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## Can and Should Universal Injunctions Be Saved?

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# NOTES

## Can and Should Universal Injunctions Be Saved?

*The practice of a federal district court judge halting the government’s enforcement of an executive action against not only the parties before the court but against anyone, anywhere, may be coming to an end. Multiple Supreme Court Justices have expressed their skepticism in the propriety of universal injunctions. The growing scholarly consensus is that there should be a brightline rule against them. If the universal injunction’s demise is impending and the class action’s demise continues unabated, obtaining systemwide relief may be difficult when such relief may be most needed.*

*This Note considers whether universal injunctions can and should be saved. It first compares the macro-level trends and current tradeoffs between the two procedural choices for seeking systemwide relief. Then, this Note considers whether universal injunctions can be theoretically justified based on the development of issue preclusion doctrine and the drafting of the modern class action rules. Finally, this Note proposes a specialized forum to adjudicate universal injunction suits that would solve the two most pressing problems caused by such injunctions—judge shopping and preclusion asymmetry—and realign the tradeoffs that plaintiffs consider when choosing how to seek systemwide relief.*

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*When one invokes a law before the courts of the United States that the judge deems contrary to the Constitution, he can therefore refuse to apply it. This power is the only one which is particular to the American magistrate, but a great political influence flows from it . . . . If the judge had been able to attack laws in a theoretical and general manner, if he had been able to take the initiative and censure the legislature, he would have entered onto the political stage with a bang; having become the champion or adversary of one party, he would have appealed to all the passions that divide the country to take part in the conflict.*

—Alexis de Tocqueville<sup>1</sup>

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1. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 96–97 (Harvey Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835).

## INTRODUCTION

In April 2017, then-Attorney General Jeff Sessions expressed his amazement<sup>2</sup> that “a judge sitting on an island in the Pacific” could stop President Donald Trump from fulfilling a key campaign promise: enacting a so-called Muslim Ban.<sup>3</sup> Sessions was adding to the growing skepticism that a federal district court judge—sometimes handpicked based on his perceived outlier views<sup>4</sup>—could grant a “universal injunction”<sup>5</sup> to immediately halt the enforcement of an executive action<sup>6</sup> against not only the parties before the court but also against anyone, anywhere.<sup>7</sup> When the final version of the Muslim Ban reached the Supreme Court in *Trump v. Hawaii*, Justice Clarence Thomas wrote separately to urge the Court to address the propriety of universal injunctions which he deemed “legally and historically dubious.”<sup>8</sup> Justice Neil Gorsuch also signaled his disapproval of these extraordinary remedies by sardonically referring to them as “cosmic injunctions” during oral

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2. Attorney General Sessions’s criticism shows that universal injunctions are hard to remove from their politically salient context. See *City of Chicago v. Sessions*, 888 F.3d 272, 288 (7th Cir. 2018) (“[In 2016], then-Senator and now-Attorney General Sessions characterized the upholding of one such nationwide preliminary injunction as ‘a victory for the American people and for the rule of law.’ Now, many who advocated for broad injunctions in those Obamaera cases are opposing them.” (citation omitted)), *reh’g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018).

3. Samantha Schmidt, *Hawaii Residents to Jeff Sessions: ‘We’re not Just Some Island’*, WASH. POST (Apr. 21, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/04/21/hawaiians-to-jeff-sessions-were-not-just-some-island/?noredirect=on&utm\\_term=.8e705ee833e6](https://www.washingtonpost.com/news/morning-mix/wp/2017/04/21/hawaiians-to-jeff-sessions-were-not-just-some-island/?noredirect=on&utm_term=.8e705ee833e6) [<https://perma.cc/9YW5-CE9L>]; see also Jeff Sessions, *Nationwide Injunctions Are a Threat to Our Constitutional Order*, NAT’L REV. (Mar. 10, 2018, 12:20 PM), <https://www.nationalreview.com/2018/03/nationwide-injunctions-stop-elected-branches-enforcing-law/> [<https://perma.cc/24AN-7HC6>].

4. See *infra* Section I.A.2.

5. The literature uses both “nationwide” and “universal” to describe injunctions that enjoin the enforcement of an executive action against anyone, anywhere. This Note follows the lead of Justice Clarence Thomas and uses the term “universal.” See *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 n.1 (2018) (Thomas, J., concurring) (“‘Nationwide injunctions’ is perhaps the more common term. But I use the term ‘universal injunctions’ in this opinion because it is more precise. These injunctions are distinctive because they prohibit the Government from enforcing a policy with respect to anyone, including nonparties—not because they have wide geographic breadth.”); see also Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335, 349–53 (2018) (arguing against using the term “nationwide” to describe the injunctions at issue).

6. This Note uses the term “executive action” to refer to all executive orders, presidential proclamations, executive memorandums, administrative agency rules, and similar authority.

7. Cf. Sessions, *supra* note 3 (“During the New Deal controversies, courts concluded that one new tax was unconstitutional more than 1,600 times. They issued more than 1,600 injunctions—each applying only to the plaintiff in the case.”).

8. 138 S. Ct. at 2426–29 (Thomas, J., concurring) (stating that the “authority to provide equitable relief is meaningfully constrained. This authority must comply with longstanding principles of equity that predate this country’s founding.”).

argument.<sup>9</sup> Chief Justice John Roberts previously voiced similar concerns.<sup>10</sup>

Even though the Supreme Court has yet to squarely address the propriety of universal injunctions,<sup>11</sup> some lower courts have interpreted *Trump v. International Refugee Assistance Project* (“*IRAP*”)<sup>12</sup> as an endorsement of the remedy, citing the decision to justify their own universal injunctions.<sup>13</sup> The Court in *IRAP* first recognized that “[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents.”<sup>14</sup> The Court then only slightly narrowed the district court’s universal injunction against the Muslim Ban by leaving it in place for “foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.”<sup>15</sup> Nevertheless, the endorsement was tepid at best, and the Court’s rebuke of universal injunctions could be impending.<sup>16</sup>

The growing scholarly consensus is that there should be a brightline rule against universal injunctions because historical limits on judicial power and the constitutional and structural constraints on

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9. Transcript of Oral Argument at 73, *Hawaii*, 138 S. Ct. 2392 (No. 17-965), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/17-965\\_15gm.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-965_15gm.pdf) [<https://perma.cc/KK5R-CSUR>] (“We have this troubling rise of this nationwide injunction, cosmic injunction . . . not limited to relief for the parties at issue or even a class action.”).

10. *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018) (“[T]his Court is not responsible for vindicating generalized partisan preferences. The Court’s constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.”).

11. *Hawaii*, 138 S. Ct. at 2423 (“Our disposition of the case makes it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court.”).

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

13. *See, e.g., E. Bay Sanctuary Covenant v. Trump (E. Bay I)*, 349 F. Supp. 3d 838, 866–67 (N.D. Cal. 2018).

14. *IRAP*, 137 S. Ct. at 2087.

15. *Id.* at 2088.

16. Andrew Coan & David Marcus, *Article III, Remedies, and Representation*, 9 CONLAWNOW 97, 98 (2018):

A majority of the justices implicitly approved—or at least failed to disapprove—injunctive relief well beyond what was necessary to remedy the particularized injuries of the only plaintiffs actually before the Court. As the three dissenters pointed out, persons similarly situated to the plaintiffs are, by definition, not the plaintiffs.

federal courts prohibit equitable remedies from intentionally<sup>17</sup> benefiting nonparties.<sup>18</sup> The Department of Justice has advised federal prosecutors to oppose universal injunctions in every case.<sup>19</sup> Furthermore, a member of Congress has introduced legislation that would create a brightline rule against the remedy.<sup>20</sup> Some commentators and judges readily point to a different procedural mechanism when decrying universal injunctions: the Rule 23(b)(2) injunctive class action.<sup>21</sup> They assert that if an individual plaintiff can secure broad injunctive relief that intentionally benefits nonparties, the 23(b)(2) class action is arguably superfluous.<sup>22</sup>

The rapid rise of universal injunctions has occurred simultaneously with the rise of sweeping public policy initiatives enacted through executive action.<sup>23</sup> Universal injunctions halted a few of President Bush's executive actions and many of President Obama's.<sup>24</sup> President

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17. Injunctions dealing with “indivisible rights” often *incidentally* benefit nonparties. A right is indivisible if it is impossible to enforce it for only a particular plaintiff without also enforcing it for nonparties. *See* *Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring) (“[Historically], American courts of equity did not provide relief beyond the parties to the case. If their injunctions advantaged nonparties, that benefit was merely incidental. Injunctions barring public nuisances were an example.”); Wasserman, *supra* note 5, at 371–73 (discussing indivisible rights in cases involving desegregation, voter identification laws, and prison conditions).

18. *See generally* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017) (proposing a brightline rule against universal injunctions); Wasserman, *supra* note 5, at 353–85 (same). Professors Amanda Frost and Suzette Malveaux have questioned Professor Bray's proposed brightline rule. Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Suzette M. Malveaux, Response, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. FORUM 56 (2017).

19. Memorandum from the Attorney Gen. to the Heads of Civil Litig. Components & U.S. Attorneys on Litigation Guidelines for Cases Presenting the Possibility for Nationwide Injunctions 2 (Sept. 13, 2018), <https://www.justice.gov/opa/press-release/file/1093881/download> [<https://perma.cc/CVG7-W5UJ>].

20. Injunctive Authority Clarification Act of 2019, H.R. 77, 116th Cong. (2019) (stating that no federal district court shall issue “an order that purports to restrain the enforcement against a non-party of any statute, regulation, order, or similar authority unless the non-party is represented by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure”).

21. *IRAP*, 137 S. Ct. 2080, 2090 (2017) (Thomas, J., concurring in part and dissenting in part) (noting that a universal injunction is improper when “[n]o class has been certified, and neither party asks for the scope of relief” to extend to an “unidentified, unnamed group”); *see also* *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (“The class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’”).

22. *See* Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487, 553 (2016) (“If the court concludes that a Defendant-Oriented Injunction would be the appropriate remedy, it should require the plaintiffs to re-file the case as a Rule 23(b)(2) class action . . . .”); *see also infra* note 111 and accompanying text.

23. *See* Gerhard Peters & John T. Woolley, *Executive Orders*, AM. PRESIDENCY PROJECT (last updated Jan. 21, 2019), <https://www.presidency.ucsb.edu/statistics/data/executive-orders> [<https://perma.cc/FS2A-VMLY>].

24. *See* Bray, *supra* note 18, at 458–60 (discussing five universal injunctions granted by Texas federal district courts in one year during the Obama administration).

Trump's policy agenda faced twenty-five universal injunctions in his first two years in office.<sup>25</sup> But robust judicial review of the democratic branches of government that can secure systemwide relief is increasingly important in the face of growing, unchecked executive power<sup>26</sup> and the erosion of the political process.<sup>27</sup> If the universal injunction's demise is impending and the class action's demise continues unabated, obtaining systemwide relief may be difficult when such relief may be most needed.<sup>28</sup>

This Note proceeds in four parts. Part I summarizes the doctrinal basics of injunctive relief and class certification, then explains how courts have interpreted and applied these doctrines in ways that have caused the rapid rise of universal injunctions and the slow demise of class actions. Part II considers the tradeoffs litigants currently face when choosing whether to file a universal injunction suit or a class action suit by examining two challenges to President Trump's executive actions on asylum policy. Part III considers whether the development of issue preclusion doctrine and the drafting of the modern class action rules can justify universal injunctions and their preclusive asymmetry on theoretical grounds.<sup>29</sup> Part IV proposes the creation of a specialized

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25. See Jeff Sessions, U.S. Attorney Gen., Dep't of Justice, Prepared Remarks Announcing New Memo on Nationwide Injunctions (Sept. 13, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-announcing-new-memo-nationwide-injunctions> [<https://perma.cc/G4P5-AURA>].

26. See Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1698 (2019) (arguing that the role of the judiciary "includes ensuring that one branch, such as the executive, does not exceed the scope of its constitutionally assigned authority by invading the turf of another, such as when an agency ignores statutory directives imposed by Congress, a co-equal branch of government"); see also Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1752–53 (2015) (noting that political polarization leads to "an increase in presidential assertions of policymaking authority and control over agencies").

27. See generally Coan & Marcus, *supra* note 16, at 104 ("[I]t is possible that the democratic process is still preferable to the courts, which have their own shortcomings. But the faith in majoritarian politics undergirding the representation-centered approach [to Article III standing] is at best naïve, at worst willfully blind to the failings of the democratic process."); Suzanna Sherry, *Why We Need More Judicial Activism*, in CONSTITUTIONALISM, EXECUTIVE POWER, AND THE SPIRIT OF MODERATION 11, 18 (Giorgi Areshidze et al. eds., 2016) ("The courts *should* stand in the way of democratic majorities, in order to keep majority rule from degenerating into majority tyranny. . . . [M]ost people . . . do not realize how strongly counter-majoritarian, even anti-democratic, the founders were.")

