



— LEGAL POLICY FOCUS —

Nationwide Injunctions

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EXECUTIVE SUMMARY

- A nationwide injunction is one that applies not only to the parties in a case, but also prevents the federal government from enforcing a law, regulation, or policy against any person, anywhere in the United States.
- Since the important point is not the geographical scope of the injunction, but that it applies to nonparties, nationwide injunctions are more appropriately termed universal injunctions.
- Universal injunctions are an invitation to plaintiffs to cherry-pick a friendly judge. There are currently 1,000 active and senior district court judges across the country, any one of them might issue a national injunction halting a federal policy.
- Universal injunctions undermine confidence in a nonpartisan judiciary. When the public sees judges in New York enjoining President Trump's policies, and judges in Texas enjoining President Obama's policies, the reputation of the judiciary suffers.
- Universal injunctions force judges into making rushed, low-information decisions in high-stakes cases. Ordinarily, a number of federal judges across the country will have had time to weigh in on a legal issue. But universal injunctions short-circuit this process, often forcing the Supreme Court to take a case once a single district judge has enjoined a law.
- Universal injunctions are inconsistent with the Constitution, which limits the judicial power to "cases" and "controversies." This constitutes the power to decide cases for *parties*, not *everyone*.
- Thus, for the first 150 years of our country, not a single federal court issued a universal injunction purporting to bind non-parties.

What You Should Know

A nationwide injunction is one that applies not only to the specific parties in a case, but also prevents the federal government from enforcing a law, regulation or policy against any person, anywhere in the United States. Nationwide injunctions are more appropriately termed universal or national injunctions because the important point is not the geographical scope of the injunction but the fact that it binds nonparties to a lawsuit.

An injunction is quite different from an ordinary legal remedy. Ordinary legal remedies include money damages and are available to a successful plaintiff as a matter of right. Equitable remedies like injunctions, on the other hand, are much more intrusive and thus more limited.

Universal injunctions are a recent judicial creation. For over one hundred and fifty years after the founding, not a single court issued an injunction purporting to bind nonparties to its judgment. And yet, this novel remedy has proliferated as of late. Federal courts issued a handful of universal injunctions during President George W. Bush's tenure and issued twenty during President Barack Obama's eight years in office. As of early 2020, however, no less than fifty-five universal injunctions have been issued against the Trump Administration

in less than four years. To say that the federal courts have embraced their newfound judicial power to issue broad remedies binding nonparties is an understatement.

In August of 2019, for instance, the Trump Administration issued a final rule defining the term “public charge” under section 212(a)(4) of the Immigration and Nationality Act, a provision which makes inadmissible an alien seeking admission to the U.S. or an adjustment of status if the alien, “at the time of application for admission or adjustment of status, is likely at any time to become a public charge.”¹ States, organizations, and individuals quickly filed suit in a handful of jurisdictions likely to find in their favor—California, Washington, Maryland, Illinois, and New York. Each



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¹ Section 212(a)(4) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(a)(4).

of these hand-picked federal judges found in favor of the plaintiffs and issued a hodgepodge of conflicting injunctions.

- The Northern District of California issued an injunction forbidding the government from enforcing the new rule in California, Oregon, Maine, Pennsylvania, and the District of Columbia. (This injunction was reversed by the Ninth Circuit because that court found the government was likely to succeed on the merits.)²
- The Eastern District of Washington issued a global injunction forbidding the government from enforcing the new rule anywhere. (The Ninth Circuit reversed the universal injunction.)³
- The District of Maryland entered a second universal injunction. (The Fourth Circuit reversed the injunction.)⁴
- The Southern District of New York entered its own universal injunction forbidding the government from applying the new definition to anyone, regardless of geography or participation in any lawsuit.⁵ In this case, the Second Circuit upheld the universal injunction forcing the Supreme Court to intervene and grant a stay permitting the final rule to take effect.⁶

The Supreme Court has recently stepped in to reverse various universal injunctions against, for example, new asylum rules and funding for the border wall. And with good reason.

Why You Should Care

As even proponents of universal injunctions are forced to recognize, injunctions that bind nonparties come with significant costs.

