Entering the Political Thicket with Nationwide Injunctions

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ABSTRACT

Nationwide injunctions are a recent phenomenon that federal district court judges have increasingly issued over the past two decades. Normally, an injunction is issued only against named parties. However, nationwide injunctions apply to everyone, including nonparties, and are not limited in geographic scope. Litigants fighting against highly contested presidential policies—for example, President Donald Trump's travel ban—have taken advantage of this practice by filing their cases in jurisdictions where they are more likely to appear before an empathetic judge. Not only does this practice risk creating the public perception of a biased judiciary, but once a nationwide injunction is issued, it can seriously interrupt the enaction of federal policy. As a result, nationwide injunctions often disrupt the constitutional separation of powers.

The practice of issuing nationwide injunctions likely violates both the Constitution and the political-question doctrine. Certainly, the Founders did not intend the judiciary to wield the amount of power they have today, but instead envisioned a balance of powers. In the near future, several stakeholders could determine the fate of nationwide injunctions—Congress could pass a statute explicitly authorizing or denying district courts the authority to enjoin policies on a nationwide basis; district courts could issue traditional injunctions and allow cases to proceed as class actions if the issues affect several individuals; or, ultimately, the Supreme Court could address whether the practice of issuing nationwide injunctions is constitutional.

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INTRODUCTION

Under Article III of the Constitution of the United States, federal courts have what is known as "judicial power" to adjudicate cases for specific parties.[1] In other words, federal courts typically do not decide cases for individuals who are not named as parties to a case. Nonetheless, over the past several years, the practice of issuing what are known as "nationwide injunctions"[2] has gained notable prominence across many districts as a weapon to combat highly contested presidential policies.[3] While typically an injunction would be applied against a named defendant in a particular case vis-à-vis the named plaintiff, a nationwide injunction applies to everyone, including nonparties.[4]

1. *See* U.S. CONST. art. III, § 1; *see also* Diarmuid F. O'Scannlain, *Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation*, 101 VA. L. REV. 31, 34 (2015).

2. The term "national injunction" is also used among courts and scholars. This Article will use the term "nationwide injunction."

3. *See The Role and Impact of Nationwide Injunctions by District Courts: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 115th Cong. 10 (2017) (statement of Hans A. von Spakovsky, Manager, Election Law Reform Initiative and Senior Legal Fellow, The Heritage Foundation, Institute for Constitutional Government).

4. *See generally* Jonathan Remy Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 NOTRE DAME L. REV. 1985, 1989 (2019) (describing that a "'plain vanilla' injunction" is typically only enforced against the defendant by the

Nationwide injunctions are troublesome for a variety of reasons. For one, acting in the belief that a certain executive order or regulation violates their rights, politically liberal plaintiffs will often file suit in blue states and politically conservative plaintiffs will file in red states.[5] This encourages forum shopping and also suggests that there is political motive behind requesting a court to issue a nationwide injunction. Moreover, nationwide injunctions disrupt the constitutional separation of powers by usurping authority that instead belongs to the legislative or executive branch.[6] These reasons may explain why scholars have been unable to find any case where a federal judge issued a nationwide injunction during the first 175 years of the Republic—in fact, it took more than 200 years for courts to issue the first nationwide injunctions.[7] But now, the Department of Justice estimates that federal courts have issued 55 nationwide injunctions during the Trump administration alone.[8] How did we get here, and more importantly, could nationwide injunctions violate the political-question doctrine?

"The political question doctrine holds that some questions, in their nature, are fundamentally political, and not legal, and if a question is fundamentally political . . . then [the federal court] will refuse to hear that case . . . it will leave that question to some other aspect of the political process to settle . . . ."[9] By inserting the judiciary into these politicized issues, judges in certain districts not only risk their judgment

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plaintiffs who brought the claim, "and only within the geographic jurisdictional confines of the issuing court.").

5. *See* David French, *The Nationwide Dysfunction of the District-Court Injunction*, NAT'L REVIEW (June 6, 2019, 10:34 AM), https://bit.ly/2LTpHk7 ("Liberal plaintiffs and liberal lawyers often file suit somewhere in California, especially in San Francisco. Conservative plaintiffs and conservative lawyers seek more hospitable ground in Texas.").

6. *See* Memorandum from Att'y Gen. Jeff Sessions on Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions to the Heads of Civil Litigating Components United States Attorneys 6 (Sept. 13, 2018) (https://bit.ly/3cXSMaf) ("First, it falls to Congress to establish by statute limited and specific contexts in which a single court has the authority to review agency actions with nationwide applicability. . . . Second, nationwide injunctions deprive the Executive Branch of the opportunity to determine whether or how to apply a particular ruling beyond the parties in the case.").

7. *See id.* at 4.

8. *See* Beth Williams, Assistant Att'y Gen., Address on Nationwide Injunctions at The Heritage Foundation (Feb. 4, 2019), https://bit.ly/2PeI58W ("[C]ourts issued an average of only 1.5 nationwide injunctions per year against the Reagan, Clinton, and George W. Bush administrations, and 2.5 per year against the Obama administration."); Jeffrey A. Rosen, Deputy Att'y Gen., Address at the Forum on Nationwide Injunctions and Federal Regulatory Programs (Feb. 12, 2020), https://bit.ly/3fmm1ni ("During the current administration, federal courts have issued at least 55 nationwide injunctions in just three years.").

9. JOHN E. FINN, CIVIL LIBERTIES AND THE BILL OF RIGHTS 55 (2006).

being tainted by political bias, but these judges also risk interfering in matters more properly handled by another branch of government.[10]

Accordingly, this Article argues that nationwide injunctions violate the political-question doctrine and the Constitution. Part I discusses the scope of a federal court's jurisdiction and how the doctrines of standing and political question come into play.[11] Then, Part II reviews the history of nationwide injunctions, including their origin and how they work today.[12] Part III delves deeper into how nationwide injunctions violate the Constitution and the political-question doctrine.[13] Lastly, Part IV offers solutions for how litigants can obtain redress for their claims without seeking nationwide injunctions.[14]

I. THE CONSTITUTIONAL LIMITATIONS ON FEDERAL COURTS

Federal courts are courts of limited subject-matter jurisdiction. The Constitution provides that the federal judiciary may adjudicate certain enumerated cases and controversies, including those "arising under the Constitution" or federal statutes.[15] This is known as "original jurisdiction."[16] Specifically, Article III states that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[17]

10. *See* Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 30 (2019). *See generally* Baker v. Carr, 369 U.S. 186 (1962) (stating that the political-question doctrine should be invoked when the issue presented to the court is one that has been textually committed to another branch of government).

11. *See infra* Part I.

12. *See infra* Part II.

13. *See infra* Part III.

14. *See infra* Part IV.

15. U.S. CONST. art. III, § 2; *see also* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3521 (3d ed. 2019).

16. WRIGHT ET AL., *supra* note 15.

17. U.S. CONST. art. III, § 2.

Moreover, Article III authorizes the creation of the Supreme Court and grants Congress the power to establish "such inferior [federal] courts" as it sees fit.[18]

In contrast, state courts have general jurisdiction and typically can hear any controversy, subject to personal jurisdiction or venue considerations.[19] In some cases, a state court's jurisdiction may overlap with a federal court's, and accordingly, a plaintiff can choose to bring a case in either court.[20] If a plaintiff chooses to sue in a state court, the defendant may choose to "remove" the case to a federal court if the federal court would have subject-matter jurisdiction over it.[21] Additionally, a concept known as "diversity jurisdiction" allows a plaintiff to bring a state-law claim in federal court if all of the plaintiffs are located in a different state than all of the defendants and the amount in controversy exceeds $75,000.[22]

"A federal court's entertaining a case that is not within its subject matter jurisdiction is no mere technical violation; it is nothing less than an unconstitutional usurpation of state judicial power."[23] Therefore, a party who wishes to file in federal court must affirmatively allege facts that would support the court's subject-matter jurisdiction over the case.[24] These generalized limitations have typically operated in the sense presumed by the Founders.[25] While there will always be individuals who disapprove of certain judicial findings, "the federal court system has been characterized—certainly for the first century and a half of its existence—by relative modesty in exercising remedial powers."[26]

Professor Larry Kramer explains that "even a limited power of judicial review remained controversial in the 1780s. At the time, the most that could be said . . . was that [federal] courts might exercise review where the legislature unambiguously violated an established

18. *Id.* § 1.