28. Metzger, *supra* note 26, at 1759 ("[C]ourts may see congressional dysfunction as instead increasing the need for a judicial check to prevent executive branch unilateralism and aggrandizement.")

29. Two forthcoming articles have analogized preclusion doctrine to universal injunctions but did not consider spurious class actions and counterarguments to the analogy. Zachary D. Clopton, *Nationwide Injunctions and Preclusion*, MICH. L. REV. (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3290345](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3290345) [<https://perma.cc/Q93A-CC76>]; Alan M. Trammell, *Demystifying Nationwide Injunctions*, 70 ALA. L. REV. 1 (forthcoming 2020), <https://ssrn.com/abstract=3290838> [<https://perma.cc/P7EP-9VSQ>].

forum of twelve “borrowed” district court judges that would be randomly assigned to three-judge panels to adjudicate suits seeking universal injunctions against federal executive action.<sup>30</sup> The forum would solve the two most pressing problems caused by universal injunctions: forum shopping that can lead to judge shopping and preclusive asymmetry.

## I. THE MACRO-LEVEL TRENDS IN AGGREGATE LITIGATION

Part I first briefly summarizes the doctrinal basics of injunctive relief and class certification, then explains how courts have interpreted and applied these doctrines in ways that have caused the rapid rise of universal injunctions and the slow demise of class actions.

### A. *The Rapid Rise of Universal Injunctions*

#### 1. Indeterminate Equitable Principles

Injunctions<sup>31</sup> are an equitable remedy that control the defendant’s conduct.<sup>32</sup> An injunction can be either “mandatory,” requiring the defendant to act affirmatively, or “prohibitory,” requiring the defendant to refrain from acting.<sup>33</sup> A *preliminary* injunction maintains the legal status quo as the case proceeds in order to prevent imminent and irreparable injury.<sup>34</sup>

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30. A specialized or single forum for universal injunctions is only mentioned in passing in the current literature. See, e.g., Frost, *supra* note 18, at 1105–06; *The Role and Impact of Nationwide Injunctions by District Courts: Hearing Before the H. Subcomm. on the Courts, Intellectual Prop., and the Internet*, 117th Cong. 7 (2017) (statement of Hans A. von Spakovsky):

[D]ue to the importance of voting rights, federal law provides that such cases shall be heard by a three-judge panel, at least one of whom is a circuit court judge. It would be hard to argue that cases involving government policies that affect the other rights of citizens are any less important.

31. There are important differences between temporary restraining orders, preliminary injunctions, and permanent injunctions, but this Note does not distinguish among them. Most, if not all, of the injunctions discussed herein are preliminary injunctions. For a discussion of the differences between Rule 65(a) preliminary injunctions and Rule 65(b) temporary restraining orders, see 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2947 (3d ed. 2018).

32. See FED. R. CIV. P. 65(d)(2) (listing three groups of persons who can be bound by an injunction). Professor Michael Morley distinguishes plaintiff-orientated from defendant-orientated injunctions. See Morley, *supra* note 22, at 490.

33. 2 STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY § VIII, Rule 65 (Westlaw Feb. 2019 update).

34. See 11A WRIGHT ET AL., *supra* note 31, § 2947; see also Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. FORUM 49, 51 (2017) (“Some government policies, like President Trump’s travel ban, threaten immediate and lasting damage. They go into effect quickly, and their impact cannot be reversed at the end of a lawsuit.”).



Courts have broad equitable power to order injunctive relief at different stages of litigation.<sup>35</sup> They generally consider the following four factors when ordering *preliminary* injunctive relief: (1) whether the party seeking the injunction is likely to succeed on the merits; (2) whether the party seeking the injunction is likely to suffer irreparable harm in the absence of such relief; (3) whether the balance of equities favors the party seeking an injunction; and (4) whether the injunction is in the public interest.<sup>36</sup> When the government is a party, the last two factors merge.<sup>37</sup> The party bound by a preliminary injunction can seek immediate appellate review.<sup>38</sup> Orders denying or granting preliminary injunctive relief are reviewed under an abuse of discretion standard and are therefore rarely overturned or modified; however, the ongoing scholarly criticism of universal injunctions may have inspired appellate courts to review such orders with more scrutiny.<sup>39</sup>

There are two common law equitable principles that guide courts in crafting the *scope* of injunctions or, in other words, which parties the federal government cannot enforce the executive action against: the complete relief principle and the extent of the violation principle.<sup>40</sup> However, these principles can be cited both in support of and in opposition to granting a universal injunction.<sup>41</sup>

The complete relief principle dictates that an injunction should be “no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”<sup>42</sup> Courts often invoke the principle to issue broad injunctions in suits involving the movement of people across

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35. *IRAP*, 137 S. Ct. 2080, 2087 (2017).

36. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); FED. R. CIV. P. 65 Practice Commentary (“The test in each circuit is based on essentially the same traditional equitable grounds—primarily irreparable harm and likelihood of success—but preliminary injunction practice varies greatly across the circuits.”).

37. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

38. 28 U.S.C. § 1292(a)(1) (2012); 11A WRIGHT ET AL., *supra* note 31, § 2948.

39. 11A WRIGHT ET AL., *supra* note 31, § 2948. *See, e.g.*, *E. Bay Sanctuary Covenant v. Barr*, No. 19-16487, 2019 WL 3850928 (9th Cir. Aug. 16, 2019) (holding that the universal scope of an injunction was not supported by the evidentiary record); *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1244–45 (9th Cir. 2018) (vacating the universal scope of an injunction); *City of Chicago v. Sessions*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018) (narrowing a universal injunction to apply to the City of Chicago only); *see also infra* notes 51–53 and accompanying text.

40. Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2030–34 (2015); Wasserman, *supra* note 5, at 354.

41. *Bray*, *supra* note 18, at 467 (“[T]he complete-relief principle can be taken by courts as a constraint on national injunctions or an impetus to give them, which is to say that it is no constraint at all.”).

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

state lines<sup>43</sup> or harms that cross geographic boundaries.<sup>44</sup> But the principle perhaps should counsel *against* granting broad injunctions. If complete relief were a true limiting principle, the scope of an injunction would extend only as far as necessary to remedy the plaintiff's injuries that confer Article III standing.<sup>45</sup>

Two recent challenges to exemptions from the Affordable Care Act's ("ACA") contraceptive mandate illustrate the indeterminacy of the complete relief principle. In one challenge in the Eastern District of Pennsylvania, Pennsylvania and New Jersey sought to enjoin the enforcement of these exemptions which significantly expanded the categories of employers who could opt out of providing no-cost contraceptive coverage on the basis of sincerely held religious beliefs or moral convictions.<sup>46</sup> The two states alleged they would suffer financial harm from an increase in unintended pregnancies and women that would turn to state-funded contraceptive services as more private healthcare entities qualified for the exemptions.<sup>47</sup>

The federal government argued that an injunction limited in scope to Pennsylvania and New Jersey would provide complete relief.<sup>48</sup> The district court disagreed and granted a universal injunction.<sup>49</sup> It reasoned that a narrower injunction would not benefit thousands of New Jersey and Pennsylvania citizens that travelled across state lines to work for out-of-state entities and would not reach out-of-state students at Pennsylvania and New Jersey state universities who would lose pri-

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43. See, e.g., *Hawaii v. Trump*, 859 F.3d 741, 787–88 (9th Cir. 2017) (“[T]he Government has not proposed a workable alternative . . . that accounts for the nation’s multiple ports of entry and interconnected transit system and that would protect the proprietary interests of the States at issue here while nevertheless applying only within the States’ borders.”), *vacated and remanded*, 138 S. Ct. 377; *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) (“[T]here is a substantial likelihood that a geographically-limited injunction would be ineffective because [Deferred Action for Parents of Americans] beneficiaries would be free to move among states.”).

44. See *Frost*, *supra* note 18, at 1093 (“The obligation to provide complete relief to the plaintiff also justifies nationwide injunctions in cases involving issues that cross state lines—such as pollution of the air or water, tainted food, or defective products.”).

45. See *Salazar v. Buono*, 559 U.S. 700, 731 (2010) (Scalia, J., concurring in the judgment) (“A plaintiff cannot sidestep Article III’s requirements by combining a request for injunctive relief for which he has standing with a request for injunctive relief for which he lacks standing.”); see also *Morley*, *supra* note 22, at 523–27.

46. *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 802 (E.D. Pa. 2019).

47. *Id.* at 807. The states also had “special solicitude” in the Article III standing analysis under *Massachusetts v. EPA*, 549 U.S. 497 (2007). *Pennsylvania*, 351 F. Supp. 3d at 805–06; see also *Texas*, 809 F.3d at 154 (holding that the plaintiff states were entitled to special solicitude). This is important because states have repeatedly sought universal injunctions against federal executive action and have asserted a variety of injuries to satisfy Article III standing.

48. *Pennsylvania*, 351 F. Supp. 3d at 833.

49. *Id.* at 835.

vate contraceptive coverage and turn to state-funded contraceptive services.<sup>50</sup> However, the Ninth Circuit reviewed a universal injunction against the same exemptions and reached the opposite conclusion on the scope of the injunction.<sup>51</sup> The Ninth Circuit narrowed the district court's universal injunction because, in its view, an injunction limited to the plaintiff states<sup>52</sup> was enough to provide complete relief for their alleged injuries.<sup>53</sup>

The second equitable principle that guides courts in crafting the scope of injunctive relief is the extent of the violation principle. It dictates that an injunction's scope should match "the extent of the [constitutional] violation established."<sup>54</sup> Judge Richard Posner described the principle as follows: "When the court believes the underlying right to be highly significant, it may write injunctive relief as broad as the right itself."<sup>55</sup> The principle counsels toward granting universal injunctions where the suit "presents essentially a facial challenge to a policy applied nationwide" and implicates immigration policy, separation of powers, or other constitutional concerns.<sup>56</sup>

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50. *Id.* at 833–34.

51. *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018). *Pennsylvania* and *California* are also illustrative of two potential procedural problems with universal injunctions: the risk of conflicting injunctions and the loss of percolation. It was theoretically possible for the courts to grant conflicting injunctions which could have resulted in the government being held in contempt of court regardless of which injunction it obeyed. *But see Frost*, *supra* note 18, at 1106–07 (noting that the risk of conflicting injunctions is very low). Furthermore, these two cases show that a universal injunction in one case does not necessarily foreclose other courts from weighing in on the executive action. *See id.* at 1107–09 (discussing other universal injunctions that did not stymie percolation).

52. The plaintiff states were California, Delaware, Virginia, Maryland, and New York. *California*, 911 F.3d at 566.

53. *Id.* at 584. The different outcomes in these cases may be partially explained by the evidentiary records before each court when ruling on the motions for a preliminary injunction. In *Pennsylvania*, the court cited to amicus briefs and other documents that showed Pennsylvania and New Jersey had sizeable percentages of citizens who worked out of state and thousands of out-of-state students at their state universities. 351 F. Supp. 3d at 832. In contrast, the court in *California* noted that the record did not support a universal injunction because "while the record before the district court was voluminous on the harm to the plaintiffs, it was not developed as to the economic impact on other states." 911 F.3d at 584.

54. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class."); Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1118 (2010) ("The scope of the allegedly wrongful practice defines the scope of the indivisible remedy. And the scope of the remedy, in turn, gives rise to demands for some vehicle to determine conclusively the legality of the [generally applicable] practice in question." (citation omitted)).

55. *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 879 (7th Cir. 2011) (quoting 1 Dan B. Dobbs, *Law of Remedies* § 2.4(6) (2d ed. 1993)).

56. *City of Chicago v. Sessions*, 888 F.3d 272, 290 (7th Cir. 2018), *reh'g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018); Wasserman, *supra* note 5, at 356:

Dissenting on the merits in *Trump v. Hawaii*, Justice Sonia Sotomayor ostensibly relied on the extent of the violation principle.<sup>57</sup> Justice Sotomayor briefly remarked that the district court did not abuse its discretion in granting a universal injunction due to the Ban's deleterious effects on both national security and the country's healthcare and education systems.<sup>58</sup> The injunction's universal scope was necessary given "the nature of the Establishment Clause violation."<sup>59</sup> However, in challenges to federal executive action, the extent of the violation is *always* nationwide, so the principle provides little guidance on how to craft narrower relief.<sup>60</sup>

In sum, the complete relief and extent of the violation principles have led to the rapid rise of universal injunctions because judges with already broad equitable discretion do not treat them as true limiting principles.

## 2. Judge Shopping

The lack of any true limiting principles to guide judges' broad equitable discretion in determining the scope of injunctive relief can be compounded by plaintiffs handpicking judges. This handpicking is possible because the federal government is subject to suit in numerous venues.<sup>61</sup> The general venue provision states that venue is proper in a judicial district where "any defendant resides, if *all* defendants are residents of" the forum state or where "a substantial part of the events or omissions giving rise to the claim occurred."<sup>62</sup> In comparison, the venue provision specific to suits against the federal government, its

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In rejecting the government's argument for a non-universal injunction in *Chicago*, the district court insisted that a narrower injunction would 'allow the Attorney General to impose what this Court has ruled are likely unconstitutional conditions across a number of jurisdictions' and to 'continue enforcing likely invalid conditions' against other cities and counties.

