

“NATIONWIDE” INJUNCTIONS ARE REALLY “UNIVERSAL”
INJUNCTIONS AND THEY ARE NEVER APPROPRIATE

by
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Federal district courts routinely issue broad injunctions prohibiting the federal government from enforcing constitutionally invalid laws, regulations, and policies on immigration and immigration-adjacent issues. Styled “nationwide injunctions,” they prohibit enforcement of the challenged laws not only against the named plaintiffs, but against all people and entities everywhere.

The first problem with these injunctions is one of nomenclature. “Nationwide” suggests something about the “where” of the injunction, the geographic scope in which it protects. The better term is “universal injunction,” which captures the real controversy over the “who” of the injunction, as courts purport to protect the universe of people who might be subject to the challenged law. The second problem is scope. By any name, courts should not issue injunctions protecting beyond the plaintiffs to the case. An injunction in a constitutional case should protect the plaintiffs from government enforcement of the invalid law against them; it should not prohibit the government from enforcing the law against the universe of non-parties to the litigation, absent a new or broader injunction protecting them.

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INTRODUCTION

Recent constitutional litigation has challenged the validity of laws, regulations, and policies from the Obama and Trump Administrations regulating immigration and immigration-adjacent matters. Plaintiffs have brought pre-enforcement lawsuits seeking to enjoin responsible federal officials from enforcing challenged laws, regulations, and policies. Consider:

1. The Fifth Circuit enjoined enforcement of President Obama's Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program, a decision affirmed by an evenly divided eight-person Supreme Court.¹

¹ *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by evenly divided Court*, *United States v. Texas*, 136 S. Ct. 2271 (2016).

2. The Fourth and Ninth Circuits enjoined enforcement of President Trump’s third executive order limiting travel to the United States by nationals of certain majority-Muslim countries and heightening review procedures for admitting refugees from certain countries.² This followed decisions by both courts enjoining enforcement of an earlier travel restriction that expired by its own terms.³ A divided Supreme Court held that the President had the authority to enact the third travel ban.⁴
3. District judges in the Northern District of California and in the Northern District of Illinois enjoined enforcement of Department of Justice regulations stripping “sanctuary cities” of federal funds from law-enforcement grant programs, both decisions affirmed on appeal.⁵
4. A district judge in the Western District of Washington enjoined enforcement of regulations requiring immigration attorneys to either appear and assume full representation or refrain from giving legal advice to *pro se* parties in immigration proceedings.⁶
5. District judges in the Eastern District of New York⁷ and Northern District of California⁸ enjoined enforcement of Trump Administration regulations rescinding the Deferred Action for Childhood Arrivals (“DACA”) program, which provided discretionary relief from removal for certain undocumented individuals who arrived in the United States as children.

Regardless of the correctness of the constitutional and statutory analysis in these cases,⁹ a distinct problem involves the remedies imposed.

² Int’l Refugee Assistant Project v. Trump, 883 F.3d 233 (4th Cir. 2014); Hawaii v. Trump, 878 F.3d 662, 674 (9th Cir. 2017).

³ Hawaii v. Trump, 859 F.3d 741, 789 (9th Cir. 2017), *vacated as moot*, Hawaii v. Trump, 874 F.3d 1112 (9th Cir. 2017); Int’l Refugee Assistance Project v. Trump, 857 F.3d 554, 604 (4th Cir. 2017), *vacated as moot*, Trump v. Int’l Refugee Assistance, 138 S. Ct. 353 (2017); Washington v. Trump, 847 F.3d 1151, 1156 (9th Cir. 2017).

⁴ Trump v. Hawaii, 138 S. Ct. 2392 (2018).

⁵ Chicago v. Sessions, 264 F. Supp. 3d 933, 951 (N.D. Ill. 2017) *aff’d*, 888 F.3d 272 (7th Cir. 2018); Santa Clara v. Trump, 250 F. Supp. 3d 497, 540 (N.D. Cal. 2017), *aff’d in part, vacated in part, and remanded*, 897 F.3d 1225 (9th Cir. 2018); *see also* Chicago v. Sessions, No. 17C5720, 2017 WL 4572208, at *1 (N.D. Ill. Oct. 13, 2017).

⁶ Nw. Immigrant Rights Project v. Sessions, No. C17-716 RAJ, 2017 WL 3189032, at *7 (W.D. Wash. July 27, 2017).

⁷ Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 407 (E.D.N.Y. 2018).

⁸ Regents of Univ. of California v. U.S. Dep’t of Homeland Security, 279 F. Supp. 3d 1011, 1037 (N.D. Cal. 2018).

⁹ For scholarship considering the constitutional issues, *see, e.g.*, Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L & POL. 213, 219 (2015); Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. ONLINE 96, 97 (2015); Ming H. Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. 87, 88 (2016); Adam B. Cox and Christina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 107 (2015); Stella Burch Elias, *Immigrant*

Upon the judicial determination of constitutional validity, each of these courts issued or affirmed injunctions protecting or purporting to protect not only the named plaintiffs, but all persons. The injunctions prohibited or purported to prohibit enforcement of the challenged laws, regulations, and policies not only against the named plaintiffs, but against all persons everywhere who might be subject to enforcement of those laws.¹⁰

These broad injunctions are problematic in two respects.

One problem involves nomenclature. Courts have labeled these “nationwide” or even “worldwide”¹¹ injunctions. But these injunctions prohibit government officials from enforcing the challenged laws, regulations, and policies against the universe of persons who might be subject to enforcement, regardless of whether they were parties to the lawsuit producing the injunction. They are better described as “universal,” a term that suggests something about the scope of the injunction with respect to who is protected and from what.¹² “Nationwide” speaks more to where protected persons enjoy those protections.

The second problem is that by any name courts should not issue such broad injunctions, certainly not as frequently, automatically, and seemingly unthinkingly as they have been in immigration cases. Although the Supreme Court and lower courts have issued or affirmed universal injunctions in the past,¹³ their use has accelerated in recent years,¹⁴ even as courts¹⁵ and commentators¹⁶ insist that they should not be routine. A variety of arguments are proffered in favor of universal injunctions, from facial unconstitutionality¹⁷ to the constitutional demand for uniform immigration¹⁸ law¹⁹ to judicial economy to rule-of-law considerations that

Covering, 58 WM. & MARY L. REV. 765, 769 (2017); Christopher N. Lasch et al, *Understanding “Sanctuary Cities”*, 59 B.C. L. REV. 1703 (forthcoming 2018); Earl M. Maltz, *The Constitution and the Trump Travel Ban*, 22 LEWIS & CLARK L. REV. 391 (2018).

¹⁰ Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 419 (2017); see *Int’l Refugee Assistance Project*, 883 F.3d at 272–73; *Batalla Vidal*, 279 F. Supp. 3d at 437; *Chicago*, 264 F. Supp. 3d at 951; *Santa Clara*, 250 F. Supp. 3d at 539.

¹¹ *Hawaii v. Trump*, 878 F.3d 662, 701, (9th Cir. 2017)

¹² Justice Thomas suggested this as the more “precise” term. *Trump v. Hawaii*, 138 S. Ct. 2424, n.1 (2018) (Thomas, J., concurring). Bray uses “national” injunction to capture the same idea of an injunction protecting beyond the plaintiffs. Bray, *supra* note 10, at 419 n.5.

¹³ DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 436 (4th ed. 2010); Bray, *supra* note 10, at 437–45.

¹⁴ Bray, *supra* note 10, at 437.

¹⁵ *Id.*

¹⁶ Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. ____ (forthcoming 2018).

¹⁷ *Chicago v. Sessions*, No. 17C5720, 2017 WL 4572208, at *2 (N.D. Ill. Oct. 13, 2017); *Santa Clara*, 250 F. Supp. 3d at 507.

¹⁸ U.S. CONST. art. I, § 8, cl. 4 (empowering Congress “to establish an uniform Rule of Naturalization”).

¹⁹ *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017);

would be undermined if federal law were not enforced against some and were enforced against others.²⁰ None of these arguments withstands scrutiny. Universal injunctions remain inconsistent with the historic scope of courts' equity powers, as informed by Article III of the Constitution.²¹ They raise concerns for manipulative litigant behavior. And they are ungrounded in the needs of the cases—nothing about these cases or the challenged laws, regulations, and policies requires an injunction barring their enforcement against all persons who might be subject to those laws.

Samuel Bray argues that a “federal court should give an injunction that protects the plaintiff vis-à-vis the defendant, wherever the plaintiff and the defendant may both happen to be. The injunction should not constrain the defendant’s conduct vis-à-vis nonparties.”²² Douglas Laycock similarly argues that “the court in an individual action should not globally prohibit a government agency from enforcing an invalid regulation; the court should order only that the invalid regulation not be enforced against the individual plaintiff.”²³ The Supreme Court endorsed the view in *Doran v. Salem Inn*²⁴ that “neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute.”²⁵

These scope-of-injunction concerns arise in constitutional litigation challenging local,²⁶ state,²⁷ and federal²⁸ laws. The ongoing immigration and immigration-adjacent controversies discussed in this volume offer an appropriate context to consider the problem of the universal injunction, what proper injunctions should look like, and how constitutional litigation and adjudication should proceed under appropriately scoped judicial decrees, generally and in this class of actions. This Article focuses on six sets of federal laws, regulations, and policies governing or related to immigration that have been subject to constitutional challenge in the past decade and that have produced universal (although labeled nationwide) injunctions barring enforcement of the challenged law against all persons.

Texas v. United States, 809 F.3d 134, 187–88 (5th Cir. 2015).

²⁰ *Chicago*, 2017 WL 4572208 at *4.

²¹ U.S. CONST. art. III, § 2, cl. 1.

²² Bray, *supra* note 10, at 469.

²³ *Id.* at 276.

²⁴ 422 U.S. 922, 922 (1975).

²⁵ *Id.* at 931.

²⁶ *Steffel v. Thompson*, 415 U.S. 452, 460 (1974).

²⁷ *Strawser v. Strange*, 105 F. Supp. 3d 1323, 1330 (S.D. Ala. 2015); Josh Blackman and Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 244 (2016); Howard M. Wasserman, *Crazy in Alabama: Judicial Process and the Last Stand Against Marriage Equality in the Land of George Wallace*, 110 NW. U. L. REV. ONLINE 1, 4–5 (2015).

²⁸ *See, e.g., Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935); Bray, *supra* note 10, at 433–35.

Part I discusses litigation over seven areas of immigration or immigration-adjacent laws, regulations, and policies. Part II considers the nomenclature problem and explains why the phrase “universal injunction,” rather than “nationwide injunction,” better captures what courts have been doing. Part III argues that universal injunctions are inappropriate as a matter of equitable principle, judicial decisionmaking, and Article III of the Constitution, while considering and rejecting the arguments courts and commentators have offered for such orders. Part IV considers the appropriate scope of injunctions in the six immigration and immigration-adjacent areas and how litigation would proceed under properly scoped injunctions.

I. INJUNCTIONS IN IMMIGRATION AND IMMIGRATION-ADJACENT CONTROVERSIES

This Article focuses on federal laws, regulations, and policies touching on immigration and immigration-adjacent matters because that is the focus of this volume and because these laws have been the highest-profile targets for universal injunctions. Although the cases discussed below label the injunctions “nationwide,” I will use the more-accurate “universal injunction.” For present purposes, I remain agnostic to whether the courts were correct in declaring these laws, regulations, and policies constitutionally or statutorily invalid. My focus is on the appropriate scope of the injunctive remedy upon declaration of invalidity.

A. DAPA

The litigation that started the recent wave of universal injunctions against federal immigration law involved President Obama’s Deferred Action for Parents of Americans and Lawful Permanent Residents²⁹ (“DAPA”) program, an extension of the Deferred Action for Childhood Arrivals (“DACA”).³⁰ The basic idea was that certain qualified individuals—primarily childhood arrivals and parents of U.S. citizens or lawful permanent residents meeting additional conditions—who otherwise lack lawful immigration status in the United States would have their removals deferred (or moved lower on the removal priority list) as a matter of executive discretion and would become eligible for certain state and federal benefits.³¹

Texas and 25 other states sued in the Southern District of Texas, al-

²⁹ SEC. JEH CHARLES JOHNSON, U.S. DEP’T OF HOMELAND SEC., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (2014).

³⁰ SEC. JANET NAPOLITANO, U.S. DEP’T OF HOMELAND SEC., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (2012).

³¹ *Texas v. United States*, 809 F.3d 134, 146–49 (5th Cir. 2015).

leging that DAPA violated the Administrative Procedure Act³² and the President’s constitutional obligation to “take Care that the Laws be faithfully executed.”³³ The district court preliminarily enjoined enforcement of DAPA in any state—that is, the Department of Homeland Security could not defer removal or accord status benefits to persons anywhere in the United States.³⁴ The Fifth Circuit affirmed.³⁵ As to the scope of the injunction, the court of appeals stated that partial implementation of DAPA outside the 26 plaintiff states would undermine the uniform and unified immigration law demanded by the Constitution and intended by Congress.³⁶ It also would render the injunction ineffective, because DAPA beneficiaries from non-protected states remained free to move about the country and enter protected states such as Texas.³⁷

An eight-member Supreme Court affirmed the decision, including the universal injunction, by an evenly divided Court.³⁸

B. *Travel Ban*

The highest-profile use of universal injunctions has been in the wave of federal litigation over President Trump’s travel bans.

In March 2017, Trump issued Executive Order No. 13780, entitled “Protecting the Nation from Foreign Terrorist Entry into the United States.”³⁹ The order imposed a 90-day ban on travel to the United States for nationals of six majority-Muslim nations, ordered federal agencies to review procedures for granting visas for nationals of those nations, and ordered review of procedures for refugee admissions.⁴⁰ Several lawsuits followed, challenging the validity of the order on First Amendment, equal protection, and statutory grounds.

The States of Washington and Minnesota sued in the Western District of Washington. They argued that the order harmed the teaching and research missions of their universities by restricting students, faculty,

³² *Id.* at 149–50.

³³ U.S. CONST. art. I, § 8, cl. 4.

³⁴ *Texas*, 809 F.3d at 146.

³⁵ *Id.*

³⁶ *Id.* at 187–88.

³⁷ *Id.* at 188.

³⁸ *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016). The case was argued in spring 2016, during the 14-month period between the February 2016 death of Justice Scalia and the April 2017 confirmation of Justice Gorsuch as his successor. Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court 2* (Ga. State Univ. College of Law), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2900555.

³⁹ Exec. Order No. 13780 of Mar. 6, 2017, *Protecting the Nation from Foreign Terrorist Entry into the United States*, 82 Fed. Reg. 13209, 13209 (Mar. 9, 2017) (to be codified in 3 C.F.R. (2018)).

⁴⁰ *Id.* This order revoked a previous executive order, issued in January, which sparked its own wave of emergency litigation. *Cf.* W. Bradley Wendel, *Sally Yates, Ronald Dworkin, and the Best View of the Law*, 115 MICH. L. REV. ONLINE 78 (2017).

and other visiting scholars and dignitaries who are nationals of the targeted countries and who are unable to study and work at those institutions.⁴¹ The district court granted a temporary restraining order, and the Ninth Circuit denied the government's motion to stay the order pending appeal, including its universal scope.⁴² The State of Hawaii and an individual sued in the District of Hawaii; Hawaii claimed similar injury to its universities, while the individual plaintiff claimed injury from the order preventing his Syrian-national mother-in-law from visiting the United States.⁴³

Three organizations and six individuals filed a separate action in the District of Maryland. The individual plaintiffs were U.S. citizens or lawful permanent residents whose family members would be prevented or delayed from entering the United States.⁴⁴ The International Refugee Assistance Project⁴⁵ ("IRAP") and HIAS, Inc.⁴⁶ assist refugees in resettling in the United States. The Middle East Studies Association of North America is an organization of students and scholars of Middle East studies, whose academic work would be limited by being unable to interact with students and scholars from the targeted nations.⁴⁷ The district court enjoined all enforcement and the Fourth Circuit affirmed, identifying three reasons for universality of the injunction—that plaintiffs are dispersed throughout the country, the need for uniform immigration law, and the unique nature of the Establishment Clause violation and the "message" of exclusion the order sent to plaintiffs and non-plaintiffs alike.⁴⁸

The Supreme Court granted certiorari in *Hawaii* and *IRAP* and stayed the preliminary injunctions pending appeal, to the extent they prevented enforcement with respect to nationals lacking "any bona fide relationship with a person or entity in the United States."⁴⁹ It left the injunctions in effect "with respect to respondents and those similarly situated."⁵⁰ The second executive order expired by its terms in fall 2017, prompting the Court to dismiss the appeals as moot, to vacate the lower courts' judgments, and to order dismissal of the actions as moot.⁵¹

In September 2017, Trump issued Proclamation 9645, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted En-

⁴¹ *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017).

⁴² *Id.* at 1166–67.

⁴³ *Hawaii v. Trump*, 859 F.3d 741, 789 (9th Cir. 2017).

⁴⁴ *International Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 548 (D. Md. 2017).

⁴⁵ *Id.* at 548–49.

⁴⁶ *Id.*

⁴⁷ *Id.* at 549.

⁴⁸ *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 604–05 (4th Cir. 2017).

⁴⁹ *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (granting certiorari).

