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Russell L. Weaver

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If a court concludes that an administrative regulation is invalid, illegal, or unconstitutional, how should it respond? Presumably, the court will prohibit the agency from applying the regulation to the parties before it. But should the court summarily strike down the regulation and prohibit the agency from applying the regulation to individuals not before the court? Indeed, should it go so far as to issue a nationwide injunction prohibiting the agency from applying the regulation or policy anywhere in the United States?

Although nationwide injunctions did not exist before the twentieth century, they have become relatively commonplace today.[1] Although structural injunctions have been used since the 1950s in contexts such as school desegregation, nationwide injunctions go much farther. The distinguishing feature of nationwide injunctions is that they purport to enjoin agency defendants from enforcing a regulation or policy, not only against the named plaintiffs before the court, but nationwide to everyone who is similarly situated.[2]

There is disagreement regarding the appropriateness of nationwide injunctions. Some view such injunctions as a vital and necessary component of the rule of law. Judge (now Justice) Ketanji Brown Jackson argued for the appropriateness of issuing nationwide injunctions in her decision in *Make the Road New York v. McAleenan*,[3] a case involving the Department of Homeland Security's (DHS) program providing for "expedited

* Professor of Law & Distinguished University Scholar, University of Louisville, Louis D. Brandeis School of Law. Professor Weaver wishes to thank the University of Louisville's Distinguished University Scholar program for its support of his research.

[1] Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 420 (2017) (suggesting that "the national injunction is a recent development in the history of equity" and one that did not become prominent until the second half of the twentieth century).

[2] *Id.* at 418, 454.

[3] Make the Rd. N.Y. v. McAleenan, 405 F. Supp. 3d 1, 11–12 (D.D.C. 2019), *rev'd sub nom.* Make the Rd. N.Y. v. Wolf, 962 F.3d 612, 635 (D.C. Cir. 2020).

removal" of undocumented aliens. However, Judge Jackson's position is not universally accepted. Indeed, many agencies argue that they should have the right to nonacquiesce in an adverse lower court decision and continue to maintain their litigating positions in other districts or circuits. Consistent with this approach, Professor Samuel Bray has argued that federal court injunctions should be designed to protect the defendant in the case before the court, and "should not constrain the defendant's conduct vis-a-vis nonparties."[4] Professor Douglas Laycock agrees, arguing 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."[5] On the other hand, Professor Amanda Frost agrees with Justice Jackson, arguing that "[i]n some cases, nationwide injunctions are the only means to provide plaintiffs with complete relief, or to prevent harm to thousands of individuals who cannot quickly bring their own cases before the courts."[6]

This article examines the legitimacy of the concept of "nonacquiescence." In other words, when an agency loses a case in one lower federal court, must it follow the adverse decision in other districts or circuits? If the government continues to lose in these other jurisdictions, that is likely to be the end of the matter. The US Supreme Court is probably going to refuse to consider the matter. On the other hand, if the government's position prevails in other jurisdictions, such that there is a split among the circuits, the US Supreme Court eventually is likely to intervene in order to resolve the circuit split. By that point, the facts and the legal issues have come into sharper focus and the US Supreme Court can more readily decide the issues.

This article is divided into three parts. Part I discusses the historical development of nationwide injunctions. As we shall see, such injunctions are a recent development and became commonplace by the 1980s and 1990s. Part II outlines the arguments that some have made regarding when nationwide injunctions are valuable and beneficial. Part III then discusses

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[4] Bray, *supra* note 1, at 469.

[5] Howard Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 339 (2018) (quoting Bray, *supra* note 1, at n.10); *see also id.* at 335 ("[C]ourts 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.").

[6] *See* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1065 (2018).

the myriad of concerns regarding nationwide injunctions, ultimately concluding that nationwide injunctions should be used sparingly. This article concludes that while there may be justifications for extending a lower court decision to the entire country in a few unique situations, judicial restraint is usually the preferable approach.

I. THE DEVELOPMENT OF NATIONWIDE INJUNCTIONS

Nationwide injunctions are a relatively recent phenomenon. Indeed, the "older English and American practice was that an injunction would restrain the defendant's conduct vis-à-vis the plaintiff, not vis-à-vis the world."[7] In the United States, no nationwide injunctions were issued in the nineteenth century.[8] For example, in *Georgia v. Atkins*,[9] the State of Georgia sought to challenge a federal tax imposed on it. In enjoining the tax, the court did not enjoin the government from enforcing the tax against other states, or even specifically against the State of Georgia, but rather enjoined only the particular tax at issue in that case.[10]

Professor Bray identifies the US Supreme Court's holding in *Frothingham v. Mellon*[11] as illustrating the early judicial aversion to nationwide injunctions.[12] In that case, the Court emphasized the limited nature of federal court jurisdiction:

> If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned.[13]

In *Frothingham*, the Court emphasized that "no precedent sustaining the right to maintain suits like this has been called to our attention."[14]

Even the wave of injunctions issued against New Deal legislation in the 1930s (some 1,600 injunctions in all) did not involve nationwide injunctions.[15] During that period, the only

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[7] *See* Bray, *supra* note 1, at 420.
[8] *Id.* at 428.
[9] Georgia v. Atkins, 10 F. Cas. 241, 241 (C.C.N.D. Ga. 1866) (No. 5,350).
[10] *See* Bray, *supra* note 1, at 428.
[11] Frothingham v. Mellon, 262 U.S. 477 (1923).
[12] *See* Bray, *supra* note 1, at 431–32.
[13] *Frothingham*, 262 U.S. at 487.
[14] *Id.*
[15] *See* Bray, *supra* note 1, at 434–35.

early injunction that departed from this approach was the lower court injunction issued in *Hammer v. Dagenhart*,[16] but that injunction extended only to an entire federal district.[17]

Despite the early "uncertainty" and "discomfort" with the idea of issuing national injunctions, such injunctions had become "an ordinary part of the remedial arsenal of the federal courts" by the 1980s and 1990s.[18] Since then, courts have issued nationwide injunctions in an extraordinary array of contexts: to prevent the planting of an altered strain of alfalfa,[19] to prohibit the US Forest Service from exempting salvage timber sales from notice and comment processes,[20] to prohibit protest activities at abortion clinics,[21] to prohibit a credit union from expanding its field of membership,[22] to enjoin the government from imposing release bonds on excludable aliens that barred them from seeking employment,[23] to prohibit the Bureau of Land Management's "land withdrawal review program,"[24] to enjoin a regulation limiting the fees that could be paid to attorneys for handling service-connected death or disability benefits cases,[25] to enjoin a federal regulation that denied federal financial aid to students who failed to register for the draft,[26] and to impose procedures on the government in cases involving old age and survivor benefits.[27]

By the time of the Obama and Trump administrations, such injunctions were becoming relatively commonplace. During the Obama Administration, a Texas trial court issued nationwide injunctions against President Obama's Deferred Action for Childhood Arrivals and his Deferred Action for Parents of Americans and Lawful Permanent Residents,[28] as well as against his Department of Education's interpretive guidance regarding the treatment of transgender students in

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[16] Hammer v. Dagenhart, 247 U.S. 251, 268 (1918).

[17] *See* Bray, *supra* note 1, at 436 ("The federal district judge held the law unconstitutional and granted the injunction the plaintiffs requested—an injunction restraining the enforcement of the statute within the Western District of North Carolina. The injunction thus went further than merely prohibiting enforcement against the plaintiffs.").

[18] *See id.* at 428.

[19] *See* Monsanto Co. v. Geersten Seed Farms, 561 U.S. 139, 144 (2010).

[20] *See* Summers v. Earth Island Inst., 555 U.S. 488, 490–92 (2009).

[21] *See* Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9, 15 (2006).

[22] *See* Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 489 (1998).

[23] *See* I.N.S. v. Nat'l Ctr. for Immigrants Rts., Inc., 502 U.S. 183, 186 (1991).

[24] *See* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 875 (1990).

[25] *See* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 308 (1985).

[26] *See* Selective Serv. Sys. v. Minn. Pub. Int. Rsch. Grp., 468 U.S. 841, 845 (1984).

[27] *See* Califano v. Yamasaki, 442 U.S. 682, 689 (1979).

[28] *See* Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2015) (mem).

public schools.[29] During the Trump Administration, such injunctions were frequently issued. For example, a judge entered an injunction against President Trump's second Executive Order "suspending for 90 days" the right of "nationals from six predominantly Muslim countries" from entering the United States, "suspending for 120 days the United States Refugee Admissions Program (USRAP), and decreasing refugee admissions . . . by more than half."[30] In another case, a trial court entered an injunction against President Trump's order that indefinitely barred entry into the United States by nationals from six predominantly Muslim countries (Iran, Libya, Syria, Yemen, Somalia, and Chad).[31] Injunctions were also issued against a Trump Administration order denying federal funding to sanctuary cities.[32]

Why have nationwide injunctions become commonplace? Professor Bray points to the Federal Declaratory Judgment Act (FDJA),[33] which was enacted in 1934. He believes that the FDJA encouraged courts to think about the fundamental validity of statutes and to issue broad injunctions when striking down those statutes.[34] In other words, the FDJA promoted facial challenges to laws.[35] Bray also argues that judges have fundamentally changed the way that they respond to unconstitutional laws: moving from simply refusing to apply or enforce unconstitutional laws to perceiving that they should strike them down.[36] In other words, rather than viewing "courts as preventing or remedying a specific wrong to a person and only incidentally determining the constitutionality of a law, now many see courts as determining the constitutionality of a law and only incidentally preventing or remedying a specific wrong to a person."[37] Bray suggests that these shifts have prompted courts to view themselves as vindicating constitutional rights on a national basis.[38] Professor Frost seems to agree, noting that:

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[29] *See* Texas v. United States, 201 F. Supp. 3d 810, 835–36 (N.D. Tex. 2016).