57. 138 S. Ct. 2392, 2342 (2018) (Sotomayor, J., dissenting).

58. *Id.* at 2446.

59. *Id.* at 2446 n.13.

60. Carroll, *supra* note 40, at 2031 (noting that the extent of the violation principle suggests that "proof of a common claim should usually result in system-wide relief, even in a non-class action; the very nature of a generally applicable policy or practice implies that the defendant will, unless enjoined, expose others to the same unlawful treatment on a system-wide basis"); *see also* Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2144 (2017).

61. 28 U.S.C. § 1391(e) (2012).

62. *Id.* § 1391(b)(1), (2) (emphasis added). Section 1391(b) also provides for proper venue where any defendant is subject to the court's personal jurisdiction if there is otherwise no jurisdiction in which venue is proper. *Id.* § 1391(b)(3).

agencies, officers, and employees states that venue is proper in a judicial district where (1) only *one* of the defendants resides;<sup>63</sup> (2) “a substantial part of the events or omissions giving rise to the claim occurred”;<sup>64</sup> or, most notably, (3) “the *plaintiff* resides if no real property is involved in the action.”<sup>65</sup>

These permissive venue rules for suits against the federal government, local rules for judicial assignments,<sup>66</sup> and the division of judicial districts into smaller geographic divisions<sup>67</sup> have allowed litigants not only to forum shop but also to *judge shop* in universal injunction suits.<sup>68</sup> While forum shopping is both a feature and a bug of a decentralized judicial system,<sup>69</sup> judge shopping erodes the legitimacy of the judiciary.<sup>70</sup> This delegitimization is compounded by the fact that universal injunctions are often sought by ideological litigants against sweeping executive actions with great political salience.

For example, Texas and a handful of other states filed suit in the Brownsville Division of the Southern District of Texas and were granted a universal injunction against President Obama’s executive action that expanded DACA and introduced Deferred Action for Parents

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63. *Id.* § 1391(e)(1)(A) (emphasis added).

64. *Id.* § 1391(e)(1)(B).

65. *Id.* § 1391(e)(1)(C) (emphasis added).

66. *E.g.*, Division of Work Order, *In re* Division of Work Order for 2014, General Order No. 2013-13 (S.D. Tex. Oct. 29, 2014); *see also* Andrew Kent, *Nationwide Injunctions and the Lower Federal Courts*, LAWFARE (Feb. 3, 2017, 3:02 PM), <https://www.lawfareblog.com/nationwide-injunctions-and-lower-federal-courts/> [<https://perma.cc/T873-HXHV>]:

Judge-shopping is harder in districts where many federal district judges sit in the same courthouse, as happens in large cities. But judge shopping is sometimes possible even there. For instance, two very liberal judges sitting in New York City . . . have been accused of using a local rule about ‘related’ cases to allow attorneys to steer particular litigation to themselves.

67. *See, e.g.*, 28 U.S.C. § 124 (2012) (dividing Texas into judicial districts and divisions).

68. Alex Botoman, Note, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297, 300–08 (2018) (arguing that Texas selected particular *divisions* of federal district courts to secure specific judges in suits seeking universal injunctions against President Obama’s DACA and DAPA initiatives, bathroom policy for transgender students, and overtime pay rules).

69. *See* Frost, *supra* note 18, at 1105–06; Malveaux, *supra* note 18, at 57.

70. *See* Ronald A. Cass, *Nationwide Injunctions’ Governance Problems: Forum-shopping, Politicizing Courts, and Eroding Constitutional Structure*, GEO. MASON L. REV. (forthcoming) (manuscript at 40), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3231456](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3231456) [<https://perma.cc/4CCY-7UBA>] (“[W]idespread use of nationwide injunctions . . . especially in cases infected with partisan, political overtones—ignores that risk, effectively replacing the tripartite constitutional structure with one that puts courts in the position of overall political overseers.”).

of Americans (“DAPA”).<sup>71</sup> It was virtually certain<sup>72</sup> that the case would be assigned to Judge Andrew Hanen, who had previously criticized the Obama Administration’s immigration policies.<sup>73</sup> A year later, when Texas sought a universal injunction against the Obama Administration’s bathroom policy for transgender students, it filed suit in the Wichita Falls Division of the Northern District of Texas.<sup>74</sup> The case landed on the docket of Judge Reed O’Connor, the only judge presiding over civil cases in the Wichita Falls Division at the time of the suit.<sup>75</sup> Judge O’Connor had a judicial record of invalidating agency actions that expanded LGBTQ protections,<sup>76</sup> and he granted a universal injunction after finding that the word “sex” in Title IX referred to biological sex at birth.<sup>77</sup> In fact, Judge O’Connor granted universal injunctions against five separate Obama executive actions.<sup>78</sup>

In sum, courts have two indeterminate equitable principles for crafting the scope of injunctive relief. This lack of any true limiting principles is then compounded by plaintiffs handpicking judges who may have outlier views. Part IV offers a solution to preserve universal injunction suits but eliminate judge shopping: a specialized forum of twelve “borrowed” district court judges that would be randomly assigned to three-judge panels to adjudicate suits seeking universal injunctions against executive action.

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71. *Texas v. United States*, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015). The decision was later affirmed by split decisions in the Fifth Circuit and Supreme Court. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam).

72. *Botoman*, *supra* note 68, at 301–03 (“At the time that Texas filed suit, all civil cases in Brownsville were assigned to either Judge Andrew Hanen or Senior Judge Hilda Tagle.”).

73. *See, e.g.*, *United States v. Nava-Martinez*, No. B-13-441-1, 2013 WL 8844097, at \*3 n.4 (S.D. Tex. Dec. 13, 2013) (“[T]he DHS should cease telling the citizens of the United States that it is enforcing our border security laws because it is clearly not. Even worse, it is helping those who violate these laws.”).

74. *Complaint for Declaratory & Injunctive Relief, Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016) (No. 7:16-cv-00054-O), 2016 WL 3023276.

75. *Botoman*, *supra* note 68, at 305.

76. *Id.*

77. *Texas*, 201 F. Supp. 3d at 832–33, 836 (“The Court concludes this injunction should apply nationwide. As the separate facilities provision . . . is permissive, states that authorize schools to define sex to include gender identity for purposes of providing separate [restrooms] will not be impacted by it.”).

78. Emma Platoff, *By Gutting Obamacare, Judge Reed O’Connor Handed Texas a Win. It Wasn’t the First Time*, TEX. TRIB. (Dec. 19, 2018, 2:00 PM), <https://www.texastribune.org/2018/12/19/reed-oconnor-federal-judge-texas-obamacare-forum-shopping-ken-paxton/> [<https://perma.cc/7WKN-NMEU>] (“For some years, O’Connor was the only district judge hearing cases in the state’s tiny Wichita Falls division. Texas filed five challenges to the federal government there in 2015 and 2016; O’Connor heard all five.”).

*B. The Slow Demise of Class Actions*

## 1. Rule 23 Prerequisites

Federal Rule of Civil Procedure 23(a) enumerates four prerequisites for all class actions—numerosity, commonality, typicality, and adequacy.<sup>79</sup> While there is no magic number to satisfy numerosity, the class must be “so numerous that joinder of all members is impracticable.”<sup>80</sup> Commonality requires “questions of law or fact”<sup>81</sup> that can “generate common *answers* apt to drive the resolution of the litigation.”<sup>82</sup> A single significant question of law or fact is enough, particularly when the action challenges a systemwide government policy or practice.<sup>83</sup> Typicality focuses on the similarity of facts and issues between the absent class members and the named plaintiffs.<sup>84</sup> It asks whether the claims are “so interrelated that the interests of the class members will be fairly and adequately protected in their absence.”<sup>85</sup> And finally, the adequacy requirement probes whether the named plaintiffs and their counsel have any conflicts of interest with the absent class members and whether they will litigate the suit with “zeal and competence.”<sup>86</sup> The inquiry into the adequacy of class counsel is guided by the criteria enumerated in Rule 23(g): investigative efforts, class action litigation experience, knowledge of applicable law, and resources. At bottom, the adequacy, typicality, and commonality prerequisites will often overlap factually and conceptually.

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79. FED. R. CIV. P. 23(a). In addition to the four “explicit” prerequisites of Rule 23, numerous courts also have an “implicit” prerequisite that the proposed class be ascertainable, meaning that the class members must be identifiable under some objective standard. ROBERT H. KLONOFF, *CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION* 39 (4th ed. 2017); *see also* 1 STEVEN S. GENSLER, *FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY* § IV, Rule 23 (Westlaw Feb. 2019 update):

Some circuits extend [ascertainability] further, holding that a class cannot be certified if the proposed class is defined in a way that would necessitate extensive, individualized fact-finding simply to know who the class members are. Most circuits, however, have rejected this extension. . . . Ascertainability is generally an issue in (b)(3) class actions but not in (b)(2) class actions.

(citations omitted).

80. FED. R. CIV. P. 23(a)(1).

81. FED. R. CIV. P. 23(a)(2).

82. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

83. *Id.* at 359; *see also* Order Granting in Part Plaintiff’s Motion for Class Certification at 12, *Ms. L. v. U.S Immigration & Customs Enf’t*, 3:18-cv-00428-DMS-MDD (S.D. Cal. Jun. 26, 2018).

84. *See* FED. R. CIV. P. 23(a)(3) (requiring that “the claims or defenses of the representative parties [be] typical of the claims or defenses of the class”).

85. *Dukes*, 564 U.S. at 349 n.5.

86. *Fendler v. Westgate-California Corp.*, 527 F.2d 1168, 1170 (9th Cir. 1975).

In addition to satisfying Rule 23(a)'s four general prerequisites, the suit must also fit into a specific type of class action under Rule 23(b).<sup>87</sup> A (b)(2) class action is proper when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”<sup>88</sup> Unlike damages in a (b)(3) class action, injunctive relief in a (b)(2) class action is indivisible, benefits each and every class member, and is based on a government policy or practice that applies uniformly to the class.<sup>89</sup> Notice to class members and an opportunity to opt out are not required in (b)(1) and (b)(2) class actions.<sup>90</sup>

## 2. Collateral Damage to the 23(b)(2) Class Action

The (b)(2) injunctive class action was created by the Advisory Committee on Civil Rules (“Committee”) in 1966 to, in part, ease the procedural challenges litigants faced in desegregating schools after *Brown v. Board of Education*.<sup>91</sup> After *Brown*, recalcitrant school districts replaced “de jure policies of segregation” with “pupil placement laws” that allowed school boards to individually assign black students to black schools.<sup>92</sup> These laws were later buttressed by “freedom of choice plans” which purportedly gave black students the choice to transfer schools after an initial assignment.<sup>93</sup> When class action suits challenged these practices, segregationist judges readily accepted the idea that any particular student’s assignment to any particular school was an individualized determination with no common questions of law or

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87. PRACTICAL LAW LITIGATION, CLASS ACTIONS: OVERVIEW; PRACTICAL LAW PRACTICE NOTE OVERVIEW 2-529-7368 (Westlaw 2019).

88. FED. R. CIV. P. 23(b)(2).

89. *Dukes*, 564 U.S. at 361–62.

90. FED. R. CIV. P. 23(c)(2)(a) (“For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.”); *see also* FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment (“There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages.”).

91. *See* FED. R. CIV. P. 23 advisory committee’s note to 1966 amendments (“Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.”). For a comprehensive discussion of the origins of the (b)(2) class action and its lack of notice and opt-out provisions, *see* David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011).

92. Marcus, *supra* note 91, at 683–84.

93. *Id.* at 688.



fact and denied class certification.<sup>94</sup> In response, the Committee was determined to draft a class action rule that could produce a judgment that benefited and bound all class members.<sup>95</sup> The result was Rule 23(b)(2), which has been left unchanged since its adoption in 1966.<sup>96</sup>

Commentators have long predicted the demise of certain types of class actions.<sup>97</sup> These predictions are based on congressional<sup>98</sup> and judicial hostility toward the (b)(3) damages class action for allegedly facilitating “blackmail” and “sweetheart” settlements<sup>99</sup> that threaten corporations with bankruptcy at the hands of a single jury and enrich plaintiffs’ attorneys at the expense of the harmed class members.<sup>100</sup> Professor Maureen Carroll has argued that the hostility toward the (b)(3) damages class action has motivated myopic “across-the-board” changes that have inadvertently made (b)(2) class certification more difficult.<sup>101</sup> These changes include making class certification decisions subject to interlocutory review,<sup>102</sup> raising the burden of proof for class certification, setting higher ascertainability standards,<sup>103</sup> and imposing a heightened commonality requirement.<sup>104</sup>

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94. *Id.* at 693 (“[T]he shift from pupil placement laws to freedom of choice plans . . . required the reconception of *Brown’s* mandate as requiring integration if litigation would end monochromatic schools. For a suit seeking this systemic relief to proceed as a class action, doctrine had to evolve.”).