⁵⁰ *Id.*

⁵¹ *Trump v. Hawaii*, 138 S. Ct. 377, 377 (2017).

try into the United States by Terrorists or Other Public-Safety Threats.”⁵² This third travel order identified eight countries (two of which—North Korea and Venezuela—are not majority-Muslim) whose nationals should not be allowed entry to the United States.

The district court in *Hawaii* again enjoined enforcement.⁵³ The Ninth Circuit again affirmed a universal injunction, emphasizing the need for uniformity in immigration policy and that any application of the Proclamation to persons beyond the plaintiffs would violate federal law.⁵⁴ But the court rejected a “worldwide injunction” protecting foreign nationals lacking a credible claim of a bona fide relationship with a person or entity in the United States.⁵⁵

In *IRAP*, the district court enjoined enforcement of the Proclamation again universally, emphasizing the special problems of a law that violates the Establishment Clause with a message of ostracism that affects everyone, beyond the plaintiffs.⁵⁶ The Fourth Circuit largely affirmed as to the six majority-Muslim countries, but not as to North Korea and Venezuela. *IRAP* and other resettlement-organization plaintiffs had to similarly show a bona fide relationship with potential refugee clients that is “formal, documented, and formed in the ordinary course, rather than for the purpose of evading the travel restrictions.”⁵⁷ The universal scope was appropriate because plaintiffs are scattered throughout the country, making piecemeal injunction relief difficult; because Congress has an interest in uniform immigration law; and because enjoining enforcement of a regulation issued in violation of the Constitution only as to the plaintiff “would not cure its deficiencies.”⁵⁸

A divided Supreme Court reversed in *Hawaii*, declaring the travel ban a valid exercise of presidential power over immigration.⁵⁹ Because the order was valid, the Court declined to address the scope of the injunction.⁶⁰ Justice Thomas concurred to argue that “universal injunctions are legally and historically dubious. If federal courts continue to issue them, this Court is dutybound to adjudicate their authority to do so.”⁶¹ Dissenting on the merits, Justice Sotomayor argued that universal relief was appropriate given the nature of the constitutional violation.⁶²

⁵² Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,161 (Sept. 27, 2017).

⁵³ *Hawaii v. Trump*, 878 F.3d 662, 673 (9th Cir. 2017).

⁵⁴ *Id.* at 701–02.

⁵⁵ *Id.*

⁵⁶ *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 632 (D. Md. 2017).

⁵⁷ *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 272–73 (4th Cir. 2018) (en banc) (quoting *Trump*, 137 S. Ct. at 2088).

⁵⁸ *Id.* at 273.

⁵⁹ *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018).

⁶⁰ *Id.* at 2423; Transcript of Oral Argument at 72–73, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

⁶¹ *Trump v. Hawaii*, 138 S. Ct. at 2429 (Thomas, J., concurring).

⁶² *Id.* at 2446 n.13 (Sotomayor, J., dissenting).

C. *Sanctuary Cities*

The Department of Justice imposed new conditions on federal programs providing grants to state, county, and municipal law enforcement. The regulations would require withholding of federal funds to “sanctuary cities” that fail or decline to assist the federal government in enforcing immigration laws, especially by notifying federal agencies of the identity and location of persons within those cities unlawfully present in the United States and by declining to hold persons detained on state and local charges for additional periods to allow federal immigration officials to take them into immigration detention.⁶³

The County of Santa Clara and the City and County of San Francisco challenged the funding restrictions in the Northern District of California, arguing that the funding restrictions violated separation of powers, the Tenth Amendment, and Fifth Amendment due process.⁶⁴ The district court preliminarily,⁶⁵ then permanently,⁶⁶ enjoined DOJ officials from enforcing the restrictions or from stripping state and local law-enforcement agencies of federal funds. The district court enjoined the defendants from enforcing the regulations as to all funding of all state and local governments; it emphasized the facial unconstitutionality of the regulations and that the violations were not limited to Santa Clara and San Francisco, but applied to all jurisdictions nationwide.⁶⁷ A panel of the Ninth Circuit affirmed on the merits, but narrowed the injunction to prohibit enforcement of the regulations only as to San Francisco and Santa Clara and as to one non-party, the State of California. The court found that the plaintiff municipalities offered sufficient evidence of negative effects on their budgets if federal funds were denied to them or to the State of California, from which both municipalities drew a portion of their budgets. But the plaintiffs failed to show how they would be affected by enforcement against other non-party jurisdictions, so the injunction should not extend that far.⁶⁸

The City of Chicago filed a similar action in the Northern District of Illinois, challenging the threat to withhold funds from one grant program. That court also preliminarily enjoined enforcement universally, finding “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

⁶³ *Chicago v. Sessions*, 264 F. Supp. 3d 933, 937–38 (N.D. Ill. 2017); *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 509–11 (N.D. Cal. 2017).

⁶⁴ *Santa Clara*, 250 F. Supp. 3d at 507.

⁶⁵ *Id.* at 508–09.

⁶⁶ *Santa Clara v. Trump*, 250 F. Supp. 3d 1196, 1201 (N.D. Cal. 2017).

⁶⁷ *Id.*; *Santa Clara*, 250 F. Supp. 3d at 539.

⁶⁸ *San Francisco v. Trump*, No. 17-17478, slip op. at 34–35 (9th Cir. Aug. 1, 2018).

General would differ in another jurisdiction.”⁶⁹

In denying a motion to stay the preliminary injunction pending appeal, the district court offered the most comprehensive analysis and justification for a universal injunction, emphasizing several points. The City made a facial challenge to the federal laws and regulations at issue, so the government’s power and the constitutional violation would be the same as to all entities nationwide.⁷⁰ The district court cited cases issuing or affirming universal injunctions in immigration cases, with the Supreme Court at least tacitly validating the practice.⁷¹ Judicial economy counseled against requiring other jurisdictions to file their own lawsuits to obtain injunctions barring enforcement as to them (with the decision in *Chicago* serving as at least persuasive authority), where 37 cities and counties had submitted amicus briefs in support of Chicago.⁷² The court recognized recent scholarship raising concerns with the practice; it acknowledged that a universal injunction should not be the default approach, but should be limited to extraordinary cases.⁷³ But this was the extraordinary case, given concerns for federal uniformity, the unfairness resulting from enforcement of the funding regulations against some municipalities and not others, and concerns for the rule of law.⁷⁴

A divided Seventh Circuit panel affirmed, offering a lengthy defense of universal injunctions as a rarity that can “play an important and proper role in some circumstances,”⁷⁵ while a dissenting judge argued that the universal injunction “constituted an overstep of the district court’s authority.”⁷⁶ On petition of the government, the Seventh Circuit granted rehearing en banc on the scope of the injunction and vacated the panel opinion “insofar as it sustained the district court’s decision to extend preliminary relief nationwide.”⁷⁷ A follow-up order stayed the injunction as to its universal scope pending the en banc decision.⁷⁸ While the scope-of-injunction issue was pending before the en banc court of appeals, the district court made the universal injunction permanent.⁷⁹ But the court stayed the scope of the injunction’s protections to jurisdictions other than Chicago; it acknowledged the controversy over universal injunctions, that the court of appeals was poised to resolve the issue, and that

⁶⁹ *Chicago*, 264 F. Supp. 3d at 951.

⁷⁰ *Chicago v. Sessions*, No. 17C5720, 2017 WL 4572208, at *2 (N.D. Ill. Oct. 13, 2017).

⁷¹ *Id.*

⁷² *Id.* at *3.

⁷³ *Id.* at *4.

⁷⁴ *Id.* at *4–5.

⁷⁵ *Chicago v. Sessions*, 888 F.3d 272, 288 (7th Cir. 2018); *id.* at 287–93.

⁷⁶ *Id.* at 294 (Manion, J., concurring in the judgment in part and dissenting in part).

⁷⁷ Order, *Chicago v. Sessions*, No. 17-2991 (7th Cir. June 4, 2018), ECF No. 128.

⁷⁸ Order, *Chicago v. Sessions*, No. 17-2991 (7th Cir. June 26, 2018) ECF No. 134.

⁷⁹ *Chicago v. Sessions*, No. 17C5720, 2018 WL 3608564, at *18 (N.D. Ill. Jul. 27, 2018).

the court of appeals had stayed the universal scope of the preliminary injunction, suggesting that a stay was appropriate because DOJ might succeed on the scope question on appeal.⁸⁰

D. Regulating Attorneys in Immigration Proceedings

The Executive Office of Immigration Review (“EOIR”), part of DOJ, enforces regulations of attorneys practicing in immigration proceedings. One regulation required attorneys to file a notice of appearance when the attorney engaged in “practice” or “preparation” in a proceeding, the latter including incidental advice, activities, or preparation, even outside of full representation.⁸¹ The effect of the regulation was that attorneys must appear and undertake full legal representation in cases, although attorney and advocacy groups often want to provide only limited assistance for parties otherwise proceeding *pro se*.⁸²

The Northwest Immigrant Rights Project (“NWIRP”) provides legal services in immigration proceedings in Washington, sometimes appearing as counsel and sometimes advising *pro se* litigants. It received a cease-and-desist letter from EOIR, ordering it to stop providing any assistance in any proceedings without appearing and providing full representation, something NWIRP alleged it lacked resources to do.⁸³ NWIRP filed suit in the Western District of Washington, alleging that the regulations violated the First Amendment, by interfering with communications between NWIRP and parties to immigration proceedings, and the Tenth Amendment, by infringing on the state power to regulate attorneys.⁸⁴ The court preliminarily enjoined enforcement of the cease-and-desist letter and the regulations pursuant to which the letter issued. It acknowledged EOIR’s stated intention to enforce the regulations against other attorneys and applied the injunction to “any other similarly situated non-profit organizations who, like NWIRP, self-identify and disclose their assistance on *pro se* filings.”⁸⁵

E. Abortion Access for Detained, Undocumented, Unaccompanied Minors

This class of immigration-adjacent litigation did not produce an unwarranted universal injunction, but instead proceeded according to appropriate judicial and remedial procedures. Plaintiffs challenged policies of the Office of Refugee Settlement (an agency in the Department of Health and Human Services) refusing to allow unaccompanied undocumented minors in HHS detention to leave the facilities to terminate

⁸⁰ *Id.*

⁸¹ *Nw. Immigrant Rights Project v. Sessions*, No. 17-716 RAJ, 2017 WL 3189032, at *1 (W.D. Wash. July 27, 2017).

⁸² *Id.* at *1–2.

⁸³ *Id.* at *2.

⁸⁴ *Id.* at *2–6.

⁸⁵ *Id.* at *7.

pregnancies.⁸⁶ A lawsuit filed by a guardian ad litem produced two district court injunctions compelling HHS to permit three girls (identified as J.D., J.R., and J.P.) to obtain abortions.⁸⁷ The judge expressly prohibited HHS officials from interfering or retaliating against the three girls for obtaining abortions, but made no mention of, and did not extend the order to, other similarly situated detainees.⁸⁸

The district then certified a class action under Federal Rule of Civil Procedure 23(b)(2) of “all pregnant, unaccompanied immigrant minor children (“UC”s) who are or will be in the legal custody of the federal government” and granted a class-wide preliminary injunction.⁸⁹

F. *DACA Rescission*

In 2012, the Department of Homeland Security created DACA, a program permitting certain individuals without lawful immigration status who entered the United States as children to obtain contingent discretionary relief from deportation and authorization to work legally in the United States. In 2017, DHS announced a gradual end to DACA.⁹⁰

In the Northern District of California, five groups of plaintiffs filed non-class actions. The plaintiffs were the President and Regents of the University of California, four states, a city, a county, a union, and several individual DACA recipients; they argued that rescission violated the APA. The district agreed the new order was invalid and ordered DHS to “maintain the DACA program on a nationwide basis.”⁹¹ It insisted that the scope of the injunction was appropriate given the strong interest in uniform immigration law and the problem of DACA rescission affecting every state and territory of the United States. “Limiting relief to the States in suit or the Individual Plaintiffs would result in administrative confusion and simply provoke many thousands of individual lawsuits all over the

⁸⁶ *Garza v. Hargan*, 874 F.3d 735, 737 (D.C. Cir. 2017) (en banc) (order denying stay); *id.* at 736 (Millett, J., concurring); *id.* at 743 (Henderson, J., dissenting); *see also* Marty Lederman, *Lawless and Cruel: The HHS Abortion Scandal That’s Flying Under the Radar*, BALKINIZATION (Dec. 22, 2017), <https://balkin.blogspot.com/2017/12/lawless-and-cruel-hhs-abortion-scandal.html> [hereinafter Lederman, *Lawless and Cruel*]; Marty Lederman, *The SG’s Remarkable Cert. Petition in Hargan v. Garza, the “Jane Doe” Abortion Case*, BALKINIZATION (Nov. 8, 2017), <https://balkin.blogspot.com/2017/11/the-sgs-remarkable-cert-petition-in.html> [hereinafter Lederman, *The SG’s Remarkable Cert. Petition*]; Michael C. Dorf, *The Troublingly Widening Gyre of Complicity Claims*, VERDICT: JUSTICIA (Nov. 1, 2017), <https://verdict.justia.com/2017/11/01/troublingly-widening-gyre-complicity-claims>.

⁸⁷ *Garza v. Hargan*, 2017 WL 6462270, at *2–3 (D.D.C. Dec. 18, 2017); *Garza v. Hargan*, 2017 WL 4707287, at *1 (D.D.C. Oct. 18, 2017).

⁸⁸ *Garza*, 2017 WL 4707287, at *1.

⁸⁹ *Garza v. Hargan*, 307 F. Supp. 3d 145, 150 (D.D.C. 2018).

⁹⁰ *Regents of Univ. of California v. United States Dep’t. of Homeland Security*, 279 F. Supp. 3d 1011, 1022–23, 1025–26 (N.D. Cal. 2018); *Batalla Vidal v. Nielson*, 279 F. Supp. 3d 401, 407, 413–16 (E.D.N.Y. 2018); *Batalla Vidal v. Duke*, 295 F. Supp. 3d, 127, 137–40 (E.D.N.Y. 2017).

⁹¹ *Regents*, 279 F. Supp. 3d at 1048.

country.”⁹²

A different group of plaintiffs filed suit in the Eastern District of New York. Plaintiffs included individuals, 15 states, and the District of Columbia, alleging violations of equal protection and due process and the APA. The district court enjoined DACA rescission “on a universal or ‘nation-wide’ basis,” using the terms synonymously.⁹³ It insisted it did not do so “lightly” and recognized commentary criticizing the practice.⁹⁴ It emphasized the strong federal interest in uniform immigration law, as well as how impractical it would be to issue a narrower injunction that sufficiently protected plaintiffs’ interests, in light of the ability of people to move from state to state and job to job.⁹⁵

G. Family Separation

In Spring 2018, a new immigration controversy arose. Federal agencies began a practice of separating minor children from parents who attempted to unlawfully enter the United States, whether at or between points of entry, and were placed in detention. Attorney General Jeff Sessions announced a “zero tolerance” policy, under which all adults entering the United States unlawfully would be prosecuted for unlawful entry and detained pending prosecution, requiring that children be separated. President Trump issued an executive order calling for maintaining family unity where feasible and consistent with law, but maintaining a policy of continued rigorous prosecution of unlawful entry without announcing plans for reuniting families. Meanwhile, tent cities and space on military installations were setup for detention of families. The new controversy repeated the media coverage and public protests that accompanied the original travel bans.⁹⁶

Two plaintiffs sued in the Southern District of California. One, identified as “Ms. L,” presented herself at a point of entry and requested asylum, but her minor daughter was moved to a different facility across the country, based on concerns that she was not her mother; they were reunited only after the mother was moved into removal proceedings to pursue her asylum claim. The second, identified as “Ms. C,” entered the United States unlawfully and was placed in criminal detention pending prosecution, with her son moved to a different facility across the country; after Ms. C served a 25-day prison sentence and was moved to removal proceedings to make an asylum claim, she was reunited with her son following an eight-month separation.⁹⁷ Plaintiffs alleged that the policy and

⁹² *Id.* at 1049.

⁹³ *Batalla Vidal*, 279 F. Supp. 3d at 437.

⁹⁴ *Id.*

⁹⁵ *Id.* at 438.

⁹⁶ *Ms. L v. U.S. Immigration and Customs Enforcement*, 310 F.Supp.3d 1133, 1137–40 (S.D. Cal. 2018).

⁹⁷ *Id.* at 1137–38.

practice of separating minor children from their parents and not taking steps to reunite them “shocked the conscience” and violated substantive due process.⁹⁸

The district court certified a class for injunctive relief of “[a]ll adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child who is or will be separated from them by DHS and detained in Office of Refugee Resettlement (“ORR”) custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child.”⁹⁹ The court then issued a classwide preliminary injunction, prohibiting federal agencies from detaining parents “without and apart” from their minor children and ordering agencies to release any minor children in detention and to reunite children with their parents.¹⁰⁰

II. UNIVERSAL (NOT NATIONWIDE)

The first problem with these broad injunctions involves nomenclature, in labeling them “nationwide” injunctions rather than “universal” injunctions.

The scope of an injunction involves two distinct considerations—“who” and “where.” “Who” refers to the persons protected and bound by the injunction—who enjoys the blanket of the court’s power, who can return to court to enforce the injunction if it is disobeyed, and who is bound to act or refrain from acting in some respect.¹⁰¹ “Where” refers to the “territorial breadth” or geographic scope of the order, where the injunction and the court’s enforcement power can find those protected or bound by that injunction. In the context of the pre-enforcement constitutional litigation at issue, “where” means the place in the country the government is barred from enforcing the law; “who” means against what persons it is barred from enforcing the challenged law and against what persons it remains free from judicial decree to enforce the challenged law.