[30] *See* Trump v. Int'l Refugee Assistance Project, 137 Ct. 2080, 2080 (2017) (per curiam).

[31] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2399 (2018).

[32] *See* County of Santa Clara v. Trump, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017).

[33] 28 U.S.C. §§ 2201–2202.

[34] *See* Bray, *supra* note 1, at 450.

[35] *Id.*

[36] *Id.* at 451.

[37] *Id.*

[38] *Id.* at 452 ("That shift matters for the logic of the national injunction. If a court considers a statute inconsistent with the Constitution, and thus *does not apply it*, nothing follows about the remedy. The court has not done anything to the statute. It remains undisturbed. But on the newer conception of what a court does—striking down or setting aside an unconstitutional statute or unlawful regulation—a national injunction begins to have a relentless logic. If a court strikes down a statute, regulation,

> At its core, the debate over nationwide injunctions is really a debate about the role of the federal courts in the constitutional structure. Are courts primarily intended to resolve disputes between the parties, or do they also declare the meaning of federal law for everyone? To what degree are courts intended to serve as a check on the political branches, and should their authority expand in lockstep with that of Congress and the President?[39]

Thus, she seems to share Professor Bray's views regarding why nationwide injunctions have become so commonplace.

II. THE NEED FOR NATIONWIDE INJUNCTIONS

So, are there good reasons for issuing nationwide injunctions? Justice Jackson thinks so. In her *Make the Road* decision, which involved a DHS order that provided for the expedited removal of aliens who had been in the country for up to two years and who were located far beyond the border, she made the case for judicial issuance of nationwide injunctions. In that case, she emphasized that aliens who were not before the court but who were subject to expedited removal could suffer serious harm unless her injunction was extended to them.[40] She emphasized that immigrants who may have been "living and working inside the United States for lengthy periods of time" could be subject to "surveillance and arrests at courthouses, buses, and trains, as well as raids on workplaces and homes," and they might be forced to continuously carry documents establishing their lawful status.[41]

In her decision, Judge Jackson also emphasized that Section 706 of the Administrative Procedure Act commands the courts to "hold unlawful and set aside" agency actions that the court finds are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[42] In other words, when a reviewing court concludes that an agency's regulations are unlawful, it should vacate those regulations rather than

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or order, why should it give it respect by allowing its continued enforcement? Wouldn't enforcement, anywhere, offend the court's determination that it was invalid, struck down, *obliterated*? If a law is unconstitutional in all its applications, why should the court permit it to be applied to anyone? Again, reasons can be given for stopping short—ones grounded in equitable remedies, judicial competence, humility, separation of powers, federalism, and so on. But the logic of the national injunction is certainly strengthened by the newer view of what judges do when one law is inconsistent with a higher one, as well as by the metaphorical language used to express that view.")

[39] Frost, *supra* note 6, at 1086–87.

[40] Make the Rd. N.Y. v. McAleenan, 405 F. Supp. 3d 1, 56, 70 (D.D.C. 2019), *rev'd sub nom.* Make the Rd. N.Y. v. Wolf, 962 F.3d 612, 635 (D.C. Cir. 2020).

[41] *Id.* at 56–57 (internal quotations omitted).

[42] *Id.* at 45–46 (quoting 5 U.S.C. § 706(2)(A)).

simply limit its decision to the parties before it.[43] Once declared unlawful, a nationwide injunction enjoining enforcement would (in her view) be appropriate.[44]

Professor Frost contends that nationwide injunctions are appropriate in three different types of cases—when such injunctions:

> are the only method of providing the plaintiff with complete relief; when they are the only means of preventing irreparable injury to individuals similarly situated to plaintiffs; and when they are the only practical remedy because a more limited injunction would be chaotic to administer and would impose significant costs on the courts or others.[45]

She argues that when "nationwide injunctions can serve one or more of these goals, the benefits of such an injunction may outweigh the costs."[46]