95. *See id.* at 704–08 (describing the drafting process of Rule 23(b)(2)); *see also* Alexandra D. Lahav et al., *Government Class Actions After Jennings v. Rodriguez*, HARV. L. REV. BLOG (May 8, 2018), <https://blog.harvardlawreview.org/government-class-actions-after-jennings-v-rodriguez/> [<https://perma.cc/7NKZ-ZGYT>] (explaining that “the Committee members most responsible for the revised Rule 23 were ‘keenly interested’ in . . . attempts to use individual procedures to defeat de-segregation class actions”).

96. Marcus, *supra* note 91, at 704.

97. *See, e.g.*, Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 163 (2015) (predicting that corporations will eventually be able to eliminate virtually all class actions suits through arbitration clauses).

98. *See, e.g.*, Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d) (2012).

99. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (“Other courts have noted the risk of ‘in terrorem’ settlements that class actions entail . . .”).

100. Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2043–44 (2010) (“Class action lawyers are some of the most frequently derided players in our system of civil litigation. The focus of this ire is usually the ‘take’ that class action lawyers receive from class action settlements.”).

101. Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 850 (2016) (“Not only does the current debate largely fail to reflect the function and importance of subtypes other than the aggregated-damages class action, but more important, it also has produced across-the-board changes in class-action law that have made the purposes of the other subtypes more difficult to achieve.” (footnote omitted)).

102. FED. R. CIV. P. 23(f) (“A court of appeals may permit an appeal from an order granting or denying class-action certification . . .”).

103. *See supra* note 79 and accompanying text.

104. *See* Carroll, *supra* note 101, at 876–90 (discussing the effects of Rule 23(f), as well as judicial trends that increased the burden of proof for class certification); *see also* Malveaux, *supra*

Over fifty years after the adoption of Rule 23(b)(2), a class of noncitizen detainees brought a (b)(2) class action challenging the federal government's blanket refusal to hold individualized bond hearings before indefinitely detaining them in the course of immigration proceedings.<sup>105</sup> The Supreme Court in *Jennings v. Rodriguez* held that the Immigration and Nationality Act did not implicitly require individualized bond hearings every six months of detention.<sup>106</sup> The Court declined to reach the detainees' constitutional due process claims and remanded the case, instructing the Ninth Circuit to examine whether such claims could be adjudicated as a class action in the first place.<sup>107</sup> Justice Samuel Alito briefly remarked that class action treatment may not be appropriate after *Wal-Mart v. Dukes* and that the flexibility of due process demands individualized assessments.<sup>108</sup>

If taken too far, the Court's dicta and remand in *Jennings* could relegate the class action to its pre-1966 efficacy.<sup>109</sup> Professor Arthur R. Miller, a pivotal member of the Committee, recently lamented the current threats to the class action:

[T]he demise of the class action would be completely at odds with the litigation system's contemporary needs. In today's world, a procedural system cannot function with a reasonable degree of efficiency by processing a substantial number of overlapping or related claims one-by-one. Abandonment of the class action and other multi-party consolidation devices is not a reasonable option.<sup>110</sup>

Regardless of the final outcome in *Jennings*, class actions have been undermined at the very same time commentators decrying universal injunctions have insisted on a greater reliance on them.<sup>111</sup> The procedural choices for plaintiffs seeking systemwide relief are uncertain, especially if the universal injunction's demise is impending.

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note 18, at 59–60 (listing hostility toward monetary relief, heightened standing requirements, and questioning of issue certification as additional hurdles in (b)(2) class actions).

105. *Jennings v. Rodriguez*, 138 S. Ct. 830, 838–39 (2018).

106. *Id.* at 851.

107. *See id.* (“When the District Court certified the class under Rule 23(b)(2) . . . it had their statutory challenge primarily in mind. Now that we have resolved that challenge, however, new questions emerge.”).

108. *Id.* at 851–52. *But see id.* at 876 (Breyer, J., dissenting) (“Every member of each class seeks the same relief (a bail hearing), every member has been denied that relief, and the differences in situation among members of the class are not relevant to their entitlement to a bail hearing.”); KLONOFF, *supra* note 79, at 194 (noting that courts overwhelmingly hold that, unlike Rule 23(b)(3), Rule 23(b)(2) does not require that common issues predominate over individual issues).

109. *See Carroll, supra* note 101, at 850 (“[I]t is unclear whether the paradigmatic post-*Brown* desegregation cases could be certified as class actions under today's restrictive standards.”).

110. Arthur R. Miller, *What Are Courts for? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 763 (2018).

111. Malveaux, *supra* note 18, at 60; Morley, *supra* note 22, at 553. Some commentators opposed to universal injunctions note that if an individual plaintiff can secure a universal injunction that intentionally benefits nonparties, the 23(b)(2) class action is arguably superfluous. However, the necessity doctrine already treats class certification as superfluous in some situations.

## II. THE CURRENT TRADEOFFS BETWEEN THE PROCEDURAL CHOICES

This Part first situates universal injunctions within the broader procedural choices plaintiffs have to seek systemwide relief against federal executive action.<sup>112</sup> It does so by examining two challenges to President Trump's executive actions on asylum policy. Then, this Part considers the costs and benefits of a universal injunction suit vis-à-vis a class action suit. This Part concludes that the preclusive asymmetry of universal injunctions makes them significantly less risky than a (b)(2) class action, which can bind all class members to an unfavorable outcome. As a result, the current procedural choices are fundamentally misaligned; plaintiffs seeking systemwide relief are generally incentivized to choose a universal injunction suit over a class action suit.<sup>113</sup>

### *A. Halting Executive Action via Universal Injunction*

#### 1. The Case: *East Bay Sanctuary Covenant v. Trump*

On November 8, 2018, the Acting Attorney General and Secretary of Homeland Security promulgated an interim final rule that rendered categorically ineligible for asylum any person who entered the United States in violation of a presidential proclamation that limits the entry of aliens along the southern border.<sup>114</sup> The stated purpose of the rule was to address the “urgent situation at the southern border,” where there had been a “significant increase in the number and percentage of

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KLONOFF, *supra* note 79, at 207. Courts invoking the necessity doctrine have refused to certify a class when an individual suit could achieve the same relief. *See, e.g.,* *Dionne v. Bouley*, 757 F.2d 1344, 1356–57 (1st Cir. 1985) (endorsing the necessity doctrine and seeing “no practical need for class certification” in the given case because the court could, among other considerations, “reasonably assume the good faith” of the enjoined government official in abiding by the injunction with respect to nonparties).

112. Professor Maureen Carroll wrote a prescient article prior to the rapid rise in universal injunctions that compares the structural disincentives plaintiffs have to pursue systemwide relief with a class action when “quasi-individual actions” could achieve the same result. Carroll, *supra* note 40, at 2020.

113. Professor Carroll came to the same conclusion even prior to the rapid rise of universal injunctions: “Notwithstanding the availability of Rule 23(b)(2), plaintiffs currently face a set of structural disincentives to class treatment that cause many of them to choose the individual form.” *Id.* at 2022. Professor Carroll proposes changes to class actions to realign the tradeoffs facing plaintiffs: expedited processes, reform of the necessity doctrine, and fee-shifting incentives. *Id.* at 2075–81. In contrast, this Note proposes changes to how universal injunction suits are litigated. *See infra* Part IV.

114. Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9, 2018) (to be codified at 8 C.F.R. pt. 208).

aliens who seek admission or unlawfully enter and then assert an intent to apply for asylum.”<sup>115</sup>

On the same day, President Trump issued a presidential proclamation that limited alien entry into the United States along the southern border to “any alien who enters the United States at a port of entry and properly presents for inspection.”<sup>116</sup> So-called “caravans” of migrants from El Salvador, Guatemala, and Honduras were a popular talking point for the President before the 2018 midterm elections.<sup>117</sup> Taken together, the rule and the presidential proclamation rendered any asylum seeker who did not arrive to the United States at a port of entry categorically ineligible for asylum.<sup>118</sup>

Four legal aid groups that assist asylum seekers immediately brought suit in the Northern District of California to challenge the executive actions.<sup>119</sup> The legal aid groups asserted that the executive actions violated both the notice and comment provisions of the Administrative Procedure Act (“APA”)<sup>120</sup> and the Immigration and Nationality Act’s provision that any alien who is physically present in the United States may apply for asylum *irrespective of whether they arrived at a port of entry*.<sup>121</sup> The groups had organizational standing because the asylum policy frustrated their mission of providing legal aid to asylum seekers, required diverting resources from other legal initiatives, and would cause the groups to lose substantial state funding.<sup>122</sup>

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115. *Id.* at 55,944; *see also* *E. Bay Sanctuary Covenant v. Trump (E. Bay II)*, 909 F.3d 1219, 1230 (9th Cir. 2018) (“We have experienced a staggering increase in asylum applications. Ten years ago we received about 5,000 applications for asylum. In fiscal year 2018 we received about 97,000—nearly a twenty-fold increase.”).

116. *Addressing Mass Migration Through the Southern Border of the United States*, 83 Fed. Reg. 57,661, 57,663 (Nov. 9, 2018).

117. *See, e.g.*, Donald Trump (@realDonaldTrump), TWITTER (Oct. 25, 2018, 11:31 AM), <https://twitter.com/realDonaldTrump/status/1055527191235227648> [<https://perma.cc/T8X3-YXFX>] (“To those in the Caravan, turnaround, we are not letting people into the United States illegally. Go back to your Country and if you want, apply for citizenship like millions of others are doing!”).

118. *E. Bay Sanctuary Covenant v. Trump (E. Bay III)*, 354 F. Supp. 3d 1094, 1101 (N.D. Cal. 2018).

119. Complaint for Declaratory and Injunctive Relief at 2–3, *E. Bay III*, 354 F. Supp. 3d 1094 (No. 18-cv-06810) (“Venue is proper under 28 U.S.C. § 1391(e)(1) because the defendants are agencies of the United States and officers of the United States acting in their official capacity and 1) at least one plaintiff resides in this district . . .”).

120. 5 U.S.C. § 553 (2012).

121. 8 U.S.C. § 1158(a)(1) (2012); *see also E. Bay I*, 349 F. Supp. 3d 838, 844 (N.D. Cal. 2018) (granting a temporary restraining order because “[t]he rule barring asylum for immigrants who enter the country outside a port of entry irreconcilably conflicts with the INA and the expressed intent of Congress. Whatever the scope of the President’s authority, he may not rewrite the immigration laws to impose a condition that Congress has expressly forbidden.”).

122. *E. Bay II*, 909 F.3d 1219, 1241–44 (9th Cir. 2018).

The court first granted a universal temporary restraining order (“TRO”),<sup>123</sup> and then a universal preliminary injunction a month later.<sup>124</sup> The court considered the usual factors for granting preliminary injunctive relief before turning to its scope.<sup>125</sup> The court then provided almost all of the common reasons for enjoining the enforcement of the asylum policy against anyone, anywhere and not just against the four legal aid groups and their clients. First, the court noted that an injunction limited in geographic scope or to the alleged injuries would have given the groups’ clients “special rights that other immigrants would not have,” which conflicts with the need for uniformity in immigration law.<sup>126</sup> Second, the court referenced the extent of the violation principle and held that, because the asylum policy was unconstitutional on its face and as applied to nonparties, a universal injunction was appropriate.<sup>127</sup> Third, the court interpreted the Supreme Court’s decision in *IRAP* as an endorsement of the remedy.<sup>128</sup> And finally, the court reasoned that the judicial review provision of the APA, which allows courts to “hold unlawful and set aside agency action,”<sup>129</sup> compels universal injunctions against invalid executive actions.<sup>130</sup>

The Ninth Circuit denied the government’s emergency motion to stay the universal TRO pending appeal.<sup>131</sup> The court acknowledged “a growing uncertainty about the propriety of universal injunctions” but nonetheless concluded that the district court did not err in granting one because the government failed to show that a narrower remedy would have provided the legal aid groups with complete relief.<sup>132</sup> The government then applied to the Supreme Court for a stay pending appeal and

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123. *E. Bay I*, 349 F. Supp. 3d at 868.

124. *E. Bay III*, 354 F. Supp. 3d at 1121.

125. *E. Bay I*, 349 F. Supp. 3d at 855–66; see also *supra* note 36 and accompanying text.

126. *E. Bay I*, 349 F. Supp. 3d at 866 n.21. Many other courts have cited the need for uniformity in immigration law when granting universal injunctions. See, e.g., *IRAP*, 857 F.3d 554, 605 (4th Cir. 2017) (relying on congressional intent that immigration laws be enforced uniformly).

127. *E. Bay I*, 349 F. Supp. 3d at 866 (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

128. *Id.* at 866–67.

129. 5 U.S.C. § 706 (2012).