19. *See* WRIGHT ET AL., *supra* note 15, § 3522.

20. *See id.*

21. *See* Haik v. Salt Lake Cty. Bd. of Health, 604 Fed. Appx. 659, 662 (10th Cir. 2015). A case may be removed from state to federal court only if the federal court has subject-matter jurisdiction. *See id.* The party invoking federal jurisdiction has the burden of establishing that such jurisdiction is proper and overcoming a presumption to the contrary. *See id.*

22. *See* WRIGHT ET AL., *supra* note 15, § 3522.

23. *Id.*

24. *See id.*

25. *See* Cass, *supra* note 10, at 33 ("[T]hose who framed the Constitution, and were party to its early implementation, were confident that judges [because of their insulation from direct application of political forces, the requirements of reasoned explanation, their grounding decisions in text and precedent, and the limited focus and specific setting for which their interpretations of law applied] would not pose a threat to the operation of the other branches of government.").

26. *Id.*

principle of fundamental law."[27] In fact, Alexander Hamilton stated that a federal court would only be able to declare a statute unconstitutional if an "irreconcilable variance" existed between the Constitution and the statute in question.[28]

A. The Power of the Court Through Marbury v. Madison

The Supreme Court's decision in *Marbury v. Madison* was the genesis for establishing "who may obtain constitutional declarations and when."[29] The background facts of *Marbury* involve a dramatic political showdown when Federalists were ratifying appointments of "midnight judges" after they were defeated in the election of 1800.[30] Outgoing President John Adams issued 42 judicial appointments, with William Marbury's appointment as Justice of the Peace among the last of them.[31] Once Thomas Jefferson was sworn in as President, he directed James Madison, his Secretary of State, to withhold certain commissions, including Marbury's.[32] As a result, Marbury filed suit in the Supreme Court seeking a writ of mandamus directing Madison to honor his appointment.[33] Marbury was able to do this because of a provision in the Judiciary Act of 1789 that attempted to expand the Supreme Court's original jurisdiction.[34]

While Marbury's mandamus petition may appear like a typical run-of-the-mill injunctive-relief request, in actuality, Chief Justice John Marshall had a heavy decision to make. If the Court ruled for Marbury, President Jefferson would likely direct Madison to disregard the Court's decision.[35] The Court, unable to enforce its own ruling, would have seen its power necessarily diminished.[36] However, if the Court ruled for

27. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 238–40 (2000).

28. *See* THE FEDERALIST NO. 78 (Alexander Hamilton); *see also* THE FEDERALIST NO. 81 (Alexander Hamilton) (stating that statutes can be voided by courts if they are in "evident opposition" to the Constitution).

29. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1364–65 (1973).

30. *See* Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 9 (2003).

31. *See* Richard A. Samuelson, *The Midnight Appointments*, WHITE HOUSE HISTORICAL ASS'N, https://bit.ly/3gkpnZA (last visited July 29, 2019).

32. *See* Melvin I. Urofsky, *Marbury v. Madison*, BRITANNICA, https://bit.ly/2Tyr1gO (last visited July 29, 2019).

33. *See id.*

34. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73, 77–78 ("[W]rits of error and appeals shall lie from decisions therein to the Supreme Court in the same causes, as from a circuit court to the Supreme Court, and under the same regulations.").

35. *See* Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 383 (1993).

36. *See* Urofsky, *supra* note 32.

Madison, then it would seem as if the Court was unconstitutionally yielding to the executive branch.[37]

With the ability to establish the role of the Court in his hands, Chief Justice Marshall delivered a ruling that cemented the power of the Court "as the ultimate arbiter of the Constitution."[38] The Court noted that, though Marbury had a right to his commission and for every right there must be a judicial remedy, the Court lacked jurisdiction to grant Marbury the remedy to which he had a right.[39] Chief Justice Marshall stated that Congress's attempt to expand the Court's original jurisdiction was unconstitutional because the Constitution explicitly states the Court is to function as an appellate court and may preside as a trial court in only a few enumerated categories of cases, in which its jurisdiction is also exclusive.[40] The type of suit brought by Marbury did not fit into any of these categories.[41] The Court further ruled that its sole authority was to resolve issues pertaining to the rights of individuals, and it could not resolve constitutional issues that were political in nature, or belonging to a different branch of government.[42]

Marbury established that federal courts cannot decide issues beyond what is necessary to redress a concrete dispute.[43] As one scholar noted, "[w]ithin the fields of constitutional law and federal courts law, *Marbury* is not merely a case of historical importance, but a living paradigm of the necessary and proper function of courts in exercising judicial review."[44]

B. Standing and How It Relates to the Political-Question Doctrine

Justiciability determines whether a federal court is an appropriate forum to hear a particular case.[45] The legal doctrines of advisory opinions, ripeness, mootness, standing, and political question all encompass justiciability and place restrictions on judicial review.[46] This section solely addresses the doctrines of standing and political question.

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37. *See id.*
38. *Id.*
39. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163, 176–80 (1803).
40. *See id.* at 173.
41. *See id.*
42. *See id.* at 170.
43. *See* Monaghan, *supra* note 29, at 1366.
44. Fallon, *supra* note 30, at 11.
45. *See* D.J. GALLIGAN, DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION 241 (1986).
46. *See id.*; *see also Ex parte* Baez, 177 U.S. 378, 390 (1900) (opining that courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies); Blanchette v. Connecticut, 419 U.S. 102, 140 (1974) (stating that ripeness is an issue of timeliness, because if a case is brought prematurely, no injury is ready to be addressed by the court); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 153 (1893)

Since *Marbury* was decided, the Supreme Court has repeatedly asserted that federal courts should not have jurisdiction over cases unless there is a "distinct and palpable" injury to identified individuals.[47] The exercise of federal judicial power should be reserved only as "a tool of last resort" when necessary to protect specific litigants who can "show injury in fact."[48] Furthermore, a litigant must show "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent' . . . [and] [a]n interest shared generally with the public at large . . . will not do."[49] This concept is otherwise known as standing.[50] Broadly speaking, the standing doctrine examines whether a specific litigant can have a federal court provide redress on a particular issue.[51] "The requirement of standing has been made part of American constitutional law through (for want of a better vehicle) the provision of Art. III, Sec. 2 . . . ."[52] Article III provides the "cases" and "controversies" requirement for standing.[53]

Even though the requirements for standing can be traced back to 1788, when the Constitution was ratified, cases involving issues of standing were not decided until over 100 years later.[54] In the 1923 case *Frothingham v. Mellon*, taxpayers challenged a federal statute that provided for state appropriations to reduce maternal and infant mortality and protect the health of mothers and infants.[55] The litigants argued that

("[T]he giving of advisory opinions . . . is not the exercise of the judicial function at all, and the opinions thus given have not the quality of judicial authority.").

47. *See* Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 100 (1979) (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)); *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

48. Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 473–74 (1982).

49. Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997) (quoting *Lujan*, 504 U.S. at 555, 560).

50. *See generally* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983) (explaining the concept of standing and how it affects the separation of powers).

51. *See Warth*, 422 U.S. at 498 (explaining that standing asks "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."); *see also* Flast v. Cohen, 392 U.S. 83, 99–100 (1968) ("[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue . . . .").