- **The Department of Justice has argued against universal injunctions.** The Department of Justice has argued that universal injunctions create “an absurd situation in which a plaintiff only needs to win once to stop a national law or policy—but the government needs to win every time to carry out its policies. That makes governing all but impossible.”⁷
- **Universal injunctions lead to forum shopping and undermine confidence in a nonpartisan judiciary.** Universal injunctions are a virtual invitation to plaintiffs

² *City & County of San Francisco v. USCIS*, 944 F.3d 773, 799 (9th Cir. 2019).

³ *Id.*

⁴ Order, *Casa de Maryland, Inc. v. Trump*, No. 19-2222 (4th Cir. Dec. 9, 2019).

⁵ *Make the Road New York v. Cuccinelli*, 2019 WL 5589072 (S.D.N.Y. Oct. 11, 2019).

⁶ *Department of Homeland Security v. New York*, 589 U.S. ____ (2020), slip op. at 3 (Gorsuch, J., concurring).

⁷ Attorney General Jeff Sessions, Remarks at the Federalist Society’s Student Symposium, Washington, DC (March 10, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-federalist-society-s-student-symposium>.

to cherry-pick a friendly judge. There are currently 1,000 active and senior district court judges, sitting across 94 judicial districts, and subject to review in 12 different regional courts of appeal.⁸ Thus, plaintiffs have 94 opportunities to secure a nationwide injunction. Meanwhile, the government can only lose once. When judges in New York enjoin President Trump’s policies and judges in Texas enjoin President Obama’s policies the reputation of the judiciary suffers.

■ **Universal injunctions result in less reasoned judicial decision-making.** By the time an ordinary case gets to the Supreme Court, a number of federal judges from across the country will have been able to weigh in with their best thinking on a legal issue. As Justice Ginsburg put it, this dialogue “may yield a better informed and more enduring final pronouncement” by the Supreme Court. Universal injunctions short-circuit this process by forcing lower courts to decide cases on an expedited briefing schedule and depriving the Supreme Court of percolation in the lower courts. They force judges into making rushed, low-information decisions in high-profile cases.

■ **Universal injunctions are in conflict with Article III of the United States**

Constitution. Article III limits the judicial power to “Cases and Controversies”—which requires a plaintiff to demonstrate that she has standing for every claim and form of relief she seeks. As Professor Sam Bray puts it, the judicial power “is a power to decide cases for parties, not questions for everyone.”⁹ Yet universal injunctions expand the power of federal courts well beyond the parties before them. These injunctions award injunctive relief to every person potentially affected by a government policy, no matter where that person is located or whether they would have standing to sue.



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Background

Injunctions are an extraordinary remedy of ancient vintage. The English courts of equity developed certain remedies, including injunctions, around the time of Henry VIII. The system of equity developed out of the King’s delegation of “extraordinary jurisdiction—that of *Grace*” to the Chancellor to dispense discretionary relief to the parties where relief was unavailable at common law.¹⁰ Equitable remedies thus differ

⁸ *Department of Homeland Security v. New York*, 589 U. S. ____ (2020), slip op. at 3 (Gorsuch, J., concurring).

⁹ Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 421 (2017).

¹⁰ *Trump v. Hawaii*, 584 U.S. __ (2018) slip op. 5 (Thomas, J., concurring) (citing 1 S. Symon’s, Pomeroy’s, Equity Jurisprudence §33 at 38 (5th ed. 1941)).

from legal remedies like money damages which are available to successful plaintiffs as a matter of right. Equitable remedies force a party to do something or refrain from doing something and thus are carefully limited because they invoke the coercive powers of the court.

The English Court of Chancery continued to grant such “equitable remedies” up through the time of the founding. And in **the Judiciary Act of 1789**, Congress granted jurisdiction to the federal courts over “all suits ... in equity.”¹¹ The Supreme Court, however, has long-recognized that this grant of jurisdiction and the equitable remedies available under the Judiciary Act of 1789 are limited by the principles in place during that time period.¹²

Thus, the only equitable remedies that are authorized by the Judiciary Act of 1789 are those that existed in the English Court of Chancery at the time of the founding. That system did not contemplate universal injunctions; indeed, it was a cardinal principle of English equity that an equitable remedy could bind only the parties to a case.¹³ Thus, it is hardly surprising that, *for the first 150 years of our country, not a single federal court issued a universal injunction purporting to bind non-parties.*