130. *E. Bay I*, 349 F. Supp. 3d at 867 (citing *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409–10 (D.C. Cir. 1998)). A few courts have treated granting universal injunctions as a matter of course in challenges to executive action under the APA. See, e.g., *City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087, 1101 (C.D. Cal. 2018) (“The Ninth Circuit has also held that where an agency violates the APA, the district court is compelled to issue a nationwide injunction.”). But Professor Bray argues that neither universal injunctions nor even widespread agency rulemaking were contemplated when the APA was enacted, so the APA cannot be statutory authority for universal injunctions. Bray, *supra* note 18, at 438 n.121; see also Siddique, *supra* note 60, at 2120–26 (examining universal injunctions in APA cases).

131. *E. Bay II*, 909 F.3d 1219, 1256 (9th Cir. 2018). Ordinarily, a TRO is not an appealable order, but the Ninth Circuit treated the TRO as effectively a preliminary injunction. *Id.* at 1238–39.

132. *Id.* at 1255–56.

was denied.<sup>133</sup> President Trump decried the universal injunction and called the presiding district court judge who granted it an “Obama judge,” which earned the President a rebuke from Chief Justice Roberts.<sup>134</sup>

## 2. The Costs and Benefits of a Universal Injunction

The four legal aid groups in *East Bay Sanctuary Covenant* faced certain tradeoffs when they sought systemwide relief with a universal injunction suit instead of a class action suit. A plaintiff seeking a universal injunction has greater autonomy than a named plaintiff in a class action. Plaintiffs seeking a universal injunction are free to choose their attorney, but under Rule 23(g), the court appoints class counsel after assessing each counsel’s knowledge, experience, and resources.<sup>135</sup> Class counsel not only represents the named plaintiffs but also serves as a fiduciary to the absent class members and must therefore “fairly and adequately” protect their interests.<sup>136</sup> Plaintiffs seeking a universal injunction thus have a “significantly broader ability to shape the overall strategy of the litigation” than plaintiffs in a class action, who generally have little or no control over the suit.<sup>137</sup> And as aforementioned, judges take a relatively more active role in supervising and guiding class action litigation. Further, seeking a universal injunction is more expedient and cheaper than seeking a classwide injunction because the increasingly rigorous evidentiary standards for the Rule 23 prerequisites have made class certification a “drawn-out procedural bog.”<sup>138</sup>

Most importantly, harmed nonparties benefit from preclusive asymmetry when similarly situated plaintiffs seek a universal injunction.<sup>139</sup> A universal injunction suit allows nonparties to benefit from a

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133. *Trump v. E. Bay Sanctuary Covenant (E. Bay IV)*, 139 S. Ct. 782, 782 (mem.) (2018). Justices Thomas, Alito, Gorsuch, and Kavanaugh would have granted the stay. *Id.*

134. Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap over Judges*, ASSOCIATED PRESS (Nov. 21, 2018), <https://www.apnews.com/c4b34f9639e141069c08cf1e3deb6b84> [<https://perma.cc/YQG2-ZEX2>] (quoting Chief Justice Roberts as saying, “We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.”).

135. Carroll, *supra* note 40, at 2028 (noting that courts usually select the named plaintiff’s counsel of choice).

136. FED. R. CIV. P. 23(a)(4).

137. Carroll, *supra* note 40, at 2030.

138. *Id.* at 2034–35 (quoting Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 208 (2009)).

139. Professor Richard Nagareda defines preclusive symmetry in the context of class actions as “an insistence that the plaintiff class ought not to be positioned to wield the bargaining leverage of a class-wide trial without, at the same time, affording to the defendant the assurance of a commensurately binding victory were the defendant, rather than the plaintiff class, to prevail on the merits.” Nagareda, *supra* note 54, at 1113.

favorable outcome without being bound by an unfavorable one. That is, if the first plaintiff does not secure a universal injunction, a nonparty can seek an identical injunction in even the same forum because the federal government cannot invoke preclusion doctrines against them and the unfavorable outcome has no binding precedential authority across district courts.<sup>140</sup> The federal government is therefore subject to potential “serial relitigation” until a universal injunction is finally granted.<sup>141</sup> This preclusive asymmetry makes pursuing systemwide relief through a universal injunction significantly less risky than pursuing such relief through a (b)(2) class action, which binds all class members to an unfavorable outcome.<sup>142</sup>

For example, the four legal aid groups in *East Bay Sanctuary Covenant* were likely not the only groups in the United States to have their missions, resources, and funding put in jeopardy because of the new asylum policy. When the asylum policy was universally enjoined, nonparty groups enjoyed the remedial benefit of the suit without having to do anything and without the risk of being bound to a denial of a universal injunction. In other words, similarly situated legal aid groups enjoyed all the remedial reward without any preclusive risk. They would have been free to serially seek universal injunctions if the legal aid groups in *East Bay Sanctuary Covenant* did not prevail, deterred only by unfavorable persuasive precedent.

### *B. Halting Executive Action via Class Action*

#### 1. The Case: *Ms. L. v. U.S. Immigration & Customs Enforcement*

In May 2018, the Attorney General announced a “zero tolerance policy” under which all migrant adults entering the United States illegally would be subject to prosecution and, if accompanied by a minor child, would be separated from that child.<sup>143</sup> Executive officials vigorously denied there was an “official” family separation policy, but leaked

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140. See *infra* Section III.A.

141. Carroll, *supra* note 40, at 2020–21. Professor Bray colorfully describes preclusive asymmetry as allowing parties to “shop ‘til the statute drops.” Bray, *supra* note 18, at 460.

142. Carroll, *supra* note 40, at 2038:

A plaintiff might want to ensure that, even if he loses his own case, other potential claimants will be able to continue pressing the common claim against the defendant. Such relitigation will not be possible if the plaintiff obtains class certification, which results in “two-way preclusion” no matter whether the claim succeeds or fails on the merits.

(quoting Elizabeth Chamblee Burch, *Adequately Representing Groups*, 81 *FORDHAM L. REV.* 3043, 3056 (2013)).

143. *Ms. L. v. U.S. Immigration & Customs Enft*, 310 F. Supp. 3d 1133, 1136 (S.D. Cal. 2018) (order granting plaintiff’s motion for classwide preliminary injunction); see also Jeff Sessions, U.S.

internal DHS memos<sup>144</sup> and President Trump himself later revealed that officials believed the zero tolerance policy would have desirable deterrent and punitive effects.<sup>145</sup>

Fearing death in her home country of the Democratic Republic of the Congo, “Ms. L.” fled with her six-year-old daughter and arrived at a port of entry near San Diego seeking asylum.<sup>146</sup> An asylum officer conducted a screening interview and determined that Ms. L. had a credible fear of persecution and a significant possibility of ultimately receiving asylum.<sup>147</sup> After such a determination, asylum seekers are usually eligible for release from detention on parole.<sup>148</sup> But Ms. L. and her daughter were detained and separated.<sup>149</sup> Ms. L. was taken to a San Diego detention center and her young daughter was sent to a Chicago detention center for unaccompanied minors.<sup>150</sup> The separation occurred without the required determination that Ms. L. was unfit or presented a danger to her daughter.<sup>151</sup>

With Ms. L. as one of two named plaintiffs,<sup>152</sup> the ACLU brought a putative class action against numerous government entities and officials alleging that the federal government had a systemwide practice of

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Attorney Gen., Dep’t of Justice, Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [<https://perma.cc/NX8D-34FA>] (“If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law.”).

144. Eli Rosenberg, *Senator Asks FBI for Perjury Investigation of Kirstjen Nielsen Over Family Separation Statements*, WASH. POST (Jan. 8, 2019), <https://www.washingtonpost.com/politics/2019/01/18/senator-asks-fbi-perjury-investigation-kirstjen-nielsen-over-family-separation-statements/> [<https://perma.cc/H66F-7Q62>].

145. Cf. Miriam Jordan, *A Migrant Boy Rejoins His Mother, but He’s Not the Same*, N.Y. TIMES (July 31, 2018), <https://www.nytimes.com/2018/07/31/us/migrant-children-separation-anxiety.html> [<https://perma.cc/8GSS-PLAQ>] (“[M]any of the children released to their parents are exhibiting signs of anxiety, introversion, regression and other mental health issues . . .”).

146. *Ms. L. v. U.S. Immigration & Customs Enft*, 302 F. Supp. 3d 1149, 1154 (S.D. Cal. 2018) (order granting in part and denying in part defendants’ motion to dismiss).

147. *Id.* at 1164.

148. Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief ¶ 54, *Ms. L.*, 310 F. Supp. 3d 1133 (No. 18CV0428 DMS MDD), 2018 WL 1310160.

149. *Id.* ¶¶ 41–42.

150. *Id.* ¶¶ 7–8.

151. *Ms. L.*, 302 F. Supp. 3d at 1154.

152. The other named plaintiff was Ms. C., a citizen of Brazil who entered the United States with her fourteen-year-old son but not at a port of entry like Ms. L. She was convicted of misdemeanor illegal entry, served twenty-five days in federal custody, and was then taken into U.S. Immigration and Customs Enforcement (“ICE”) detention for removal proceedings and consideration of her asylum claim. *Id.* at 1155. During the five months she was in ICE detention, she spoke with her son on the phone only a few times. *Id.*



separating families without the required fitness determination in violation of the asylum seekers' substantive due process rights.<sup>153</sup> The Southern District of California held that the lawsuit met Rule 23's prerequisites for class certification.<sup>154</sup> The class met the numerosity requirement because the proposed class definition covered as many as seven hundred separated families.<sup>155</sup> The government vigorously disputed that the commonality requirement was met, claiming that the individual circumstances of each separation were unique, as evidenced by the two named plaintiffs, Ms. L. and Ms. C.<sup>156</sup> Ms. L. arrived in the United States at a port of entry, whereas Ms. C. did not.<sup>157</sup> The court was not persuaded, however, and noted that commonality only requires a "single significant question of law or fact," especially when the suit challenges a systemwide policy that violates the substantive due process rights of all class members in a uniform way.<sup>158</sup>

The arguments that supported commonality also helped to satisfy typicality. The court reasoned that the named plaintiffs and the absent class members would suffer the same injury: separation from their young children without the required fitness determination.<sup>159</sup> The government argued that the named plaintiffs were not adequate representatives because both of their claims were moot and the court lacked venue over Ms. C.'s claims.<sup>160</sup> The court rejected these arguments, determined there were no conflicts of interest between the named plaintiffs and the absent class members, and found that counsel for the

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153. The court held that the plaintiffs failed to state a claim under the APA and the Asylum Act, 8 U.S.C. § 1158 (2012), but stated a legally cognizable claim for violation of their substantive due process rights to family integrity under the Fifth Amendment. *Id.* at 1161–68.

154. Order Granting in Part Plaintiff's Motion for Class Certification at 17, *Ms. L. v. U.S. Immigration & Customs Enft.*, No. 3:18-cv-00428-DMS-MDD (S.D. Cal. Jun. 26, 2018). The class was slightly redefined from the plaintiffs' proposed class and encompassed

[a]ll adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child.

*Id.*

155. *Id.* at 7–8.

156. *Id.* at 9–10.

157. *Id.* at 9.

158. *Id.* at 12 (citation omitted).

159. *Id.* at 13–14.

160. *Id.* at 15. Both Ms. L. and Ms. C. had been reunited with their children prior to class certification, but the court applied the "voluntary cessation exception" because the government had not shown that the reunifications were for reasons other than the litigation. *Ms. L. v. U.S. Immigration & Customs Enft.*, 302 F. Supp. 3d 1149, 1156–58 (S.D. Cal. 2018). The court also held that venue is satisfied when at least one plaintiff meets the venue requirements, and there was no dispute that Ms. L. was a resident of the Southern District of California at the time the complaint was filed. *Id.* at 1158–59.

named plaintiffs would vigorously litigate the action.<sup>161</sup> The court later granted a classwide preliminary injunction to “prohibit separation of class members from their children in the future absent a finding the parent is unfit or presents a danger to the child, and to require reunification of these families once the parent is returned to immigration custody.”<sup>162</sup>

## 2. The Costs and Benefits of a Classwide Injunction

Plaintiffs like Ms. L. and Ms. C. enjoy two benefits when they seek systemwide relief with a class action suit instead of a universal injunction suit. First, when plaintiffs seek a universal injunction, they face the risk that their claims could be mooted if the federal government stops subjecting them to the alleged harm. In contrast, when a court renders a named plaintiff’s case moot, a class action may continue if at least one absent class member continues to suffer harm.<sup>163</sup> Second, when a court certifies a class and grants a classwide injunction, any and all class members can hold the government in contempt for violating the injunction and invoke preclusion doctrines in subsequent suits.<sup>164</sup> In contrast, when a court grants a universal injunction, only the plaintiffs can enforce the injunction and invoke preclusion doctrines even though the injunction remedially benefits nonparties.<sup>165</sup>

The biggest cost of pursuing systemwide relief with a class action vis-à-vis a universal injunction is that the class members and the government are in preclusive *symmetry*. That is, if the named plaintiffs obtain class certification but then lose on the merits, the unfavorable outcome binds every class member who now cannot relitigate.<sup>166</sup> If the goal is to obtain systemwide relief, a class action loss can be devastating. Therefore, despite the two benefits enjoyed by class action plaintiffs, the current procedural choices are fundamentally misaligned; plaintiffs seeking systemwide relief are generally incentivized to choose a less risky, cheaper, and more autonomous universal injunction suit over a class action suit.