In her *Make the Road* opinion, then-Judge Jackson was especially reluctant to limit her opinion to the plaintiffs before her in that case. She emphasized that even a partial invalidation of the DHS rule would "create nearly insurmountable practical problems."[47] For one thing, in order to challenge the DHS rule, other "undocumented non-citizens who are members of Plaintiffs' organizations would first have to identify themselves to the government, which, of course, is the first step in a chain of events that might well lead to their deportation."[48] Moreover, she viewed the government's nonacquiescence argument as reflecting "a spirit of defiance of judicial authority in the aftermath of defeat that is not easily reconciled with established constitutional norms or with standard, good faith practices that seek to ensure that a successful plaintiff is made whole."[49] Relying on the US Supreme Court's landmark decision in *Marbury v. Madison*,[50] she viewed DHS's nonacquiescence argument as unacceptable.[51]

Judge Jackson seemed indignant by DHS's nonacquiescence argument, which she viewed as suggesting that DHS should be allowed "to press its prerogatives however it wants after being told specifically, by a federal court, that the

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[43] *Id.*

[44] *Id.*

[45] *See* Frost, *supra* note 6, at 1090.

[46] *Id.*

[47] *Make the Rd.*, 405 F. Supp 3d at 70.

[48] *Id.*

[49] *Id.*

[50] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[51] *Make the Rd.*, 405 F. Supp 3d at 71.

law requires cessation of that behavior, [which] conflicts with core constitutional norms."[52] As a result, she viewed DHS's position as ill-founded:

> DHS makes the astonishing suggestion that the Court *itself* should declare that, after a plaintiff successfully establishes that an agency rule violates the law, the federal courts must stand impotently by while the agency acts in direct defiance of that court's legal determination by continuing to apply the invalid rule with respect to any person who is not the individual who filed the legal action that is before the Court.[53]

She viewed that argument as "untenable," and as inconsistent with "core constitutional norms."[54]

Professor Amanda Frost agrees. She argues that without nationwide injunctions:

> the federal courts would be powerless to protect thousands or millions of people from potentially illegal or unconstitutional government policies—policies that can be applied with minimal notice or process, and to many who lack the ability to bring their individual cases before the courts. The need for such injunctions is particularly great in an era when major policy choices are increasingly made through unilateral executive action affecting millions.[55]

Others also argue that nationwide injunctions help promote the uniform application of the laws, especially immigration laws.[56] On the surface, this argument seems sound: if a law or policy is unconstitutional, it seems inappropriate to allow the government to try to enforce that policy in other jurisdictions when suits are brought against such policies. Indeed, the action of a single lower court obviates the need for numerous courts all over the country to consider and decide the same issue.

III. CONCERNS ABOUT NATIONWIDE INJUNCTIONS

Despite Judge Jackson's forceful arguments, courts should exercise care before issuing nationwide relief. There are a variety of concerns.

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[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] Frost, *supra* note 6, at 1069.
[56] *See* Wasserman, *supra* note 5, at 338.

A. Risk of Abuse and Forum Shopping

For one thing, nationwide injunctions are subject to abuse and their issuance can prevent agencies from implementing their policy preferences for a considerable period of time. Moreover, if agencies have no authority to refuse to acquiesce, plaintiffs have powerful incentives to "forum shop" in an effort to place their cases before judges who are sympathetic toward their clients.[57] It should come as no surprise that injunctions against Obama-era policies were commonly sought in the (relatively conservative) Texas federal courts, and were appealed to the (relatively conservative) Court of Appeals for the Fifth Circuit. By contrast, many challenges to Trump Administration actions were brought before (relatively more liberal) California federal court judges, and therefore appealed to the (relatively liberal) Court of Appeals for the Ninth Circuit.[58] As Professor Bray has recognized, a plaintiff need only find a single judge who is willing to grant a nationwide injunction in order to stop agency action.[59] If one judge denies the request, they can try with a different plaintiff before a different judge. If any one district judge *invalidates* the agency action and issues a national injunction, the agency's action is halted in its tracks.[60] As Professor Bray has recognized, a plaintiff's incentive is to "[s]hop 'til the statute drops."[61]

B. The Risks of Erroneous Decisions

It would be one thing if lower court decisions granting nationwide relief were invariably (or even often) correct. The difficulty is that as litigants engage in forum shopping, looking

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[57] *See* Bray, *supra* note 1, at 457.

[58] *Id.* at 459–60 ("It is no accident which courts have given the major national injunctions in the last three administrations. In the George W. Bush Administration, it was federal courts in California. In the Obama Administration, it was federal courts in Texas. Now, in the Trump Administration, the national preliminary injunctions have come from federal courts in several less conservative circuits (the Fourth, Seventh, and Ninth). The forum selection happens not only for the district court, but also for the appellate court. The pattern is as obvious as it is disconcerting. Given the sweeping power of the individual judge to issue a national injunction, and the plaintiff's ability to select a forum, it is unsurprising that there would be rampant forum shopping.").