52. Scalia, *supra* note 50, at 882; *see* U.S. CONST. art. III, § 2.

53. *See* U.S. CONST. art. III, § 2; Scalia, *supra* note 50, at 882.

54. *See* Frothingham v. Mellon, 262 U.S. 447, 479 (1923), *aff'g* 288 F. 252 (D.C. Cir. 1923). This case does not explicitly mention standing, but in later years, the Court stated that it "first faced squarely the question whether a litigant asserting only his status as a taxpayer has standing to maintain a suit in federal court in *Frothingham v. Mellon*." *Id.*; *see also Flast*, 392 U.S. at 91.

55. *Frothingham*, 262 U.S. at 479.

these appropriations would "increase the burden of future taxation."[56] The Court, however, declined to hear the merits of the claim and held:

> The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.[57]

The Court further noted that judicial power can be invoked only when a federal statute has caused direct injury and that the Court has "no power per se to review and annul acts of Congress on the ground that they are unconstitutional."[58] In the 1950s, the Court further recognized that the standing doctrine derives from the "case" or "controversy" requirement by reasoning that "because [the Court's] jurisdiction is cast in terms of 'case or controversy,' [the Court] cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such."[59]

Today, the standing doctrine as we know it is comprised of three elements: (1) "the plaintiff must have suffered an 'injury in fact' . . . which is . . . concrete and particularized, and . . . 'actual or imminent, not "conjectural" or "hypothetical"'"; (2) "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court'"; and (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[60] The modern standing doctrine has been formulated to safeguard the separation of powers among the three branches of government.[61]

Issues with standing may be remedied by changing certain facts. For example, standing could be resolved if a different litigant comes forth with a personal stake in the matter.[62] However, if a case presents a political question, then it is not within the purview of federal judicial review.[63] Alexander Hamilton may have foreshadowed[64] the emergence of the political-question doctrine when he stated:

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56. *Id.* at 486.
57. *Id.* at 488.
58. *Id.*
59. Doremus v. Bd. of Ed., 342 U.S. 429, 434 (1952).
60. *Lujan*, 504 U.S. 555, 560 (1992) (first quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); then quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976)) (citations omitted).
61. *See* Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea - the idea of separation of powers.").
62. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 122 (6th ed. 2000) (citation omitted).
63. *See id.* at 121.

> If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution.[65]

Accordingly, there are exceptions to judicial review that are expressed in "particular provisions of the Constitution."[66]

In a precursor to the political-question doctrine, Chief Justice Marshall in *Marbury* cautioned against the Court deciding questions that should be handled by the other branches of government. He contended that the Supreme Court could not review every single legal question involving a potential violation of the Constitution, because in their very nature, some questions are targeted at the discretion of the legislative or executive branch.[67] However, the Chief Justice did note that it was up to the Supreme Court to decide whether an issue, in essence, presented a political question.[68] Years later, he repeated the belief that the Supreme Court should defer to a different political branch of government in certain cases. In *McCulloch v. Maryland*, the Supreme Court invoked the Necessary and Proper Clause of the Constitution and stated that while "the powers of the government are limited," when federal courts are faced with the decision to offer judicial review, they "must allow the national legislature the discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people."[69] If federal courts were faced with an issue regarding whether judicial review was "necessary," it would "pass the line which circumscribes the judicial department, and tread on legislative ground."[70] Basically, what qualifies as "necessary," under the Necessary and Proper Clause, should be decided by Congress, not federal courts.[71]

The initial case presenting a political-question issue was *Luther v. Borden* in 1849.[72] At the time *Luther* was decided, Rhode Island was governed by a 1663 charter that stated only men who owned property could vote.[73] An individual named Thomas Dorr led a movement

64. *See* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 424 (1996).
65. THE FEDERALIST NO. 78 (Alexander Hamilton).
66. *Id.*
67. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–66 (1803).
68. *See id.* at 167.
69. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).
70. *Id.* at 423.
71. *See id.*; *see also* U.S. CONST. art. I, § 8.
72. *See* Luther v. Borden, 48 U.S. (7 How.) 1, 40 (1849).
73. *Id.* at 35–36.

campaigning for the right of all men to vote, regardless of property ownership.[74] Dorr also organized a constitutional convention where he and his supporters declared themselves as a new government.[75] As a result, Rhode Island declared martial law and the governor ordered members of the militia, including Luther Borden, to arrest a member of Dorr's group, Martin Luther, by breaking and entering into his home.[76] The Supreme Court was faced with the issue of whether the militia had committed trespass; however, to render a decision, the Court would have had to recognize Dorr's government as legitimate.[77] To circumvent this issue, the Supreme Court held that it did not have "the power of determining that a State government ha[d] been lawfully established," and only Congress could make that type of decision.[78]

Almost 100 years after *Luther*, the political-question doctrine was further expanded in 1946, when the Supreme Court, writing through Justice Felix Frankfurter, concluded that it did not have jurisdiction to decide whether the state of Illinois had malapportioned congressional districts.[79] In *Colegrove v. Green*, Justice Frankfurter wrote that the dispute was about "politics, in the sense of party contests and party interests."[80] Accordingly, the Supreme Court reasoned that it should not grant judicial review when "the politics of the people" are involved, because to do so would be "hostile to a democratic system."[81] The Supreme Court held that "[t]he Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights."[82] Justice Frankfurter was clear in stating that federal courts "ought not to enter this political thicket."[83] If they did, they would risk compromising their stature.[84]

Less than two decades later, in the landmark case of *Baker v. Carr*, Justice William Brennan engineered the present-day political-question doctrine.[85] In *Baker*, the Court created six conditions that guide how we recognize the political-question doctrine today.[86] These conditions were

74. *Id.* at 36–37.
75. *See id.*
76. *Id.* at 37.
77. *See id.* at 34–35.
78. *Id.* at 40, 42.
79. *See* Colegrove v. Green, 328 U.S. 549, 552 (1946).
80. *Id.* at 554.
81. *Id.* at 553–54.
82. *Id.* at 556.
83. *Id.*
84. *See id.*
85. *See* Baker v. Carr, 369 U.S. 186 (1962).
86. *Id.* at 217.

all derived from the principle of separation of powers.[87] Specifically, the Supreme Court stated:

> [S]everal formulations . . . may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[88]

If you look closely, you will notice a common thread amongst the six standards: they all pertain to how federal courts should operate in relation to the other branches of government.[89] The first three—a "commitment of the issue to a coordinate political department," "lack of judicially discoverable and manageable standards," and "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"—all intend to ascertain whether the issue presented before the federal court is one that falls within the purview of a different policy-making branch of government, or if the judiciary is constitutionally prohibited from addressing such issues.[90] Then, the last three—"the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," "an unusual need for unquestioning adherence to a political decision already made," and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question"—all focus on the capacity of a federal court to offer judicial review of an issue without offending the principle of separation of powers and the different roles explicitly assigned to each branch of government.[91]

Clearly then, some questions of law sit wholly outside judicial review. By analyzing the standards set out in *Baker* regarding what

87. *Id.*
88. *Id.*
89. Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303, 332–33 (1996).
90. *Baker*, 369 U.S. at 217.
91. *Id.*; *see also* Simard, *supra* note 89, at 323–33.

would qualify as a political question "in terms of cognizability and redressability, the overlap between the political question doctrine and the modern standing doctrine becomes apparent."[92] This overlap occurs because when federal courts analyze whether a litigant has standing, they must do so with the principle of the separation of powers in mind.[93] Accordingly, today's standing analysis has incorporated the issues addressed in *Baker*, which solidified the modern political-question doctrine.[94] As one scholar succinctly stated: "[i]n essence, it appears that the two doctrines have converged."[95]

