke some disagreement among circuits.”); Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 715 (2018) (noting empirical evidence that most cases heard by the Supreme Court on certiorari involved issues over which the lower courts divided and that the Court is much more likely to grant certiorari petitions that allege a split among the lower courts).

49 See Frost, *supra* note 4, at 1098–101.

mentary, Fifth Circuit Judge Gregg Costa explains: “For regulatory schemes that depend on nationwide application for effective implementation, a patchwork of traditional, parties-only injunctions may be more disruptive than even an injunction that halts enforcement in full.”⁵⁰

Fifth, in some cases, it may be necessary, in order to provide the plaintiffs with “complete relief,” for the court to issue an injunction that applies to nonparties.⁵¹ Amanda Frost explains: “School desegregation cases provide a paradigmatic example. If an African American plaintiff challenges a segregated public school system, granting an injunction requiring the defendant school system to admit the plaintiff only, and no other African American child, would not alleviate the plaintiff’s injury.”⁵² More generally, where the relief sought by a plaintiff is “indivisible,” then a strong argument lies that injunctive relief applicable beyond just the plaintiff may be appropriate.⁵³ An extension of this logic suggests that harm that is indivisible across the nation might justify a nationwide injunction. At the same time, there might be few settings where the harm is truly indivisible across the nation; perhaps, in other words, a court-wide nonparty injunction would ordinarily suffice. One example with arguably nationwide indivisible harm might be the ongoing litigation over the proper form of the national census questionnaire: it is hard to imagine the federal government administering the census in different forms in different parts of the country.⁵⁴

50 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/>.

51 See Frost, *supra* note 4, at 1091 (stating “[i]n some cases, an injunction that enforces rights of individuals who are not parties to the lawsuit is required” to provide “complete relief” to the plaintiffs); *id.* at 1090–94; Morley, *supra* note 28, at 620, 654–55; Siddique, *supra* note 6, at 2107–47 (arguing that “complete relief” should be the basis for judging the validity of nationwide injunctions).

52 Frost, *supra* note 4, at 1091.

53 See Morley, *supra* note 28, at 620 (“In cases involving indivisible rights, . . . it is impossible to enforce only the plaintiffs’ rights without also necessarily enforcing other peoples’ rights . . .”); *id.* (identifying examples such as “redistricting or school desegregation case[s]”); *id.* at 654 (favoring allowing nationwide injunctions when “a plaintiff asserts an ‘indivisible’ right”); see also *id.* at 646 n.184 (“[T]o comply with a Plaintiff-Oriented Injunction concerning indivisible rights, government defendants would also have to enforce the rights of third-party nonlitigants (at least so long as the plaintiff retains standing to continue enforcing the injunction).”).

54 See *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 677–78 (S.D.N.Y. 2019) (describing the case as “concern[ing] a single decision about a single questionnaire, to be used on a single census throughout the nation,” and noting that “Defendants have never suggested—let alone presented any evidence to support—that a citizenship question could somehow be included only in some census questionnaires, but not in others”).

Sixth, nationwide injunctions avoid broad-based irreparable harm and further the public interest.⁵⁵ In particular, a nationwide injunction will protect nonparties against potential irreparable harm.⁵⁶

C. *Settings Where Nationwide Injunctions Might Be Desirable*

Given the penchant of some to focus on the drawbacks of nationwide injunctions, it is well to acknowledge that there might be some settings where nationwide injunctions might actually be desirable. First, nationwide injunctions might be justified by the shape of the judicial hierarchy. Second, the particular legal context might render a nationwide injunction appropriate. Third, a nationwide injunction might be appropriate where substantial inequities might arise in the absence of such relief.

1. Hierarchically Desirable

It is not often thought of, but nationwide injunctions issued by the Supreme Court itself are not—or would not be—normatively problematic.⁵⁷ After all, when the Court decides an issue, it is presumptively final. Thus, whether an injunction affirmed (or otherwise entered) by the Supreme Court technically is nationwide, no one would understand the effect of the Court’s holding to extend only to the parties to the suit in question. Indeed, the Court generally grants certiorari and summarily remands cases that raise identical issues to a case it has just decided; where the Court has affirmed injunctive relief, lower courts will presumably enter similar injunctions in cases raising the identical issue, even if there is no overlap among the parties.

Indeed, the Court has at times acknowledged the propriety of nationwide injunctions affirmed by the Court in cases brought by states against the federal government by effectively converting what otherwise might be an injunction limited to the actual parties to one with effect across the nation for all states. In *South Carolina v. Katzenbach*,⁵⁸ the State of South Carolina filed a suit (in the Supreme Court’s original jurisdiction⁵⁹), seeking a declaration that certain provisions of the newly enacted Voting Rights Act of

55 See *City of Chicago v. Sessions*, 888 F.3d 272, 288 (7th Cir.) (“[F]or issues of widespread national impact, a nationwide injunction can be beneficial . . . in the avoidance of irreparable harm and in furtherance of the public interest.”), *reh’g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir.), *vacated*, Nos. 17-2991 & 18-2649, 2018 WL 4268814 (7th Cir. Aug. 10, 2018) (per curiam).

56 See *Frost*, *supra* note 4, at 1094–98; see also Spencer E. Amdur & David Hausman, Response, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 51–53 (2017).

57 See *Morley*, *supra* note 28, at 623 (“The propriety of nationwide injunctions is primarily a structural issue concerning the proper role of lower courts of limited geographic jurisdiction within a hierarchical judiciary.”).

58 383 U.S. 301 (1966).

59 *Id.* at 307.

1965⁶⁰ were unconstitutional, and an injunction precluding the U.S. Attorney General from enforcing those provisions against South Carolina.⁶¹ The Court “[r]ecogniz[ed] that the questions presented were of urgent concern to the entire country,” and accordingly “invited all of the States to participate in this proceeding as friends of the Court.”⁶² In the end, “[a] majority responded by submitting or joining in briefs on the merits, some supporting South Carolina and others the Attorney General.”⁶³ Indeed, “[s]even of these States also requested and received permission to argue the case orally at our hearing.”⁶⁴ The Court noted that, as a result, “[a]ll viewpoints on the issues have been fully developed,” and that “this additional assistance has been most helpful to the Court.”⁶⁵ The bottom line is that the Court recognized that a single national resolution of the issues was appropriate.