[59] *Id.*

[60] *Id.* at 460

[61] *Id.* ("The opportunity for forum shopping is extended by the asymmetric effect of decisions upholding and invalidating a statute, regulation, or order. If a plaintiff brings an individual action seeking a national injunction, and the district judge *upholds* the challenged law, that decision has no effect on other potential plaintiffs. But if one district judge *invalidates* it and issues a national injunction, the injunction controls the defendant's actions with respect to everyone.").

for judges who are more likely to be sympathetic to their causes, the likelihood of an erroneous lower court ruling dramatically increases. Moreover, if an erroneous ruling is embodied in a nationwide injunction, an agency's regulatory objectives might be thwarted for a considerable period of time.

Justice Jackson's *Make the Road* injunction illustrates the problem. In that case, then Judge Jackson issued a nationwide injunction against DHS, referring to the agency's argument that it should not be required to acquiesce in her decision as "astonishing" and flatly asserting that courts should not "stand impotently by while the agency acts in direct defiance . . . by continuing to apply the invalid rule with respect to any person who is not the individual who filed the legal action that is before the Court."[62] Indeed, Justice Jackson seemed miffed by the agency's position, which she viewed as evidencing "a spirit of defiance of judicial authority in the aftermath of defeat that is not easily reconciled with established constitutional norms or with standard, good faith practices that seek to ensure that a successful plaintiff is made whole."[63] The difficulty with Judge Jackson's position was that her decision enjoining DHS was itself erroneous. When the *Make the Road* decision went up on appeal, it was reversed on the basis that the Immigration and Naturalization Service had unreviewable discretion over the issue raised in the case and therefore the injunction never should have been issued.[64] Thus, even though the agency's discretion was unreviewable and unchallengeable, and even though the agency had the legal right to do what it did, the agency was enjoined from exercising its discretion for a considerable period of time, and Judge Jackson blasted the agency for suggesting that it would not acquiesce to her ruling.

If Judge Jackson's erroneous decision were the only example of judicial error in these types of cases, that would be one thing. The reality is that most nationwide injunctions reviewed by the US Supreme Court are overturned. In *Walters v. National Association of Radiation Survivors*,[65] in overturning a lower court injunction involving the US Department of Health, Education and Welfare's effort to recoup overpayments made under the Social Security Act, the Court concluded that the lower court's analysis of the issue was "totally unconvincing." The Court also held that decision was "quite lacking in the

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[62] Make the Rd. N.Y. v. McAleenan, 405 F. Supp. 3d 1, 71 (D.D.C. 2019), *rev'd sub nom*. Make the Rd. N.Y. v. Wolf, 962 F.3d 612, 635 (D.C. Cir. 2020).

[63] *Id.* at 70.

[64] *See Make the Rd.*, 962 F.3d at 612.

[65] Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 328 (1985).

deference which ought to be shown by any federal court in evaluating the constitutionality of an Act of Congress,"[66] and the Court went on to note that the trial court's decision "inappropriately frustrated the congressional objective of keeping the proceeding simple."[67] Likewise, in *Selective Service System v. Minnesota Public Interest Research Group*,[68] the Court vacated a nationwide injunction issued on behalf of college students who challenged a federal statute that denied federal student aid to students who failed to register for the draft, finding multiple constitutional violations.[69] In *Scheidler v. National Organization for Women, Inc.*,[70] the trial court imposed a nationwide injunction restricting protest activities near abortion clinics anywhere in the nation based on a federal statute that prohibited the use of violence to extort or rob. The US Supreme Court concluded that the trial court had misconstrued and misapplied the federal statute, and therefore vacated the injunction. In *Immigration & Naturalization Service v. National Center for Immigrants Rights, Inc.*,[71] a trial court issued a nationwide injunction precluding the government from prohibiting aliens released on bond from seeking employment, concluding that the agency had violated its governing statute and therefore deprived aliens of their right to due process. The US Supreme Court vacated the nationwide injunction on the basis that the agency did not violate its statutory authority or due process.[72]

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[66] *Id.* at 326, 328 ("Thus, even apart from the frustration of Congress' principal goal of wanting the veteran to get the entirety of the award, the destruction of the fee limitation would bid fair to complicate a proceeding which Congress wished to keep as simple as possible.")."

[67] Russell L. Weaver, *Nationwide Injunctions*, 14 FIU L. REV. 103, 109 (2020); *Walters*, 473 U.S. at 324, 326 ("It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys. And this additional complexity will undoubtedly engender greater administrative costs, with the end result being that less Government money reaches its intended beneficiaries.").