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Universal injunctions are novel in that they go beyond the parties to a case and award broad relief to anyone whom the statute, regulation, or policy might possibly be enforced against. Professor Bray identifies *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518 (CADC 1963) as the first case involving a universal injunction. Although only three plaintiffs were parties to the suit, the D.C. Circuit held that the Secretary of Labor’s minimum wage determination was invalid and that, provided the plaintiffs had standing, the district court should enjoin the Secretary’s determination “with respect to the entire industry.”¹⁴

To issue an injunction is to tap the very zenith of a federal court’s power because injunctions are extraordinary remedies that compel a party to do something or refrain

¹¹ The Judiciary Act, 1 Stat. 73 (1789).

¹² *Guaranty Trust Co. v. New York*, 326 U.S. 99, 105 (1945) (jurisdictional statutes constrained by “the body of law which had been transplanted to this country from th English Court of Chancery” in 1789).

¹³ Bray, *supra* note 3 at 425.

¹⁴ *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 535 (CADC 1963).

from doing something. Injunctions, that is, invoke the coercive power of an Article III court and often require the court to manage the parties in a lawsuit. When one of those parties is the federal government “concerns about separation of powers ... are heightened.”¹⁵ Because injunctions are more intrusive than legal remedies, the circumstances in which they may be issued are carefully circumscribed: injunctions may only be granted at the discretion of the court (and never as of right) and upon a clear showing the plaintiff is entitled to relief.

Myths About Universal Injunctions

Even proponents of universal injunctions admit that this form of extraordinary equitable relief comes with significant costs, and thus should be limited to specific circumstances.¹⁶ Yet, even the circumstances identified by universal injunction proponents fail to justify the extra-constitutional remedy.

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MYTH #1—Universal Injunctions Are The Only Way To Provide Plaintiff With Complete Relief.

- A.** Professor Amanda Frost argues that when a plaintiff seeks to desegregate a school or to challenge policies that cross lines, like air and water regulations, the only way to award complete relief to such a plaintiff is to enter a “broad injunction” that binds nonparties.¹⁷ This argument fails, however, because the Federal Rules of Civil Procedure already provide a mechanism to address just these sorts of situations. FRCP 23(b)(2) created a class action system to “deal with civil rights and, explicitly, segregation.”¹⁸ The existence of a congressionally-authorized federal class action that allows a small number of plaintiffs to represent a large group and obtain injunctive relief on behalf of them all is a powerful mechanism to obtain relief in civil rights cases. It also defeats the

¹⁵ Bray, *supra* note 3 at 472.

¹⁶ Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1069 (2018).

¹⁷ *Id.* at 1091.

¹⁸ Suzette M. Malveaux, *Response, Class Actions, Civil Rights, and the National Injunction*, 131 Harv. L. Rev. F. 56, 58 (2017) (quoting John P. Frank, Response to 1996 Circulation of Proposed Rule 23 on Class Actions, in 2 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 260, 266 (Admin. Office of the U.S. Courts ed., 1997), <http://www.uscourts.gov/sites/default/files/workingpapers-vol2.pdf> (goal of the advisory committee “was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation”)).

argument that universal injunctions are necessary to afford complete relief to civil rights plaintiffs. Further, Congress authorized a class-wide injunctive remedy only if certain conditions were met.¹⁹ To permit universal injunctions is to allow an end-run around those conditions imposed by Congress.

B. Indeed, the Federal Rules were amended in 1966 to add Rule 23(b) (2) “with the express goal of empowering litigants challenging systemic discrimination—particularly segregation—to force courts to order widespread injunctive relief that would protect the class as a whole.”²⁰ As Professor Suzette Malveaux argues, “the civil rights class action provision remains as salient to the enforcement of federal civil rights statutes and constitutional claims as at its inception.”

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Article III gives the judiciary the authority to decide the case before it and to provide a remedy for the wrong done to litigants. It does not sanction a free-roving power to remedy the supposed wrongs of individuals who are not before the court.
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C. In all events, the fact that other plaintiffs may need to be joined to a lawsuit or that a policy crosses state lines, does not justify an expansion of federal court powers. Article III gives the judiciary the authority to decide the case before it and to provide a remedy for the wrong done to litigants. It does not sanction a free-roving power to remedy the supposed wrongs of individuals who are not before the court.