We might more generally ask why it seems appropriate for the Supreme Court to use a single state’s (or, indeed, a single litigant’s) claim to resolve an issue definitively on a national basis. To be sure, part of the answer is that the Court is a unitary actor; it has no rivals.⁶⁶ But a further necessary component is that the Court understands itself to be largely bound by its earlier decisions. Thus, the resolution of the claim of one state against the federal government will in every likelihood control the resolution of the same claim brought by *another* state against the federal government. While that conclusion may not have been foreordained (or even accepted by many) during the Court’s infancy,⁶⁷ it seems clear today that only rarely will the Court overturn

60 Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 & 52 U.S.C.).

61 *Katzenbach*, 383 U.S. at 307.

62 *Id.*

63 *Id.* Five states backed South Carolina’s position, while twenty-one states aligned with the Attorney General. *See id.* at 307 n.2.

64 *Id.* at 307–08.

65 *Id.* at 308.

66 *See, e.g.,* James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the “Court of Law” Requirement*, 107 Nw. U. L. Rev. 1125, 1165 (2013).

67 *See* III–IV G. EDWARD WHITE, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35*, at 524 (Paul A. Freund & Stanley A. Katz eds., 1988) (noting that *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), “was originally conceived, by lawyers representing the interests of the state of Ohio, as a means of securing reconsideration of the Eleventh Amendment interpretation announced in *Cohens [v. Virginia]*, 19 U.S. (6 Wheat.) 264 (1821),] and of *McCulloch v. Maryland*, [17 U.S. (4 Wheat.) 316 (1819)]”).

its earlier holdings.⁶⁸ To put it in legal terms, the Court sees itself as strongly bound by horizontal stare decisis.⁶⁹

One might think that the appropriateness of nationwide injunctions at the Supreme Court is also a factor of the Court's position at the apex of the (national) jurisdictional system, but that is not the case. Rather, the key component is that the judges on the court in question be bound by horizontal stare decisis. Consider, by way of example, the setting of the Delaware Court of Chancery. That court is a dedicated court of equity.⁷⁰ It is staffed by one chancellor and six vice-chancellors.⁷¹

While the Chancery Court does not lie at the apex of the Delaware judicial hierarchy,⁷² and while the court consists of multiple chancellors, still it seems that forum shopping and inconsistent injunctions are unlikely to occur. And horizontal stare decisis presumably precludes the possibility of different chancellors reaching different conclusions on the same issue.⁷³

Consider now the federal courts of appeals and district courts, in contradistinction to the Supreme Court and the Delaware Court of Chancery. Prior decisions of a particular court of appeals are binding on that court of appeals (subject to review by that court en banc), but there is no rule of horizontal stare decisis binding one court of appeals to follow earlier decisions by other courts of appeals.⁷⁴ Federal district courts are not bound to follow decisions

68 Thus, attempts to defy recent Court decisions are fraught with peril. Consider, for example, the actions of then-Alabama Chief Justice Roy Moore in the wake of the United States Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015), holding restrictions on same-sex marriage unconstitutional. In clear defiance of the *Obergefell* decision, Chief Justice Moore issued an administrative order purporting to preclude Alabama probate judges from issuing same-sex marriage licenses. Administrative Order of the Chief Justice of the Alabama Supreme Court (Jan. 6, 2016), https://www.splcenter.org/sites/default/files/roymoore-adminorder_jan6-2016.pdf. It was clear, however, that the United States Supreme Court's decision had legalized same-sex marriage across the country, not just for the parties in the *Obergefell* case. In the end, the Alabama Court of the Judiciary suspended Chief Justice Moore for the remainder of his judicial term, thus effectively ending his judicial career. See Kent Faulk, *Alabama Supreme Court Chief Justice Roy Moore Suspended for Rest of Term*, ADVANCE LOCAL (Sept. 30, 2016), https://www.al.com/news/birmingham/index.ssf/2016/09/alabama_supreme_court_chief_ju.html.

69 See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992). As a corollary, there is no need for further “percolation” of an issue once the Court has decided it.

70 See DEL. CONST., art. IV, § 10; DEL. CODE ANN. tit. 10, §§ 341–351 (2019).

71 See DEL. CONST., art. IV, § 2; DEL. CODE ANN. tit. 10, § 307. The court is empowered to appoint Masters in Chancery. See *id.*, tit. 10, §§ 372–373.

72 See DEL. CONST., art. IV, § 11(4) (providing for the Delaware Supreme Court to hear appeals from the Delaware Court of Chancery).

73 I leave to the side the point that different chancellors might choose to exercise their discretion differently.

74 See Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1750 n.13 (2008). Indeed, it is the very absence of such horizontal stare decisis that allows for the development of circuit splits. See Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831, 834 (1990) (“The rejection of

of other federal district courts (even within the same circuit), and indeed a federal district judge is generally not bound to follow decisions by other district judges *in the same district*.⁷⁵ It is this absence of horizontal stare decisis among a multiplicity of judges⁷⁶ that is the necessary precondition to forum shopping and possibly inconsistent injunctions. Its presence—as at the Supreme Court—renders a more congenial setting for nationwide injunctions.

To state things a little differently, we might logically expect a court—at least a court (unlike a federal district court) with horizontal stare decisis—to issue *court-wide* injunctions. For the Supreme Court, it thus makes sense to understand Court’s endorsement of injunctions to have nationwide effect. In contrast, the same logic would find nonparty injunctions issued by a federal court of appeals only to that circuit’s geographic scope.⁷⁷

2. Legally Desirable

Some commentators identify certain legal contexts in which nationwide injunctions might be more appropriate. As I have noted above, commentators generally acknowledge the propriety of relief reaching nonparties—including the possibility of nationwide injunctions—where the harm is indivisible⁷⁸—i.e., in settings in which it is hard to imagine how the harm can be redressed for one person without also effectively providing relief to others. At the same time, it is worth noting that such relief still could at least sometimes be plaintiff focused—i.e., enforceable only by the plaintiff.⁷⁹ Some commentators and courts also find nationwide injunctions more appropriate in fields where uniformity is highly valued.⁸⁰

intercircuit stare decisis is premised upon—and given the obvious costs in deferring uniformity, is explainable only in terms of—the benefits of dialogue among the circuits.” (footnote omitted); see also Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CALIF. L. REV. 1309, 1352 (1995) [hereinafter Stearns, *Standing Back from the Forest*] (arguing that social choice theory suggests that the Supreme Court “would desire intra- but not inter-circuit stare decisis,” since such a regime “avoids the irrationality that would result from cyclical preferences *within* particular circuits, while, at the same time, reducing the likelihood that legal doctrine that results from path manipulation in a *given* circuit will be replicated *across* the circuits”).