[68] Selective Serv. Sys. v. Minn. Pub. Int. Rsch. Grp., 468 U.S. 841 (1984).

[69] *Id.* at 856 ("[W]ithin the meaning of Bill of Attainder Clause, we hold that the District Court erred in striking down § 12(f) as an impermissible attainder.")."

[70] Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9, 14–15 (2006).

[71] I.N.S. v. Nat'l Ctr. for Immigrants Rts., Inc., 502 U.S. 183, 186 (1991).

[72] The Court did not reach the constitutional issue because it was not considered or relied on by the court of appeals decision affirming the trial court's decision. In regard to the statutory issue, the Court concluded that: "Taken together all of these administrative procedures are designed to ensure that aliens detained and bonds issued under the contested regulation will receive the individualized determinations mandated by the Act in this context. For these reasons, we conclude that 8 CFR

Erroneous decisions to grant nationwide injunctions can have real world consequences. In the case of injunctions issued against the Obama and Trump administrations, the injunctions thwarted the implementation of regulatory programs for a considerable period of time. Thus, the actions of a single judge, in one part of the country, can effectively stop regulatory programs in their tracks all over the nation. When one realizes that plaintiffs engage in forum shopping in these cases, and that most nationwide injunctions are reversed on appeal, one can legitimately question whether trial courts should be entering such orders. In addition, one can legitimately expect agencies to refuse to acquiesce in appropriate cases.

C. Negatively Impacting Judicial Review

Nationwide injunctions also can negatively impact the judicial review process. Professor Frost cites the case of *Trump v. International Refugee Assistance Project*[73] as an example of a situation when a nationwide injunction would be appropriate.[74] In fact, *Trump* illustrates the opposite. Because a nationwide injunction was issued in that case, the case hurtled through the lower courts at a precipitous pace. After several lower courts enjoined enforcement of a Trump executive order, the Court agreed to hear the government's request for a stay of the injunction on an expedited basis.[75] Although the lower court rulings were not rendered until late May, a petition for certiorari was filed on June 1, 2017, and the Court directed that responses to the request for stay be filed just eleven days later on June 12, 2017.[76] The Court rendered its decision on the stay only fifteen days later on June 27, 2017. In *Trump*, the lower court injunction allowed certain types of individuals to enter the country who would not ultimately prevail before the Court, as it stayed important parts of the trial court's injunction.[77] The net effect was that the lower court's order erroneously allowed several classes of individuals to enter the United States who should not have been allowed to enter.

Likewise, in *Selective Service System v. Minnesota Public Interest Research Group*,[78] a case involving individuals who

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§ 103.6(a)(2)(ii) (1991) is consistent with the Attorney General's statutory authority under § 242(a) of the INA." *Id.* at 196.

[73] Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (per curiam).

[74] Frost, *supra* note 6, at 1099.

[75] *Trump*, 137 S. Ct. at 2086.

[76] *Id.* at 2085.

[77] *Id.* at 2089.

[78] Selective Serv. Sys. v. Minn. Pub. Int. Rsch. Grp., 468 U.S. 841 (1984).

challenged the denial of federal student assistance because of their refusal to register for the draft, the case came quite rapidly to the US Supreme Court. The trial court issued a nationwide injunction on June 16, 1983, and the case was before the US Supreme Court on a request for stay on June 29, 1983.[79] In other words, only thirteen days later. Thereafter, the Court heard and resolved the case. Because the trial court issued a nationwide injunction, the case was not able to percolate its way to the US Supreme Court.

Precipitous review has been common in cases involving nationwide injunctions.[80] In *Califano v. Yamasaki*, a case in which the trial court certified a nationwide class composed of "all individuals eligible for [old-age and survivors' benefits] whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing," the court of appeals held that it would be inappropriate to require the recipients to sue individually because that would have resulted in an unnecessary duplication of actions.[81] Since the "issues involved are common to the class as a whole," it is "unlikely that differences in the factual background of each claim will affect the outcome of the legal issue."[82] The difficulty was that in *Califano,* both the appellate court and the trial court improperly issued and affirmed a nationwide injunction when one should not have been issued. Because the injunction was issued on a nationwide basis, the actions of the lower courts forced the US Supreme Court to become prematurely, indeed precipitously, involved in the case.

As a general rule, it is preferable to allow injunction cases to proceed through the court system in a more deliberate way that allows the lower courts to develop the record and define the issues. Nonacquiescence plays a very positive role in the judicial process because it helps provide the US Supreme Court with fuller and more developed records and arguments, as well as multiple considered decisions by lower courts. As more and more judges hear and decide the issues presented, they clarify the issues and facts, and help sharpen the legal analysis. If the lower

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[79] *Id.* at 846.