Courts conflate these distinct aspects in posing the central distinction as between a nationwide injunction and an injunction limited only to the plaintiffs.¹⁰² One judge in the Northern District of California erroneously framed the issue as whether the injunction “should be issued only with regards to the plaintiffs and should not apply nationwide.”¹⁰³ At the same time, the terms should not be used interchangeably or synony-

⁹⁸ *Id.* at 1142–43.

⁹⁹ *Id.* at 1139 n.5.

¹⁰⁰ *Id.* at 1149–50.

¹⁰¹ Bray, *supra* note 10, at 419 n.5.

¹⁰² *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017).

¹⁰³ *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017).

mously.¹⁰⁴

It is “inapt”¹⁰⁵ to describe these injunctions as nationwide or to justify them on the conclusion that plaintiffs “established injury that reaches beyond the geographic bounds” of the judicial district or state.¹⁰⁶ Both framings describe the geographic “where” of the injunction’s enforcement. So understood, all injunctions are and should be nationwide—they should reach beyond the geographical bounds of the issuing judicial district or affirming appellate circuit. All injunctions should protect the plaintiff against defendants’ unconstitutional or unlawful conduct throughout the nation, wherever the plaintiff may be or should go. That is, government officials are and should be prohibited from enforcing the constitutionally defective law or regulation against the protected party wherever the protected party may be or should go. Rights are violated by threatened enforcement of a constitutionally defective law wherever the rights-holder goes, and the injunction protecting her against those rights violations protects her wherever she goes.

The significant feature of these injunctions is their “who.” They prohibit enforcement of the challenged law, regulation, or policy against the universe of people who might be subject to enforcement of the challenged law, regulation or policy, whether parties to the constitutional litigation or otherwise. The injunctions purport to prohibit government officials from enforcing the challenged laws against the universe of all persons and entities subject to laws, not only the named plaintiffs. During oral arguments in *Hawaii*, Justice Gorsuch recognized the problem as injunctions “not limited to relief for the parties at issue” striking down “a federal statute with regard to anybody anywhere in the world.”¹⁰⁷ The appropriate term for injunctions purporting to reach a broad “who” is “universal,” because the injunctions prohibit enforcement against the universe of people, parties or otherwise, against whom the challenged law might be enforced. Justice Thomas agreed this is the more precise and appropriate term because the distinctive feature of the injunctions is prohibiting the government from enforcing a policy with respect to anyone.¹⁰⁸

*NWIRP*¹⁰⁹ illustrates the distinction. By prohibiting the federal government from enforcing the attorney regulations against *NWIRP*, the district court necessarily prohibited enforcement of the regulations against *NWIRP* anywhere in the United States it may attempt to provide legal

¹⁰⁴ *Batalla Vidal v. Nielson*, 279 F. Supp. 3d 401, 407, 413–16 (E.D.N.Y. 2018).

¹⁰⁵ *Bray*, *supra* note 10, at 419 n.5.

¹⁰⁶ *Regents of Univ. of California v. United States Dep’t of Homeland Security*, 279 F. Supp. 3d 1011, 1049 (N.D. Cal. 2018).

¹⁰⁷ Transcript of Oral Argument at 72–73, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

¹⁰⁸ *Trump*, 138 S. Ct. at 2424 n.1 (2018) (Thomas, J., concurring).

¹⁰⁹ *Nw. Immigrant Rights Project v. Sessions*, No. C17-716 RAJ, 2017 WL 3189032 at *7 (W.D. Wash. July 27, 2017).

services in immigration proceedings. NWIRP works in Washington,¹¹⁰ so the injunction obviously prohibits enforcement in proceedings held there. But if NWIRP began providing legal services in immigration proceedings in Oregon or Texas or Florida or Maine, the injunction would bar enforcement of the regulations against NWIRP in those proceedings. The protection that the injunction afforded to NWIRP against enforcement applied wherever it was and wherever it might otherwise be subject to enforcement. The injunction was properly and appropriately nationwide. The issue is that the district court extended the “who” of the injunction, purporting and intending to protect other immigration attorneys and representation organizations against enforcement of those regulations. It prohibited enforcement of the challenged regulations not only against NWIRP, but against all other attorneys and representation organizations.¹¹¹

Bray recognizes that it is more appropriate to speak of the scope of an injunction in terms of universality rather than nationwide, but expresses concern that universality may fail to capture “the distinctive fact that these injunctions constrain the national government, as opposed to state governments.”¹¹² But universality—enjoining the defendant’s constitutionally defective conduct with respect to the universe of prospective targets—remains the central idea and central problem, regardless of the source of the challenged law. The difference between a universal injunction prohibiting enforcement of a federal law and a universal injunction prohibiting enforcement of a state law is the size of the universes against whom enforcement is proscribed. But the concept remains appropriate.

In *Koontz v. Watson*, the District of Kansas declared constitutionally invalid a Kansas law requiring all persons who contract with the state to certify that they are not involved in boycotts of Israel.¹¹³ The plaintiff, a teacher hired to conduct teacher-training programs, alleged that the law violated the First Amendment and the court agreed. The injunction prohibited the state from enforcing any statute, law, policy, or practice requiring independent contractors to declare that they are not participating in a boycott of Israel and prohibited the state “from requiring any independent contractor” to certify that they are not participating in a boycott of Israel as a condition of contracting with the state.¹¹⁴ That injunction was universal—prohibiting enforcement of any state laws against any non-party potential contractors with the state, regardless of who those contractors are, where they are, what they are contracting for, and what laws they are subject to.

An injunction prohibiting enforcement of a state law should be as nationwide as an injunction prohibiting enforcement of federal law—it

¹¹⁰ *Id.* at * 1.

¹¹¹ *Id.* at * 7.

¹¹² *Id.* at 419 n.5.

¹¹³ *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1007 (D. Kan. Feb. 2018).

¹¹⁴ *Id.* at 1027.

should protect the plaintiff against enforcement of the constitutionally defective state law everywhere she is or goes in the United States. This is less of a practical problem with state laws because of constitutional and prudential limits on extraterritorial application of state laws. But that renders a nationwide injunction unnecessary; it does not render the terminology inapplicable. If a court enjoins Florida from enforcing a law prohibiting flag-burning against the plaintiff, the injunction prohibits Florida from enforcing that law anywhere the plaintiff might burn a flag. Limits on extraterritorial application of Florida's flag-burning law also prohibit that enforcement.

While calling beyond-the-plaintiff injunctions “nationwide” is inappropriate, universality is not the only available term to capture the real issue. Bray uses “national” to describe an injunction protecting the “nation” of persons against enforcement.¹¹⁵ Justice Gorsuch, perhaps sarcastically, referred to a “cosmic injunction.”¹¹⁶ Michael Morley frames the issue around the “orientation” of the injunction. A plaintiff-oriented injunction “vindicates the plaintiffs’ rights, but otherwise leaves the underlying statute or regulation undisturbed.”¹¹⁷ A defendant-oriented injunction allows a single judge in one case “to completely prohibit the defendant agency or official from enforcing the challenged provision against anyone throughout the state or nation,” the equivalent of a universal injunction.¹¹⁸

Because “nationwide” and “universal” address different aspects of the scope of the judicial order, they are not synonymous or interchangeable. An injunction can be both nationwide and universal, as with the recent immigration injunctions. Injunctions are nationwide in protecting the named plaintiffs against enforcement of the constitutionally defective laws throughout the nation, wherever the plaintiffs are or go; that is proper and unremarkable. It also is consistent with *Califano v. Yamasaki*,¹¹⁹ where the Supreme Court approved application of an injunction that protected a plaintiff class spread throughout the country, because the entire class was before the court and the court's equitable powers allowed it to protect those before it, regardless of their location.¹²⁰ These injunctions are nationwide because injunctions should be nationwide, at least where plaintiffs are persons who may move around and might be subject to the challenged law, regulation, or policy throughout the country.

¹¹⁵ Bray, *supra* note 10 at 419 n.5.

¹¹⁶ Transcript of Oral Argument at 73, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

¹¹⁷ Michael T. Morley, *DeFacto Class Actions? Plaintiff and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 Harv. J. Law & Pub. Pol'y 487, 500 (2016).

¹¹⁸ *Id.*; Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. Rev. 611, 616 (2017).

¹¹⁹ 442 U.S. 682 (1979).

¹²⁰ *Id.* at 702, 706.

These injunctions are universal in purporting to protect the universe of people from enforcement of the constitutionally defective laws, regulations, and policies and to prohibit federal officials from enforcing the constitutionally defective laws, regulations, and policies against the universe of people. That has been the real point of contention and controversy, to which Part III turns.

III. NEVER APPROPRIATE, BY ANY LABEL

By any label, courts should not have issued universal injunctions in these cases, which prohibit defendant federal officials from enforcing the challenged laws, regulations, and policies against the universe of any person anywhere who may be subject to enforcement, beyond the named plaintiffs in those cases. They certainly should not issue as frequently, unthinkingly, and automatically as they have been. Universal injunctions were not unheard-of prior to *Texas v. United States* and these cases; the practice traces to the 1960s and 1970s.¹²¹ But their issuance has accelerated in recent years.¹²²

Whatever courts have done descriptively, universal injunctions are normatively inappropriate. As Bray argues, a “federal court should give an injunction that protects the plaintiff vis-à-vis the defendant, wherever the plaintiff and the defendant may both happen to be. The injunction should not constrain the defendant’s conduct vis-à-vis nonparties.”¹²³ Laycock agrees that the power to issue injunctions that protect beyond the plaintiffs in individual actions is “rather doubtful.”¹²⁴ He similarly proposes that “the court in an individual action should not globally prohibit a government agency from enforcing an invalid regulation; the court should order only that the invalid regulation not be enforced against the individual plaintiff.”¹²⁵ The Supreme Court endorsed this limited scope for injunctions in *Doran v. Salem Inn*,¹²⁶ stating that “neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute.”¹²⁷

This Part offers the scholarly case against universal injunctions and shows the defects in the judicial justifications for universal injunctions in these cases.

¹²¹ LAYCOCK, *supra* note 13, at 436; Bray, *supra* note 10, at 437–45.

¹²² Bray, *supra* note 10, at 437.

¹²³ *Id.* at 469.

¹²⁴ LAYCOCK, *supra* note 13, at 275.

¹²⁵ *Id.* at 276.

¹²⁶ 422 U.S. 922 (1975).

¹²⁷ *Id.* at 931.

A. Equitable Principles and the Scope of Injunctions

Two competing principles guide courts in defining the proper scope of an injunction. First, the “scope of injunctive relief is dictated by the extent of the [constitutional] violation established”¹²⁸ and the injunctive remedy should be commensurate with and match the constitutional violation.¹²⁹ Second, “injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”¹³⁰ Courts in these immigration cases have justified universal injunctions by reference to both the remedy-matches-the-violation¹³¹ and the no-more-burdensome/complete relief¹³² principles.

1. Conceptualizing Constitutional Litigation

Whether either stated principle supports a universal injunction depends on how courts conceptualize constitutional rights, what is before a court in constitutional litigation, and what the court is asked to do in resolving the case. The trend towards universal injunctions reflects a conceptual shift in that judicial understanding.

Historically, constitutional injunctions take the form of anti-suit injunctions, in which a plaintiff sought federal court orders directed at public officials to halt enforcement of the challenged law through a judicial proceeding initiated against the federal plaintiffs.¹³³ The court declares the constitutional validity of the challenged law, but as an incident of preventing or remedying the wrong to the individual¹³⁴ and only to the extent the government defendants threatened to enforce the law against the plaintiff.¹³⁵ Kevin Walsh describes a pre-enforcement constitutional action as an “in personam litigation in which the court is asked to decide the respective rights and duties of persons under law. If the plaintiff’s pre-enforcement challenge is successful, the remedy issued runs against the defendant as a person.”¹³⁶ If a law or regulation is (in the language of *Marbury v. Madison*¹³⁷) “repugnant” to the Constitution, a court must refuse to apply it as a rule of decision;¹³⁸ the court issuing an anti-suit in-

¹²⁸ *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

¹²⁹ *Hills v. Gautreaux*, 425 U.S. 284, 293–94 (1976).

¹³⁰ *Califano*, 442 U.S. at 702; *see also* *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 778 (1994).

¹³¹ *Chicago v. Sessions*, No. 17C5720, 2017 WL 4572208, at *2 (N.D. Ill. Oct. 13, 2017); *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017); *see also* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (Sotomayor, J., dissenting).

¹³² *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017); *Chicago*, 2017 WL 4572208, at *2.

¹³³ *See* *Bray*, *supra* note 10, at 449–50.

¹³⁴ *Id.* at 451; *Frost*, *supra* note 16 (manuscript at 44–45).

¹³⁵ *Bray*, *supra* note 10, at 451.

¹³⁶ Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1725 (2017).

¹³⁷ 5 U.S. (1 Cranch.) 137 (1803).

¹³⁸ *Bray*, *supra* note 10, at 451.

junction prohibits public officials from initiating an enforcement proceeding, thereby prohibiting the challenged law or regulation from serving as the rule of decision in that proceeding.

Conceptualizing constitutional rights and litigation in this way, a court should not make the injunction universal because the point of the action is not the declaration of the law’s constitutional validity, but halting enforcement of the challenged law as to the plaintiff.¹³⁹ The paradigm constitutional case for this model is *Ex Parte Young*,¹⁴⁰ which recognized preemptive constitutional actions by potential enforcement defendants (the railroad and its officers) against executive officials (the state attorney general) to halt enforcement of constitutionally defective laws against them.¹⁴¹

Either scope-of-injunction principle supports limiting such injunctions to the plaintiffs. Consider *Chicago v. Sessions*. DOJ threatened to deny federal law-enforcement funds to Chicago, pursuant to federal regulations, because Chicago operates as a sanctuary jurisdiction and refuses to aid federal enforcement of immigration laws. Chicago obtains complete relief if the injunction prohibits DOJ from enforcing those regulations and from denying funds to Chicago; Chicago does not lose complete relief and its relief does not become less than complete if DOJ denies funds to San Francisco or Santa Clara. The constitutional violation is the denial of funds to Chicago pursuant to the regulations, not the regulations themselves; an injunction prohibiting enforcement of the regulations and denial of funds to Chicago matches and remedies, and is commensurate with, the constitutional violation in the case.

But federal courts and litigants have adopted a new conception of constitutional rights and constitutional litigation. On this conception, the court’s power is directed not to protecting an individual or entity against enforcement of a constitutionally defective law or regulation, but to attacking the defective law or regulation itself. Judges see themselves as “invalidating” or “striking down” or “setting aside” or “nullifying” or “blocking” unconstitutional laws, acting against the constitutionally defective law itself to eliminate and render it non-existent.¹⁴² The challenged law or regulation is treated as a *res* on which the court acts for all purposes and all persons.¹⁴³

If the court’s determination of constitutional invalidity “obliterates” the law, a universal injunction has “relentless logic,”¹⁴⁴ offering a remedy

¹³⁹ *Id.* at 449–50; Walsh, *supra* note 136, at 1725.

¹⁴⁰ *Ex parte Young*, 209 U.S. 123, 123 (1908).

¹⁴¹ *Virginia Office for Prot. and Advocacy v. Stewart*, 563 U.S. 246, 247 (2010).

¹⁴² Bray, *supra* note 10, at 451–52; Aaron-Andrew Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481, at 552; Fallon, *As-Applied and Facial Challenges*, *supra* note 210, at 1339; Frost, *supra* note 16 (manuscript at 40); Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. ____ (forthcoming 2018) (manuscript at 4–6).

¹⁴³ Walsh, *supra* note 136, at 1725.

¹⁴⁴ Bray, *supra* note 10, at 452.

that logically must benefit all persons and purposes from an entirely invalid law. If a law as a thing is unconstitutional, it is undeserving of any respect, and continued enforcement to anyone, anywhere, would imply that respect. If the constitutional violation is the very existence of the law, then only a universal injunction is commensurate with and matches that violation.

Courts issuing universal injunctions rely on this newer conception of constitutional litigation. Courts target the “legal issues” raised in the case, considering the laws challenged and the constitutional flaws in those laws, all of which are universal and not limited to the particular plaintiff.¹⁴⁵ The legal problems in denying sanctuary cities funding were not restricted to Chicago, because the unlawful authority wielded by the Attorney General in denying (or threatening to deny) funding would be the same in Chicago as in another jurisdiction.¹⁴⁶ A limited injunction could not resolve the constitutional defects of the funding regulations themselves.