75 See Nash & Pardo, *supra* note 74, at 1750 n.13.

76 With a lone judge deciding all cases, there is no need for stare decisis unless that judge’s preferences change over time. See Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI-KENT L. REV. 63, 74 (1989) (explaining that within a system with a single judge deciding all cases, “principled adjudication entails that a judge with invariant principles will decide cases that present identical grounds for decision identically [and] [t]he practice of stare decisis, then, will differ from the norm of principled adjudication, only if the single judge changes her principles”).

77 See Berger, *supra* note 35, at 1100–04.

78 See *supra* notes 51–54 and accompanying text.

79 See Mitchell, *supra* note 6, at 986–92.

80 See, e.g., *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir.) (“[N]ationwide injunctions are especially appropriate in the immigration context, as Congress has made clear that ‘the immigration laws of the United States should be enforced

To whatever extent one might disagree that some areas of law are especially appropriate havens for nationwide injunctions, Congress itself has seemingly recognized the appropriateness of the nationwide injunction in at least one legal setting. The Administrative Procedure Act (APA)⁸¹ directs a reviewing court to “hold unlawful and set aside” agency rules, orders, and actions that it finds to be unconstitutional or otherwise unlawful.⁸² At least one court—the Ninth Circuit—has asserted that, where an agency rule, order, or action is indeed unlawful, the issuance of a nationwide injunction is “compelled” by the APA’s text.⁸³ Some commentators, however, question this logic.⁸⁴

3. Desirable Because of Concerns of Equitability and Legitimacy

In some settings, it might be technically possible for the government to apply different standards to different societal actors under a legal regime, but

vigorously and *uniformly*.” (quoting *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015)), *vacated and remanded*, 138 S. Ct. 353 (2017) (per curiam).

81 5 U.S.C. §§ 551–559, 561–570a, 701–706 (2012).

82 In pertinent part, the APA provides:

The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2). Some substantive statutes include somewhat similar procedural directives. See Mitchell, *supra* note 6, at 1012; see also *id.* at 1012 n.317 (authorities cited).

83 *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007), *rev’d on other grounds sub nom.*, *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009). Professor Mitchell disagrees that such action is actually “compelled,” arguing that courts remain free to sever the illegal agency action as to particular individuals or regions. See Mitchell, *supra* note 6, at 1014. Still, he concedes both that (i) “courts *do* hold the power to ‘strike down’ an agency’s work, and the disapproved agency action is treated as though it had never happened,” *id.* at 1013, and that (ii) “*any* court decision that ‘sets aside’ an agency action will bind other courts to the extent it pronounces an agency action invalid[.] . . . even when the judgment comes from a court that lacks the authority to bind other tribunals under the rules of *stare decisis*.” *Id.* at 1014.

84 See Bray, *supra* note 9, at 454 n.220; Siddique, *supra* note 6, at 2120–26. Indeed, the notion of agency nonacquiescence in unfavorable lower court rulings presumes some agency freedom to administer the law with some degree of disuniformity. See generally Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989).

nevertheless detrimental for the government to pursue that course. When, for example, a particular course has been determined to be clearly unconstitutional or otherwise illegal, it may be seen as inequitable for the government to abide by an injunction and not engage in that behavior with respect to some actors, and yet continue to engage in the problematic behavior with respect to others.⁸⁵ And that inequity—whether actual or perceived—may in turn breed questions about the judiciary’s legitimacy. In such circumstances, it may be desirable to put in place a nationwide injunction.⁸⁶

On the other hand, one could well imagine a more circumscribed approach, under which regional courts would enter court-wide nonparty injunctions but leave the ultimate resolution of the issue to the Supreme Court. Such an approach could work in contexts where the need for national uniformity is less acute.⁸⁷

D. A Setting Where Nationwide Injunctions Might Be Undesirable: Where the Benefits of Percolation Outweigh the Need for Speedy Resolution

While the need for a speedy resolution of an issue may at times warrant abandoning efforts to allow the issue to percolate in the lower courts before the Court turns to the issue,⁸⁸ in general percolation is the preferred course.⁸⁹ In such cases, a nationwide injunction may be inadvisable.

Zachary Clopton argues that the setting of litigation involving the possibility of a nationwide injunction provides a substitute for percolation: such cases, he argues, attract the participation of interested interveners and amici curiae.⁹⁰ These interveners and amici will, in effect, provide for an airing of the issue that substitutes for the opportunity of numerous lower courts to

85 See Trammell, *supra* note 41, at 39 (“The most conspicuous example of bad faith—and thus the touchstone for when a nationwide injunction is most appropriate—is when the government fails to abide by settled law.”); Katherine B. Wheeler, Comment, *Why There Should Be a Presumption Against Nationwide Preliminary Injunctions*, 96 N.C. L. REV. 200, 211–15 (2017) (arguing that nationwide injunctions are less appropriate in the context of preliminary, as opposed to permanent, injunctions because “a preliminary injunction only requires that the plaintiff is *likely to win* the case on the merits, while a permanent injunction is to be granted after a party has *already won* on the merits”).

86 Along these lines, commentators have identified inequities that arise when a federal agency declines to acquiesce in the holding of one court of appeals when litigating the analogous the point in a different court of appeals. See, e.g., Gary W. Carter, *The Commissioner’s Nonacquiescence: A Case for a National Court of Tax Appeals*, 59 TEMP. L.Q. 879, 883–85 (1986) (noting the inequitable effects on taxpayers resulting from intercircuit nonacquiescence by the Commissioner of Internal Revenue).

87 Cf. Frost, *supra* note 4, at 1101–03 (suggesting settings where arguments in favor of the need for uniformity fall short).