[80] *See, e.g.*, *Trump*, 582 U.S. at 572 (overturning the injunction in part); Monsanto Co. v. Geersten Seed Farms, 561 U.S. 139 (2010); Summers v. Earth Island Inst., 555 U.S. 488 (2009); Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9 (2006); *Nat'l Ctr. for Immigrants Rts.,* 502 U.S. 183; Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990); Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985); *Minn. Pub. Int. Rsch. Grp.*, 468 U.S. 841.

[81] Califano v. Yamasaki, 442 U.S., 682, 689 (1979) (internal quotation marks omitted).

[82] *Id.* at 701.

courts disagree with each other, the facts and issues come into focus as multiple lower court decisions are issued. In other words, adversarial litigation helps ensure that the US Supreme Court receives a more highly developed record.

In *Califano*,[83] although the Court upheld aspects of a nationwide injunction, it conceded "the force of the Secretary's contentions that nationwide class actions may have a detrimental effect by foreclosing adjudication by a number of different courts and judges, and of increasing . . . the pressures on this Court's docket."[84] The Court concluded that it would have been preferable "to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts."[85] For those reasons, the Court concluded that "a federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts."[86] *Califano* concluded that nationwide injunctions would be appropriate only in certain limited situations.[87]

Walters v. National Association of Radiation Survivors is illustrative of the need for judicial deliberation.[88] There, after the trial court enjoined the operation of a federal law "across the country and under all circumstances," the Supreme Court quickly involved itself and heard an appeal on an expedited basis.[89] A concurring Justice O'Connor argued that the trial court had "abused its discretion in issuing a nationwide preliminary injunction."[90] While she agreed that "expeditious" review of the case was warranted under the circumstances,[91] she argued that plaintiffs' claims should have been considered individually because they were differentially situated.[92] A dissenting Justice Brennan argued that the Court should have

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[83] *Id.* at 706.

[84] *Id.* at 702.

[85] *Id.*

[86] *Id.*

[87] *Id.* ("Nor is a nationwide class inconsistent with principles of equity jurisprudence, since the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class. If a class action is otherwise proper, and if jurisdiction lies over the claims of the members of the class, the fact that the class is nationwide in scope does not necessarily mean that the relief afforded the plaintiffs will be more burdensome than necessary to redress the complaining parties.") (internal citation omitted).

[88] Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 319 (1985).

[89] *Id.* at 319.

[90] *Id.* at 336 (O'Connor, J., concurring).

[91] *Id.* (quoting Heckler v. Edwards, 465 U.S. 870, 882 (1984)).

[92] *Id.* at 337–38.

refused to hear an interlocutory appeal of a nationwide injunction because he believed that it was important to have a full development of the case so that appellate decisions can be fully informed:

> where "grave, far-reaching constitutional questions" are presented: the records developed in preliminary-injunction cases are "simply insufficient" to allow a final decision on the merits; as a matter of fairness the litigants are entitled to a full evidentiary presentation before a final decision is reached; and where question of constitutional law turn on disputed fact, such decisions must initially be rendered by a district court factfinder.[93]

In *Walters*, the Court's unwillingness to delay review was undoubtedly attributable to the fact that the trial court enjoined application of the regulation "across the country and under all circumstances" rather than simply decide the case before it.[94]

In many cases in which nationwide injunctions are sought, plaintiffs frame their request for relief as a "class action," which protects a broad range of plaintiffs—some presently before the court, some not. Some commentators have argued that the class action provides the court with a solid basis for issuing nationwide injunctions.[95] However, this type of analysis creates potential problems. A lower court may think that it understands the full ramifications of a requested injunction, and it may think that it fully understands who will be affected by an injunction and how they will be affected, but the court may be incorrect. For example, in *Summers v. Earth Island Institute*,[96] even though the parties had settled the underlying case, so that an Article III case or controversy no longer existed, the trial court decided to go ahead and decide the merits of the case and issue a nationwide injunction. The US Supreme Court reversed, concluding that the settlement deprived plaintiffs of standing to litigate the case.[97] Likewise, in *Lujan v. National Wildlife Federation*,[98] although the lower courts concluded that plaintiff's injuries were sufficient to

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[93] *Id.* at 342 (Brennan, J., dissenting) (internal citation omitted).

[94] *Id.* at 319 (majority opinion).

[95] *See* Frost, *supra* note 6, at 1084 ("The class action device further demonstrates that courts have the constitutional authority to enjoin defendants from taking action affecting nonparties. Under Federal Rule of Civil Procedure 23, a few named individuals can bring a lawsuit on behalf of all similarly situated individuals across the nation as long as they satisfy the four class certification requirements listed in Rule 23(a), as well as Rule 23(b)(2)'s requirement that the 'party opposing the class has acted . . . on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole.'") (internal citation omitted).