In rejecting the government’s argument for a non-universal injunction in *Chicago*, the district court insisted that a narrower injunction would “allow the Attorney General to impose what this Court has ruled are likely unconstitutional conditions across a number of jurisdictions” and to “continue enforcing likely invalid conditions” against other cities and counties.¹⁴⁷ The district court in *Santa Clara* similarly insisted that the “constitutional violations” it found in the funding regulations “apply equally to all states and local jurisdictions.”¹⁴⁸ The Fourth Circuit in *International Refugee Assistance Project v. Trump* stated that enjoining the federal government only as to the plaintiffs “would not cure the constitutional deficiency, which would endure” in all other applications of the executive order.¹⁴⁹ The same court later insisted that because “we find that the Proclamation was issued in violation of the Constitution, enjoining it only as to Plaintiffs would not cure its deficiencies,” which “endure” in all other applications of the executive order.¹⁵⁰

This conception, Jonathan Mitchell argues, sees judicial review as granting a writ of erasure. A “judicial pronouncement of unconstitutionality has canceled or blotted out a duly enacted statute.”¹⁵¹ The court orders not non-enforcement of the statute, but suspension or revocation.¹⁵²

¹⁴⁵ *Chicago v. Sessions*, No. 17C5720, 2017 WL 4572208, at *2 (N.D. Ill. Oct. 13, 2017).

¹⁴⁶ *Chicago v. Sessions*, 264 F. Supp. 3d 933, 951–52 (N.D. Ill. 2017).

¹⁴⁷ *Chicago*, 2017 WL 4572208, at *3.

¹⁴⁸ *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017).

¹⁴⁹ *Int’l Refugee Assistant Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017) (*IRAP II*).

¹⁵⁰ *Int’l Refugee Assistant Project v. Trump*, 883 F.3d 233, 273 (4th Cir. 2018) (*IRAP IV*).

¹⁵¹ Mitchell, *supra* note 142 (manuscript at 5).

¹⁵² *Id.* (manuscript at 12).

Suspension or revocation leaves nothing to enforce against anyone.

It is not clear when the conceptual shift occurred,¹⁵³ although it can be tied to two developments. Bray points to enactment of the Declaratory Judgment Act¹⁵⁴ in 1934; by allowing courts to “declare” rights, it encouraged judges to think of litigation as a challenge to the law itself.¹⁵⁵ A second change is the expansion of *Ex Parte Young*¹⁵⁶ beyond antisuit injunctions¹⁵⁷ to all lawsuits seeking “relief properly characterized as prospective” against enforcement of constitutionally defective laws, regardless of the form that enforcement takes.¹⁵⁸ Pre-enforcement injunctive actions seek to halt not only judicial proceedings to enforce the challenged law (such as the threatened criminal prosecution in *Young*),¹⁵⁹ but also non-judicial enforcement actions by non-judicial actors, such as a county clerk denying a marriage license to a same-sex couple,¹⁶⁰ Marshals shackling defendants during criminal proceedings,¹⁶¹ or DOJ denying federal funds to a sanctuary city.¹⁶² The prospective relief no longer is about stopping a discrete judicial proceeding involving enforcement of a law against discrete parties; it is about stopping the challenged law itself.

Amanda Frost frames the dueling conceptions in terms of competing judicial roles—resolving disputes between parties or declaring the meaning of the law for everyone. She argues that critics of universal injunctions view the primary judicial role as resolving individual disputes, with the law-declaration power as incidental to that primary role.¹⁶³ The newer conception of constitutional litigation conforms to a sharper focus on the law-declaration role.

2. *In Defense of the Traditional Conception*

The traditional conception, and the particularized, non-universal injunctions the traditional conception supports, represents a more appropriate approach to constitutional litigation. It better describes what happens in constitutional litigation, it is more consistent with Article III limits on the jurisdiction of federal courts, and it better controls litigant

¹⁵³ Bray, *supra* note 10, at 450.

¹⁵⁴ 28 U.S.C. §§ 2201–2202 (2012).

¹⁵⁵ Bray, *supra* note 10, at 450.

¹⁵⁶ 209 U.S. 123 (1908).

¹⁵⁷ John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 990, 1014–15 (2008); *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 262 (2011) (Kennedy, J., concurring).

¹⁵⁸ *Virginia Office for Protection and Advocacy*, 563 U.S. at 256–57.

¹⁵⁹ *Young* 209 U.S. at 128–29; Harrison, *supra* note 142, at 992; Barry Friedman, *The Story of Ex parte Young: Once Controversial, Now Canon*, in *FEDERAL COURTS STORIES* 247, 260–61 (Vicki C. Jackson & Judith Resnik eds. 2010).

¹⁶⁰ *Miller v. Davis*, 123 F. Supp. 3d 924, 933–34 (E.D. Ky. 2015).

¹⁶¹ Transcript of Oral Argument at 16–18, *United States v. Sanchez-Gomez*, 138 S. Ct. 1532 (2018).

¹⁶² *Chicago v. Sessions*, 264 F. Supp. 3d 933, 937–38 (N.D. Ill. 2017); *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 509–11 (N.D. Cal. 2017).

¹⁶³ Frost, *supra* note 16 (manuscript at 44–45).

behavior.

a. Describing Constitutional Litigation

The traditional conception better describes what happens in constitutional litigation.

One way to see this is by imagining these constitutional issues resolved not in preemptive actions initiated by the right-holders to enjoin enforcement, but in a government-initiated enforcement action. Government enforces the challenged law by initiating a judicial enforcement proceeding against the rights-holder, who raises the constitutional validity of the law being enforced as a defense to enforcement liability. If the court agrees that the law is constitutionally invalid, it dismisses the action or otherwise resolves the proceeding in favor of the rights-holder. The court's order dismissing the enforcement action benefits the rights-holding defendant, but does not speak to or affect other people. Nor does it affect the law itself, which remains undisturbed.¹⁶⁴ This is *Marbury*—understanding that a law or regulation is repugnant to the Constitution, the court refuses to apply it as rule of decision in that proceeding, leaving no valid law to be applied and requiring dismissal of the proceeding and judgment in favor of the rights-holder.¹⁶⁵

Consider, again, the attorney regulations in *NWIRP*. If *NWIRP* continues to advise *pro se* litigants without filing the required notice of appearance, *EOIR* would institute a disciplinary proceeding against *NWIRP* in the immigration court. *NWIRP* would defend in the proceeding by arguing that the attorney regulations are repugnant to the First and Tenth Amendments and cannot form the basis for disciplining it, based on the same arguments as in the preemptive suit in federal court. If the body hearing the attorney-disciplinary action agrees that the regulations are constitutionally invalid, it finds in favor of *NWIRP* and resolves the disciplinary proceeding in its favor, there being no constitutionally valid regulation to use as the rule of decision against *NWIRP*. But that remedy, even if based on a finding of a constitutional defect in the regulations, protects only *NWIRP*, no other attorneys or representative organizations. It follows that *NWIRP*'s preemptive federal injunctive action to prohibit *EOIR* from commencing future disciplinary proceedings against it should produce an injunctive remedy that similarly protects only *NWIRP*, no other attorneys or representative organizations.

A second way to see this is to identify the precise constitutional violation. The violation is neither the enactment nor existence of an unconstitutional law, regulation, or policy; the violation is the enforcement or threatened enforcement of that law, regulation, or policy against particular persons. Describing the remedy as “striking down the law”¹⁶⁶ or “declaring the law unconstitutional” does not accurately describe the results

¹⁶⁴ Bray, *supra* note 10, at 452.

¹⁶⁵ *Id.* at 451; Mitchell, *supra* note 142 (manuscript at 35, 42).

¹⁶⁶ Frost, *supra* note 16 (manuscript at 40).

or effects of litigation. A federal law declared constitutionally invalid does not disappear—it remains in the United States Code and Congress is not compelled to repeal or amend it.¹⁶⁷ The court’s judgment prevents enforcement of the law by those executive officers charged with carrying out legislative directives.¹⁶⁸ But enforcement requires a particular target. It follows that an injunction preventing enforcement against the target remedies the constitutional violation, even if it does not prohibit enforcement of the law against others.

Mitchell labels the contrary view the “writ-of-erasure fallacy,” defined as “the assumption that a judicial pronouncement of unconstitutionality has canceled or blotted out a duly enacted statute, when the court’s ruling is in fact more limited in scope and leaves room for the statute to continue to operate.”¹⁶⁹ Judges, politicians, and the public regard “judicially disapproved statutes” as legal nullities, even though they remain on the books and continue to operate as law, a mindset that “has needlessly truncated the scope and effect of many federal and state statutes.”¹⁷⁰ Instead, “[a]ll a court can do is decline to enforce the statute and enjoin the executive from enforcing it.”¹⁷¹ The injunction is “nothing more than a judicially imposed non-enforcement policy.”¹⁷²

Mitchell’s proper conception of the effect of judicial review combines with the party-specific narrowness of ordinary litigation to require particularized, non-universal injunctions. The law remains in the books (absent Congressional repeal) and the court prohibits the executive from enforcing as to particular persons, not as to the universe.¹⁷³

b. Article III Limits

The traditional conception and non-universal, particularized injunctive relief better conforms to limits on the power of federal courts.

Federal courts possess power under Article III to decide “case[s]” and “controvers[ies],”¹⁷⁴ which means power to decide cases or controversies for particular parties to a particular legal dispute.¹⁷⁵ Courts do not decide general or abstract legal issues to provide remedies for people not before the court.¹⁷⁶ Morley frames this around standing. A plaintiff has Article III standing to obtain injunctive relief only by showing that she suffers ongoing, impending, or substantially likely harm, usually from the

¹⁶⁷ Bray, *supra* note 10, at 451; Mitchell, *supra* note 142 (manuscript at 4–5, 42).

¹⁶⁸ Cf. *Franklin v. Massachusetts*, 505 U.S. 788, 828–29 (1992) (Scalia, concurring in part and concurring in the judgment).

¹⁶⁹ Mitchell, *supra* note 142 (manuscript at 5).

¹⁷⁰ *Id.* (manuscript at 40).

¹⁷¹ *Id.* (manuscript at 59).

¹⁷² *Id.* (manuscript at 58).

¹⁷³ Mitchell takes no explicit position on the question of against who the non-enforcement policy applies or against whom the executive is barred from enforcing.

¹⁷⁴ U.S. CONST. art. III, § 2.

¹⁷⁵ Bray, *supra* note 10, at 471–72.

¹⁷⁶ *Id.*

actual or threatened enforcement of the challenged law against her.¹⁷⁷ The existence of a law, without a credible threat of enforcement of that law against her, is not sufficient to confer standing.¹⁷⁸ Threats of enforcement to persons other than the plaintiff are not sufficient to confer standing on that plaintiff.¹⁷⁹ Nor are generalized threats of enforcement as to the public as a whole that are not specific or unique to the plaintiff.¹⁸⁰

Universal injunctions become possible because of what Aaron-Andrew Bruhl derides as the “one good plaintiff” rule—courts adjudicate, and provide a broad equitable remedy in, multi-party actions if one plaintiff can show standing, without determining standing for every plaintiff.¹⁸¹ They do so believing that injunctive relief applies to everyone, so it is necessary to find only one person with standing to obtain the remedy. The Fourth Circuit proceeded to the constitutional merits of the challenge to the travel ban after finding that one individual plaintiff had standing, deeming it unnecessary to consider standing of other plaintiffs, such as IRAP or the scholarly association.¹⁸² The Fifth Circuit in *Texas v. United States* similarly stopped its standing inquiry with Texas.¹⁸³ Bruhl argues that courts would be more constrained in issuing remedies if they were more constrained in determining standing. If judges consider the standing of every plaintiff, they may better consider how to protect the interests of the plaintiffs with standing without going beyond that scope to protect the universe of similarly situated persons who may or may not have standing.¹⁸⁴

The law of standing reveals two things. The constitutional problem is not the existence of a constitutionally defective law, but the threat of enforcement of that constitutionally defective law against particular persons. Having identified a plaintiff with standing, the court cannot grant relief “that would not prevent likely, impending, or ongoing harm to the plaintiff herself.”¹⁸⁵ That limitation precludes relief going beyond preventing harm to the plaintiff by attempting to prevent harm to people not before the court, at least where unnecessary to prevent harm to the plaintiff.

¹⁷⁷ Morley, *DeFacto Class Actions*, *supra* note 117, at 523–25; *see, e.g.*, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2342 (2014); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983).

¹⁷⁸ *Susan B. Anthony List*, 134 S. Ct. at 2342; *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979).

¹⁷⁹ *Lyons*, 461 U.S. at 105.

¹⁸⁰ *U.S. v. Richardson*, 418 U.S. 166, 176 (1974).

¹⁸¹ Bruhl, *supra* note 142, at 500.

¹⁸² *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 586 (4th Cir. 2017).

¹⁸³ *Texas v. United States*, 809 F.3d 134, 151 (5th Cir. 2015); Bruhl, *supra* note 142, at 511–12.

¹⁸⁴ Bruhl, *supra* note 142, at 552.

¹⁸⁵ Morley, *DeFacto Class Actions*, *supra* note 117, at 524.

*Califano v. Yamasaki*¹⁸⁶ assumes this party specificity, which lower courts have ignored in issuing universal injunctions in these immigration cases. Courts quote *Califano* for the complete-relief principle, that an injunction should be no more burdensome than necessary to accord complete relief.¹⁸⁷ But the oft-quoted sentence describing the complete-relief requirement ends with three oft-ignored words—“to the plaintiffs.”¹⁸⁸ A court must ensure that the plaintiff obtains complete relief, but need not ensure that anyone else obtains complete relief. And the failure to accord relief beyond the plaintiff does not deprive the plaintiff of complete relief. *Califano* relied on the traditional conception of an injunction that stops enforcement as to the parties, not the new conception of protecting the universe from a constitutionally defective law. Those three words in *Califano* were intentional and essential to the Court’s conception of constitutional litigation and cannot be disregarded as the lower courts have.¹⁸⁹

Amanda Frost argues that Article III does not necessarily limit courts’ adjudicatory or remedial authority to the plaintiffs, pointing to the mootness doctrine of “capable of repetition yet evading review.”¹⁹⁰ A case is not moot (or mootness will be excepted) when, although the named plaintiff is not presently harmed or threatened with future harm, the injury is reasonably likely to reoccur in the future and the claim is so transitory that the injury would cease of its own force before litigation (including all appeals) could be completed.¹⁹¹ Common applications of capable-of-repetition include constitutional challenges to holiday-season religious displays (the holiday season lasts approximately one month)¹⁹² and to laws restricting abortion (the pregnancy ends within, at most, nine months).¹⁹³ Courts adjudicate and grant remedies in these cases despite potential mootness, because they otherwise would never have an opportunity to adjudicate and resolve important constitutional issues arising in these time-sensitive contexts.

For a case to not be moot under this doctrine, the injury must be ca-

¹⁸⁶ 442 U.S. 672 (1979).

¹⁸⁷ *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2090 (2017) (Thomas, J., concurring in part and dissenting in part); *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 632 (D. Md. 2017).

¹⁸⁸ *Califano*, 442 U.S. at 702; cf. *Chicago v. Sessions*, No. 17C5720, 2017 WL 4572208, at *2 (N.D. Ill. Oct. 13, 2017) (quoting *Califano* without the three final words).

¹⁸⁹ *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. at 2090 (Thomas, J., concurring in part and dissenting in part).

¹⁹⁰ Frost, *supra* note 16 (manuscript at 41).

¹⁹¹ *Turner v. Rogers*, 564 U.S. 431, 439–40 (2011); *Spencer v. Kemna*, 523 U.S. 1, 17 (1998).

¹⁹² *Chabad Lubavitch of Vermont v. City of Burlington*, 936 F.3d 109, 111 (2d Cir. 1991); *American Humanist Ass’n v. Baxter Cty.*, 143 F. Supp. 3d 816, 822 (W.D. Ark. 2015).

¹⁹³ *Roe v. Wade*, 410 U.S. 113, 125 (1973).

pable of repetition as to the same complaining plaintiff, through a showing that she will be subjected to the challenged unlawful conduct in the future.¹⁹⁴ The plaintiff must show that she will encounter the constitutionally invalid religious display in the future because Christmas will return the following December or that she might become pregnant and seek an abortion (and be injured by potential enforcement of the abortion restriction) in the future. That a non-party might be injured through enforcement of the same abortion restriction or the future erection of the religious display does not avoid mootness. The court's Article III jurisdiction remains tied to future enforcement or threatened enforcement against this plaintiff, not against the universe of non-party individuals who might be subject to future enforcement. If one plaintiff brings an individual action challenging a seasonal religious display then moves out of the state, the court would find the case moot, even though the government may erect the display the following year, and cause constitutional injury to non-parties offended by the display. One of those non-parties would have to establish standing and join or file a new lawsuit challenging the future display.

Finally, neither of the above explanations justifies the shift in conception of constitutional litigation from injuries caused by individualized enforcement of the law to injuries caused by the existence of the law itself.¹⁹⁵ To the extent the shift derives from the creation of the declaratory judgment, it misunderstands that remedy. The Declaratory Judgment Act empowers courts to "declare the rights and other legal relations of any interested party"; it permits determinations of the rights of interested parties to the federal litigation, not free-standing declarations of rights in the abstract. The statute speaks of parties, which has a known meaning in litigation, rather than persons, which might consider people beyond the litigation. Declaratory judgments also do not place the law itself before the court, only the rights and relations of particular people with respect to that law.

In *Doran v. Salem Inn*,¹⁹⁶ the Court endorsed particularized, non-universal remedies as to both injunctive and declaratory relief, showing that both protect parties against enforcement of the challenged law.¹⁹⁷ Injunctions and declaratory judgments have the same practical effect.¹⁹⁸ If injunctions are limited to protecting the plaintiffs and do not prohibit enforcement of the challenged laws against non-parties, then declaratory judgments must be similarly limited. Declaratory relief is narrower than injunctive relief in not imposing an immediate prohibition on the defendant's conduct, but relying on the persuasive force of the judgment to

¹⁹⁴ *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540–41 (2018); *Spencer*, 523 U.S. at 17; *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983).