II. THE EVOLUTION OF NATIONWIDE INJUNCTIONS

An injunction is one type of remedy a federal court will issue that requires the defendant to perform or refrain from committing a certain action for or against the plaintiff.[96] Historically, federal courts have accepted injunctions as a limited remedy for unlawful violations that cannot be addressed through other remedies such as compensatory damages.[97] Injunctions typically have been limited to specific parties—also known as the named-parties rule—and to a certain geographic jurisdiction.[98] One exception to the named-parties rule is when a lawsuit involves a class action.[99] In those instances, federal courts are allowed to issue injunctions and remedies that affect unnamed parties.[100]

A nationwide injunction differs from a typical injunction because it affects the defendant's conduct against a group of unnamed individuals, instead of against the named plaintiff alone.[101] While in a class action there may be many individuals who are not named, each must still elect to participate in the suit. When a nationwide injunction is issued, however, its effects extend to a whole group that never elected to participate.[102] As mentioned at the outset of this Article, a nationwide injunction is a fairly new legal method being prescribed by certain federal district courts.[103] In fact, nationwide injunctions were completely

92. Simard, *supra* note 89, at 333.
93. *See id.*
94. *See id.*
95. *Id.*
96. *Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see* Brian Duignan, *What is an Injunction?*, BRITANNICA, https://bit.ly/2ThZsrK (last visited July 31, 2019).
97. *See* Cass, *supra* note 10, at 34.
98. *See id.* at 34–35.
99. *See id.* at 34.
100. *See id.*
101. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 418, 425 (2017).
102. *See generally* FED. R. CIV. P. 23 (noting that the court may offer an opt-out opportunity).
103. *See supra* INTRODUCTION.

unheard of in English courts of equity, and therefore, were not part of the jurisdictional grant enacted by the Judiciary Act of 1789.[104]

A. The First 175 Years of the Republic

In the nineteenth century, the concept of issuing a nationwide injunction to restrain the enforcement of a certain law did not encounter acceptance.[105] For example, consider the 1897 case of *Scott v. Donald*.[106] In *Scott*, the Court held a South Carolina statute to be unconstitutional, and James Donald, the original plaintiff who was a wine importer in South Carolina, requested that the Court issue an injunction restraining any state executive officer from enforcing a similar statute against him or anyone else.[107] However, the Court refused to issue such a broad injunction, reasoning:

> The theory of the decree is that the plaintiff is one of a class of persons whose rights are infringed and threatened, and that he so represents such class that he may pray an injunction on behalf of all persons that constitute it. It is, indeed, possible that there may be others in like case with the plaintiff, and that such persons may be numerous, but such a state of facts is too conjectural to furnish a safe basis upon which a court of equity ought to grant an injunction.[108]

Several cases ensued in the first half of the twentieth century where federal courts issued injunctions that pertained solely to the parties in the matter.[109] In fact, a considerable number of suits were brought during the New Deal era, resulting in 1,600 injunctions against the enforcement of the Agricultural Adjustment Act; not a single one was a nationwide injunction.[110] Even more remarkable, the government was still able to collect taxes from more than 71,000 taxpayers who had not brought suit,

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104. *See* Bray, *supra* note 101, at 425; *see also* Judiciary Act of 1789, ch. 20, 1 Stat. 73, 77–78. *See generally* Judiciary Act of 1801, ch. 4, § 11, 2 Stat. 89, 92 (repealed 1802) (establishing federal question jurisdiction); Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470, 470 (codified as amended at 28 U.S.C. § 1331 (2012)) (reestablishing federal question jurisdiction).

105. *See* Bray, *supra* note 101, at 429.

106. *See id. See generally* Scott v. Donald, 165 U.S. 107 (1897) (refusing Donald's request that the Court issue an injunction refraining enforcement of a statute by any state executive officer against Donald or anyone else).

107. *See* Scott v. Donald, 165 U.S. 58, 105–106, 107, 110 (1897); *see also* Bray, *supra* note 101, at 429.

108. *Scott*, 165 U.S. at 115.

109. *See* DEP'T OF JUSTICE, INJUNCTIONS IN CASES INVOLVING ACTS OF CONGRESS, S. DOC. NO. 75-42, at 3 (1st Sess. 1937).

110. *See id.* (explaining that the Agricultural Adjustment Act was a federal law where the Government would buy livestock for slaughter and pay farmers subsidies not to plant on certain areas of their land and that the subsidies were paid for by a tax on the companies that processed the crops); *see also* 7 U.S.C. §§ 601–627.

despite the injunctions.[111] Therefore, history shows that injunctions with a nationwide scope did not appear during the first half of the twentieth century.

B. Nationwide Injunctions in the 1960s to Today

The first nationwide injunction was issued in *Wirtz v. Baldor Electric Co.* in 1963.[112] As discussed above, the concept of a nationwide injunction was uncommon. In *Wirtz*, the Court was faced with the issue of whether the Secretary of Labor improperly relied on certain information when setting the federal minimum wage.[113] The plaintiffs sought to enjoin the Secretary's determination, and the court held that "if one or more of the plaintiffs-appellees is or are found to have standing" to challenge a wage determination by the Department of Labor, "the District Court should enjoin the effectiveness of the Secretary's determination with respect to the entire industry."[114]

From *Wirtz* in 1963 up until the 1980s, nationwide injunctions were more or less isolated occurrences.[115] Then, in the 1990s and early 2000s, they began to emerge with some regularity.[116] Some of the more well-known nationwide injunctions that gained heavy coverage in the news cycle included: transgender students having access to bathrooms that coincided with the gender they identified with; a ban on the military's "Don't Ask, Don't Tell" policy; a freeze on parts of President Barack Obama's Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") and Deferred Action for Childhood Arrivals ("DACA") programs; and the halting of President Donald Trump's travel bans, to name a few.[117] Notably, the lawsuits challenging

111. *See* INJUNCTIONS IN CASES INVOLVING ACTS OF CONGRESS, *supra* note 109.

112. *See* Wirtz v. Baldor Elec. Co., 337 F.2d 518, 536 (D.C. Cir. 1963).

113. *See id.* at 520.

114. *Id.* at 535.

115. Getzel Berger, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1078 (2017).

116. *See id.*

117. *See id.*; *see also* Hawai'i v. Trump, 245 F. Supp. 3d 1227, 1237 (D. Haw. 2017) (issuing national injunction against other parts of the revised travel ban); Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 565 (D. Md. 2017) (issuing national injunction against part of the revised version of the travel ban); Washington v. Trump, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017) (enjoining the United States from enforcing certain sections of President Trump's travel ban executive order), *stay denied*, 847 F.3d 1151 (9th Cir. 2017); Texas v. United States, 201 F. Supp. 3d 810, 815 (N.D. Tex. 2016) (issuing national injunction allowing transgender individuals to have access to public bathrooms); Texas v. United States, 86 F. Supp. 3d 591, 676 (S.D. Tex. 2015) (issuing injunction that would have given illegal immigrants legal status and protection and let them apply for work permits), *aff'd*, 809 F.3d 134 (5th Cir. 2015); Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 969 (C.D. Cal. 2010) (finding that the "Don't Ask, Don't Tell" policy violated the First Amendment), *vacated*, 658 F.3d 1162 (9th Cir. 2011).