88 See, e.g., Estreicher & Sexton, *supra* note 38, at 716.

89 See *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (noting “the benefit” the Supreme Court “receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari”); Estreicher & Sexton, *supra* note 38, at 720; see also *supra* notes 37–40 and accompanying text.

90 See Clopton, *supra* note 41, at 37–38.

examine the issue.⁹¹ Further along these lines, in the setting where states sue the federal government for a nationwide injunction, experience has shown that states tend to gather on both sides of the litigation, thus arguably providing for a substitute for lower court percolation.⁹²

But this argument proves too much—and indeed is somewhat circular—in that it suggests that percolation is always dispensable by putting a nationwide injunction on the table. But at some point, there may be too many nationwide injunction cases such that interveners and amici are unable to participate adequately in all those cases. More importantly, it seems that interveners and amici may not be perfect substitutes for lower courts: amici, after all, are advocates. At some point, advocates may run out of novel arguments, and may simply wind up echoing one another. In contrast, lower court judges are (at least in theory) instead interested in resolving the relevant factual and legal issues correctly. Thus, lower court opinions are likely to be far more valuable in airing an issue than are briefs of interveners or amici.

Indeed, history reflects congressional recognition that some cases—indeed, a small subset of all cases—may properly avoid the ordinary percolation process. For much of the twentieth century, Congress provided for a three-judge district court to try cases where the plaintiff sought injunctive relief on the ground that a federal statute was unconstitutional; in other words, Congress did not empower a single judge to strike down a federal statute.⁹³ Interestingly, Congress also provided for mandatory Supreme Court review in such cases.⁹⁴ One can take congressional repeal in 1976 of both aspects of this procedure⁹⁵—i.e., both the three-judge panels and the mandatory review—in all cases except certain voting rights disputes as evidence either that Congress now views it as proper to allow individual district judges to decide whether a nationwide injunction is appropriate on a case-by-case basis, or that Congress implicitly believes that district courts should *never*

91 *Id.* at 38.

92 *See id.* at 37–38 (“[N]ational-injunction cases are seemingly weak candidates for a percolation argument, given that . . . they are accompanied by numerous interveners and *amici curiae* who can provide the functional equivalent of district-court percolation.”).

93 *See* Act of June 25, 1948, ch. 646, 62 Stat. 968 (repealed 1976) (“An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under [28 U.S.C. § 2284].”). This statute was an extension of a statute that similarly required three-judge district court panels to hear claims for injunctive relief against allegedly unconstitutional *state* statutes. For historical discussion, see David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 3–12 (1964); Michael E. Solimine, *Congress, Ex parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 113–18 (2008).

94 *See* Act of Aug. 24, 1937, ch. 754, § 3, 50 Stat. 751, 753 (“An appeal may be taken directly to the Supreme Court of the United States . . .”), *repealed by* Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119.

95 *See* Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119.

(or at least infrequently) issue nationwide injunctions.⁹⁶ Either way, the fact remains that there has been recognition that some cases are more deserving of percolation than others.

III. STANDING, STATES, AND NATIONWIDE INJUNCTIONS

In this Part, I consider the role that standing may play in limiting the ability of states to obtain nationwide injunctions against the federal government. In Section A, I provide a brief overview of standing doctrine (both constitutional and prudential) in general, and then as it has been applied in the context of state plaintiffs. In Section B, I outline limits that standing may impose on plaintiffs seeking nationwide injunctions in federal cases generally (i.e., not just states suing the federal government); after all, if standing does not constrain courts from issuing nationwide injunctions in general, then clearly it can offer no constraint in the context of a state suing the federal government. Then, in Section C, I consider whether the “special solicitude” that the Court has said states enjoy in the standing calculus ought to be understood to *expand* the availability of nationwide injunctions in cases where states sue the federal government.

Before proceeding, however, I pause to address a fundamental question: Why should one look for limits on federal courts’ freedom to issue nationwide injunctions in standing doctrine in the first place? After all, the discussion in Part II seems to highlight that much of the debate here centers not on law, but on policy.⁹⁷ Further, the general notion that constitutional procedural limitations should be read narrowly so as to preserve congressional prerogatives⁹⁸ might apply here to suggest reading standing not to limit the issuance of nationwide injunctions.⁹⁹

The answer to the question of “why standing” is twofold. The first answer sounds (if somewhat tautologically) in the “rule of law”: it is appropriate to look to Article III standing doctrine for limits if indeed that doctrine might reasonably provide such limits.

96 See Morley, *supra* note 28, at 632 (“On the one hand, Congress’s decision to allow single judges to enjoin federal laws can be seen as an expression of confidence in their competence to properly adjudicate such matters, without the involvement of multiple other judges. Conversely, the 1976 amendments can instead be interpreted as underscoring the importance of limiting the reach of any single district court’s constitutional rulings, precisely because each district judge now acts alone and the right of direct appellate review in the Supreme Court no longer exists.”).

97 See *supra* Part II.

98 Thus, for example, the Court has read language in the Constitution far more broadly than identical language in jurisdictional statutes. See Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 545 (2012).

99 See, e.g., Michael T. Morley, *Public Law at the Cathedral: Enjoining the Government*, 35 CARDOZO L. REV. 2453, 2453 (2014) (arguing that “a constitutional or statutory right receives the greatest available level of protection when it is secured by an injunction” and the plaintiff’s path to injunctive relief should be made easier, particularly in public law cases, by relaxing nonmerits requirements).

The second answer links the policy underlying standing with at least one policy motivation for limiting the availability of nationwide injunctions. As Maxwell Stearns has explained, standing doctrine protects the public and the legal system against savvy litigants and courts working to manipulate courts' dockets in order to develop precedent selectively.¹⁰⁰ But, as I have discussed above, the danger of selectively locking precedent in place lurks as well in the issuance of nationwide injunctions.¹⁰¹ It makes logical sense, then, to look for limits on a procedural device that may deleteriously affect the development of law and precedent to a body of law that acts to protect the neutral and beneficial development of law and precedent.

A. *A Brief Overview of Standing*

This Section first addresses standing in general. It then turns to the narrower question of state standing.