¹⁹⁵ *Supra* notes 153–163 and accompanying text.

¹⁹⁶ 422 U.S. 922 (1975).

¹⁹⁷ *Id.* at 931.

¹⁹⁸ *Id.* (quoting *Samuels v. Mackell*, 401 U.S. 66, 73 (1971)).

convince state officials to rethink the law and its enforcement.¹⁹⁹ Declaratory judgments are famously a “milder alternative” to the “strong medicine” of the injunction.²⁰⁰ If the stronger injunction controls government officials only as to the plaintiffs, the milder and narrower declaratory remedy should not carry a broader “who” in its scope.

As to the expansion of *Ex Parte Young* beyond antisuit injunctions, these cases still involve threatened enforcement of a law against particular individuals. All that has changed is that enforcement occurs in a non-judicial context—the couple seeking a marriage license, the defendant shackled without cause, or the municipality denied federal funds. That the enforcement mechanism is administrative rather than judicial does not change that the focus remains on the harm from threatened enforcement of the law against an identifiable individual, not on the law itself.

c. Litigant Behavior

The prospect that one district judge can enjoin enforcement of a law as to the universe of potential enforcement targets promotes forum-shopping and plaintiff-shopping. Those opposed to the challenged laws, regulations, and policies seek the right plaintiffs and the right court to take-out the law in all applications in one judicial shot. When Texas and other Republican-led states sought to challenge immigrant-friendly policies of the Obama Administration, Texas took the lead and filed suit in the Southern District of Texas, with review in the Fifth Circuit. Beneficiaries of those policies went to federal court in New York for a ruling that the policies remained enforceable in other states. Opponents of the Trump Administration’s immigration-restricting policies found plaintiffs with family or associates seeking entry to the United States and focused their litigation efforts in Hawaii, Washington, and California, with review in the Ninth Circuit, or Maryland, with review in the Fourth Circuit.²⁰¹ It is neither an accident nor a surprise that Austin, Texas did not challenge the sanctuary-city restrictions in the Fifth Circuit.

Forum- or plaintiff-shopping is not inherently problematic. But universal injunctions make it risk-free and asymmetrical, allowing plaintiffs to, in Bray’s words, “shop ‘til the statute drops.”²⁰² If Court I declares the law constitutionally valid, that decision has no preclusive effect on non-parties to that action; a different plaintiff can file a different challenge to the same law in Court II,²⁰³ subject to some precedential effect (depend-

¹⁹⁹ *Steffel v. Thompson*, 415 U.S. 452, 470–71 (1974).

²⁰⁰ *Id.* at 466–67. *But see* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 *Duke L.J.* 1091, 1093–94 (2014) (questioning the “mildness thesis”).

²⁰¹ Bray, *supra* note 10, at 457–60.

²⁰² *Id.* at 460.

²⁰³ *Id.*; Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 *CARDOZO L. REV.* 2017, 2020 (2015); Morley, *DeFacto Class Actions*, *supra* note 117, at 532.

ing on what court addressed the challenged law in Court I).²⁰⁴ If Court I declares the challenged law invalid and issues a universal injunction, it ends the game²⁰⁵—the challenged law is unenforceable against anyone anywhere, unless the universal injunction is reversed on appeal. Non-parties need not take the extra steps of joining the action and expanding the injunction or obtaining their own injunctions.²⁰⁶ For efficiency's sake, challengers will find the right plaintiffs and the right court and halt enforcement as quickly as possible. But they incur no cost (other than the risk of ongoing enforcement of the law) if they guess wrong and must take a second bite at the apple with a different plaintiff.

3. *Non-Universality in Every Court*

The impropriety of universal injunctions (or the demand for particularized injunctions) does not vary by court. Universal injunctions are inappropriate because a court should not prohibit government from enforcing the challenged laws, regulations, or policies beyond the named plaintiffs. They therefore are inappropriate whether issued by one district judge in the Western District of Washington, issued by a three-judge district court, affirmed by a panel of a regional court of appeals, affirmed by an en banc court of appeals, or affirmed by a unanimous Supreme Court. The problem is not “a single judge sitting on an island in the Pacific” halting enforcement of federal law through lawless individual judicial action, as Attorney General Jeff Sessions complained about *Hawaii's* injunction prohibiting enforcement of the travel ban.²⁰⁷ Universal injunctions would be as improper if the Supreme Court were granted original jurisdiction to issue them at the outset or if all constitutional challenges to federal laws were adjudicated by three-judge district courts (as they were prior to 1976²⁰⁸), as some have proposed.²⁰⁹ No court, regardless of place in the judicial hierarchy or number of members, should issue a universal, non-particularized injunction prohibiting enforcement beyond the plaintiffs.

Rejecting universal injunctions by any court does not mean that a federal judgment declaring a law, regulation, or policy constitutionally

²⁰⁴ Blackman & Wasserman, *supra* note 27, at 244; Bray, *supra* note 10, at 465; Morley, *DeFacto Class Actions*, *supra* note 117, at 533.

²⁰⁵ Bray, *supra* note 10 at 460; Carroll, *supra* note 203, at 2020–21 (2015); Morley, *DeFacto Class Actions*, *supra* note 117, at 532.

²⁰⁶ Blackman & Wasserman, *supra* note 27, at 256–57.

²⁰⁷ Dep't of Justice, *Attorney General Sessions Delivers Remarks at the Heritage Foundation's Legal Strategy Forum* (Oct. 26, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-heritage-foundation-s-legal-strategy-forum>; Charlie Savage, *Jeff Sessions Dismisses Hawaii as “an Island in the Pacific,”* N.Y. TIMES (Apr. 20, 2017), https://www.nytimes.com/2017/04/20/us/politics/jeff-sessions-judge-hawaii-pacific-island.html?_r=0.

²⁰⁸ *Cf. Shapiro v. McManus*, 136 S. Ct. 450, 453 (2015).

²⁰⁹ Tim Ryan, *Republicans Seek to Limit Courts' Nationwide Injunctions*, COURTHOUSE NEWS (Dec. 1, 2017), <https://www.courthousenews.com/republicans-seek-to-limit-courts-nationwide-injunctions/>.

defective and enjoining its enforcement has no effect beyond the named plaintiffs. The effect derives from the precedential force of the court’s opinion analyzing the validity of the law, and explaining the injunction. The decision of Court I, declaring the attorney regulations invalid as to NWIRP, serves as precedent for Court II considering the validity of those regulations if the federal government seeks or threatens to enforce them against attorneys other than NWIRP. Precedential force varies by court—a district court decision granting the injunction has only persuasive force for the next court, a regional court of appeals decision affirming the injunction has binding force on district courts within its circuit and persuasive force elsewhere, and a Supreme Court affirmance has binding force on all courts in all states, districts, and circuits.²¹⁰

Supreme Court affirmance of a non-universal particularized injunction does not render that injunction universal or extend it to prohibit enforcement of the challenged law against non-plaintiffs to that action. The effect is similar, of course. Supreme Court affirmance means all future judicial enforcement efforts must fail and all pre-enforcement injunctive actions must succeed, because all courts are bound by the Court’s pronouncement that the challenged law, regulation, or policy is constitutionally defective and not enforceable.²¹¹ But the affirmance resolves the question as a matter of the law of precedent, the effect that a ruling in one action has on a second action involving enforcement against people who were not party to the first action. It is not a function of the law of judgments or as an injunction prohibiting enforcement against those non-parties.

This responds to Frost’s argument about competing judicial roles and the preference among critics of universality for the dispute-resolution over the law-declaration focus.²¹² Particularity and non-universality is required not because dispute resolution is more important than law declaration or because law declaration is incidental to dispute resolution. Rather, each judicial role operates in a distinct sphere. Dispute resolution operates in the instant case, resolving the dispute between the parties, as by enjoining government officials from enforcing the challenged law against the plaintiffs. Law declaration operates through precedential effect in the next case involving different enforcement efforts against different parties.

²¹⁰ Blackman & Wasserman, *supra* note 27, at 250–51; Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 923 n.31 (2011) [hereinafter Fallon, *Fact and Fiction*]; Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339 (2000) [hereinafter Fallon, *As-Applied and Facial Challenges*]; Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1727–28 (2017).

²¹¹ Blackman & Wasserman, *supra* note 27, at 252–53; Walsh, *supra* note 210, at 1715, 1727–28.

²¹² Frost, *supra* note 16 (manuscript at 44–45).

B. Expanding the Scope of the Injunction by Expanding the Scope of Litigation

Universal injunctions—injunctions prohibiting enforcement of the challenged laws, regulations, and policies beyond the named plaintiffs—are impermissible. But constitutional adjudication need not be atomized to single rights-holder/plaintiffs; judgments can have broader effects. The solution is not to extend the court's remedial authority beyond the plaintiffs. The solution is to expand the who of the litigation, thereby expanding the permissible who of the injunction, whether formally or in practice. This allows a judgment and injunctive remedy to have broader effects than protecting one individual, while keeping the court's remedial focus on the parties to litigation.

Each method of expanding the scope of litigation has limitations, drawbacks, and difficulties. Each is more complicated, more difficult to establish, and takes longer than allowing the court to avoid intermediate steps and issue one universal injunction in one lawsuit. But the difficulty of satisfying these requirements or the risk of delay does not warrant ignoring procedure or adopting a new procedure (universal injunctions) that obviates established litigation processes.

1. Class Actions

A court can certify an injunctive class under Federal Rule of Civil Procedure 23(b)(2), where “the party opposing the class” has “acted or refused to act on grounds that apply generally to the class,” so “that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”²¹³ In pre-enforcement actions, government officials oppose the class, their actions in enforcing or threatening to enforce the challenged law, regulation, or policy injure all members of the class; and an injunction prohibiting enforcement of the challenged law against the class protects the class. A class-wide injunction still protects only the plaintiff, but the plaintiff is the class, which assumes an identity and legal status independent of the representative individual plaintiff.²¹⁴ Two district courts avoided universality problems by taking this appropriate step. In the challenge to restrictions on abortion access for detained undocumented unaccompanied pregnant minors, the court certified a class of “all pregnant, unaccompanied immigrant minor children (UCs) who are or will be in the legal custody of the federal government” and granted a class-wide preliminary injunction.²¹⁵ The district court in the family-separation litigation did the same, certifying a class of “[a]ll adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child who is or will be separated from

²¹³ Fed. R. Civ. P. 23(b)(2); Bray, *supra* note 10, at 464 n.278; Morley, *DeFacto Class Actions*, *supra* note 117, at 649–50; Morley, *Nationwide Injunctions*, *supra* note 118, at 624 n.49.

²¹⁴ *Sosna v. Iowa*, 419 U.S. 393, 399 (1975).

²¹⁵ *Garza v. Hargan*, 304 F. Supp. 3d 145, 150 (D.D.C. 2018).

them by DHS and detained in ORR custody, ORR foster care, or DHS custody,”²¹⁶ then entering classwide preliminary injunctive relief.²¹⁷

The Supreme Court enacted the modern version of FRCP 23(b)(2) in 1966 to achieve two goals related to constitutional litigation.

The class mechanism ensures that courts can issue broad indivisible relief where appropriate. The rule responded to Massive Resistance to *Brown v. Board of Education*, in which school districts admitted named African-American plaintiffs into all-white schools, but without altering the basic structure or operation of the school system and without benefitting non-party African-American students.²¹⁸ By certifying a class of prospective African-American students wishing to attend integrated schools, the court could issue an injunction compelling broader structural changes.²¹⁹ This injunction is not universal, because it does not protect beyond the plaintiffs to the case. The rule expands who is a party before the court and who is and may be properly protected by a particularized injunction.²²⁰ The court may narrow the scope and effect of the injunction by narrowing the scope of the class.²²¹ But it need not engage in constitutional debates about the court’s federal power.

Rule 23(b)(2) also broadens the preclusive effect of one judgment, eliminating the asymmetrical preclusion plaguing individual actions.²²² Prior to 1966, non-parties controlled how an injunction might affect them.²²³ If the court awarded relief, a non-party could opt-in to the class after the fact, reaping the benefits of the injunction. If the court did not award relief, the non-party could remain out of the case, unbound by preclusion and free to file a new lawsuit.²²⁴ Under amended 23(b)(2), the identities of all potential class members must be clear and in the case when the court certifies the class, subjecting individual class members to the full preclusive effect of a judgment in either direction.

Allowing universal injunctions in non-class cases renders Rule 23(b)(2) superfluous.²²⁵ If a single plaintiff bringing an individual suit can obtain an injunction barring enforcement of the challenged law as to everyone in the universe, no plaintiff would pursue a class action. Not having to certify the class removes an issue the plaintiff must litigate. And

²¹⁶ *Ms. L v. U.S. Immigration and Customs Enforcement*, 310 F. Supp. 3d 1133, 1139 n.5 (S.D. Cal. 2018).

²¹⁷ *Id.* at 1148–50.

²¹⁸ Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 858–59 (2016); David Marcus, *Flawed But Noble: Desegregation Litigation and Its implications for the Modern Class Action*, 63 FLA. L. REV. 657, 680–81 (2011).

²¹⁹ Carroll, *supra* note 218, at 859–60; Marcus, *supra* note 218, at 693–95.

²²⁰ *Sosna*, 419 U.S. at 399; Morley, *DeFacto Class Actions*, *supra* note 117, at 541.

²²¹ Morley, *Nationwide Injunctions*, *supra* note 118, at 650.

²²² Morley, *DeFacto Class Actions*, *supra* note 117, at 554.

²²³ *Id.* at 535.

²²⁴ *Id.* at 500–01; Marcus, *supra* note 218, at 672–74.

²²⁵ Bray, *supra* note 10, at 464–65; Morley, *DeFacto Class Actions*, *supra* note 117, at 540.

the lone plaintiff (and her attorneys) can seek relief, knowing that others remain free to bring future actions if this one is unsuccessful in halting enforcement of the challenged law.

The incentive to avoid Rule 23 grows because certifying classes can be unwieldy and difficult, especially for broad and disparate groups in which class members may be affected by the same law in different ways.²²⁶ Class certification is time-consuming,²²⁷ while temporary restraining orders and preliminary injunctions are issued in fast-moving, even emergent situations. Courts have cut back on aggregate litigation in recent years,²²⁸ although Maureen Carroll criticizes retrenchment as a “myopic” application of fears of unwieldy aggregated-damages class actions to the distinct context of civil rights injunctions.²²⁹ But the difficulty of litigating class actions does not justify circumventing that rule by allowing individual litigation to provide the functional equivalent of class-wide relief.²³⁰ Moreover, there is no disconnect between the urgency of preliminary relief from threatened enforcement of a constitutionally defective law and the slowness of class certification, because courts can issue class-wide preliminary injunctive relief, prohibiting enforcement of the challenged law against the putative class, even before formally certifying the class.²³¹

While *Califano* approved a nationwide class (and thus an injunction protecting all members of the class),²³² Morley argues that such classes should be presumptively avoided. He prefers circuit-wide classes, which establishes class-wide relief in one locale, while leaving the government the opportunity to relitigate in other cases (whether individual or class actions) in other regional circuits.²³³ But the point remains that a class (of whatever size) is necessary for a broader injunction.

2. Associational Standing

The plaintiff in a constitutional case might be an entity suing on behalf of members adversely affected by the challenged law, regulation, or policy.²³⁴ The injunction runs in favor of the association and its members,

²²⁶ Bray, *supra* note 10, at 476; Carroll, *supra* note 218, at 846 n.8, 849–50; Frost, *supra* note 16 (manuscript at 18–20); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 59–60 (2017).

²²⁷ Frost, *supra* note 16 (manuscript at 18–19).

²²⁸ Carroll, *supra* note, 218 at 846; Frost, *supra* note 16, (manuscript at 19–20); Malveaux, *supra* note 226, at 59–60.

²²⁹ Carroll, *supra* note 218, at 845, 850–51.

²³⁰ Bray, *supra* note 10, at 477.

²³¹ *Rodriguez v. Providence Community Corr., Inc.*, 155 F.3d 758, 766–67 (M.D. Tenn. 2015); *Planned Parenthood of Kansas v. Mosier*, No. 16-2284-JAR-GLR, 2016 WL 3597457, *26 (D. Kan. Jul. 5, 2016), *aff'd in part and rev'd in part*, 882 F.3d 1205 (10th Cir. 2018); WILLIAM RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 4.30 (5th ed. 2018).

²³² *Califano v. Yamasaki*, 442 U.S. 682, 702–03 (1979).

²³³ Morley, *Nationwide Injunctions*, *supra* note 118, at 650–53.

²³⁴ Morley, *DeFacto Class Actions*, *supra* note 117, at 542; *see, e.g.*, *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342–43 (1977); *Warth v.*

carrying the same scope as injunctions obtained by individuals suing on their own behalf.²³⁵

An injunction issued in an associational case is not universal. Rather, associational standing creates something like a practical class of all of the association members. Having an entity sue on behalf of its members expands the practical scope of the injunction, because the entity may have thousands of members spread across the country or the world, all of whom enjoy the protections of the injunction by virtue of being members of the protected plaintiff-organization. An individual avails herself of the injunction’s protections against future enforcement by showing membership in the association.