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161. Order Granting in Part Plaintiff’s Motion for Class Certification at 14–15, *Ms. L. v. U.S. Immigration & Customs Enft.*, No. 3:18-cv-00428-DMS-MDD (S.D. Cal. Jun. 26, 2018).

162. *Ms. L. v. U.S. Immigration & Customs Enft.*, 310 F. Supp. 3d 1133, 1137 (S.D. Cal. 2018).

163. Carroll, *supra* note 40, at 2036–38.

164. *Id.* at 2038.

165. Frost, *supra* note 18, at 1114 n.217 (“Nonparties to a nationwide injunction cannot seek to have the defendant held in contempt for violating the injunction . . . nor can they assert res judicata in subsequent litigation.”).

166. *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 367 (1921) (“If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented.”); *see also* Carroll, *supra* note 40, at 2038.

### III. POSSIBLE THEORETICAL JUSTIFICATIONS FOR UNIVERSAL INJUNCTIONS

Professor Sam Bray proposes a brightline rule against universal injunctions based on the absence of such injunctions in the early history of equity.<sup>167</sup> Justice Clarence Thomas relied heavily on Bray's historical account in his *Trump v. Hawaii* concurrence to conclude that universal injunctions are "legally and historically dubious."<sup>168</sup> Professor Bray explains: "Protecting nonparties with an injunction is a remedial choice. It is a relatively new choice, and like all remedial choices, it needs to be justified."<sup>169</sup>

This Part answers Professor Bray's invitation for a justification. Commentators have thus far justified universal injunctions on mostly pragmatic grounds: they promote uniformity; protect people from imminent and irreparable harm; avoid inefficient, duplicative litigation; and circumvent plaintiff-detection problems.<sup>170</sup> However, these pragmatic justifications take as given the assumption that nonparties benefitting from litigation is unfamiliar. On the contrary, the preclusive asymmetry of universal injunctions is not unfamiliar. Judges and rulemakers grappled with preclusion asymmetry when developing issue preclusion doctrine and drafting the modern class action rules. This Part recounts these two contexts and considers if they can help determine the propriety of universal injunctions.<sup>171</sup>

#### A. Lessons from Preclusion Law

##### 1. Nonmutual Offensive Issue Preclusion

The preclusive asymmetry and wider policy tradeoffs of universal injunctions are familiar. They are the same tradeoffs relevant when

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167. Bray, *supra* note 18, at 469 (proposing the following brightline rule: "A federal court should give an injunction that protects the plaintiff vis-à-vis the defendant, wherever the plaintiff and the defendant may both happen to be. The injunction should not constrain the defendant's conduct vis-à-vis nonparties."); see also Sessions, *supra* note 25 ("In the first 175 years of this Republic, not a single judge issued [a universal injunction].").

168. *Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring).

169. Bray, *supra* note 18, at 457.

170. See Amdur & Hausman, *supra* note 34, at 51 ("[W]hat Bray calls the 'epistemic advantages' of narrow relief—slower deliberation, more forums and judges weighing in—do not always outweigh the need to prevent real-world harm."); Frost, *supra* note 18, at 1090–1101; Malveaux, *supra* note 18, at 58.

171. Two forthcoming articles have analogized preclusion doctrine to universal injunctions but did not consider spurious class actions and counterarguments to the analogy. Clopton, *supra* note 29; Trammell, *supra* note 29.

crafting issue preclusion doctrines.<sup>172</sup> Issue preclusion prohibits a party from relitigating an issue in a subsequent suit when the issue was actually litigated, actually decided, and essential to the judgment in a prior suit.<sup>173</sup> Issue preclusion can apply even when the subsequent suit is filed in a different jurisdiction, which is akin to a universal injunction benefiting anyone, anywhere.<sup>174</sup>

Initially, issue preclusion required mutuality; only the parties or their privies in a first suit could later invoke and benefit from the judgment in a subsequent suit.<sup>175</sup> In other words, nonparties were not bound by adverse judgments, but they could not benefit from favorable ones either. The Supreme Court eliminated the mutuality requirement for issue preclusion in *Parklane Hosiery Co. v. Shore*.<sup>176</sup> A class of Parklane shareholders sued Parklane for making materially misleading statements in a proxy statement related to a merger.<sup>177</sup> Before the shareholder class action went to trial, the SEC also sued Parklane and obtained a declaratory judgment that the proxy statement was materially misleading.<sup>178</sup> The shareholders asserted that Parklane was precluded from relitigating whether the proxy statement was materially misleading even though they were not parties in the SEC suit.<sup>179</sup> The Court held that the Parklane shareholders could invoke and benefit from the favorable declaratory judgment in the SEC suit because Parklane had its day in court, did not prevail, and should not get a second bite at the apple.<sup>180</sup>

The Court did, however, impose some limits on when nonparties like the Parklane shareholders could invoke offensive issue preclusion: “[I]n cases where a plaintiff could easily have joined in the earlier action or . . . the application of offensive estoppel would be unfair to a defend-

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172. See *City of Chicago v. Sessions*, 888 F.3d 272, 296 (7th Cir. 2018) (Manion, J., concurring in part and dissenting in part) (“A nationwide injunction is similar in effect to nonmutual offensive collateral estoppel . . .”), *reh’g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018).

173. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1982); 18 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4416 (3d ed. 2018).

174. 18 WRIGHT ET AL., *supra* note 173, § 4416.

175. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1982); 18 WRIGHT ET AL., *supra* note 173, § 4416.

176. 439 U.S. 322, 331 (1979). The Court endorsed *defensive* nonmutual issue preclusion in *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971).

177. *Parklane*, 439 U.S. at 324.

178. *Id.* at 324–25.

179. *Id.*

180. *Id.* at 332–33.

ant, a trial judge should not allow the use of offensive collateral estoppel.”<sup>181</sup> This general rule is supplemented by numerous factors to determine whether the party against whom issue preclusion is invoked had a “full and fair” opportunity to litigate the issue in the first suit and whether the party invoking issue preclusion was an opportunistic “wait-and-see” observer of the first suit.<sup>182</sup> In sum, the *Parklane* Court had good reasons to issue a brightline rule against nonmutual offensive issue preclusion but chose not to do so. Instead, the Court left the decision of whether to apply issue preclusion in particular cases to judicial discretion.<sup>183</sup>

The development of issue preclusion doctrine did not end with *Parklane*. In *United States v. Mendoza*, the Supreme Court held that private parties cannot invoke nonmutual offensive issue preclusion against the federal government.<sup>184</sup> As a result, in a subsequent suit against a different party, the federal government is free to relitigate issues it has previously lost. Universal injunctions are arguably inconsistent with *Mendoza*.<sup>185</sup> They subject the federal government to de facto issue preclusion because it cannot enforce a given executive action against anyone, anywhere.<sup>186</sup>

However, neither historical limits on judicial power nor the structure of the federal courts motivated the decision in *Mendoza*. The Court exempted the federal government from nonmutual offensive issue preclusion for four policy reasons.<sup>187</sup> First, the government litigates far more than any private party and the suits often carry great public

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181. *Id.* at 331.

182. RESTATEMENT (SECOND) OF JUDGMENTS §§ 28–29 (AM. LAW INST. 1982); *see also Parklane*, 439 U.S. at 329–33:

If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable . . . . Still another situation where it might be unfair to apply offensive estoppel is where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.

183. *Parklane*, 439 U.S. at 331.

184. 464 U.S. 154, 162–63 (1984).

185. Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 627–31 (2017). *But see* Frost, *supra* note 18, at 1112–14 (arguing that *Mendoza*'s rejection of nonmutual offensive issue preclusion does not “demand a similar prohibition” against universal injunctions because the government is still free to litigate cases in which it lost and was subject to a universal injunction, like the Muslim Ban and sanctuary city cases).

186. *See, e.g., City of Chicago v. Sessions*, 888 F.3d 272, 296–97 (7th Cir. 2018) (Manion, J., concurring in part and dissenting in part), *reh'g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018); Frost, *supra* note 18, at 1112–13.

187. *See* Morley, *supra* note 185, at 627–30.

importance.<sup>188</sup> Second, private parties invoking preclusion against the government would stymie percolation and make it harder for the Supreme Court to decide when to grant certiorari.<sup>189</sup> Third, the government would lose its wide discretion in deciding which adverse judgments to appeal.<sup>190</sup> Fourth, subjecting the government to nonmutual offensive issue preclusion would impede successive executive branches from adopting different legal positions than their predecessors.<sup>191</sup>

In sum, the development of issue preclusion doctrine in *Parklane* and *Mendoza* suggests two broad points that can inform the discussion on the propriety of universal injunctions. First, the question of who can enjoy the preclusive benefit of litigation is left to judicial discretion. Second, courts balanced the competing policy concerns of fairness, uniformity, efficiency, error costs, and percolation.

## 2. The Spurious Class Action

The preclusion asymmetry produced by universal injunctions was once a common feature of class actions. The class action as it existed in 1938 came in three types based on the rights at issue: true, hybrid, and spurious.<sup>192</sup> Unlike true and hybrid class action members, only class members who *opted in* to spurious class actions were bound by and could benefit from the judgment.<sup>193</sup> The original motivation for the opt-in feature was to allow class members to “intervene on an ancillary basis without being required to show an independent basis of [f]ederal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations.”<sup>194</sup> But as Professor Brian Fitzpatrick notes, most courts allowed class members

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188. *Mendoza*, 464 U.S. at 159–60.

189. *Id.* at 160.

190. *Id.* at 161 (“[T]he Solicitor General considers a variety of factors, such as the limited resources of the Government and the crowded dockets of the courts, before authorizing an appeal.”).

191. *Id.*

192. David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang*, 90 WASH. U. L. REV. 587, 600 (2013). In a “true” class action, the rights sought to be enforced were shared rights and joinder of all class members was required to adjudicate those shared rights like, for example, in a shareholder derivative action. *Id.* In a “hybrid” class action, the rights of the class members could be several, not joint, and would often relate to the equitable distribution of property like a fund. *Id.* The “spurious” class action was designed to enforce the rights of class members with no previous association “where there was a common question of law or fact affecting such rights and ‘common relief’ was sought.” Charles Alan Wright, *Class Actions*, 47 F.R.D. 169, 175 (1970).

193. FED. R. CIV. P. 23 advisory committee’s note to 1966 amendments; *see also* Marcus, *supra* note 192, at 600–01.

194. FED. R. CIV. P. 23 advisory committee’s note to 1966 amendments.

to opt in *after a judgment*.<sup>195</sup> Thus, “wait-and-see” class members could opt in to a favorable outcome but, in the case of an unfavorable outcome, could decline to opt in and relitigate on their own.<sup>196</sup> This is the same kind of preclusive asymmetry produced by universal injunctions.

Charles Alan Wright, a pivotal member of the Advisory Committee on Civil Rules (“Committee”), called the spurious class action “a particularly puzzling creation” because its preclusive asymmetry made a “mockery” out of the class action.<sup>197</sup> Just like universal injunctions are viewed as unfair to the federal government, spurious class actions were viewed by many on the Committee as unfair to corporate defendants.<sup>198</sup> To that effect, the *opt-in* spurious class action was eliminated and the *opt-out* (b)(3) class action was adopted in 1966.<sup>199</sup> The new rule bound all class members to both favorable and unfavorable outcomes unless they affirmatively opted out. Corporate defendants soon realized the immense power of the opt-out class action to aggregate low value claims that would never have been brought individually and expose them to “bet-the-company” liability.<sup>200</sup> The corporate community has since consistently supported a return to the spurious class action.<sup>201</sup>

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195. Brian T. Fitzpatrick, *The Ironic History of Rule 23 9–10* (Vanderbilt Law Sch. Legal Studies Research Paper Series, Working Paper No. 17-41, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3020306](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020306) [<https://perma.cc/V6QL-TP3L>]; see also FED. R. CIV. P. 23 advisory committee’s note to 1966 amendments:

Hitherto, in a few actions conducted as “spurious” class actions . . . courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision.

196. Fitzpatrick, *supra* note 195, at 10.

197. Wright, *supra* note 192, at 175, 181.

198. Fitzpatrick, *supra* note 195, at 10. When the Committee reconvened in 1960, it was so intent on eliminating the spurious class action that the first version of the (b)(3) class action did not allow for any opt-out whatsoever. *Id.* at 4.

199. *Id.* at 4; see also John E. Kennedy, *Class Actions: The Right to Opt Out*, 25 ARIZ. L. REV. 3, 17 (1983):

[T]o remove the lack of mutuality and unfairness to the defendant inherent in “one-way intervention,” the new procedural rule would require, prior to determination of liability, notice to all class members. This notice was to inform all class members that the court would “exclude” them if they so request; and if they did not “request exclusion,” the class judgment would include them. In short, the members’ formal power-duty of “exclusion” or in legal slang, “right to opt out” was born.