1. Standing in General

The Supreme Court has interpreted Article III's "case or controversy" requirement to mandate a plaintiff suing a defendant to establish (i) that the plaintiff has been injured, (ii) that the injury was caused by the defendant, and (iii) that the court is capable of fashioning relief that will redress the plaintiff's injury.¹⁰² In a case with multiple plaintiffs, the Court has long held that it suffices that one plaintiff establish the requisite standing.¹⁰³ However, standing must be established for every claim; the mere fact that standing inheres for one claim does not provide standing with respect to any other claim.¹⁰⁴

It is generally accepted that the tripartite constitutional standing inquiry will most often turn on the injury prong. The Court has made clear that only an injury that is "concrete and particularized," and "either actual or immi-

100 See Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 348–404 (1995) (marshalling historical evidence and caselaw to support point that standing doctrines prevent manipulation); Stearns, *Standing Back from the Forest*, *supra* note 74, at 1323 n.48 (“[C]ommentators have failed to identify the reason behind the general presumption against [ideological] litigation [that standing represents], namely that a contrary rule would enable ideological litigants to manipulate the critically important path of case presentation.”); see also Robert J. Pushaw, Jr., *Limiting Article III Standing to “Accidental” Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 11 (2010) (arguing that standing is best understood to limit court access to plaintiffs who have been injured because of chance events beyond their control).

101 See *supra* notes 33–35 and accompanying text (discussing how the availability of nationwide injunctions encourages forum shopping and races to the courthouse).

102 See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

103 See, e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977). But see Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481, 514–52 (2017) (arguing against the rule).

104 See, e.g., *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006) (“[A] plaintiff must demonstrate standing for each claim he seeks to press . . .”).

ment” will suffice;¹⁰⁵ a generalized or speculative injury will not.¹⁰⁶ An economic injury represents the paradigm for a successful assertion of standing.¹⁰⁷ However, the Court has over time also recognized the viability of other forms of injury, such as stigmatic injury.¹⁰⁸

There is a school of thought that Congress has substantial, if not unlimited, freedom to create new causes of action that recognize new, and new forms of, injuries.¹⁰⁹ This view prevails most often in the sphere of administrative law, where the demands of the traditional injury test would, if applicable, preclude many challenges to agency administrative action.¹¹⁰

2. Standing for States

The Supreme Court has long recognized the possibility that states may have standing to pursue claims—including claims against the federal government—in federal court.¹¹¹ The Court has applied the standard tripartite test for standing in cases involving states.¹¹² However, the Court has cautioned that courts should afford “special solicitude” when measuring a state’s assertion of standing against the standard test.¹¹³ At the same time, it remains murky exactly what that special solicitude is, and when it applies.¹¹⁴

105 *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007).

106 *See, e.g., Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013); *Lujan*, 504 U.S. at 573–78.

107 *See, e.g., Jonathan Remy Nash, Sovereign Preemption State Standing*, 112 *Nw. U. L. REV.* 201, 202 (2017).

108 *See, e.g., Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984).

109 *See, e.g., Elizabeth Magill, Standing for the Public: A Lost History*, 95 *VA. L. REV.* 1131, 1135–50 (2009) (arguing that congressional freedom to define standing by establishing causes of action dates to the early twentieth century); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 *U. PA. L. REV.* 613, 641–43 (1999) (arguing the point in the context of the growth of the administrative state). *But cf.* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 *MICH. L. REV.* 689, 712–18 (2004) (arguing that the recognition of standing’s constitutional status is of long-standing historical pedigree); Caleb Nelson, “*Standing*” and Remedial Rights in Administrative Law, 105 *VA. L. REV.* (forthcoming 2019) (manuscript at 30–68), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3235637 (arguing that modern-day courts and commentators have misread the Court’s holding in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), the opinion most often cited for the proposition that constitutional standing in the administrative law context rests upon Congress’s definition of the relevant cause of action).

110 *See* Sunstein, *supra* note 109, at 641–43. *But see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016) (holding that a plaintiff “cannot satisfy the demands of Article III by alleging a bare procedural violation,” since “[a] violation of one of the [administrative statute’s] procedural requirements may result in no harm”).

111 For comprehensive analysis, see Ann Woolhandler & Michael G. Collins, *State Standing*, 81 *VA. L. REV.* 387 (1995). For a much briefer historical overview, see Nash, *supra* note 107, at 210–27.

112 *See, e.g., Nash, supra* note 107, at 216.

113 *See Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

114 *See* Nash, *supra* note 107, at 203–06, 225–27; *see* Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. EPA’s New Standing Test for*

I have elsewhere delineated two categories into which modern assertions of state injury may be said to fall. First, a state can advance a traditional direct injury—usually economic—much as any party can do.¹¹⁵ Second, a state can pursue an injury to its *parens patriae*, or quasi-sovereign, interests.¹¹⁶ To do so, I have argued that the state must claim that (i) the federal government is meaningfully underenforcing federal statutory law; and (ii) state law in the area is preempted.¹¹⁷ I refer to this as “sovereign preemption state standing.”¹¹⁸

B. A Truncated Examination of Whether Standing Might Limit the Availability of Nationwide Injunctions

It stands to reason that standing can provide constraints on a state seeking a nationwide injunction against the federal government only if standing doctrine has some role to play generally in limiting the availability of nationwide injunctions. While that topic generally lies beyond the scope of this Essay, in this Section, I offer some preliminary and tentative thoughts on the question. After conducting that preliminary analysis, I will be in position in Section III.C to consider how standing might provide constraints in the specific context of states suing the federal government.

States, 49 WM. & MARY L. REV. 1701, 1733–34, 1746–47, 1786 (2008). *But see* Hessick & Marshall, *supra* note 32, at 107 (“[I]t appears that the special solicitude the Court afforded Massachusetts was to relax the restriction on speculative injuries.”). I have elsewhere suggested different formulations that might give the Court’s “special solicitude” language content. *See* Jonathan Remy Nash, Essay, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494, 513 (2008) (arguing that states’ “special solicitude” is consistent with recognizing the unique ability of states to pursue claims where the claimed injury is unlikely to occur but where the magnitude of that injury, were it to occur, would be very large); Nash, *supra* note 107, at 245 (arguing that special solicitude can appropriately be understood to authorize states to pursue quasi-sovereign claims against the federal government).

115 *See* Nash, *supra* note 107, at 221–24.

116 *See id.* at 224–27.