Myth #2—Universal Injunctions Are Essential To Maintaining The Constitutional Balance Of Powers.

A. Because our federal government is one of limited powers, the powers given to any branch must be expressly authorized. Here, the Constitution limits federal court powers to “Cases and Controversies,” it does not expand those powers in cases of congressional inaction.²¹ At bottom the separation of powers argument

¹⁹ Fed. R. Civ. P. 23(a) (requiring numerosity, commonality, and typicality), https://www.law.cornell.edu/rules/frcp/rule_23.

²⁰ *Id.*

²¹ To the extent that proponents of nationwide injunctions are worried about the inaction of Congress, the policy solution isn’t to give unaccountable courts *more power* but for courts to insist that Congress shoulder its legislative responsibilities. In addition to the major questions doctrine and nondelegation doctrine, which provide a means for courts to ensure that Congress fulfills its constitutional role, the federal courts have powerful tools at their disposal to curb any alleged executive branch power grab. From the Supreme Court’s famous decision in *Youngstown Steel* putting the presidential takeover of a steel mill on ice, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), to the Supreme Court’s numerous recent decisions striking down administrative action for failure to comply with the Administrative Procedure Act, *see, e.g., Department of Commerce v. New York*, 139 S.Ct. 953 (2019), the federal courts are able to curb executive overreach while still complying with the strictures of the separation of powers laid out in the Constitution.

“boi[ls] down to a policy judgment” about how powers ought to be allocated among our three branches of government.”²² As Justice Thomas pointedly put it, “that decision, however, was made long ago by the people who ratified the Constitution.”²³

MYTH #3—Universal Injunctions Are Efficient.

- A.** Some proponents of universal injunctions suggest that efficiency justifies their use.²⁴ But efficiency is never a good enough reason for courts to update the Constitution.²⁵ Moreover, the federal class action procedure created by Congress authorizes a mechanism for joining together claims that would be difficult to bring alone, and it balances this efficiency with procedural protections requiring that the plaintiff establish adequacy of representation, commonality, typicality, and numerosity.²⁶

MYTH #4—Universal Injunctions Promote Uniformity.

- A.** A number of district court judges have argued that universal injunctions are necessary to promote the uniformity of federal law.²⁷ As even proponents of universal injunctions acknowledge, however, uniformity is an inadequate rationale for national injunctions.²⁸ Rather, “our federal judicial system is intentionally designed to allow lower courts to reach different conclusions about the meaning of federal law—conflicts in interpretation that remain unless and until the Supreme Court chooses to resolve the split.”²⁹ The system of different federal districts permits numerous judges to weigh in on a legal question. And should circumstances require, the Supreme Court can always step in on an expedited basis—something the current system of unending universal injunctions all but guarantees. And if an injunction limited to the parties in a case causes confusion, the executive can choose to adopt the district court’s resolution “as a rule for

²² *Trump v. Hawaii*, 584 U.S. __ (2018), slip op. at 10 (Thomas, J., concurring).

²³ *Id.*

²⁴ Frost, *supra* note 19 at 1098.

²⁵ The Supreme Court has already rejected the efficiency rationale in a similar circumstance. In *United States v. Mendoza*, the Supreme Court held that offensive nonmutual collateral estoppel—a doctrine holding that once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit, and may be enforced even by a nonparty to the prior lawsuit—did not apply to the federal government. 464 U.S. 154, 158-59 (1984). The Court explained that the potential benefits of collateral estoppel—including efficiency and the conservation of judicial resources—were outweighed by the costs. To permit nonmutual collateral estoppel against the government would “substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular issue.” *Id.*

²⁶ Fed. R. Civ. Proc. 23, https://www.law.cornell.edu/rules/frcp/rule_23.

²⁷ See, e.g., *Texas v. United States*, 2016 WL 7852331, at *4 (N.D. Tex. Oct. 18, 2016); *City of Chicago v. Sessions*, 2017 WL 4572208, at *2 (N.D. Ill. Oct. 13, 2017).

²⁸ Frost, *supra* note 19 at 1102-1103.