President Obama's policies were filed in red states, while lawsuits challenging President Trump's policies were filed in blue states. This practice of filing suit in a forum more likely to render a favorable outcome[118] was also seen during President George W. Bush's administration when plaintiffs filed lawsuits in California seeking to enjoin several of his environmental policies.[119]

For approximately the past two decades, it seems as though some federal judges are more willing to issue nationwide injunctions than in the past. The courts' explanations for their newfound readiness vary. For example, when the U.S. Court of Appeals for the Fifth Circuit affirmed the nationwide injunction issued in *Texas v. United States* against DAPA's continued implementation, the court defended its opinion by stating that there would be a "substantial likelihood that a [geographically limited] injunction would be ineffective because DAPA beneficiaries would be free to move between states."[120] By stating as much, the Court basically implied that a traditional injunction, which typically applies to a certain geographical jurisdiction, would not provide meaningful relief since DAPA states cannot constitutionally bar beneficiaries' travel within the United States.[121]

While the Fifth Circuit in *Texas* emphasized the nationwide injunction's impact on specific interests for the parties before it, other federal courts have concentrated on more general interests that affect a broader group of individuals.[122] This can be seen in the U.S. Court of Appeals for the Fourth Circuit's decision affirming a district court's nationwide injunction against the third executive order issued by President Trump restricting immigration from certain countries.[123] In that instance, the court held "because we find that the Proclamation was issued in violation of the Constitution, enjoining it only as to Plaintiffs

118. This is a legal concept known as "forum-shopping," discussed below. *See infra* Section III.B.

119. *See* Berger, *supra* note 115, at 1078; *see also* Citizens for Better Forestry v. U.S. Dep't of Agric., Nos. C 05-1144 PJH, C 04-4512 PJH, 2007 WL 1970096, at *19 (N.D. Cal. July 3, 2007) (enjoining a forestry rule); California *ex rel.* Lockyer v. U.S. Dep't of Agric., 468 F. Supp. 2d 1140, 1144 (N.D. Cal. 2006) (enjoining repeal of the Roadless Rule), *aff'd*, 575 F.3d 999 (9th Cir. 2009); Earth Island Inst. v. Ruthenbeck, No. CIV F-03-6386 JKS, 2005 WL 5280466, at *1–2 (E.D. Cal. Sept. 20, 2005) (enjoining Forest Service regulations).

120. Texas v. United States, 787 F.3d 733, 769 (5th Cir. 2015).

121. *See id.*

122. *See generally* Int'l Refugee Assistance Project v. Trump, 883 F.3d 233 (4th Cir. 2018), *vacated*, 138 S. Ct. 2710 (2018) (holding that nationwide injunction that extended only to individuals with "credible bona fide relationship" with the United States was warranted with respect to executive order that barred entry by nationals from six predominantly Muslim countries).

123. *See id.*

would not cure its deficiencies."[124] Thus, the Fourth Circuit concluded that a nationwide injunction that was unlimited in nature—applying to anyone, anywhere—was justified.[125]

Interestingly, when the U.S. Court of Appeals for the Ninth Circuit upheld the nationwide injunction issued in *Hawai'i v. Trump*, the opinion included an analysis that was reminiscent of the Fifth Circuit's interstate travel concerns in *Texas v. United States*.[126] Specifically, the Ninth Circuit noted that "the Government did not provide a workable framework for narrowing the geographic scope of the injunction."[127] The court further noted that "the Government ha[d] not proposed a workable alternative form of the [injunction] that account[ed] for the nation's multiple ports of entry and interconnected transit system and that would protect the proprietary interests of the States at issue [t]here while nevertheless applying only within the States' borders."[128] Ultimately, the Supreme Court reversed the Ninth Circuit's decision, but only on the merits.[129] In Justice Clarence Thomas's concurring opinion, he explained the importance of addressing "universal injunctions" and expressed his concerns about the constitutionality of the practice.[130]

III. NATIONWIDE INJUNCTIONS VIOLATE THE CONSTITUTION AND THE POLITICAL-QUESTION DOCTRINE

Federal courts that issue nationwide injunctions are likely violating the Constitution's limitations of judicial power under Article III.[131] As stated above, the judiciary's authority extends only to certain cases and controversies.[132] When the Judiciary Act of 1789 conferred jurisdiction over suits at equity to federal courts, the Founders based that authority on principles adhered to by English courts of equity.[133] Thus, the general rule regarding the issuance of injunctions today encompasses the traditional equitable principle that "relief should be no more burdensome to the defendant than necessary to provide complete relief to the

124. *Id.* at 273.

125. *See id.*

126. *See generally* Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017), *rev'd*, Trump v. Hawaii, 138 S.Ct. 2392, 2423 (2018).

127. *Id.* at 787.

128. *Id.* at 787–88.

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

130. *See id.* at 2425 (Thomas, J., concurring).

131. *See id.* at 2425 n.2 ("Even if Congress someday enacted a statute that clearly and expressly authorized [nationwide] injunctions, courts would need to consider whether that statute complies with the limits that Article III places on the authority of federal courts.").

132. *See* U.S. CONST. art. III, § 2.

133. *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999).

plaintiffs."[134] Moreover, the Supreme Court has stated that the equitable power of federal courts under the Constitution is limited "to render[ing] a judgment or decree upon the rights of the litigant parties."[135] Consequently, nationwide injunctions are at odds with the historical scope of the federal courts' equity powers as enumerated in Article III, because their relief goes beyond the specific parties to a certain litigation.[136]

In essence, a litigant seeking a nationwide injunction is basically stating that the named plaintiff "suffers in some indefinite way in common with people generally."[137] This is because nationwide injunctions apply to people who are, in general, similarly situated to the plaintiff. Additionally, since nationwide injunctions affect individuals who are not parties to the case, they likely afford relief to individuals who would not otherwise have standing to seek an injunction. Therefore, the relief granted goes above "the inadequacy that produced the injury in fact that the plaintiff has established."[138] As such, the standing doctrine is implicated.

A. Politicizing Federal Courts

One of the many negative byproducts of nationwide injunctions is the increasing politicization of federal courts. In general, significant discrepancies in predicted outcomes between different federal courts or individual judges are problematic.[139] Litigants have sought nationwide injunctions for cases that often involve polarizing issues. Frequently in the background of those cases are groups of public officials and interest groups with political agendas.[140]

The ensuing historical pattern includes conservatives who sought injunctions against President Obama's policies on matters mostly related to healthcare, the environment, and immigration, and liberals who have sought injunctions against President Trump's policies on similar issues.[141] Inserting the judiciary into these overtly political and nationally divided disputes plainly compromises the public perception that judges

134. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979)).

135. Rhode Island v. Massachusetts, 37 U.S. 657, 718 (1838).

136. *See* Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 339 (2018).

137. Frothingham v. Mellon, 262 U.S. 447, 488 (1923).

138. Lewis v. Casey, 518 U.S. 343, 357 (1996).

139. *See* RONALD A. CASS, THE RULE OF LAW IN AMERICA 7–12 (2001) (explaining the importance of principled predictability).

140. *See* Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U. RICH. L. REV. 633, 634–46 (2018).

141. *See id.*

are—and judges' duty to remain—unbiased.[142] For example, when litigants choose Texas as their venue to combat a Democratic presidential policy because they expect that venue to be favorable to their cause, and their expectation is validated, the presiding judges' decision appears to have been based on a political preference, or at least affected by their political leaning.[143] In effect, by issuing nationwide injunctions, the federal judiciary has entered the political thicket, as these matters are often better left for another branch of government to deal with. Moreover, the issue of judges appearing biased ultimately runs in both political directions. "The point is not a partisan one. . . . National injunctions are equal-opportunity offenders."[144]

Lawsuits seeking nationwide injunctions are undoubtedly politically motivated.[145] As a result, when these actions are brought before courts "thought likely to share (and act on) the plaintiffs' political predilections[, they] generate legal decisions that are widely viewed through political lenses and often (rightly or wrongly) suspected of being the result of judges' political leanings."[146] Consequently, district judges become "soldiers in proxy fights over political platforms."[147] This easily snowballs into an increase in the political focus of judicial appointments.[148] Opposing political parties will attempt to nominate judges with leanings that appear to mirror their platform, and "will take steps to protect what matters to them."[149]

B. The Pick of the Litter: Choosing the Right Venue Through Forum-Shopping

Black's Law Dictionary defines forum-shopping as "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard."[150] A second major byproduct of nationwide injunctions

142. *See* Memorandum from Att'y Gen. Jeff Sessions, *supra* note 6, at 6; *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 1 (AM. BAR ASS'N 2020).