117 Or, as I have put it more precisely:

First, the state must allege that the Executive Branch has underenforced the federal law in a way that is inconsistent with a governing statute. Second, the state must be able to point to preemption of state law. In particular, either the preemption of state law must be obvious and clear from a federal statute; the federal government must have previously sought, or be concurrently seeking, to preempt state law; or the preemption must otherwise already have been determined judicially. I refer to this as a “preemption exhaustion” requirement; such a threshold requirement makes sense because the underenforcement of federal law would not injure the state and its citizens were state law not preempted. Finally, there must be a nexus between the area of preemption and the area in which the Executive Branch is allegedly underenforcing federal law.

Id. at 235–36 (footnotes omitted); *see also* Hessick & Marshall, *supra* note 32, at 95–96.

118 Nash, *supra* note 107, at 235–36.

Some take the position that, while there may be limits on the availability of nationwide injunctions, standing itself provides no such limits.¹¹⁹ But this argument ignores the fact that a showing of standing requires consideration of how the court can *redress* the plaintiff's injury.¹²⁰ And, indeed, the Supreme Court has recognized that different forms of relief require as prerequisites different types of injuries.¹²¹ In particular, a plaintiff has *standing* to pursue injunctive relief only upon a showing of a likelihood of some future injury.¹²² The same past injury that suffices to establish standing to collect damages is insufficient to establish standing for injunctive relief.¹²³

The fact that standing for one type of remedy—damages—does not justify standing for another—injunctive relief—extends logically to the notion that standing for one type of injunction does not extend to standing for another type of injunction. On this basis, Article III's standing requirement arguably may preclude a federal court from granting a nationwide nonparty injunction.¹²⁴

119 See, e.g., Howard Wasserman, *Injunction Authority Clarification Act of 2018*, PRAWFSBLAWG (Sept. 11, 2018), <https://prawfsblawg.blogs.com/prawfsblawg/2018/09/injunction-authority-clarification-act-of-2018.html> (“I am glad the [injunctive authority clarification] bill does not speak of jurisdiction but of remedy, which should be a non-jurisdictional merits-related issue.”).

120 See *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (“We caution . . . that ‘standing is not dispensed in gross’: A plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury.” (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006))).

121 See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (“[A] plaintiff must demonstrate standing separately for each form of relief sought.”); *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (“The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.”).

122 See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (explaining that plaintiff’s “standing to seek the injunction requested depended on whether he was likely to suffer future injury”).

123 See *O’Shea v. Littleton*, 414 U.S. 488, 495–96 (1974) (“Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.”).

124 See 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, 525 (2016) (arguing that Article III “prevents a plaintiff from bootstrapping, based on the injury she has suffered to her own rights, to seek an injunction protecting the rights of others”); Memorandum from Jeffrey Sessions, Attorney Gen., to the Heads of Civil Litigating Components 2–3 (Sept. 13, 2018), <https://www.justice.gov/opa/press-release/file/1093881/download>; William Barr, *Attorney General Confirmation Hearing, Day 1*, C-SPAN (Jan. 15, 2019), <https://www.c-span.org/video/?456626-101/attorney-general-nominee-william-barr-confirmation-hearing&playEvent&vod> (“People have lost sight of the fact that it’s really a question of who gets the relief in a case, and under the ‘Case or Controversy’ [requirement] it should be limited to the parties . . . I’d like to see these universal injunctions challenged.”).

Professor Morley accepts that Article III allows for nationwide nonparty injunctions where the harm is indivisible. See Morley, *supra*, at 525. He explains that, under such circumstances, “to grant complete relief to a plaintiff, a court . . . must issue an order which winds up benefitting other people.” *Id.* Even if that is true, however, it is unclear from a transaction-cost perspective why a court would need to afford nonparties the right to

For the most part, lower courts and commentators have given short shrift (if any attention at all) to the notion that standing poses any limit on a federal court's ability to award a nationwide injunction. The basis for this leap seems to be the Court's embrace of another notion—that federal courts have wide berth to craft appropriate injunctive relief. As the Seventh Circuit held in an opinion in a sanctuary city case (an opinion since withdrawn in favor of en banc review), the argument against standing to issue a nationwide injunction is a “non-starter.”¹²⁵ The court reasoned that, once a plaintiff “ha[s] standing to seek injunctive relief . . . the district court ha[s] the authority to fashion the terms of that injunction as it determine[s] necessary for the public interest.”¹²⁶

But this logical leap lacks support in precedent. To be sure, the Court has indeed endorsed the broad power of a federal district court to fashion injunctive relief as appropriate in a given case, including injunctions of nationwide scope. In *Califano v. Yamasaki*,¹²⁷ the Court held that Rule 23 posed no barrier to nationwide class actions.¹²⁸ The Court then proceeded to uphold the district court's issuance of an injunction against the government of nationwide scope,¹²⁹ emphasizing, “[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.”¹³⁰ The opinion lacks any reference to the plaintiff class's standing.¹³¹

Despite the absence of any reference to standing in the Court's opinion in *Califano*, there are two reasons not to read the opinion to mean that standing is irrelevant to a federal court's power to issue a nationwide nonparty

enforce that injunction. After all, vesting an actor with enforcement power affords that actor with bargaining power, since the government can only avoid the injunction by buying out all enforcement rights. If the nonparty thinks the enforcement right is important enough, he or she could pursue his or her own lawsuit for relief. Cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) (“An [alienable] entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.”); Kontorovich, *supra* note 43, at 1685 (“The denial of standing on transaction-cost grounds must depend on at least two additional determinations. First, that the plaintiff is not the highest value user—that is, that the buyout of an injunction would be the socially desirable outcome. Second, that transaction costs would likely frustrate such an efficient resolution between the plaintiff and higher-value users.”). *But see supra* subsection II.C.3 (noting the possibility that such differential enforcement could be unseemly and undermine the judiciary's legitimacy).

125 *City of Chicago v. Sessions*, 888 F.3d 272, 289 (7th Cir.), *reh'g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir.), *vacated*, Nos. 17-2991 & 18-2649, 2018 WL 4268814 (7th Cir. Aug. 10, 2018) (per curiam).

126 *Id.* at 289–90.

127 442 U.S. 682 (1979).

128 *Id.* at 702.

129 *Id.* at 702, 706.

130 *Id.* at 705.