²⁹ *Id.*

the nation.”³⁰ In short, for the vast majority of cases, Congress has prioritized percolation over the uniform interpretation of federal law.³¹

MYTH #5—Universal Injunctions Protect Similarly-Situated Plaintiffs.

- A.** Congress already has provided a mechanism and safeguards for representative litigation—the class action device, which allows a court to provide relief to parties who are not before it. To permit universal injunctions in situations where a class action cannot be maintained would thwart the safeguards Congress built into federal class actions.

Arguments Against Universal Injunctions

1. Universal Injunctions Undermine Public Confidence In The Judicial System—

The wide availability of universal injunctions is an invitation to plaintiffs to forum shop and undermines public confidence in the judiciary. As Attorney General William Barr has recognized, blatant “forum shopping in litigation of high-profile, politically-sensitive cases designed to achieve

nationwide injunctions does lasting harm to the public’s confidence in the rule of law and the fairness and impartiality of the judiciary.”³² As nearly every one to look at universal injunctions has concluded, it is no coincidence that federal courts sitting in California enjoined policies from the Bush Administration, that courts sitting in Texas halted President Obama’s policies, and that judges from the “blue states” of Hawaii, Washington, and New York have enjoined many of Trump’s policies. Universal injunctions issued in high-profile, politically-sensitive cases by judges from red or blue states harm the reputation of an impartial judiciary. As Fifth Circuit Court of Appeals Judge Gregg Costa explains, the “forum shopping the [universal injunction] incentivizes on issues of substantial public importance feeds the growing perception that the courts are politicized.”³³



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³⁰ Bray, *supra* note 3 at 476.

³¹ See *id.*

³² Memorandum from Attorney General William Barr, at 6 (Sept 13, 2018), <https://www.justice.gov/opa/press-release/file/1093881/download>.

³³ 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/>.

Further, there are currently 1,000 active and senior district court judges, sitting across 94 judicial districts, and subject to review in 12 different regional courts of appeal.³⁴ Any one of those district court judges can put a national policy on ice. And because plaintiffs are not generally bound by an adverse judgment in a case in which they were not a party, there is an unending opportunity for plaintiffs to shop for a friendly judicial forum. In other words, plaintiffs have 94 shots at securing an injunction and can, as Professor Bray says, “[s]hop ‘til the statute drops.”³⁵ The government is in a far worse position, it can win in 93 judicial districts, but if it loses in the 94th, the statue can be enjoined as to all persons all across the country.

2. Universal Injunctions Are Inconsistent With Our Constitution—Universal injunctions are inconsistent with our Constitution because they exceed the Article III powers conferred on federal courts. The “judicial power”³⁶ is limited to “cases” and “controversies,”³⁷ meaning the particular claimant and case before the court.³⁸ As Professor Bray has noted, a federal court simply “has no constitutional basis to decide disputes and issue remedies for those who are not parties.”³⁹

Universal injunctions are inconsistent with Article III because they extend relief far beyond the parties to a case, to anyone located anywhere in the United States (and sometimes the world). They are flawed because they “direct how the defendant must act toward persons who are not parties to the case”⁴⁰ and turn standing principles on their head, awarding relief to nonparties, even those people who would not have had standing to sue.⁴¹

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3. Universal Injunctions Are Inconsistent With Centuries Of Equitable Practice—As Justice Story explained in 1832, equitable remedies are to be administered “according to the practice of courts of equity in [England].”⁴² Thus, suits in equity are tied to the

³⁴ *Department of Homeland Security v. New York*, 589 U. S. ____ (2020), slip op. at 3 (Gorsuch, J., concurring).

³⁵ Bray, *supra* note 3 at 460.

³⁶ U.S. Const. art. III, § 1.

³⁷ U.S. Const. art. III, § 2.

³⁸ Bray, *supra* note 3 at 470-472.

³⁹ Bray, *supra* note 3 at 471.

⁴⁰ *Department of Homeland Security v. New York*, 589 U. S. ____ (2020), slip op. at 3 (Gorsuch, J., concurring).