[96] Summers v. Earth Island Inst., 555 U.S. 488, 491–92 (2009).

[97] *Id.* at 500–01.

[98] Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 899 (1990).

warrant the entry of a nationwide injunction, the Court held that plaintiffs lacked standing. Accordingly, the case was not justiciable under Article III.

In some cases, the US Supreme Court reverses or limits the scope of an injunctive decree because the trial court's order went well beyond the parties before the court. For example, in *Trump v. International Refugee Assistance Project*,[99] although the lower courts enjoined the Trump Administration from enforcing an executive order against anyone, the Court decided to limit the scope of the injunction only to those individuals who had a bona fide relationship with a person or entity in the United States,[100] and to lift the injunction as to individuals who did not have a bona fide relationship.[101] The Court found that the government's interest was "at [its] peak" when individuals with no bona fide relationship to the United States are involved.[102] Finding that the individual respondents had such a relationship, the Court left the injunction in place as to them, but it lifted it as to others. Had the trial court kept its focus on the parties before it, rather than certifying a nationwide class that included individuals not before the court, the court's order might not have been so overbroad.[103]

Califano v. Yamasaki[104] also illustrates the problems with nationwide injunctions. In that case, which involved the US Department of Health, Education and Welfare's attempt to recoup overpayments made to beneficiaries under the Social Security Act, the trial court purported to certify a nationwide class composed of "all individuals eligible for [old-age and survivors' benefits] whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing." The court of appeals agreed with the lower court and held that to require recipients to sue individually would result in an unnecessary duplication of actions and therefore that class relief was appropriate and that a nationwide injunction could be issued. Indeed, the court of appeals concluded that it "is unlikely

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[99] Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (per curiam).

[100] *Id.*

[101] *Id.* at 580.

[102] *Id.* at 581.

[103] *Id.* ("But the injunctions reach much further than that: They also bar enforcement of § 2(c) against foreign nationals abroad who have no connection to the United States at all. The equities relied on by the lower courts do not balance the same way in that context. Denying entry to such a foreign national does not burden any American party by reason of that party's relationship with the foreign national. And the courts below did not conclude that exclusion in such circumstances would impose any legally relevant hardship on the foreign national himself.").

[104] Califano v. Yamasaki, 442 U.S. 682, 689 (1979).

that differences in the factual background of each claim will affect the outcome of the legal issue."[105] The US Supreme Court disagreed, concluding that the certified class was overbroad because it swept in individuals who had not filed requests for reconsideration or waiver.[106]

CONCLUSION

Although the concept of nonacquiescence has been criticized,[107] the concept clearly has a place in the US legal system. While nationwide injunctions might have a place in the US legal system as well, they are often overused and can have an undesirable impact on the law and the legal system. In addition, nationwide injunctions promote forum shopping. Litigants seek out judges who are likely to be sympathetic to their positions, and therefore who are more likely to issue injunctions. If they can persuade a judge to issue a nationwide injunction, they can place an entire regulatory program in abeyance until a higher court can review the decision.

Nationwide injunctions also may have an undesirable impact on judicial review processes. Instead of allowing issues to percolate their way to the US Supreme Court, and providing that Court with the views and analyses of a variety of lower court judges, cases involving nationwide injunctions often move quite quickly through the court system and are rapidly presented to the Court. Undoubtedly, this rapid pace of review is attributable to the significance of the injunction that the lower court issued (e.g., that it purported to enjoin governmental action nationwide).

Finally, there is a risk that nationwide injunctions will encourage forum shopping, politicize the courts, create the risk of conflicting injunctions, and potentially give enormous power to a single district court judge. Professor Bray, therefore, argues that courts should not issue injunctions protecting nonparties.

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[105] *Id.* at 701.

[106] *Id.* at 704 ("The relief to which the Secretary objects in this Court is the determination that he must afford class members an opportunity for a prerecoupment oral hearing. With respect to that relief, the classes certified were plainly too broad. Both the *Elliott* and the *Buffington* classes included persons who had not filed requests for reconsideration or waiver in the past and would not do so in the future. As to them, no 'final decision' concerning the right to a prerecoupment hearing has been or will be made.").

[107] *See generally* Jeffrey Freedman, *New Rulings Move SSA Away from Policy of Non-Acquiesence*, 63 N.Y. ST. B.J. 22 (Mar./Apr. 1991); Joshua I. Schwartz, *Nonacquiescence,* Crowell v. Benson*, and Administrative Adjudication*, 77 GEO. L.J. 1815 (1989).