131 *See id.*

injunction. First, the injunction affirmed by the Supreme Court was indeed nationwide, but plaintiff focused; it did not grant enforcement rights to nonparties.¹³² Thus, while *Califano* supports the power of federal courts to issue nationwide *plaintiff-focused* injunctions, it says nothing on the subject of nationwide *nonparty* injunctions (i.e., nothing on the primary subject of this Essay). But the fact that a district court's injunctive powers are not limited by the court's geographic reach is not surprising. Indeed, Justice Thomas's concurring opinion in *Trump v. Hawaii* conceded that "[a]n injunction that was properly limited to the plaintiffs in the case would not be invalid simply because it governed the defendant's conduct nationwide,"¹³³ even while at the same time expressing "skeptical[ism]" as to whether "district courts have the authority to enter universal injunctions."¹³⁴

Second, even on its own terms, the Court's opinion in *Califano* emphasized not that a federal district court's authority to fashion injunctive relief is unlimited, but rather the scope of that power "in suits *over which they have jurisdiction*."¹³⁵ While perhaps not the most artful way to express the notion, one can read this statement to recognize judicial discretion to fashion equitable relief only to the extent that the plaintiff has established standing to justify such equitable relief.¹³⁶

Some commentators justify federal judicial power to issue nationwide injunctions on the Court's endorsement of prophylactic injunctions,¹³⁷ the doctrine of third-party standing,¹³⁸ and standing in the context of injuries that, while technically moot, are capable of repetition yet will continue otherwise to evade review.¹³⁹ To be sure, these doctrines provide evidence that Article III standing does not tie the scope of an injunction directly to the injury suffered by the aggrieved plaintiff. To say, however, that these doctrines necessarily validate the nationwide injunction is quite a stretch. A true nationwide nonparty injunction presents one of the greatest possible disjunctions between a plaintiff's actual injury and injunctive scope. None of these doctrines fully divorces the scope of injunctive relief from actual injury suffered.¹⁴⁰ In short, existing standing doctrine neither forecloses nor clearly validates the nationwide injunction.

132 *Id.* at 689–90; see Wasserman, *supra* note 5, at 361.

133 *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 n.1 (2018) (Thomas, J., concurring).

134 *Id.* at 2425.

135 *Califano*, 442 U.S. at 705 (emphasis added).

136 See Morley, *supra* note 124, at 525–26 ("Although courts have broad equitable discretion in crafting the scope of injunctive relief, Article III imposes outer bounds on the scope of that discretion. Relief that goes beyond redressing a plaintiff's injuries is beyond the court's authority." (footnote omitted)).

137 See Frost, *supra* note 4, at 1083; Trammell, *supra* note 41, at 20–21.

138 See Frost, *supra* note 4, at 1084.

139 See *id.* at 1083.

140 See *id.* at 1083–84.

C. *Examining the Case for Special State Standing to Pursue Nationwide Injunctions Against the Federal Government*

Section III.B addressed, without definitively resolving, the question in general whether Article III standing poses a barrier to the award of nationwide injunctions. In this Section, I focus on the question of whether—*assuming* that there are some such limits in general—federal courts have greater latitude to award nationwide injunctions to states suing the federal government.

My analysis divides into two settings that hearken back to different conceptions of Article III standing that I discussed above in Section III.A. I first consider the possibility that Article III imposes some limits on the availability of nationwide injunctions in large,¹⁴¹ and ask whether states' special solicitude should allow them greater access to nationwide injunctions when they sue the federal government. I argue that they generally should not, except possibly in cases where no other plaintiff would have standing to sue. I next consider the possibility that Article III recognizes large congressional leeway to define injuries by enacting new causes of action.¹⁴² Here I argue that special solicitude should not afford states greater access to nationwide injunctions.

1. State Standing to Pursue Nationwide Injunctions Against the Federal Government for Injuries as to Which Article III Does Not Otherwise Allow for Nationwide Injunctions

Let us assume that Article III does not permit, in the ordinary course, a plaintiff to obtain a nationwide injunction against a defendant. Should the "special solicitude" that states enjoy in the standing calculus afford them the possibility of obtaining nationwide injunctions when they sue the federal government?

I argue that this question should be answered in the negative, with the possible exception of one small—but conceivably important—class of cases. Start with the basic setting where a plaintiff state has standing to pursue a claim against the federal government that nonstate plaintiffs could also readily pursue; in other words, the plaintiff state alleges a direct injury to itself that others also suffer, and it is not relying on special solicitude to establish standing. In such a setting, special solicitude ought not to provide any basis for the state to obtain nationwide injunction. From a doctrinal perspective, while the Court has not clearly explained what "special solicitude" is or when it applies, it has never so much as suggested that it applies to make available forms of relief that would otherwise be available. And from a policy perspective, the fact that other plaintiffs could readily bring similar suit means that affording the plaintiff state a nationwide injunction would undercut other

141 See Wasserman, *supra* note 5, at 361–62.

142 See *supra* notes 109–10 and accompanying text.

prospective plaintiffs' ability to bargain over their rights.¹⁴³ (To be sure, there may be reasons that make it unseemly *not* to grant a nationwide injunction. But that would suggest that a nationwide injunction should be relief available for *all* plaintiffs, not just states; yet I am assuming for purposes of this Section that Article III makes nationwide injunctions generally unavailable.) Moreover, to the extent that the "one plaintiff rule" applies in the context of remedial standing,¹⁴⁴ making nationwide injunctions more readily available to states would further increase the incentive that special solicitude already creates for nonstate plaintiffs to include states as coplaintiffs.

By contrast, there are reasons to conclude that special solicitude should make nationwide injunctions potentially available in cases where plaintiff states can allege standing but other (nonstate) plaintiffs cannot. (In other words, direct injury with special solicitude and/or quasi-sovereign injury.) Now the nationwide injunction does not undermine other prospective nonstate plaintiffs' rights because there *are no* other prospective nonstate plaintiffs. Moreover, cases where states alone have standing are likely to be cases where the state is acting in the public interest.¹⁴⁵ This makes the availability of the nationwide injunction more acceptable from a policy perspective.