But standing doctrine imposes additional requirements, which makes it less an obvious end-run around than purely universal injunctions in individual cases. Associational standing requires that members of the association would have had individual standing, that the interests protected in the action are “germane” to the association’s purposes, and that the claim and injunctive remedy do not require individual participation.²³⁶

Associational standing has been present, but not resolved, in these immigration cases. One plaintiff in *IRAP* was the Middle East Studies Association, suing on behalf of members whose academic work would be limited by being unable to interact with students and scholars from the targeted nations.²³⁷ The Fourth Circuit did not resolve the organization’s standing, having found standing for a different plaintiff (an individual) sufficient to proceed with the action.²³⁸ Assuming individuals can show membership in the Association, associational standing seems present—affected members would have standing because the travel ban limits their interactions with scholars from the targeted nations and protecting the ability of its members to interact with students and scholars is germane to that organization’s purposes.

3. *Third-Party Standing*

An individual plaintiff, whether a person or organization, may assert third-party standing.²³⁹ The person or entity suffers an injury from defendant’s conduct and sues to vindicate the constitutional rights of rights-holders with whom the plaintiff has a business, professional, or other close relationship where it is not feasible for rights-holders to sue on their own behalf.²⁴⁰ Relationships allowing third-party standing include

Seldin, 422 U.S. 490, 511 (1975).

²³⁵ Morley, *DeFacto Class Actions*, *supra* note 117, at 539, 544–45.

²³⁶ *Hunt*, 432 U.S. at 343.

²³⁷ *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 578 (4th Cir. 2017).

²³⁸ *Id.* at 586.

²³⁹ *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004).

²⁴⁰ *Id.* at 130; *U.S. Dep’t of Labor v. Triplett*, 494 U.S. 715, 720 (1990).

businesses suing on behalf of potential customers,²⁴¹ medical professionals suing on behalf of patients,²⁴² and lawyers and advocates suing on behalf of clients.²⁴³ Hawaii, Washington, and Minnesota proceeded on third-party standing on behalf of students, teachers, and scholars who would study and work at their universities, but were prevented from doing so by the travel order.²⁴⁴ IRAP and HIAS sued on behalf of the refugees who they would help resettle but who were barred by the travel order from entering the United States.²⁴⁵

An injunction granted to one plaintiff asserting third-party standing may produce an expansive injunction. The scope of the injunction varies with the scope of the plaintiff's base of clients or customers, which may be difficult to determine. Hawaii argued it could not identify the individuals who might apply to work or study at its universities as to come within the injunction's protections.²⁴⁶ Every refugee who might be subject to enforcement of the travel ban is a potential IRAP client; every student and scholar might be a potential student or faculty member at a Hawaiian university. Only a universal injunction, it is argued, provides effective relief.

This uncertainty affects judicial enforcement of an existing injunction, not its scope when entered. The injunction could be written to protect the plaintiff (IRAP or Hawaii), then leave to later enforcement efforts whether the person targeted for future enforcement of the challenged law is connected to the named plaintiff and thus protected by the injunction. In other words, if the government attempts to enforce the travel ban against an individual, Hawaii can argue to the court that the individual is a potential student protected by the injunction and that enforcement of the travel ban against her is inconsistent with the injunction. But it is unnecessary for the injunction protecting Hawaii to also protect Washington, Minnesota, or another state and the students and scholars whom those states wish to bring to their universities. IRAP can enforce its injunction as to a client-refugee denied entry, but it is unnecessary for the injunction protecting IRAP to also protect other refugee-resettlement organizations and their potential clients.

The idea of "bona fide relationship" does some analytical work here. In granting certiorari as to the injunction prohibiting enforcement of the second travel order, the Supreme Court stayed the injunction except as to "foreign nationals who have a credible claim of a bona fide relation-

²⁴¹ *Craig v. Boren*, 429 U.S. 190, 195 (1976).

²⁴² *Griswold v. Connecticut*, 381 U.S. 479, 480–81 (1965).

²⁴³ *Triplett*, 494 U.S. at 720; *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989). *But see Kowalski*, 543 U.S. at 131–33.

²⁴⁴ *Hawaii v. Trump*, 859 F.3d 741, 789 (9th Cir. 2017); *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017).

²⁴⁵ *International Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 548–49 (D. Md. 2017).

²⁴⁶ *Hawaii v. Trump* 878 F.3d 662, 701 (9th Cir. 2017).

ship with a person or entity in the United States.”²⁴⁷ The Ninth Circuit applied the same standard to narrow the injunction barring enforcement of the third travel order, rejecting a “worldwide” injunction as to all nationals of the affected countries.²⁴⁸ The Fourth Circuit did the same as to the injunction protecting IRAP and its potential refugee clients.²⁴⁹

Where a court enjoins enforcement of law as to an entity asserting third-party standing, it can demand a “bona fide relationship” with that plaintiff before enforcing the injunction as to any third party. In enforcing an injunction protecting IRAP or Hawaii, the court overseeing the injunction must decide whether a foreign national subject to possible enforcement of the travel ban has a “credible claim of a bona fide relationship” specifically with IRAP or with Hawaii. If she has such a relationship, the existing injunction protects her (as someone on whose behalf the plaintiffs had sued) and enforcement of the travel order is prohibited. If she does not have such a relationship, the injunction does not protect her and the federal government can enforce the travel ban to bar that person from entering the country, subject to a new or expanded injunction protecting her or an organization with which she has that credible claim of a bona fide relationship.

4. *Incidental Benefits and Spillover Effects*

An injunction’s “who” may expand in practice when relief accorded to the named plaintiffs in an individual action incidentally inures to the benefits of other persons similarly situated. Carroll describes this as a “system-wide” remedy that provides relief as broad as the challenged government policy or practice.²⁵⁰ Morley describes this in terms of indivisibility of rights and remedies.²⁵¹ Divisible rights belong to the plaintiffs alone and can be remedied by a limited injunction protecting the plaintiffs alone.²⁵² With indivisible rights, the rights of one person cannot be separated from the rights of others, thus a remedy benefitting one person must benefit other people similarly situated.²⁵³

One example might be school desegregation—an individual African-American plaintiff having shown a constitutional violation of being prevented from attending a white public school, the court must order integration of the public schools by requiring schools to reform their admission policies for all African-American students.²⁵⁴ But history shows that such system-wide relief is not inherent in school desegregation. Courts

²⁴⁷ *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

²⁴⁸ *Hawaii*, 878 F.3d at 701.

²⁴⁹ *Int’l Refugee Assistance Project*, 883 F.3d 233, 272 (4th Cir. 2018) (en banc).

²⁵⁰ Carroll, *supra* note 203, at 2030.

²⁵¹ Morley, *DeFacto Class Actions*, *supra* note 117, at 492.

²⁵² *Id.* at 524–25.

²⁵³ Carroll, *supra* note 218, at 846; Marcus, *supra* note 218, at 667; Morley, *Nationwide Injunctions*, *supra* note 118, at 616–17; Morley, *DeFacto Class Actions*, *supra* note 117, at 524.

²⁵⁴ Morley, *Nationwide Injunctions*, *supra* note 118, at 616.

did enjoin school officials to admit individuals without ordering system-wide relief, benefitting non-party students, the practice that prompted the expansion of injunctive class actions.²⁵⁵

A better example involves challenges to prison conditions—protecting the plaintiff prisoner by ordering government officials to remove raw sewage from the prison floors benefits non-party prisoners, since the prison cannot clean sewage as to one prisoner and not others. Another example is legislative redistricting—an injunction ordering the government to draw a new district benefits the plaintiffs and all voters whose rights were infringed by the previous, constitutionally infirm district.²⁵⁶ A third example involves challenges to public religious displays—the injunction protects one plaintiff from the offense of having to come across a display of the Ten Commandments in the courthouse by ordering government to remove the display, benefitting non-parties who also might be offended, since government cannot remove the display for one person and not others.

Laycock offers a related situation in which government officials cannot distinguish plaintiffs from non-plaintiffs. A court enjoined overly aggressive practices in enforcing a state motorcycle helmet law.²⁵⁷ An individual patrol officer could not know whether the motorcyclist against whom he was enforcing the law had been a plaintiff protected by the injunction, placing the officer in danger of violating the court order; the court therefore properly enjoined the forbidden practices as to all motorcyclists in the state.²⁵⁸ But this seems a rare situation, one that lends itself to a 23(b)(2) class of motorcyclists in the state and a class-wide injunction or to an action by an organization representing all motorcyclists.

One point of confusion is between incidental spillover benefits to non-parties and considerations of public interest that are required in the injunction analysis. Frost argues that if the court must account for concerns of non-party members of the public in deciding whether to grant an injunction, the court also can protect non-party members of the public in the injunction.²⁵⁹ In deciding whether to issue an injunction, the court considers the public interest and balances the equities.²⁶⁰ This analysis is concerned with potential conflicts between protecting the named party and protecting the broader public, with the goal of balancing the interests of the individual plaintiff against competing interests of the public at large. But accounting for countervailing public interests in deciding whether to issue the injunction is different from protecting the

²⁵⁵ Carroll, *supra* note 218, at 858–59; Marcus, *supra* note 218, at 680–81; *see supra* notes 218–221 and accompanying text.

²⁵⁶ Morley, *Nationwide Injunctions*, *supra* note 118, at 616.

²⁵⁷ LAYCOCK, *supra* note 13, at 276 (discussing *Easyriders Freedom F.I.G.H.T v. Hannigan*, 92 F.3d 1486 (9th Cir. 1996)).

²⁵⁸ *Id.*

²⁵⁹ Frost, *supra* note 16 (manuscript at 31).

²⁶⁰ *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

public at large by mandating spillover in the injunction itself.

Frost offers an example of a challenge to a voter-ID law, in which a non-party believes that the absence of a voter-ID requirement abridges her right to vote, but would lack Article III standing to bring such a claim.²⁶¹ The injunction analysis accounts for the competing concerns Frost raises. In balancing the equities and determining whether an injunction prohibiting enforcement of a voter-ID law is in the public interest, the district court accounts for the negative externalities upon other voters who would be protected by the ID law (the people the government sought to protect by enacting the law in the first instance). That has nothing to do with the scope of the injunction granted.

Courts also should not assume that only a broad injunction is sufficient. A court may order a general remedy—“remedy these constitutionally deficient prison conditions” or “cease enforcing the challenged law”—and leave to the defendant officials the discretion of how to achieve that obligation. If the government believes a narrower change sufficient to satisfy the injunction, it can pursue that narrower option. The only requirement is that any remedy protect the named plaintiffs. No one can complain that the injunction does not protect others.

Granting incidental or spillover benefits to non-parties does not make the injunction universal or expand the “who” the injunction protects. Unlike the named plaintiff, the non-party cannot enforce the injunction if the government acts inconsistent with the court’s order and the government cannot be held in contempt for its actions as to non-parties. If a non-party believes government officials have failed to make sufficient progress in redressing the constitutional violations, she cannot move the court to push the defendants to comply. Only the plaintiff can enforce the injunction, and if she is satisfied with the pace of the defendant’s compliance, an objecting non-party can do nothing about that. Others may benefit from the litigation decisions the plaintiff makes, but the decisions remain the plaintiff’s to make. To gain direct protection and the right to a court order to enforce, non-parties must obtain their own injunctions (using the first decision for some precedential value) prohibiting enforcement of the challenged laws, regulations, or policies as to them.

5. *Voluntary Compliance as to Non-Parties*

Government officials, enjoined from enforcing the challenged law as to the named plaintiffs, may go further than the injunction requires and cease enforcing the law against other persons.²⁶² They may do so for many reasons—convenience, agreement with the decision, or belief that the precedential force of the decision ensures that later courts will agree that the law is constitutionally invalid and enjoin or reject future enforcement

²⁶¹ Frost, *supra* note 16 (manuscript at 31).

²⁶² Blackman & Wasserman, *supra* note 27, at 254–55.

against a different group of rights-holders.²⁶³ State and local officials may do so out of cost concerns—a defeat in future constitutional litigation arising from actual or threatened enforcement against others may result in awards of attorneys’ fees.²⁶⁴ This represents the other sphere for judicial law declaration²⁶⁵—the court’s declaration of law in issuing the injunction may prompt government officials to cease all enforcement efforts against all persons, even if the injunction does not compel them to do so.

Voluntary compliance played a substantial role in marriage-equality litigation, before and after the Supreme Court decided the constitutional question. Having been enjoined from enforcing same-sex-marriage bans and having been compelled to issue marriage licenses to plaintiff couples, officials in many states went further, voluntarily issuing marriage licenses to all same-sex couples.²⁶⁶ The Trump Administration has not pursued similar voluntary compliance, reflecting its desire to fight the constitutional issues to the end. The point is that government officials are not required to comply beyond the named plaintiffs, and executive officials do not violate the Constitution or their oaths by refusing to voluntarily comply or by waiting for new injunctions.²⁶⁷

What constitutes “the end” of this process is unclear. The popular perception is that the end is a Supreme Court determination of the constitutional validity of the law; once the Court speaks to the validity of the travel ban or the sanctuary-city regulations, the government will cease all enforcement against all persons. But, as noted above, the judgment of the Supreme Court in a case arising from an individual injunction (as opposed to a class injunction or an injunction protecting a broad group of an association’s members or clients) does not compel this.²⁶⁸ Assuming some form of departmentalism in which judicial interpretations of the Constitution do not preempt the popular branches from adopting their own understandings of the Constitution,²⁶⁹ the executive could rely on his constitutional conclusions that the law remains valid and enforceable against others, at least until a new or expanded injunction prohibits enforcement against that next group. In following a Supreme Court precedent and declining to enforce the challenged law as to non-plaintiffs, the executive engages in a form of voluntary compliance.

Universal injunctions reflect lower-court impatience with the process

²⁶³ *Id.* at 256–60.

²⁶⁴ 42 U.S.C. § 1988(b) (2012); Blackman & Wasserman, *supra* note 27, at 258–59, 265.

²⁶⁵ Frost, *supra* note 16 (manuscript at 44–45).

²⁶⁶ Blackman & Wasserman, *supra* note 27, at 262–67.

²⁶⁷ *Id.* at 267–69.

²⁶⁸ *Supra* notes 207–12 and accompanying text.

²⁶⁹ Blackman & Wasserman, *supra* note 27, at 252–53; Gary Lawson and Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1269–70 (1996); Walsh, *supra* note 210, at 1715; Wasserman, *supra* note 27, at 7–8.

of precedent and voluntarily compliance, issued on the belief that non-parties should be as protected as parties from enforcement of the challenged law.²⁷⁰ But there is no obvious reason for that, at least under the traditional conception that constitutional defects are about enforcement of a law against a target rather than the existence of the law itself. Courts granting universal injunctions assume the government will not question the scope of the injunction because officials voluntarily comply as to all non-parties similarly situated.²⁷¹ Plaintiffs remain protected against enforcement by the judgment, regardless of what else government officials do as to other rights-holders. Any value or need to protect non-parties against enforcement of constitutionally suspect laws²⁷² derives from government’s voluntary decisions. Universal injunctions, overbroad as to “who,” deprive executive officials of that choice and relieve rights-holders of the obligation to take the additional step of commencing new litigation or joining ongoing litigation.

C. *Trying, and Failing, to Defend Universal Injunctions*

Despite the arguments described above, universal injunctions are becoming common and routine.²⁷³ During argument in *Trump v. Hawaii*, Justice Gorsuch questioned Hawaii’s counsel about “this troubling rise of this nationwide injunction, cosmic injunction . . . not limited to relief for the parties at issue or even a class action.”²⁷⁴ And Justice Thomas criticizes the trend in his *Hawaii* concurrence.²⁷⁵

Courts in these immigration and immigration-adjacent cases have been unhesitant and unrepentant in issuing such injunctions. And they have done so with little or no explanation or justification, beyond listing singular reasons. Only the district court in *Chicago v. Sessions*, in denying a stay of the universal injunction, offered detailed support for the practice.²⁷⁶ No justification withstands close scrutiny. All either fail to support a universal injunction or prove too much, making universality the default in all challenges to the validity of all federal laws, regulations, and policies, despite insistence to the contrary. Justice Thomas argued that these reasons “at best ‘boi[I] down to a policy judgment’ about how powers ought to be allocated among our three branches of government.”²⁷⁷

This part considers, and rejects, the reasons offered by courts in these immigration actions and by commentators supporting the practice.

²⁷⁰ Frost, *supra* note 16 (manuscript at 17–18).

²⁷¹ LAYCOCK, *supra* note 13, at 275.

²⁷² Frost, *supra* note 16 (manuscript at 54).

²⁷³ Bray, *supra* note 10, at 444–45.

²⁷⁴ Transcript of Oral Argument at 72–73, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

²⁷⁵ *Trump*, 138 S. Ct. at 2424 (Thomas, J., concurring).

²⁷⁶ *Chicago v. Sessions*, No. 17C5720, 2017 WL 4572208, at *4 (N.D. Ill. Oct. 13, 2017).

²⁷⁷ *Trump*, 138 S. Ct. at 2429 (Thomas, J., concurring) (citations omitted).