143. *See id.*; *see also* French, *supra* note 5.

144. Nicholas Bagley & Samuel Bray, *Judges Shouldn't Have the Power to Halt Laws Nationwide*, ATLANTIC (Oct. 31, 2018), https://bit.ly/3e7EpQE.

145. *See* Cass, *supra* note 10, at 55–56.

146. *Id.* at 56.

147. *Id.*

148. *See id.* at 56–57.

149. *Id.* at 57 (citing Thomas Burr, *Democrats Criticize Utah Judicial Pick over His Fight for Prop 8 and Support for Memos Justifying Torture*, SALT LAKE TRIB. (Jan. 10, 2018), https://perma.cc/22TJ-4P62; Nina Totenberg & Lee Sheehan, *Judicial Nominee Wendy Vitter Gets Tough Questions on Birth Control and Abortion*, NPR (Apr. 11, 2018, 5:00 AM), https://perma.cc/XH6B-6VM9; Letter from Vanita Gupta, President & CEO, The Leadership Conference on Civil & Human Rights, to Senator, U.S. Senate (May 15, 2018), https://perma.cc/K72F-NUWC).

150. *Forum-Shopping*, BLACK'S LAW DICTIONARY (11th ed. 2019).

is that they encourage litigants to forum shop.[151] A litigant looking to challenge a certain presidential policy could simply find a plaintiff located in a jurisdiction where a district court, or certain judge, would most likely issue a favorable outcome. As previously mentioned, liberal groups could find a plaintiff that has standing in a blue state and seek to challenge a certain presidential policy (that president most likely being from a conservative party) in hopes that a federal judge will render a favorable decision, and vice versa. And with nationwide injunctions, a litigant need only win in one court to stop a policy or law in its tracks.[152] This gives litigants incentive to choose a forum where they are "likely to win."[153] Thus, for example, "[i]t's no coincidence that the latest Obamacare suit was filed in Texas. It's also no coincidence that many of the high-profile challenges to Trump policies have been brought in deep-blue states."[154] Predictably, finding a federal court that is more likely to grant a litigant's request for a nationwide injunction becomes a game. Since the federal government is subject to suit anywhere in the country, special-interest groups can easily find a plaintiff in a state where they believe a federal court may be more sympathetic to their plaintiff's position.[155]

Overwhelming evidence suggests that nationwide injunctions incentivize forum shopping. For example, as noted at several points throughout this Article, groups challenging conservative presidential policies often request nationwide injunctions in more liberal jurisdictions like California, Washington, and Hawaii.[156] In contrast, litigants often challenge liberal presidential policies in federal district courts located in conservative jurisdictions such as Texas.[157] In fact, the Fifth Circuit,

151. *See* Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J.F. 242, 243 (2017).

152. *See* Bagley & Bray, *supra* note 144.

153. *See id.*

154. *Id.*

155. *See generally* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553 (1989) (discussing the common practice of forum shopping and advantages for plaintiffs).

156. *See, e.g.*, Citizens for Better Forestry v. U.S. Dep't of Agric., Nos. C 05-1144 PJH, C 04-4512 PJH, 2007 WL 1970096, at *19 (N.D. Cal. July 3, 2007) (enjoining a forestry rule); California *ex rel.* Lockyer v. U.S. Dep't of Agric., 468 F. Supp. 2d 1140, 1149 (N.D. Cal. 2006) (enjoining repeal of the Roadless Rule); Earth Island Inst. v. Ruthenbeck, No. CIV F-03-6386 JKS, 2005 WL 5280466, at *1-2–3 (E.D. Cal. Sept. 20, 2005) (enjoining Forest Service regulations).

157. *See, e.g.*, Dialysis Patient Citizens v. Burwell, No. 4:17-CV-16, 2017 WL 365271, at *6 (E.D. Tex. Jan. 25, 2017) (enjoining rule requiring dialysis providers to make certain disclosures); Nevada v. U.S. Dep't of Labor, 218 F. Supp. 3d 520, 534 (E.D. Tex. 2016) (enjoining Department of Labor overtime rule); Associated Builders & Contractors of Se. Tex. v. Rung, No. 1:16-CV-425, 2016 WL 8188655, at *15 (E.D. Tex. Oct. 24, 2016) (enjoining Department of Labor rule requiring government contractor to make certain disclosures); Franciscan All., Inc. v. Burwell, 227 F.Supp.3d 660, 695 (N.D.

which reviews decisions by Texas district courts, has been dubbed the most conservative in the country.[158] Meanwhile, the Ninth Circuit, which reviews decisions rendered by federal district courts in California, Washington, and Hawaii, has been viewed as the most liberal.[159] As an example, there is evidence that lawsuits have been strategically filed in a certain jurisdiction within Texas, just to reach a specific judge.[160] More specifically, in the Northern District of Texas, Wichita Falls division, only one active judge has consistently ruled against LGBTQ rights.[161] Two challenges to President Obama's policies on transgender rights were brought before this judge, and unsurprisingly, nationwide injunctions were issued against them.[162] Essentially, forum shopping is blatantly "obvious" as well as "disconcerting."[163] "[I]t seeks out biases that contradict fundamental features of a system that embodies the rule of law."[164]

C. Nationwide Injunctions Frustrate the Principle of Separation of Powers

It is difficult for a federal district court to issue a nationwide injunction without inserting itself into a conflict that is more properly addressed by another branch of government.[165] Each separate branch of government—executive, legislative, and judiciary—has a defined role.[166]

Tex. 2016) (enjoining regulation prohibiting discrimination on the basis of gender identity or termination of pregnancy); *Texas*, 201 F. Supp. at 836 (N.D. Tex. 2016) (enjoining Department of Justice guidance on transgender bathrooms in schools); Nat'l Fed'n of Indep. Bus. v. Perez, No. 5:16-cv-00066-C, 2016 WL 3766121, at *46 (N.D. Tex. June 27, 2016) (enjoining Department of Labor rule on union persuaders); Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015) (enjoining parts of DACA and DAPA).

158. *See* Matt Ford, *A Voter-ID Battle in Texas*, ATLANTIC (Mar. 10, 2016), bit.ly/2XeQjRO.

159. *See* John Schwartz, *'Liberal' Reputation Precedes Ninth Circuit Court*, N.Y. TIMES (Apr. 24, 2010), https://nyti.ms/3cXwtRJ.

160. *See* Josh Blackman, *Scotus After Scalia*, 11 N.Y.U. J.L. & LIBERTY 48, 128–30 (2017).

161. *See* John Council, *Why Conservative States Handpicked this Texas Judge for Transgender Bathroom Challenge*, LAW.COM (Aug. 24, 2016, 10:58 AM), https://bit.ly/2TvB1qY.

162. *See id.*; *see also Texas*, 201 F. Supp. at 816 (challenging defendants' assertion that Title VII and Title IX require that all persons be afforded opportunity to have access to restrooms, locker rooms, and showers that match their gender identity rather than their biological sex).

163. *See* Bray, *supra* note 101, at 460.

164. Cass, *supra* note 10, at 44.

165. *See* Memorandum from Att'y Gen. Jeff Sessions, *supra* note 6, at 6. *See generally* Baker v. Carr, 369 U.S. 186 (1962) (holding that the political-question doctrine should be invoked when the issue presented should be resolved by another branch of government).

166. *See* Cass, *supra* note 10, at 62.