Existing doctrine may well justify reaching a different conclusion regarding the availability of nationwide injunctions depending upon whether or not there is a nonstate plaintiff who likely has standing to pursue a similar case. While the Court has often disclaimed the notion that a plaintiff's standing is bolstered by the absence of other actors who would have standing,¹⁴⁶ the Court has at times lent support to that notion.¹⁴⁷

Such an exception would result in greater availability of nationwide injunctions to states suing the federal government for underregulation (that is, enforcing a statutory scheme allegedly below the level called for by the scheme) than overregulation. After all, it is comparatively difficult to find an individual actor who is adversely affected by government inaction;¹⁴⁸ and

143 See Kontorovich, *supra* note 43, at 1679. Professors Mank and Solimine advance reasons to believe that states are good representatives of constituents' interests. See Mank & Solimine, *supra* note 2, (manuscript at 13–14). That may be true in some contexts, but to the extent that nonstate plaintiffs can bring similar suits it is unclear why it is necessary to vest states with authority to seek nationwide injunctions. If indeed the interests of states and nonstate plaintiffs are aligned, then the nationwide injunction would seem unnecessary. Of course, if some nonstate plaintiffs have differing views, then the argument that the states are good representatives is undercut, and the nationwide injunction seems unnecessary.

144 See *supra* note 103 and accompanying text; see also *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) ("At least one plaintiff must have standing to seek each form of relief requested in the complaint." (emphasis added)).

145 After all, such cases are likely to involve a state asserting direct constitutional injury or quasi-sovereign injury. See *supra* notes 115–18 and accompanying text.

146 See, e.g., *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013).

147 See, e.g., *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 614 (2007) (plurality opinion).

148 See Nash, *supra* note 107, at 237.

that is precisely the setting in which sovereign preemption state standing is likely to arise.¹⁴⁹ At the same time, a setting where the government is *over*-regulating would tend to give rise to other (nonstate) plaintiffs who could conceivably seek injunctions (even if not nationwide ones) to protect their own rights.¹⁵⁰ Thus, in a sense, allowing states greater access to nationwide injunctions in the context of underregulation may actually result in a fair balance in access to injunctive relief.

In addition, while making nationwide injunctions available in settings of overregulation raises Eugene Kontorovich's concern about short-circuiting individual actors' valuation of their rights,¹⁵¹ making nationwide injunctions available in the setting of underregulation (where private actors are less likely to have causes of action) puts at risk only the rights of other states. But, as practice has demonstrated, states are quite capable—from the perspective of both resources and expertise—of joining in litigation in which nationwide injunctions are at stake.¹⁵²

2. State Standing to Pursue Nationwide Injunctions Where Congress Has Rein to Make Nationwide Injunctions Available (or Unavailable)

Assume now that Congress has considerable rein to define the scope of Article III standing by generating (or, conversely, eliminating) causes of action. If that is so, then a clear decision to make nationwide injunctions available would be valid—and applicable to parties, state and nonstate alike. The same would be true of a clear decision to make nationwide injunctions unavailable.

But what about the setting where Congress is silent on the question of nationwide injunctions? Should special solicitude make nationwide injunctions *more* available to state plaintiffs than nonstate plaintiffs?

The answer should be no. So far as the Supreme Court's cryptic pronouncements allow for assessment, special solicitude is a feature of Article III. If Article III incorporates deference to congressional definitions of causes of action and available relief, then that notion ought to hold as well for state plaintiffs as for nonstate ones.

CONCLUSION

In this Essay, I have considered the role of standing in limiting state efforts to obtain nationwide injunctions against the federal government. I have identified circumstances where nationwide injunctions may be more, or less, desirable, and highlighted some undesirable incentives to which nationwide injunctions may give rise—incentives that standing doctrine is designed at least to some degree to address.

149 *See id.* at 243.

150 *See id.* at 244.

151 *See supra* notes 43–44 and accompanying text.

152 *See supra* note 28 and accompanying text.

I have further outlined how—without definitively resolving whether—standing doctrine may limit in general the availability of nationwide injunctions. Assuming standing doctrine *does* provide some limits, I have argued that states' special solicitude should not provide states any greater access to nationwide injunctions when suing the federal government—except possibly in cases where no plaintiff other than a state could bring suit.

If indeed the states do have some greater access to nationwide injunctions when suing the federal government, then an interesting quandary arises. As I have noted above, state attorneys general have seemed more and more likely to sue the federal government and to pursue that form of relief.¹⁵³ But, even if one accepts that a few nationwide injunctions may be appropriate and manageable,¹⁵⁴ still a proliferation of nationwide injunctions may be problematic.¹⁵⁵ What, if anything, might restrain this trend? Perhaps the best answer is something to which the Supreme Court adverted in the early twentieth century in the context of state standing to bring suit: states that choose to assert “extreme rights” by seeking nationwide injunctions against the federal government in favor of one policy agenda might soon see other states with different policy goals seeking nationwide injunctions to advance their own goals.¹⁵⁶ To put it another way, the escalation in seeking nationwide injunctions may eventually backfire as states on both sides see their policy agendas frustrated; in this way, the incentive to seek nationwide injunctions may be self-policing.

153 See *supra* notes 29–32 and accompanying text.

154 See Frost, *supra* note 4, at 1115–18; Suzette M. Malveaux, Response, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 62 (2017); see also Alexandra D. Lahav, *Go Big or Go Home: The Debate Over National Injunctions*, J. THINGS WE LIKE (LOTS) (Oct. 23, 2018), <https://courtslaw.jotwell.com/go-big-or-go-home-the-debate-over-national-injunctions/> (reviewing Frost, *supra* note 4).

155 See, e.g., Rebecca Kheel, *Appeals Court Sides with Trump on Transgender Military Ban*, HILL (Jan. 4, 2019), <https://thehill.com/policy/defense/423862-appeals-court-sides-with-trump-on-transgender-military-ban?userid=18067> (“The ruling hands Trump a win in a case that has seen several courts block the policy. But the policy still cannot take effect because of those other injunctions, which applied nationwide.”).

156 See *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 239 (1907) (“Whether Georgia by insisting upon this claim is doing more harm than good to her own citizens is for her to determine. The possible disaster to those outside the State must be accepted as a consequence of her standing upon her extreme rights.”); see also *Missouri v. Illinois*, 200 U.S. 496, 522 (1906) (suggesting that a state exerts “extreme rights” when it “deliberately permits discharges similar to those of which it complains”).