⁴¹ *Id.*

⁴² *Boyle v. Zacharie & Turner*, 6 Pet. 648, 658 (1832).

remedies “which had been devised and were being administered by the English Court of Chancery at the time of the separation of the two countries.”⁴³

In fact, the scope of equitable powers was a point of contention during the founding period. Anti-Federalists criticized the Constitution’s extension of the federal judicial power to “Case[s] in ... Equity.”⁴⁴ They worried that equity would vest the federal courts with discretionary power to interpret the Constitution according to its spirit, rather than its terms.⁴⁵ Alexander Hamilton responded by explaining the limited nature of equity: a court exercising equitable powers would be “bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.”⁴⁶ Thus, while the Constitution vests federal courts with the discretion to award an equitable remedy, they have never been permitted to expand a remedy beyond its traditionally defined scope.⁴⁷

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Universal injunctions were not part of the English system of equity and thus are absent from the jurisdictional grant made by the Judiciary Act of 1789,⁴⁸ and thus it is hardly surprising that for the first 150 years of our country, there is not a single instance of a federal court issuing a universal injunction.⁴⁹

Universal injunctions have experienced a meteoric rise as district court after district court has embraced its newfound power to provide a remedy to parties who have never appeared before the court. Because this newfound power is an equitable remedy, however, it must (but cannot) trace its roots to traditional equitable practice. As a result, universal injunctions were unheard of for the first century and a half of our country.

⁴³ *Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999).

⁴⁴ *Trump v. Hawaii*, 584 U.S. __ (2018) slip op. 4 (Thomas, J., concurring).

⁴⁵ *Id.*

⁴⁶ The Federalist No. 78, p. 471 (C. Rossiter ed. 1961).

⁴⁷ *Id.*

⁴⁸ Bray, *supra* note 3 at 427.

⁴⁹ For instance, courts issued more than 1,600 injunctions issued against the enforcement of the Agricultural Adjustment Act’s processing tax—but the government was still able to collect the tax from more than 71,000 taxpayers who had not challenged the tax in court. See Memorandum from Attorney General William Barr, at 3 (Sept 13, 2018), <https://www.justice.gov/opa/press-release/file/1093881/download> (citing Report of Attorney General Homer Cummings, Injunctions in Cases Involving Acts of Congress, Sen. Doc. No. 42, 75th Cong., 1st Sess., at 3 (Mar. 25, 1937)).

4. Universal Injunctions Short-Circuit Percolation Of A Legal Issue In The Lower Courts

—One of the benefits of our judicial system is that, by the time an ordinary case gets to the Supreme Court, a number of federal judges from across the country will have been able to weigh in with their best thinking on the legal issue. This dialogue among federal judges provides helpful information if and when the case makes its way to the Supreme Court. As Justice Ginsburg put it: “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.”⁵⁰ Universal injunctions are inconsistent with Congress’s expressed preference for percolation in the lower courts.

Universal injunctions short-circuit this process. The issuance of such an injunction—which routinely happens at a preliminary stage in a case, before any factual record has been developed—often prompts an expedited appeal to the circuit court, and often, an emergency petition of certiorari to the Supreme Court. As Professor Frost (who favors universal injunctions) explains, if “the first district court to address the constitutionality of a federal law issues a nationwide preliminary injunction barring that law from going into effect, it can force the Supreme Court to address the question without the benefit of additional viewpoints from other lower federal courts and without a fully developed factual record.”⁵¹

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What We Can Do

Universal Injunctions are constitutionally suspect and come with many costs. As a result,

- Justices Thomas and Gorsuch have urged the Supreme Court to address the issue squarely and to restore the judicial power to its appropriate limits.
- There have been a number of bills put forward in both the House and Senate that seek to restore the proper balance of power between the courts and the other branches of government by requiring that an injunction either be limited to the parties before it or to the judicial district in which the injunction is issued. Either limitation is a good start towards restoring the proper balance of power set out in our Constitution.

⁵⁰ *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

⁵¹ Frost, *supra* note 19 at 1108.

Conclusion

As Justice Thomas has noted, “universal injunctions are legally and historically dubious.”⁵² They also impose widely-recognized costs on the justice system, undermining principled decision-making and the legitimacy of the judiciary. Even more importantly, they have no basis in our Constitution or in traditional equitable remedies.

⁵² *Trump v. Hawaii*, 584 U.S. __ (2018) slip op. 10 (Thomas, J., concurring).