At the inception of the Republic, the Founders understood that Congress, which forms the legislative branch, would be in charge of basic policy decisions and lawmaking.[167] These polices and laws would be carried out by the executive branch.[168] Finally, courts would render decisions applying those laws to particular facts that encompassed cases and controversies.[169] Hamilton called the judiciary the "least dangerous" branch because it had "no influence over either the sword or the purse."[170] Fast forward to today, however, and court-issued nationwide injunctions have become a tool for partisan activists to frustrate the functions of the different political branches of government, regardless of the merits of each case.[171]

The three branches of government were intended to be coequal, with no one yielding control to the others.[172] Nevertheless, when federal judges issue nationwide injunctions, they block the entire government from enforcing an executive branch policy or congressional statute, against anyone, anywhere in the United States.[173] Essentially, by issuing nationwide injunctions, certain federal judges are making the judiciary the superior branch of government. For example, when the Northern District of California issued a nationwide injunction that prohibited a repeal of DACA, Democrats were less eager to negotiate a "compromise on immigration and border security" with President Trump since the federal district court had already preserved their political position on the matter.[174] Regarding the issuance of this particular nationwide injunction, Attorney General Bill Barr stated, "the first injunction . . . from the Northern District of California came down on January 9, 2018, in the middle of high-profile legislative discussions."[175] As a result, President Trump "lost much of his leverage in negotiating with congressional leaders who wanted him to maintain DACA nationwide for the indefinite future."[176] Vice President Mike Pence echoed a similar concern when he noted that "a single district court judge can issue [a nationwide injunction], effectively preventing the duly-elected president of the

167. *See* THE FEDERALIST NOS. 10, 42, 45–51 (James Madison).
168. *See* THE FEDERALIST NOS. 66–67 (Alexander Hamilton).
169. *See* THE FEDERALIST NO. 78 (Alexander Hamilton)
170. *Id.* at 464 (Alexander Hamilton) (McLean ed., 1788).
171. *See* French, *supra* note 5.
172. *See* Jeff Sessions, *Nationwide Injunctions Are a Threat to Our Constitutional Order*, NAT'L REVIEW (Mar. 10, 2018, 12:20 PM), https://bit.ly/2Txmx9T.
173. *See id.*
174. *See* French, *supra* note 5.
175. *Id.* (quoting Att'y Gen. Bill Barr, Speech Condemning Nationwide Injunctions (May 21, 2019)).
176. *Id.* (quoting Att'y Gen. Bill Barr, *supra* note 175).

United States from fulfilling what he believes is a constitutional duty."[177] Indeed, by issuing a nationwide injunction, a federal court can easily "undermine the rule of law and the separation of powers that are central to our nation's founding, that lie at the very heart of our Constitution."[178]

Since nationwide injunctions apply to the entire United States, regardless of what a presidential policy or statute enacted by Congress states, the separation of powers becomes unbalanced and the political-question doctrine is violated. "The political question doctrine functions as a protector of the concept of the separation of powers."[179] As early as *Marbury*, Justice Marshall began to define the political-question doctrine in relation to the executive and judicial branches by stating:

> The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[180]

The Court in *Baker* further solidified this notion when it spelled out six characteristics of situations to which the political-question doctrine would apply, and how political questions contain identifiable elements that comprise as a "function of the separation of powers."[181] Some of these characteristics specifically describe situations in which a case is not justiciable: (1) because there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) due to the "impossibility of a court's undertaking independent resolution without expressing lack of . . . respect [for a] coordinate branch[] of [the] government"; or (3) due to the "impossibility of deciding [the issue] without an initial policy [decision]," which is beyond the discretion of the court.[182] Nationwide injunctions implicate all of these characteristics. When a federal court issues an injunction regarding a particular presidential policy that has a sweeping effect against the entire nation, that court disrespects the executive branch. Matters before the federal court requiring these nationwide injunctions also properly belong to a different political department, usually the executive, and sometimes the legislative.

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177. Craig Trainor, *Nationwide Injunctions: Obstruction by Other Means*, WASH. EXAMINER (May 31, 2019, 12:05 AM) (quoting Vice President Mike Pence, Address to the Federalist Society), https://washex.am/3bWBN6N.

178. *Id.*

179. Gordon v. State of Texas, 965 F. Supp. 913, 916 (S.D. Tex. 1997), *rev'd*, 153 F.3d 190 (5th Cir. 1998) (quoting *Baker*, 369 U.S. at 210).

180. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

181. *Baker*, 369 U.S. at 217.

182. *Id.*

The supremacy clause of the Constitution establishes that the Constitution, federal laws made pursuant to it, and treaties under its authority are the "supreme law of the land."[183] Only the Supreme Court has the power to declare a certain policy or law unconstitutional as to the entire nation since it is "the ultimate arbiter of the Constitution."[184] The opinion issued in *Marbury* crystallized this legal concept by stating that it is "emphatically the province and duty of the [Supreme Court] to say what the law is."[185] Lower federal courts do not have a monopoly on deciding what is or is not unconstitutional. The political-question doctrine, among others, has been established to rein in the federal court on issues that are not justiciable. These limits on judicial review have been established in order to leave room for deference to other political branches on certain policies and laws.[186] Thus, when a federal judge issues a nationwide injunction, he or she effectively neuters an entire policy decision with "the stroke of a pen."[187] Specific federal courts that issue nationwide injunctions are acting with an "unprecedented show of force [that] is nothing less than a usurpation of the prerogatives of the executive branch and an erosion of the geographical limits Congress set on the jurisdiction of lower courts—in short, a deeply unsettling violation of the bedrock constitutional principle of separation of powers."[188]

IV. SOLUTIONS TO NATIONWIDE INJUNCTIONS

In September 2018, the House Judiciary Committee approved the "Injunctive Authority Clarification Act of 2018."[189] The drafted legislation attempts to prohibit federal courts from issuing nationwide injunctions "that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit."[190] However, the proposal appears to be stalled, as the last update includes only an introduction in the House on September 7, 2018.[191] The fate of the Act is unclear. Regardless of whether the Act

183. U.S. CONST. art. III, § 1.

184. Urofsky, *supra* note 32.

185. *Marbury*, 5 U.S. at 177.

186. *See* Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 7–9 (1983).

187. Alison Frankel, *AG Barr Joins Renewed Trump Administration Push to Curtail Nationwide Injunctions*, REUTERS (May 22, 2019, 3:02 PM), https://reut.rs/2yjZBDI.

188. *Id.*

189. Injunctive Authority Clarification Act of 2018, H.R. 6730, 115th Cong. (2018); Suzanne Monyak, *House Panel Advances Bill to Bar Nationwide Injunctions*, LAW 360 (Sept. 13, 2018, 8:10 PM), https://bit.ly/3e8m9Xy.

190. Injunctive Authority Clarification Act of 2018, H.R.6730, CONGRESS.GOV (2018) https://bit.ly/3g8WYFX.

191. *See id.*

moves forward, courts and litigants should avail themselves to several alternatives that already exist.

First and foremost, a federal court that is tempted to issue a nationwide injunction should instead issue a traditional preliminary injunction that pertains only to the specific parties in that litigation. Litigants can request this relief as well. This is not an impossible feat. For example, in *Aziz v. Trump*, the district court enjoined President Trump's first travel ban, but the injunction only stopped the government from enforcing the ban in the state of Virginia.[192] One reason the judge issued such a ruling was to "avoid encroaching on the ability of other circuits to consider the questions raised."[193] Similarly, a district court in Wisconsin also enjoined the travel ban, but the injunction was limited strictly to the family in that case.[194] Legal scholar Zayn Siddique has proposed that "[a] nationwide injunction should not issue unless it is necessary to provide complete relief to the plaintiffs."[195] By the same token, traditional injunctive relief binds only the parties to the litigation, and federal courts should render decisions that reflect that legal concept.[196] Accordingly, federal courts should issue injunctions, when appropriate, that provide relief exclusively to the plaintiff(s) in the specific matter before it.