1. Supreme Court Approval

The Supreme Court approved the practice of universal injunctions in concept, at least implicitly. The Court affirmed the Fifth Circuit by an evenly divided Court in *Texas v. United States*, including the universal scope of the injunction.²⁷⁸ In a *per curiam* opinion granting certiorari and staying in part the universal preliminary injunctions against the second travel ban, the Court allowed the injunction to continue protecting the plaintiffs in *International Refugee Assistance Project* “and those similarly situated.”²⁷⁹ Both decisions appear to accept universality (as narrowed in some respects) and protection for non-parties. The district court in *Chicago* cited the Fourth Circuit (on the second travel ban) in supporting its universal injunction against the sanctuary-city funding regulations.²⁸⁰

This does not resolve the issue and does not even provide strong support.

Texas does not provide strong support, because an affirmance by an evenly divided Court carries limited precedential force.²⁸¹ *Trump v. IRAP* did not have full briefing on the scope-of-injunction issue and did not explain or analyze whether and why an injunction can or should protect beyond the plaintiffs. Given full briefing in *Hawaii*, the majority found it unnecessary to address the scope issue.²⁸² Justice Sotomayor’s dissent for herself and Justice Ginsburg argued in a footnote that making the injunction universal was not an abuse of discretion, but offered no detailed explanation or justification for the practice.²⁸³

And voices on the court point the other way. Justice Thomas dissented in part for himself and Justices Alito and Gorsuch in *International Refugee Assistance Project*. Citing *Califano*’s complete-relief principle and emphasizing that relief should run “to the plaintiffs,” Thomas argued that “a court’s role is ‘to provide relief’ only ‘to claimants . . . who have suffered, or will imminently suffer, actual harm.’”²⁸⁴ Courts protect parties from future injuries from enforcement of challenged laws and regulations; they do not issue orders benefitting the universe of affected non-parties. Thomas reaffirmed his opposition as to the third travel ban in *Hawaii*, rejecting universal injunctions as “legally and historically dubious,”²⁸⁵ exploring the history and limits of equitable powers, and reviewing and rejecting the arguments for universality.

²⁷⁸ *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016).

²⁷⁹ *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

²⁸⁰ *Chicago*, 2017 WL 4572208, at *2.

²⁸¹ *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987); *Neil v. Biggers*, 409 U.S. 188, 192 (1972).

²⁸² *Trump*, 138 S. Ct. at 2392.

²⁸³ *Id.* at 2446 n.13 (Sotomayor, J., dissenting).

²⁸⁴ *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2090 (2017) (Thomas, J., concurring in part and dissenting in part).

²⁸⁵ *Trump*, 138 S. Ct. at 2424 (Thomas, J., concurring).

2. *Equal Protection and the Rule of Law*

Courts insist that particularized, plaintiff-specific non-universal injunctions raise equal protection and rule-of-law problems, by prohibiting enforcement of federal law against some persons or entities (parties to the suit and the injunction) while allowing continued enforcement of the same law against other people or entities (non-parties not protected by the injunction). The district court in *Chicago* explained that “[a]ll similarly-situated persons are entitled to similar outcomes under the law, and as a corollary, an injunction that results in unequal treatment of litigants appears arbitrary.”²⁸⁶ Leaving the federal government free to administer the funding regulations declared invalid as to Chicago against other states and cities “flies in the face of the rule of law and the role of the courts to ensure the rule of law is enforced.”²⁸⁷ The Fourth Circuit framed this in terms of the “message” of the law—allowing continued enforcement of the travel ban against similarly situated non-plaintiffs sends the “message” that non-plaintiffs “are outsiders, not full members of the political community.”²⁸⁸

The short answer to the equal protection argument is that parties and non-parties are not similarly situated and so are not entitled to similar outcomes. “Because the plaintiff is the one who took the initiative and sued, it is the plaintiff who is protected. Others can receive the same protection if they take the same action by bringing their own suits (invoking the authority of the earlier decision).”²⁸⁹ Stated differently, “X (whether rich or poor) had to sue the government to win, and now Y (whether rich or poor) also has to sue the government to win.”²⁹⁰ Were Y to sue the government and obtain her own injunction prohibiting enforcement of the challenged law against her, Y and X become similarly situated—and any differential treatment disappears, because both are protected by an injunction against future enforcement of the challenged law. Concretely, if Chicago obtains an injunction protecting its funding but New York City does not, there is no equal protection problem in stripping New York of funds but not Chicago, because the cities are not similarly situated. When New York City obtains its own injunction protecting its funding, the cities become similarly situated and treated the same—neither can be stripped of its funding.

The longer answer is that the equal-protection argument misapprehends judicial review, the structure of the federal courts, and the nature of constitutional judicial decisionmaking.

²⁸⁶ *Chicago v. Sessions*, No. 17C5720, 2017 WL 4572208, at *4 (N.D. Ill. Oct. 13, 2017).

²⁸⁷ *Id.*

²⁸⁸ *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605(4th Cir. 2017).

²⁸⁹ *Bray*, *supra* note 10, at 474.

²⁹⁰ Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 *CARDOZO L. REV.* 43, 54 (1993); *see also* Morley, *DeFacto Class Actions*, *supra* note 117, at 548–49.

Constitutional review has been delegated, at least in part,²⁹¹ to federal courts, which resolve constitutional questions in the course of resolving concrete legal disputes between discrete parties.²⁹² Federal-court decisionmaking is distributed among three levels of a hierarchical structure. The lower tiers are geographically dispersed and the precedential effect of their decisions is geographically limited—a court of appeals creates binding precedent for itself and all district courts within its circuit, while a district court creates persuasive authority but has no binding effect.²⁹³ Only the Supreme Court at the top of the hierarchy has nationwide precedential reach, but its original jurisdiction is limited.²⁹⁴

Temporary disuniformity of federal law is inherent in multiple federal courts performing constitutional review in cases or controversies arising from discrete factual situations.²⁹⁵ It constitutes a feature rather than a bug in a system that relies on “percolation” of issues in lower courts. Multiple district and circuit judges have the opportunity to express their views. And the process achieves a balanced result, either through lower-court consensus that obviates Supreme Court resolution or lower-court disagreement that gives the Supreme Court a fuller legal and factual record with which to work when it ultimately resolves the legal question.²⁹⁶ Either approach yields ultimate uniformity of federal law, albeit at the cost of temporary disuniformity as multiple cases in multiple courts wend through the judicial process.²⁹⁷

Universal injunctions short-circuit that percolation process by allowing one district court (with affirmance by one circuit panel) to halt all enforcement against all persons. This compels the Supreme Court to resolve the matter on a single case rather than a broader record of lower-court analysis. More problematically, faster-moving immigration cases have been resolved on a preliminary-injunction (or a temporary restraining order treated as a preliminary injunction).²⁹⁸ Because orders granting

²⁹¹ Cf. Blackman & Wasserman, *supra* note 27, at 252–53; Lawson and Moore, *supra* note 269, 1269–70; Walsh, *supra* note 210, at 1715; Wasserman, *supra* note 27, at 7–8.

²⁹² Bray, *supra* note 10, at 461–62; Frost, *supra* note 16 (manuscript at 44–46).

²⁹³ Bray, *supra* note 10, at 465; Fallon, *As-Applied and Facial Challenges*, *supra* note 210, at 1339–40; Fallon, *Fact and Fiction*, *supra* note 210, at 923 n.31.

²⁹⁴ U.S. Const. art. II, § 1, cl. 2; 28 U.S.C. § 1251 (2012); see generally *Marbury v. Madison*, 5 U.S. 137, 138 (1803). The state plaintiffs in *Hawaii v. Trump*, *Washington v. Trump*, and *Texas v. United States* could have framed the cases to create a controversy between the United States and a state for original jurisdiction under § 1251(b)(2). But (b)(2) jurisdiction is concurrent; district courts had jurisdiction over the actions because the states’ claims arose under federal law. See 28 U.S.C. § 1331 (2012). Supreme Court practice has been to decline original jurisdiction over such cases, pushing the state plaintiffs to district court and the ordinary review process.

²⁹⁵ Bray, *supra* note 10, at 461; Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1605–06 (2008).

²⁹⁶ Bray, *supra* note 10, at 421–22, 461–62.

²⁹⁷ *Id.*

²⁹⁸ *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 255 (4th Cir. 2018);

preliminary injunctions are immediately and automatically appealable,²⁹⁹ cases move through the system, and to the Supreme Court, in a preliminary posture and without a full record.³⁰⁰ When an evenly divided eight-Justice Court could not agree in *Texas*, the Fifth Circuit decision became governing law for all persons in all places, never having gotten beyond the preliminary-injunction stage.

Ultimate uniformity of federal law remains distinct from the universal “who” of any injunction. A uniform determination that a law, regulation, or policy is constitutionally invalid produces injunctions barring enforcement as to named plaintiffs, but not non-parties. The final decision serves as binding precedent, establishing that any future enforcement effort against unprotected non-parties will fail, given binding authority establishing the invalidity of the law to be enforced.³⁰¹ The result is uniformity in litigation outcomes—the challenged law cannot be enforced. But multiple lawsuits and injunctions are necessary to achieve that uniformity.

Universal injunctions also become subject to demagogic criticism from elected officials displeased with a ruling, as when Attorney General Jeff Sessions decried that one “judge sitting on an island in the Pacific can issue an order that stops the president of the United States” from enforcing federal immigration law.³⁰² Sessions would have lobbed the same criticism at a particularized injunction limited to Hawaii and to the plaintiffs in the case. And he would have lobbed the same criticism at a similar decision from a nine-justice Supreme Court in Washington, D.C., affirming the injunction and the constitutional defects in the travel order. But giving the injunction broader effect than it should have lends force to a critical narrative about overreaching federal judges.

Criticizing temporary disuniformity on rule-of-law grounds also fails to give content to the concept of rule of law. It cannot begin and end with uniformity, but must account for additional ideas—including equitable, constitutional, and practical limitations on the scope of courts’ remedial authority, limitations on precedent, and other problems arising from universal injunctions. The rule of law also includes the power of the executive to engage in and act on its constitutional interpretation, including enforcing laws it believes constitutional when not otherwise pro-

Hawaii v. Trump, 878 F.3d 662, 672 (9th Cir. 2017); City of Chicago v. Sessions, 264 F. Supp. 3d 933, 936–37 (N.D. Ill. 2017).

²⁹⁹ 28 U.S.C. § 1292(a)(1) (2012).

³⁰⁰ Bray, *supra* note 10 at 462; Frost, *supra* note 295, at 1575–76, 1578–79.

³⁰¹ Rule-of-law values do not require the government to cease enforcement against everyone in the face of Supreme Court precedent declaring the challenged law constitutionally invalid. See Blackman & Wasserman, *supra* note 27, at 253–54. I leave that issue aside for present purposes, although plan to return to it in future work.

³⁰² Charlie Savage, *Jeff Sessions Dismisses Hawaii as “an Island in the Pacific,”* N.Y. TIMES (Apr. 20, 2017), https://www.nytimes.com/2017/04/20/us/politics/jeff-sessions-judge-hawaii-pacific-island.html?_r=0.

hibited from doing so by a properly scoped, non-universal injunction.³⁰³ An injunction that undercuts presidential power undercuts the rule of law as much as, if not more than, temporary disuniformity.

3. *Uniform Immigration Law*

The Constitution empowers Congress to “establish a uniform Rule of Naturalization.”³⁰⁴ The Fifth Circuit justified the universal injunction in *Texas* because an injunction limited to the 26 plaintiff states would result in “[p]artial implementation” of DAPA, contrary to the Framers’ intent in Article I and Congress’ intent in enacting current immigration statutes.³⁰⁵ The Fourth Circuit adopted that idea in affirming universal injunctions against the second and third travel bans,³⁰⁶ as did district courts enjoining DACA rescission.³⁰⁷

Counsel for Hawaii in the travel-ban litigation urged the Supreme Court not to resolve scope-of-the-injunction in that case because of the unique immigration context and special congressional power over immigration.³⁰⁸

The uniformity argument fails in several respects. *Texas* relied on language from *Arizona v. United States*³⁰⁹ demanding uniformity and unification of the legislative regime governing immigration. But *Arizona* involved federal preemption of state laws implicating the immigration system (the challenged state law made certain immigration violations state crimes and authorized local law enforcement to stop and search persons suspected of being unlawfully present³¹⁰); the preemption power arose from the need to ensure uniformity and to prevent state law from creating federal disuniformity.³¹¹ Uniformity-through-preemption was inapplicable in *Texas*, where federal regulation provided the sole statutory rule (DAPA), but different courts were in the midst of ruling on individual challenges to the validity of enforcing that rule as to different plaintiffs.

The Fifth Circuit’s take on the uniformity requirement would render ordinary litigation impossible for constitutional challenges to immigration laws, because even temporary disuniformity created by lower-court

³⁰³ Blackman & Wasserman, *supra* note 27, at 252–54; Walsh, *supra* note 210, at 1728; Wasserman, *supra* note 27, at 8.

³⁰⁴ U.S. CONST. art. I, § 8, cl. 4.

³⁰⁵ *Texas v. United States*, 809 F.3d 134, 188 (2015).

³⁰⁶ *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 272–73 (4th Cir. 2018) (en banc); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017).

³⁰⁷ *Regents of Univ. of California v. United States Dep’t of Homeland Security*, 279 F. Supp. 3d 1011, 1049 (N.D. Cal. 2018); *Batalla Vidal v. Nielson*, 279 F. Supp. 3d 401, 438 (E.D.N.Y. 2018).

³⁰⁸ Transcript of Oral Argument at 73–74, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

³⁰⁹ *Arizona v. United States*, 567 U.S. 387, 392 (2012).

³¹⁰ *Id.* at 393–94.

³¹¹ *Id.* at 394–95.

splits and particularized, non-universal injunctions would become constitutionally unacceptable. Only the Supreme Court could decide constitutional challenges to immigration laws, but it would have to do so with no opportunity for percolation in the lower courts and limited original jurisdiction. And, in any event, a single Supreme Court decision in an individual case does not create a universal injunction, only binding precedent.³¹²

A second part of the immigration-law-is-unique argument rests on geographic dispersal of people affected by immigration laws. *IRAP* was brought by six individuals scattered throughout the United States, two immigrant-resettlement organizations on behalf of clients dispersed in the targeted countries, and an academic organization on behalf of its members dispersed around the world.³¹³ Hawaii sued on behalf of many unknown and dispersed students and scholars the state hoped to bring to its universities.³¹⁴ Resting universality on geography continues conflating who and where. The injunctions should protect the plaintiffs (including organizations' members and clients) wherever they are in the world, but should not protect anyone other than those plaintiffs and their members and clients.

The Fifth Circuit in *Texas* also argued that a “geographically-limited injunction would be ineffective because DAPA beneficiaries would be free to move among states.”³¹⁵ Texas established standing based on its program of issuing state-subsidized drivers' licenses to all persons lawfully within the United States, which would include DAPA beneficiaries able to show lawful presence or employment authorization; it would be required to spend millions of dollars subsidizing licenses for people in the United States under an unconstitutional executive policy.³¹⁶ It therefore could not obtain complete relief from an injunction barring enforcement of DAPA only in Texas, as by prohibiting the grant of lawful status to otherwise-unlawfully present persons in the state. If the United States could continue to defer removal and accord lawful presence or work authorization to an individual in a non-plaintiff state (such as Illinois or New York), that individual could move to Texas and receive a subsidized license. Only by eliminating all enforcement of DAPA in all states could a court protect Texas against that monetary injury.

But a universal injunction was not the only way for Texas to avoid that injury. The narrowest effective injunction would have excused Texas from issuing drivers' licenses to any DAPA recipients, whether in Texas or traveling to Texas from elsewhere; that injunction would have remedied the precise injury that Texas used to get to federal court.³¹⁷ A broad-

³¹² *Supra* note 211 and accompanying text.

³¹³ *Int'l Refugee Assistance Project*, 857 F.3d at 577.

³¹⁴ *Hawaii v. Trump* 878 F.3d 662, 699 (9th Cir. 2017).

³¹⁵ *Texas v. United States*, 809 F.3d 134, 188 (2015).

³¹⁶ *Id.* at 152–53.

³¹⁷ Thanks to David Marcus for suggesting that the logic behind particularized

er, although still non-universal, injunction would have prohibited the federal government from deferring removal or according benefits to individuals present in Texas and provided that Texas need not grant nor subsidize drivers' licenses or other benefits for persons claiming the right to the benefit under DAPA, whether present in Texas at the time of the injunction or later moving there. There was no need for the court to enjoin the federal government from exercising DAPA discretion, and according DAPA benefits, to individuals with no connection to Texas or the other 25 plaintiffs.

4. *Duplicative and Inconsistent Litigation*

Faced with the prospect of being unable to issue universal injunctions and only able to protect named plaintiffs, courts have appeared at a loss. The district courts in the sanctuary-cities cases emphasized that other jurisdictions would face the same legal risk of loss of funding and that the federal government claimed the same enforcement authority as to all states, counties, and municipalities receiving federal funds.³¹⁸ Only a universal injunction could resolve that problem.

Two solutions are obvious. Plaintiffs can file their constitutional cases as Rule 23(b)(2) injunctive class actions and obtain injunctions protecting the class of persons or entities everywhere in the United States as parties.³¹⁹ Or every individual or organization (or groups of organizations) must file separate lawsuits and obtain separate injunctions barring enforcement of the challenged laws as to them or their members and clients. The earlier injunction and opinion provides some precedential value in the latter actions, depending on how far the first case went in the judicial hierarchy. And the multiple lawsuits allow the percolation on which good judicial decisionmaking depends.