200. Fitzpatrick, *supra* note 195, at 7; see also Miller, *supra* note 110, at 754:

Surely the Committee members could not have foreseen what was to come in the following decades: the explosive recognition of new substantive rights by federal and state statutes and judicial activity . . . and the frequency—let alone the character—of product and commercial failures and other adverse events that would give rise to aggregate litigation.

201. Fitzpatrick, *supra* note 195, at 7, 17–18.

### B. Possible Conclusions

The development of issue preclusion doctrine and the drafting of the modern class action rules provide, at best, a mixed bag of possible conclusions that can inform the discussion on the propriety of universal injunctions and justify universal injunctions on theoretical grounds.

At one extreme, nonmutual offensive issue preclusion may justify universal injunctions because, at bottom, they both determine if and how nonparties benefit from and are bound by litigation. If nonparties can enjoy the preclusive and precedential benefits of a suit, they should be able to enjoy its remedial benefits as well. And just like universal injunctions, issue preclusion effectively binds horizontally situated and even vertically situated courts in other geographic jurisdictions.<sup>202</sup>

But the parallel between preclusive benefits and remedial benefits may be unpersuasive for three reasons. First, after *Mendoza*, nonparties cannot enjoy the preclusive benefits of a prior suit against the federal government, and arguably, should not enjoy the remedial benefits of a universal injunction against the federal government either.<sup>203</sup> Second, to enjoy the benefits of preclusion, or even just favorable precedent, a nonparty must take the affirmative step of filing a subsequent suit and asking the subsequent court to apply the prior judgment or precedent. To enjoy the remedial benefits of a universal injunction, a nonparty does not have to do anything. Third, the remedial benefits for nonparties are in the discretion of the court that is granting a universal injunction, whereas a subsequent court determines the preclusive benefits for nonparties. That is, a court cannot predetermine the preclusive effect of its own judgment like it determines the scope of its equitable relief. Thus, these fundamental differences between the binding effects of injunctions, preclusion, and precedent and how these effects are triggered may make the parallel between issue preclusion and injunctions unpersuasive.<sup>204</sup>

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202. Morley, *supra* note 185, at 640–41:

The res judicata effect of a judgment is not subject to geographic limits. A litigant may invoke the res judicata effect of a federal court's judgment in any court as a matter of federal common law, and of a state court's judgment as a matter of full faith and credit.

(footnote omitted).

203. Clopton, *supra* note 29 (manuscript at 3). Professor Clopton has argued that *Mendoza* was a policy-driven decision that should be overruled, which would temper courts' penchant for granting universal injunctions. *Id.*; see also Zachary D. Clopton, *Arguments About Nationwide Injunctions*, TAKE CARE BLOG (July 16, 2018), <https://takecareblog.com/blog/arguments-about-nationwide-injunctions> [<https://perma.cc/LXP6-G5UM>]. *But see* sources cited *supra* note 185.

204. For a broader discussion of the relationship between injunctions, preclusion, and precedent, see Morley, *supra* note 185, at 643–47.



At the other extreme, the elimination of the spurious class action because of its preclusive asymmetry may justify a brightline rule against universal injunctions. But there are key differences between spurious class actions and universal injunctions that may undermine this conclusion. Once class members opted in to a class action, they could sue to hold the opposing party in contempt for violating an injunction and could assert issue preclusion against them in subsequent suits.<sup>205</sup> In contrast, nonparties enjoying the remedial benefits of a universal injunction do not have these powers. These powers made spurious class actions arguably *more unfair* than universal injunctions and justified their demise; perhaps universal injunctions, which are relatively less unfair, should be spared.

At the very least, the development of issue preclusion doctrine and the drafting of the modern class action rules suggest that historical limits on judicial power and the structure of the federal courts alone should not conclusively point to a brightline rule against universal injunctions.<sup>206</sup> Justice Thomas surmised that “no persuasive defense has yet been offered” for universal injunctions because they “boil down to a policy judgment about how powers ought to be allocated among our three branches of government.”<sup>207</sup> But the endorsement of nonmutual offensive issue preclusion in *Parklane* and exempting the federal government from it in *Mendoza* were policy judgments that balanced fairness, uniformity, percolation, error costs, and efficiency.<sup>208</sup> These same policy considerations should be balanced in the current context of inadequate checks on growing executive power, the erosion of the political process, and the slow demise of the class action to assess if and how nonparties should enjoy the remedial benefits of universal injunctions.

#### IV. AN EXTRAORDINARY FORUM FOR AN EXTRAORDINARY REMEDY

Under the assumption that the theoretical justifications for universal injunctions in Part III are persuasive, two pressing problems still

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205. Frost, *supra* note 18, at 1114 n.217.

206. Clopton, *supra* note 29 (manuscript at 44).

207. Trump v. Hawaii, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring) (internal quotation marks omitted) (“Defenders of these injunctions contend that they ensure that individuals who did not challenge a law are treated the same as plaintiffs who did, and that universal injunctions give the judiciary a powerful tool to check the Executive Branch.”).

208. See Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1096 (2017) (“The systemic policy considerations weighed in *Mendoza* mirror the key policy considerations on nationwide injunctions. The Court’s analysis framed the issue as pitting uniformity and efficiency against percolation and intercourt dialogue.”).

remain.<sup>209</sup> First, plaintiffs not only forum shop but also judge shop when seeking universal injunctions because of the indeterminate equitable principles for crafting the scope of injunctions and the numerous venues where the federal government can be sued.<sup>210</sup> Second, universal injunctions produce a preclusive asymmetry whereby a nonparty is not bound by an unfavorable outcome but nonetheless benefits from a favorable one. This forces the federal government to potentially serially relitigate suits it has already won and to appeal every universal injunction that is granted against it.<sup>211</sup> While permitting nonparties to enjoy the remedial benefits of a universal injunction may not itself be problematic,<sup>212</sup> subjecting the federal government to serial relitigation across the country until a single district court judge finally grants a universal injunction is undesirable.

A specialized forum to adjudicate suits seeking universal injunctions against federal executive action would eliminate judge shopping and mitigate preclusive asymmetry. The court would be composed of twelve “borrowed” federal district court judges—one from each geographic circuit—appointed by the Chief Justice of the Supreme Court to serve two-year terms. The suits would be randomly assigned to three-judge panels. The order granting or denying the injunction would be reviewable on direct appeal to the Supreme Court.<sup>213</sup> Other litigants would still be free to seek narrower relief through the normal course of litigation in federal district courts across the country.

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209. Many commentators oppose universal injunctions on constitutional grounds, so the procedural fix presented here is likely a non-starter for these commenators. *See, e.g.*, Bray, *supra* note 18, at 471–72 (arguing that Article III forbids universal injunctions); Morley, *supra* note 22, at 523–27 (same); Wasserman, *supra* note 5, at 364:

Universal injunctions are inappropriate because a court should not prohibit government from enforcing the challenged laws, regulations, or policies beyond the named plaintiffs. They therefore are inappropriate whether issued by one district judge in the Western District of Washington, issued by a three-judge district court, affirmed by a panel of a regional court of appeals, affirmed by an en banc court of appeals, or affirmed by a unanimous Supreme Court.

210. *See supra* Section I.A.

211. *See supra* Section II.A.2.

212. *See supra* Part III.

213. If this Note’s proposed forum is established by Congress, it would be subject to 28 U.S.C. § 1253 (2012), which states that “any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.”

*A. Precedent for a Specialized Forum*

The American judiciary has been generally reticent toward specialized<sup>214</sup> forums.<sup>215</sup> Such forums—including courts that only hear constitutional challenges to national legislation—are more common internationally.<sup>216</sup> Specialized forum proposals usually involve a specific subject matter, courts with rotating panels of judges, or assignment of specific cases to judges with subject matter expertise.<sup>217</sup>

There are specialized federal trial courts composed of “borrowed” Article III judges.<sup>218</sup> For example, the Foreign Intelligence Surveillance Court (“FISA”) is composed of eleven judges from districts across the country who review warrant applications for electronic surveillance of foreign intelligence information.<sup>219</sup> Appeals from warrant denials are heard by the FISA Court of Review, which is composed of three district court or court of appeals judges.<sup>220</sup> The judges on both courts are chosen by the Chief Justice of the Supreme Court to serve seven-year terms.<sup>221</sup> This Note’s proposed forum shares many of the overall features of the FISA Court: twelve borrowed district court judges—one from each geographic circuit—that would be appointed by the Chief Justice of the Supreme Court to serve two-year terms.

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214. “Specialization” is not easily defined. This Note uses the term to describe a new forum that would only adjudicate suits seeking universal injunctions against federal executive action.

215. See, e.g., FED. JUDICIAL CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 84 (1993) [hereinafter 1993 FJC REPORT], <https://www.fjc.gov/sites/default/files/2012/StrucAlt.pdf> [<https://perma.cc/V9YZ-9GLV>]; Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 786 (1983); Diane P. Wood, Judge, U.S. Court of Appeals for the Seventh Circuit, *Generalist Judges in a Specialized World*, Speech at the Southern Methodist University School of Law (Feb. 11, 1997), in 50 SMU L. REV. 1755, 1756 (1997).

216. Michael E. Solimine, *The Fall and Rise of Specialized Federal Constitutional Courts*, 17 U. PA. J. CONST. L. 115, 122 (2014) (“Many other nations have established a standing court [to hear] constitutional challenges to legislation of the national government. Indeed, there has been an increasing trend toward greater use of this centralized method of judicial review, as compared to the typically decentralized path of constitutional litigation in the United States.”).

217. See generally Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 522–23 (2008) (“Proposals over the years advocating for additional specialized courts have been consistently ignored, whether in scientific evidence, tax, immigration, administrative agency review, patents, or other areas.”).

218. LAWRENCE BAUM, SPECIALIZING THE COURTS 14–15 tbl.1.2 (2011). For a list of abolished specialized federal courts (for example, the Temporary Emergency Court of Appeals), see *id.* at 17 tbl.1.4. Freestanding courts have their own permanent judges who hear only cases on the given specialized court. Borrowed judges serve both in their home district court and on the specialized court. See *id.* at 14–15 tbl.1.2.

219. *Id.*

220. *Id.*

221. *Id.*

There is some precedent for three-judge panels adjudicating the very types of claims and rights at issue in universal injunction suits.<sup>222</sup> After *Ex parte Young*,<sup>223</sup> Congress permitted only three-judge panels to grant interlocutory injunctive relief against a state official enforcing an allegedly unconstitutional state statute with direct review by the Supreme Court.<sup>224</sup> The three-judge panel requirement was expanded in 1937 to suits seeking injunctive relief against the enforcement of allegedly unconstitutional federal statutes.<sup>225</sup> Congress believed that “a single federal judge should not have the power to enjoin a federal enactment,” a common refrain from universal injunction critics.<sup>226</sup> The administrative difficulties of convening three-judge panels and the increased docket pressure on the Supreme Court’s then-larger caseload led Congress to abolish three-judge panels in all but a few areas in 1976.<sup>227</sup> Today, three-judge panels are used to adjudicate challenges to redistricting plans, voting law changes under the Voting Rights Act, and challenges under certain statutes with a three-judge panel review provision like the Bipartisan Campaign Reform Act of 2002.<sup>228</sup>

### B. A Specialized Forum as a Solution

This Note is not the first proposal of a single forum for universal injunction suits.<sup>229</sup> The APPEAL Act was a recently proposed fix.<sup>230</sup> The Act would give the District Court for the District of Columbia exclusive original jurisdiction “to hear and determine any claim that arises in a

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222. It is important to note, however, that the three-judge panels discussed herein adjudicated the constitutionality of state and federal statutes and not the kind of executive actions at issue in most universal injunctions suits today. See 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4234 (3d ed. 2018) (noting that Congress’s 1937 expansion of three-judge panels to suits challenging the constitutionality of federal statutes “did not reach attacks on federal administrative orders.”).

223. 209 U.S. 123, 148 (1908).

224. Act of June 18, 1910, ch. 309, § 17, 36 Stat. 539, 557, requiring that applications for interlocutory injunction[s] suspending . . . the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State . . . be presented to a justice of the Supreme Court of the United States, or to a circuit judge . . . and the other two may be either circuit or district judges.

225. Act of Aug. 24, 1937, ch. 754, § 3, 50 Stat. 751, 752–53.

226. Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 420 (2019).