Secondly, where several plaintiffs will likely be involved, litigants instead should choose to file a class action seeking an injunction. A class action is a complicated legal mechanism that essentially allows for a large number of plaintiffs who are similarly situated to seek relief.[197] In fact, the legal rules applicable to class actions were designed "to address precisely the scenario where a government policy systematically denies a group of plaintiffs a meaningful opportunity to vindicate their rights."[198] By filing a class action, only those plaintiffs who opt in would be affected, instead of a whole group of unnamed parties who may not even know of the pending lawsuit. While class actions can be very complex,

192. *See* Aziz v. Trump, 234 F. Supp. 3d 724, 739 (E.D. Va. 2017).

193. *Id.* at 738 (quoting Va. Soc'y for Human Life v. Fed. Election Comm'n, 263 F.3d 379, 393 (4th Cir. 2001) (internal quotation marks omitted)).

194. *See* Josh Gerstein, *Revised Trump Travel Ban Suffers First Legal Blow*, POLITICO (Mar. 10, 2017, 1:17 PM), https://politi.co/2zlSwD7.

195. Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2141 (2017).

196. *See* Cass, *supra* note 10, at 62.

197. *See* James M. Fraser, *Opt-in Class Actions Under the FLSA, EPA, and ADEA: What Does It Mean to Be "Similarly Situated"?*, 38 SUFFOLK U. L. REV. 95, 96–99 (2004); *see also* McKenzie v. City of Chicago, 118 F.3d 552, 555 (7th Cir. 1997) ("Because a class has not been certified, the only interests at stake are those of the named plaintiffs . . . . [A] wrong done to plaintiff in the past does not authorize prospective, class-wide relief unless a class has been certified. Why else bother with class actions?").

198. Alison Frankel, *ACLU Family Separation Case Highlights Alternate Path for Trump Challengers*, REUTERS (June 27, 2018, 2:08 PM), https://reut.rs/36jcxX4.

they are designed that way to enable litigants to effectively choose a class representative who has the ability to adequately represent an entire group of individuals in a similar situation, as opposed to "shoehorning dissimilar people into a single piece of litigation."[199] The standing doctrine makes clear that plaintiffs should not be entitled to relief for other individuals that they do not represent.[200] In essence, "[i]f this elementary principle were not true, there would be no need for class actions."[201] However, a court will certify a class only if it meets the requirements laid out in Federal Rule of Civil Procedure 23.[202] Therefore, unfortunately, for some litigants seeking a nationwide injunction, this alternative, class-action option may be out of reach.

Finally, the Supreme Court must address nationwide injunctions soon. As Professor Rachel E. Barkow has so aptly noted, "the [political-question] doctrine is part of a larger vision of the constitutional structure in which the institutional strengths and weaknesses of each branch are taken into account in resolving particular issues. The Court's utter disregard of the doctrine thus reflects a broader and more dangerous trend."[203]

In January 2020, Justice Neil Gorsuch ardently urged the Supreme Court to take up this issue "at an appropriate juncture."[204] While expressing his concerns, Justice Gorsuch noted:

> As the brief and furious history of the regulation before us illustrates, the routine issuance of universal injunctions is patently unworkable, sowing chaos for litigants, the government, courts, and all those affected by these conflicting decisions. Rather than spending their time methodically developing arguments and evidence in cases limited to the parties at hand, both sides have been forced to rush from one preliminary injunction hearing to another, leaping from one emergency stay application to the next, each with potentially nationwide stakes, and all based on expedited briefing and little opportunity for the adversarial testing of evidence.[205]

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199. French, *supra* note 5.

200. *See* Zepeda v. U.S. I.N.S., 753 F.2d 719, 727–30 (9th Cir. 1983).

201. *Id.* at 728.

202. *See* FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.").

203. Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 336 (2002).

204. Dep't of Homeland Sec. v. N.Y., 140 S. Ct. 599, 601 (2020).

205. *Id.* at *5.

Thus, Justice Gorsuch, and others like him, view nationwide injunctions not as the "normal" functioning of our Republic's judiciary but as aberrations that serve only to foment discord and inhibit justice. [206]

The Court has already established elements that must be satisfied for courts to issue preliminary and permanent injunctions, and it should do the same for nationwide injunctions.[207] Otherwise, if left to the lower federal district courts, the issue will likely become increasingly chaotic. Since more individuals in the legal sector have begun to attack the practice, and certain federal courts are becoming more inclined to issue nationwide injunctions, the Court may be swayed to address the matter in an upcoming term.[208]

CONCLUSION

Nationwide injunctions are inconsistent with the Constitution. Federal courts are traditionally vested with the judicial power to issue rulings that affect only the parties directly before them.[209] Relatedly, litigators who seek nationwide injunctions in jurisdictions with judges who are expected to render favorable outcomes present a serious problem. The litigators playing in this legal arena are essentially seeking a home-court advantage—all they are required to do is find a single jurisdiction or judge that is likely to agree with them. Justice Gorsuch cast the practice of nationwide injunctions in a similar light when he recently posed the question, "What in this gamesmanship and chaos can we proud of?"[210] Indeed, a district judge who issues a nationwide injunction effectively overrules other judges from different districts who have denied the same claim or would have ruled otherwise—justice á la carte.

As early as *Marbury*, the Court acknowledged that certain issues lie outside of the purview of federal courts altogether—issues that "in their nature [are] political."[211] Chief Justice Marshall's opinion reflected that the Court understood there is a basic principle enshrined in the separation of powers that highlights the limits of judicial review and the distinct roles played by the different political branches of government.[212] Inserting the federal judiciary into obvious partisan fights—"the politics

206. *Id.*

207. *See generally* Califano v. Yamasaki, 442 U.S. 682 (1979) (explaining scope of injunctive relief as it relates to a nationwide class); *see also* U.S. v. Mendoza, 104 S. Ct. 568, 574 (1984).

208. *See* Editorial Bd., *The Judicial Injunction Dysfunction*, WALL ST. J. (July 28, 2019, 6:06 PM), https://on.wsj.com/2ZuHhmK.

209. *See* U.S. CONST. art. III, § 1.

210. *Dep't of Homeland Sec.*, 140 S. Ct. at 601.

211. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

212. *See id.*

of the people"—creates an environment "hostile to a democratic system."[213] This "embroilment in politics" is the exact type of issue that Justice Frankfurter warned the courts about in *Colegrove*—when a federal court issues a nationwide injunction, it is deciding an issue beyond what is necessary to redress a concrete dispute.[214]

Moreover, a nationwide injunction is not an order that can be quickly or easily challenged. While the government can immediately appeal it, that process can take months or more than a year. If, for example, a district judge were to issue a nationwide injunction toward the end of a presidential term, that "judge [could] effectively run out the clock on presidential action, delaying implementation for most of [a president's] term or even until [the president is] out of office."[215]

Overall, these types of lawsuits are "political cudgels" for state attorneys general or "partisan warriors" who are attempting to challenge opposing presidential administrations.[216] By issuing nationwide injunctions, certain federal judges are using an extreme form of remedy as a political weapon. These nationwide injunctions violate the political-question doctrine by politicizing the court, and lead to both forum shopping and to courts deciding issues that should be left to the branches of government more equipped and authorized to do so.

213. Colegrove v. Green, 328 U.S. 549, 553–54 (1946).

214. *Id.* at 554–56; *see also* Monaghan, *supra* note 29, at 1366.

215. French, *supra* note 5.

216. Jason L. Riley, *When District Judges Try to Run the Country*, WALL ST. J. (July 17, 2018), https://on.wsj.com/2Zx8GnP. *See generally* Amy Kapczynski, *Partisan Warriors and Political Courts*, LAW AND POLITICAL ECONOMY (Oct. 1, 2018), https://bit.ly/2Xsh4lY (commenting on the appearance of political biases in the courts).