Unfortunately, federal courts have come to regard the latter solution as inefficient and insufficient, the race to issue universal injunctions reflecting impatience with ordinary judicial processes. The district court in *Chicago* insisted that because 37 counties and cities filed an amicus brief, judicial economy counseled against compelling each to file a separate lawsuit to have a court resolve the same legal issues resolved in that case.³²⁰ The alternative risked a flood of duplicative litigation, as every city or country subject to the funding restrictions must obtain its own injunction.³²¹ The *Chicago* court also feared the risk of inconsistent judgments, with one court declaring the law invalid and enjoining enforcement as to some cities and another court declaring the law valid and allowing en-

non-universal injunctions suggests injunctions should remedy the precise injury giving the plaintiff standing, but no further.

³¹⁸ *Chicago v. Sessions*, No. 17C5720, 2017 WL 4572208, at *3 (N.D. Ill. Oct. 13, 2017); *Chicago v. Sessions*, 264 F. Supp. 3d 933, 951–52 (N.D. Ill. 2017); *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017).

³¹⁹ *Supra* notes 213–233 and accompanying text.

³²⁰ *Chicago*, 2017 WL 4572208, *3.

³²¹ *Id.*

forcement as to other persons.

Rather than the bug the *Chicago* and *Santa Clara* courts perceived, these are features of constitutional litigation and the way federal constitutional adjudication should function. Later litigation is not duplicative of earlier litigation involving different parties, because the traditional conception makes litigation about threatened enforcement of the challenged law against particular plaintiffs. Similarity of legal issues between different cases does not alter that nature of constitutional litigation; while it might justify joinder or consolidation of claims into a single proceeding for efficiency purposes,³²² it does not render separate litigation involving different parties redundant. Any inefficiency is inherent in that limited scope of a court’s equitable powers and in the hierarchically and geographically distributed decisionmaking of the federal system. Efficiency concerns cannot expand the power of a court in a single case or alter the structure and function of the federal judiciary. And the system of percolation understands inconsistency as a benefit, part of what lower courts are supposed to do in moving toward a final, uniform constitutional determination by the Article III judicial system.

Bray argues that allowing universal injunctions creates a more significant problem in the other direction—conflicting injunctions.³²³ A decision issued by one district court does not bind another district or circuit; a decision affirmed by one circuit does not bind another circuit. That the issuing court labeled or purported to make its injunction universal does not alter this. But it does allow multiple courts to expand their remedial reaches, creating a possible collision. Imagine a case in which Court I enjoins a federal official to do x , while another court enjoins the same official to refrain from doing x . As neither injunction takes precedence (short of a Supreme Court decision affirming one and reversing the other), that federal official risks violating an injunction and being held in contempt no matter what she does.³²⁴ Following the universal injunction barring enforcement of DAPA, individuals filed suit in federal districts outside of the Fifth Circuit seeking a declaration that the United States was not bound by the injunction outside of Texas or as to people outside of Texas and seeking an injunction permitting the United States to enforce DAPA (and not deport people) outside of Texas.

Courts avoid this “doomsday scenario” through restraint and good luck, both of which can run out.³²⁵ They can avoid it formally by rejecting universal injunctions and limiting all injunctions to protecting the named plaintiffs. Court I’s injunction prohibits enforcement as to the plaintiffs before it, but says nothing about the parties before Court II, whose fate remains to that court’s constitutional determination. Unfor-

³²² Fed. R. Civ. P. 20(a); Fed. R. Civ. P. 42(a); Fed. R. Civ. P. 23; see *Hall v. Hall*, 138 S. Ct. 1118 (2018).

³²³ Bray, *supra* note 10, at 462.

³²⁴ *Id.*

³²⁵ *Id.* at 464.

tunately, district courts display increasing reluctance to exercise this remedial restraint.

At a minimum, federal officials remain unclear about what they are empowered to do in enforcing federal law. Imagine Court I declares the law constitutionally invalid and issues a universal injunction but Court II declares the law constitutionally valid and allows the government to enforce it against. Enforcing the law, as permitted by Court II, would place him in contempt of Court I. But abiding by the judgment in Court I places that court and its judgment above a contrary judgment from a co-equal court.

5. *Facial Unconstitutionality*

Several courts have justified universal injunctions on the purported facial unconstitutionality of the challenged laws, deeming them unconstitutional in all possible applications, as opposed to declaring them unconstitutional only as applied to the plaintiffs.³²⁶ A limited, particularized, non-universal injunction is inconsistent with the declaration of facial unconstitutionality. Having determined that the challenged law is unconstitutional beyond the plaintiffs, a court cannot allow continued enforcement against other rights-holders.

This misapprehends the meaning and effect of facial unconstitutionality. The declaration of facial unconstitutionality goes to the scope of the court's constitutional analysis and reasoning, therefore to the precedential effect of its opinion. If Court I declares the law facially unconstitutional, Court II might use that as precedent to declare the law unconstitutional as to future plaintiffs. A Supreme Court declaration of facial unconstitutionality does the work for Court II—no further analysis is necessary if binding precedent establishes that the law cannot be constitutionally applied in the new context or to the new parties.³²⁷ But Court I and Court II make those constitutional determinations in the course of enjoining enforcement of the law as to some plaintiffs. A declaration of facial unconstitutionality does not expand the court's remedial authority or empower it to enjoin the defendant from enforcing against persons outside the case. The court's order remains as applied to the plaintiffs, although the precedential effect of its pronouncement of facial invalidity may be broader.³²⁸

6. *Proving Too Much*

The district court in *Chicago* insisted that universal injunctions should not be the default approach but remain an "extraordinary remedy that should be limited by the nature of the constitutional violation and

³²⁶ *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017); *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017).

³²⁷ Fallon, *As-Applied and Facial Challenges*, *supra* note 210, at 1339–40; Fallon, *Fact and Fiction*, *supra* note 210, at 923 n.31.

³²⁸ Fallon, *As-Applied and Facial Challenges*, *supra* note 210, at 1339–40; Fallon, *Fact and Fiction*, *supra* note 210, at 923 n.31.

subject to prudent use by the courts.”³²⁹ Amanda Frost, the strongest scholarly advocate for universality, similarly argues that the “default should be *against* issuing a nationwide injunction. A single district court judge should not lightly assert control over federal policy for the nation, and should allow her fellow judges to reach their own decisions in cases involving different plaintiffs.”³³⁰

The increasing use of universal injunctions, including as to the immigration laws discussed, suggests that universality is becoming the default in challenges to the constitutional validity of federal law, at least federal immigration and immigration-adjacent law. Leaving the injunction’s “who” to the prudence of district courts is not working as a limiting principle. Or prudence holds only for so long and we have reached that point.

The permissible-but-rare defense proves too much. *Chicago* upheld the universal injunction against the sanctuary-city regulations in light of concerns for uniformity, unfairness of disparate application, and the rule of law,³³¹ each constituting an “extraordinary” element warranting universality. But each of those elements is present in every constitutional challenge to every federal law. By its terms, therefore, the argument requires—or at least encourages—a district court to issue a universal injunction to prohibit enforcement of any federal law regulating any federal conduct.

Despite the court’s rhetorical attempt to limit universal injunctions to extraordinary cases, every case is extraordinary, as the court defined it. The authority of federal officials to enforce any federal law never varies by jurisdiction—the law and the power to enforce the law is the same nationwide. Judicial economy always favors one lawsuit over multiple lawsuits. There would be a flood of similar lawsuits by everyone affected by every federal law. Federal uniformity and the unfairness of disparate application of federal law are present with respect to every federal law. If the rule of law is undermined by enforcement of a “likely invalid” law to persons other than the named plaintiff protected by the injunction, it is undermined by enforcement of every federal law that one court has declared constitutionally invalid.

Frost argues that universal injunctions are uniquely necessary in the face of executive action, such as the executive orders and regulations challenged in these immigration cases. The Executive can announce new federal policy at the last minute, making it difficult for plaintiffs to certify a class before the policy takes effect, then can fight class certification; only a universal injunction prevents the Executive from controlling litigation to undermine entry of injunctions that protect more than a few indi-

³²⁹ *Chicago v. Sessions*, No. 17C5720, 2017 WL 4572208, at *4 (N.D. Ill. Oct. 13, 2017).

³³⁰ Frost, *supra* note 16 (manuscript at 3, 48 (emphasis in original)).

³³¹ *Id.*

viduals at a time.³³² But it is not clear why this concern is greater for federal executive action than for federal legislation; while legislation takes longer to enact than an executive order, the possibilities for manipulative litigation are the same. Moreover, courts can issue preliminary relief to benefit a putative class, even if it has not yet formally certified the class.³³³ The government does not hold exclusive power to avoid broader injunctions protecting a broader group of plaintiffs.

IV. THE WAY FORWARD

Universal injunctions are generally inappropriate in individual constitutional litigation and should not be issued in the mine run of cases. Universal injunctions are specifically inappropriate in the constitutional litigation challenging the immigration and immigration-adjacent laws, regulations, and policies discussed here. Even allowing for broader injunctions in some circumstances, these cases do not come within those circumstances—the rights and remedies are divisible, a narrower injunction affords plaintiffs complete relief, a narrower injunction is commensurate with the constitutional violation found in the threatened enforcement of the constitutionally defective laws as to the plaintiffs. Class actions, associational standing, and third-party standing would have allowed for sufficiently broad and protective injunctions prohibiting enforcement of the challenged laws, regulations, and policies, even if those injunctions were not universal and were particularized to the parties.

This Part briefly describes the appropriate scope of the injunctions that should have issued in these seven classes of constitutional challenges.

A. *Attorney Regulations*

The injunction in *NWIRP* should have prohibited EOIR from enforcing the attorney regulations as to *NWIRP*, by precluding EOIR from sanctioning *NWIRP* or *NWIRP* attorneys for continuing to advise *pro se* litigants without filing a formal appearance. The injunction should be nationwide in protecting *NWIRP* from enforcement of the regulations in any immigration proceedings anywhere in the country. The injunction need not and should not protect other attorneys or legal-representation organizations. *NWIRP*'s rights are unaffected by any promised DOJ attempts to enforce the regulations against other attorneys and the particularized injunction is commensurate with the violation of *NWIRP*'s First Amendment rights from threatened enforcement. Other attorneys or organizations can file their own lawsuits if threatened with enforcement; the district court's First Amendment decision in *NWIRP* can provide persuasive authority on the constitutional validity of the regulations in future litigation.

³³² Frost, *supra* note 16 (manuscript at 46–47).

³³³ *Supra* note 231 and accompanying text.

B. Abortion Access for Detained, Undocumented, Unaccompanied Minors

The district court got the “who” of both injunctions right in *Garza*. The injunctions expressly and appropriately protected the three named plaintiffs and ensured that HHS officials did not stop them from obtaining abortions. The injunctions were properly nationwide, in that they protected the girls wherever they were detained—Texas, where they were, or anywhere in the United States.

The injunctions need not, should not, and did not protect other undocumented unaccompanied detained minors from similar HHS efforts to prevent them from terminating pregnancies. The rights and injunctive remedies were divisible. The rights of J.D., J.R., or J.P. protected by the injunctions are not affected by HHS efforts to stop other girls from exercising their reproductive rights and the relief accorded to the three plaintiffs was not less than complete if other girls face similar government-imposed hurdles. Other pregnant minor detainees can file their own lawsuits if challenged with similar barriers or similar HHS efforts to prevent them from exercising their reproductive freedom.

Wanting a broader injunction to protect all pregnant undocumented unaccompanied minors in HHS detention, the plaintiffs took the appropriate steps by seeking to certify a class action, expanding who qualifies as a plaintiff in the case by establishing a class with an independent identity and legal status. The court subsequently certified a 23(b)(2) class of “all pregnant, unaccompanied immigrant minor children (UCs) who are or will be in the legal custody of the federal government.” In other words, the court expanded the “who” of the injunction in the appropriate manner—by using class-action procedure to expand the “who” of the litigation.

C. Funding of Sanctuary Cities

The district courts in *Chicago* and *Santa Clara* should have issued injunctions prohibiting DOJ from denying funding to Chicago and to Santa Clara and San Francisco, respectively. The injunctions cannot and should not prohibit DOJ from denying funding to any other city; neither Chicago’s nor Santa Clara’s rights are affected by DOJ attempts to enforce the funding regulations to other jurisdictions, nor is their relief rendered less than complete if DOJ attempts to strip funds from other municipalities. Other jurisdictions can file their own suits if threatened with enforcement and loss of funds, using the prior decisions as persuasive authority on the constitutional validity of the funding regulations.

The Ninth Circuit affirmance in *San Francisco* offered one proper-but-narrow exception to particularity in allowing the injunction to run against non-party California. Although the state was not party to the action, stripping it of federal funds affected San Francisco and Santa Clara because some of the federal funds that DOJ grants to California are then passed along to the municipalities, which depend on these state-

transferred funds to function. Enforcing the regulations and denying funds to California thus affected the municipalities' rights and rendered the relief of a particularized injunction less than complete; the judicial remedy could protect the plaintiffs from the constitutionally invalid funding regulations only by protecting California from the constitutionally invalid funding regulations. But courts must recognize the narrow scope of this exception to particularity. It is unlikely that San Francisco's budget depends on funds from a state other than California or from another municipality. The denial of funds to those entities (if not parties to the lawsuit) does not affect San Francisco's rights or remedies or deny them complete relief, thus it does not justify a universal injunction protecting all sanctuary cities.

D. *DAPA and DACA Rescission*

The injunction in *Texas* would have been sufficient had it relieved Texas of the obligation to subsidize drivers' licenses for any DAPA recipients. Or the injunction could have prohibited enforcement of DAPA in Texas and the 25 co-plaintiff states; the order could have prohibited the federal government from deferring removal to the class of immigrants in those states and from conferring federal and state benefits to immigrants in those states. The problem of people moving from other (non-injunction) states into Texas could be addressed by not requiring Texas or the other plaintiff states to provide state benefits, such as subsidized drivers' licenses, to DAPA recipients. But the federal government could continue to provide DAPA benefits to persons in non-objecting states.

The order enjoining DACA rescission similarly should have been limited to the plaintiff DACA recipients and the other entities and organizations bringing suit on behalf of particular recipients. The government could have proceeded with rescission in other states, at least with respect to recipients who lacked bona fide relationships with some of the plaintiffs.

E. *Travel Bans*

The Court's determination that the President had the power to enact the third travel ban obviated any discussion of the scope of the injunction.³³⁴ Which is unfortunate, because this controversy represents the most difficult example and the best argument for universality. This explains Justice Thomas's insistence that the Court was "dutybound" to resolve scope-of-injunction in *Hawaii*, given their continuing and increasing use in federal court.³³⁵

Had plaintiffs prevailed on their constitutional claims, particularized, non-universal relief would have been possible.

³³⁴ *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

³³⁵ *Id.* at 2429 (Thomas, J., concurring).

It was logically possible to enjoin enforcement of the travel ban to some persons and not others—to allow some refugees or visitors from the targeted nations into the country and not others. Allowing enforcement of the ban to some persons, while prohibiting enforcement as to the named plaintiffs, would not deny the named plaintiffs complete relief and would match the constitutional violation in banning the plaintiffs from the U.S.

The difficulty or uncertainty of identifying students and scholars who might come to Hawaii or of identifying IRAP clients in the target nations could be resolved at the enforcement stage. Faced with a future government attempt to prohibit an individual from traveling to the United States, Hawaii or IRAP must show that the targeted individual had a “bona fide” relationship with it that is “formal, documented, and formed in the ordinary course, rather than for the purpose of evading the travel restrictions.”³³⁶ That relationship would mean attempted enforcement against the person with a bona fide relationship was barred by the injunction and could be halted by a court order enforcing the injunction on request by the entity plaintiff. If the enforcement target lacked that bona fide relationship, she would seek a new injunction or an extension of the existing injunction. Absent that new or extended injunction, enforcement of the travel ban was permissible because the government was not barred by any court order from enforcing it against the new target. Either way, there would be no need to expand the original injunction at the point of issuance.

F. Family Separations

Absent class certification, particularized non-universal relief would have been possible in these cases. The individual plaintiffs in the action, identified as “Ms. L” and “Ms. C,” would have obtained complete relief by an injunction requiring that they be reunited with their children and that they not be separated from their children during the pendency of their asylum petitions. The particularized injunction matches the violation of their constitutional rights, the conscience-shocking separation of their children from them, by reuniting them with their children. Neither Ms. L’s nor Ms. C’s rights would be affected by the continued separation of other parents from their children pursuant to federal policy and practice.

Attorneys representing Ms. L and Ms. C and the district court sought a broader litigation and remedy, but avoided any universality problems by following appropriate steps. The plaintiffs sought and the court certified an injunctive class of all parents separated from their minor children at the border. That class, and all its members, became the proper plaintiffs before the court. The classwide injunction properly protected the class as a unique plaintiff (but not non-party individuals falling

³³⁶ *Int’l Refugee Assistance Project*, 883 F.3d 233, 272–73 (4th Cir. 2018) (en banc) (quoting *Trump*, 137 S. Ct. at 2088).

outside the class) against continued enforcement of the government's policies and practices. Objections or problems with the broad scope of that class can be argued under Rule 23, rather than under constitutional and equitable considerations about judicial and remedial power.