227. Solimine, *supra* note 216, at 125–27.

228. Douglas & Solimine, *supra* note 226, at 420–21.

229. Cf. Judge Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), <https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem/> [<https://perma.cc/558J-JK9L>]. Judge Costa proposes a return to the three-judge panels that heard constitutional challenges to federal statutes from 1937 to 1976. *Id.*

230. Assigning Proper Placement of Executive Action Lawsuits Act (“APPEAL Act”), H.R. 2660, 115th Cong. (2017).

case or controversy as to an Executive order, action, or memorandum.”<sup>231</sup> The D.C. District Court and the U.S. Court of Appeals for the District of Columbia are de facto specialized forums because administrative law cases are an outsized portion of their dockets.<sup>232</sup> Challenges to agency actions are litigated in the D.C. Circuit because there are numerous organic agency statutes that vest the D.C. Circuit with exclusive or concurrent jurisdiction over such challenges.<sup>233</sup> These organic agency statutes and the APPEAL Act itself suggest that Congress is comfortable with prioritizing uniformity over percolation on certain legal questions by channeling them to a single forum.<sup>234</sup>

This Note’s proposed forum is an improvement on the APPEAL Act, which is plagued by some of the common disadvantages of specialized forums. One of these disadvantages is undermining judicial independence: the Act would subject the D.C. Circuit’s judges to increased political pressure and even more politicized nomination processes.<sup>235</sup> The Act would also add to the large concentration of judicial power in the D.C. Circuit and undermine Congress’s attempt to decrease the caseload of the D.C. courts when it amended the venue statute in 1962.<sup>236</sup> Finally, the APPEAL Act would likely give the federal government a repeat-player advantage because it would repeatedly litigate universal injunction suits in front of the same few judges.<sup>237</sup>

This Note’s proposed forum also eliminates judge shopping and mitigates the preclusion asymmetry of universal injunctions. Plaintiffs would have randomly assigned three-judge panels hear their case and

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231. *Id.* § 2.

232. BAUM, *supra* note 218, at 11 (“[A]dministrative appeals are twice as plentiful on the docket of the D.C. Circuit as a proportion of all cases as they are in the other circuits. But they still constitute only about one-third of all cases in the D.C. Circuit . . .”).

233. See Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL’Y 131, 143 (2013) (noting that there are “more than 150 statutory provisions that specifically refer to the D.C. Circuit, with over 130 of these specifically relating to jurisdiction”).

234. Not only is Congress amenable to certain legal questions being decided in a single, specialized forum, it has also increasingly enacted specialized constitutional review provisions which require all constitutional challenges under the given statute to be heard by three-judge panels followed by direct review in the Supreme Court. See generally Solimine, *supra* note 216, at 128–32 (listing statutes with specialized constitutional review provisions). Therefore, Congress is amenable to the two salient features of this Note’s proposal: a single, specialized forum for certain legal questions and three-judge panels.

235. Cheng, *supra* note 217, at 552 (“Specialized courts are susceptible to other forms of politicization as well. The political branches of government can more effectively control specialized courts through monitoring, budgeting, and other forms of pressure.”).

236. See *supra* notes 61–65 and accompanying text.

237. 1993 FJC REPORT, *supra* note 215, at 85 (“Regardless of whether the parties are inclined or able to influence the appointment process, the experience of litigating before the same judges over and over gives the frequent litigant the advantage of familiarity and predictability.”). However, the litigants that often seek universal injunctions against the federal government—large public interest groups and state attorneys general—are repeat players themselves.

could no longer handpick judges in specific judicial districts who may hold outlier views. Furthermore, nonparties would still enjoy the remedial benefits of a universal injunction granted by the specialized forum. However, a single forum makes plaintiffs significantly less inclined to serially relitigate denials of universal injunctions because a single unfavorable outcome would create precedent for the forum.<sup>238</sup> In other words, nonparties would continue to benefit from a favorable outcome but would now be bound through precedent to an unfavorable one as well.<sup>239</sup>

There are additional benefits to the proposed forum beyond eliminating judge shopping and mitigating the preclusive asymmetry of universal injunctions. The forum would eliminate the potential for conflicting injunctions<sup>240</sup> and dramatically decrease the overall frequency of them.<sup>241</sup> There would be greater public confidence in universal injunctions granted by a three-judge panel rather than a single outlier judge, an original motivation for such panels in 1910 and 1937.<sup>242</sup>

The forum would also lead to better judicial decisionmaking for two reasons. First, the court would slow down the current race to the courthouse after an allegedly illegal executive action goes into effect. Public interest groups and state attorneys general would have to decide which plaintiff is best positioned to file the all-important first suit. Second, judges are currently considering the universal scope of injunctions

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238. See Alan M. Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565, 581 (2017) (“Horizontal stare decisis refers to one court’s obligation to follow its own precedents. Here, the variation from jurisdiction to jurisdiction is significantly greater. Decisions of federal district courts, for instance, are not binding even within that district; such precedent is only persuasive.”).

239. While decisions of federal district courts are not binding even within the district, the specialized forum could instead follow the lead of many U.S. Courts of Appeals and view its decisions as binding precedent. See *id.* at 581–82:

[P]anels of any given U.S. Court of Appeals follow a rule of absolute stare decisis within the circuit, such that one panel may not overrule an earlier panel decision. The theory is that the panel generates the opinion of the court, and that opinion is binding within (but not outside of) the circuit.

240. See, e.g., Berger, *supra* note 208, at 1088 (“A recent example of territorial conflict occurred in *Washington v. Trump*, when a federal court in Boston refused to enjoin the travel ban, but was functionally overruled by the nationwide injunction issued by another federal court of ostensibly equal stature.”); see also *supra* note 51 and accompanying text.

241. Even defenders of universal injunctions agree that they should be extraordinary remedies. See, e.g., Frost, *supra* note 18, at 1115–16 (“Critics are correct that federal district judges at times issue nationwide injunctions unthinkingly, assuming that if a federal policy is unlawful then its enforcement must be enjoined as to everyone. . . . [N]ationwide injunctions come with significant costs, and in many circumstances they may be unnecessary and inappropriate.”).

242. 17A WRIGHT ET AL., *supra* note 222, at § 4234 (“It was the thought of Congress that there would be less public resentment if enforcement of the state statute were stayed by three judges rather than one, and that the provision for direct appeal to the Supreme Court would provide speedy review.”); see also *supra* note 226 and accompanying text.

as a mere afterthought or not at all.<sup>243</sup> In contrast, a three-judge panel tasked specifically with determining the propriety of an injunction and its scope would take greater care in applying the aforementioned equitable principles and likely develop a robust body of law to determine when universal injunctions should be granted.<sup>244</sup>

### C. *The Percolation Problem*

The main disadvantage of a specialized forum for universal injunctions is that such a court would not restore the common law “percolation”<sup>245</sup> of legal issues that universal injunctions currently stymie.<sup>246</sup> Percolation produces circuit splits, which helps the Supreme Court decide which novel questions of law need resolution.<sup>247</sup>

Although percolation is an important benefit of a decentralized common law system, it may not be very beneficial in universal injunction suits. Percolation is most valuable when novel legal questions arise in various factual contexts.<sup>248</sup> But universal injunction cases often involve narrow questions of law regarding a systemwide and uniform government policies.<sup>249</sup> As the Seventh Circuit explained when upholding

243. Berger, *supra* note 208, at 1071 (“Despite the far-reaching impact of nationwide injunctions, courts often treat injunctive scope as an afterthought, sometimes discussing it only in a short paragraph, sentence, or footnote.”).

244. *See supra* Section I.A.1.

245. *See Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (“We have in many instances recognized that when frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.”).

246. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (“[Universal] injunctions are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.”). *But see Amdur & Hausman*, *supra* note 34, at 53 n.27 (observing that “nationwide injunctions do not always foreclose percolation” and listing concurrent suits involving the Muslim Ban and sanctuary cities).

247. *See SUP. CT. R.* 10 (listing circuit splits as one factor in the decision whether to grant certiorari).

248. *See California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018) (“[N]ationwide injunctive relief may be inappropriate where a regulatory challenge involves important or difficult questions of law, which might benefit from development in different factual contexts and in multiple decisions by the various courts of appeals.” (quoting *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011))). *But see Malveaux*, *supra* note 18, at 58:

How much time and how many decisions are reasonable for percolation? How important are factual records when the Court is ruling on the validity of a government’s uniform conduct or policy? And how justified is delay in the face of instability, uncertainty, and harm that may result? Incrementalism has its costs too.

249. *See, e.g., City of Chicago v. Sessions*, 888 F.3d 272, 292 (7th Cir. 2018) (“The public interest would be ill-served here by requiring simultaneous litigation of this narrow question of law in countless jurisdictions. . . . This is not a situation in which courts would be able to benefit from

a universal injunction in a “facial challenge to a policy applied nationwide”:

There are some legal issues which benefit from consideration in multiple courts—such as issues as to the reasonableness of searches or the excessiveness of force—for which the context of different factual scenarios will better inform the legal principle. But a determination as to the plain meaning of a sentence in a statute is not such an issue. For that issue, the duplication of litigation will have little, if any, beneficial effect.<sup>250</sup>

Even if percolation is important in universal injunction suits, the numerous amici curiae and intervenors that often participate in such suits—and the three-judge panels of the proposed forum—can serve as the “many minds” of common law percolation.<sup>251</sup> For example, thirty-seven cities and counties, the United States Conference of Mayors (representing 1,400 cities nationwide), fourteen states, and the District of Columbia participated as amici or attempted intervenors in a Seventh Circuit case seeking a universal injunction against changes to a federal grant program that would prohibit sanctuary cities from receiving federal criminal justice funding.<sup>252</sup>

But even if this Note’s proposed forum were rejected in favor of a brightline rule against universal injunctions, lost percolation would not be restored. The parties now relying on universal injunctions would instead rely on nationwide class actions, a practice endorsed by the Supreme Court in *Califano v. Yamasaki*.<sup>253</sup> While the Court was sympathetic to the loss of percolation that nationwide class actions cause, it determined that this did not counsel for a brightline rule against nationwide class actions.<sup>254</sup> Thus, the endorsement of nationwide class actions in *Califano* and nonmutual offensive issue preclusion in *Parklane*

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perusing the decisions of other courts in the matter.”), *reh’g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), and *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018).

250. *Id.* at 290–91. *But see id.* at 297 (Manion, J., concurring in part and dissenting in part):

Different parties litigating the same issues in different forums will likely engage different arguments, leading to diverse analyses and enhancing the likelihood of the strongest arguments coming to the fore. Courts faced with difficult statutory questions are the ones who benefit the most from the existence of multiple well-reasoned decisions from which to draw.

251. *See, e.g., E. Bay III*, 354 F. Supp. 3d 1094, 1105 (N.D. Cal. 2018) (“The Court also permitted six amicus curiae to file briefs in support of an injunction.”).

252. *City of Chicago*, 888 F.3d at 278, 292.

253. 442 U.S. 682, 701–03 (1979). For example, the plaintiffs in *Wal-Mart v. Dukes* sought injunctive (and monetary) relief through a nationwide 23(b)(2) class action encompassing all female Wal-Mart employees. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345–46, 360 (2011).

254. *Califano*, 442 U.S. at 702–03; *see also* Morley, *supra* note 22, at 541–43.



suggests that percolation is an important but not dispositive policy concern. The Supreme Court and Congress<sup>255</sup> have determined that percolation does not always outweigh competing concerns in the past and would have to do so again to save universal injunctions.<sup>256</sup>

A second disadvantage of the proposed forum is that the Chief Justice may be inclined to nominate district court judges to the forum that would either never grant universal injunctions or always do so. For example, Chief Justice Roberts has been criticized for appointing judges to the FISA Court that would more easily approve a warrant.<sup>257</sup> Nevertheless, the alternative—plaintiffs handpicking their judge because of his perceived outlier views—is much worse.

### CONCLUSION

If the universal injunction's demise is impending and the class action's demise continues unabated, obtaining systemwide relief against invalid federal executive action will become difficult. Universal injunctions allow nonparties to benefit from a favorable outcome but not be bound by an unfavorable one. This makes universal injunctions less risky than class actions, which always bind absent class members after class certification.

This Note argues that this preclusive asymmetry is not unfamiliar and may not justify a brightline rule against universal injunctions. The policy considerations of fairness, uniformity, percolation, error costs, and efficiency that were balanced in the development of issue preclusion doctrine and the drafting of the modern class action rules should again be balanced in the current context of inadequate checks on growing executive power, the erosion of the political process, and the slow demise of the class action to assess the propriety of universal injunctions. If universal injunctions can be saved, they should be adjudicated in a single, specialized forum that would eliminate judge shopping and mitigate their preclusive asymmetry. The forum would realign the

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255. See *supra* note 234 and accompanying text.

256. Amdur & Hausman, *supra* note 34, at 52–53 (“Even Chief Justice Rehnquist—the author of *United States v. Mendoza*, the Supreme Court’s most explicit pro-percolation case—subsequently criticized the notion of percolation for percolation’s sake.” (footnote omitted)).

257. Charlie Savage, *Roberts’s Picks Reshaping Secret Surveillance Court*, N.Y. TIMES (July 25, 2013), <https://www.nytimes.com/2013/07/26/us/politics/robertss-picks-reshaping-secret-surveillance-court.html> [<https://perma.cc/Q3DT-PS3G>].

tradeoffs that plaintiffs consider when choosing how to seek systemwide relief.

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