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## A Universal Problem: The Universal Injunction

Hayden D. Presley

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# A Universal Problem: The Universal Injunction

*Hayden D. Presley\**

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\* J.D./D.C.L. candidate 2021, Paul M. Hebert Law Center, Louisiana State University. I would like to thank everyone who contributed to this Comment. In particular, thanks go out to my parents and family for their unflagging enthusiasm concerning my endeavors, as well as to my advisor, Professor John M. Devlin, who was instrumental in channeling my thoughts for what would become the solution to my Comment. I would also like to thank Professor Raymond T. Diamond for volunteering to be my second reader; Professor Diamond, I was deeply flattered that you thought it worthwhile to reach out to me on this.

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## INTRODUCTION

“John Marshall has made his decision. Now let him enforce it.”<sup>1</sup> President Andrew Jackson, while embroiled in conflicts with the Cherokee Nation, is said to have uttered this quote in response to the Supreme Court’s 1832 decision in *Worcester v. Georgia*, where the Court held that state laws could not supersede Native American law on tribal lands.<sup>2</sup>

To this day, it is not certain whether Jackson ever truly uttered this quotation.<sup>3</sup> The statement nevertheless remains an excellent portrayal of the tension inherent between the executive and judiciary throughout this country’s history.

Since the Court’s decision in *Worcester*, this level of executive animosity towards Article III courts is rarely seen. Nevertheless, this tension still manifests itself, albeit in a very different manner.<sup>4</sup> Most recently, this tension is seen, for example, in the Trump Administration’s attempts to restrict immigration from certain countries.<sup>5</sup>

Shortly after taking office, President Donald Trump passed a series of executive orders restricting certain foreign nationals from traveling into

1. Arthur J. Sabin, *Why We Honor John Marshall—A Brief Retrospective*, 29 J. MARSHAL L. REV. 567, 571 (1996).

2. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 596 (1832).

3. Whether Jackson actually said this is sometimes questioned because the Court in *Worcester* never required the judiciary to “enforce” anything. The Court simply ruled the statute void and vacated the conviction. *Id.*

4. See, for example, the litigation involving President Trump’s “travel ban.” Whether the President intended any actual belligerence against the judiciary, which continued to invalidate his executive orders, or simply intended to find a scheme that was legal to implement his agenda, a reading of the latter judicial opinions concerning these orders suggests the courts were unhappy at being required to again consider these issues. See, e.g., *Hawaii v. Trump*, 878 F.3d 662, 672–73 (9th Cir. 2017) (“For the third time, we are called upon to assess the legality of the President’s efforts to bar over 150 million nationals of six designated countries from entering the United States or being issued immigrant visas . . .”).

5. For a prominent example of this litigation, see *Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1120 (D. Haw. 2017).

the country.<sup>6</sup> Though their issuance was controversial, the President defended these executive orders by asserting that they were designed to protect the national interest.<sup>7</sup> Various states and organizations continuously challenged the constitutionality of these executive orders, both in the Fourth and Ninth Circuits.<sup>8</sup> Opponents of this immigration policy first brought litigation in the Western District of Washington, where the court issued a preliminary injunction blocking the President's use of the first version of his travel ban.<sup>9</sup> On appeal to the United States Court of Appeals for the Ninth Circuit, the court refused the government's request to stay this injunction.<sup>10</sup> In an attempt to remove the defects that the trial court found in the first version, the President amended and re-promulgated the executive order and voluntarily dismissed any further appeals.<sup>11</sup> Nevertheless, on a challenge from the state of Hawaii, the United States Court for the District of Hawaii also enjoined and blocked the President's enforcement of the second version.<sup>12</sup> The Ninth Circuit took up appeal from this judgment and again refused to issue a stay.<sup>13</sup> Once more, the Trump Administration amended and re-promulgated the executive order in attempt to cure its defects, and once more the district of Hawaii enjoined its enforcement.<sup>14</sup> Again, the Ninth Circuit took up appeal of this case and,

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6. *Id.* The President's executive order would ban immigrants from six countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen—from entry in the United States for 90 days. See Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8977 (Jan. 27, 2017).

7. *Hawaii*, 241 F. Supp. 3d at 1120.

8. See *id.*; *Washington v. Trump*, C17-0141JLR, 2017 WL 462040, at \*3 (W.D. Wash. 2017); *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md. 2017); *State v. Trump*, 265 F. Supp. 3d 1140, 1160–61 (D. Haw. 2017).

9. *Trump*, 2017 WL 462040, at \*3.

10. *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017).

11. *Hawaii*, 241 F. Supp. 3d at 1122.

12. *Id.* at 1140. For an example of parallel litigation, see *Int'l Refugee Assistance Project*, 241 F. Supp. 3d at 566 (enjoining the enforcement of Section 2(c) of the second executive order).

13. *Hawaii v. Trump*, 878 F.3d 662, 789 (9th Cir. 2017). It is worth noting that the Ninth Circuit did limit the injunction insofar as it affected “inward-facing agency conduct.” *Id.* For the appeal of the previously mentioned parallel litigation, see *Int'l Refugee Assistance Project*, 857 F.3d at 606 (maintaining the district of Maryland's injunction except in regard to enjoining the President himself).

14. *State v. Trump*, 265 F. Supp. 3d 1140, 1160–61 (D. Haw. 2017).

for a third time, refused to grant a stay on the preliminary injunction.<sup>15</sup> This cycle, however, was not the end of the litigation.<sup>16</sup>

Soon after the Ninth Circuit reached its decision on the third version of the President's travel ban, the U.S. Supreme Court granted certiorari to review the findings of the Fourth and Ninth Circuit courts.<sup>17</sup> The Supreme Court, with Chief Justice Roberts writing for the majority, found that the state of Hawaii failed to meet its burden for overcoming the language in 5 U.S.C. § 1182(f), which gave broad discretion to the President for excluding illegal aliens.<sup>18</sup> Moreover, using rational basis review, Chief Justice Roberts concluded that the President had not violated the Establishment Clause of the First Amendment.<sup>19</sup>

The Court's majority opinion addressed the lower courts' rulings only on the merits and never addressed the nature of the district court's remedy.<sup>20</sup> Justice Thomas, motivated by this omission, filed a concurring opinion discussing the use of not only the temporary restraining order in this case, but universal injunctions in general.<sup>21</sup> Justice Thomas noted that "[d]istrict courts . . . have begun imposing universal injunctions without considering their authority to grant such sweeping relief."<sup>22</sup> Justice Thomas then went on to argue that there were several problems with universal injunctions.<sup>23</sup> In particular, they "prevent[] legal questions from percolating through the federal courts, encourag[e] forum shopping, and mak[e] every case a national emergency for the courts and for the Executive Branch."<sup>24</sup> The universal injunction represents the stiffest remedy a court can give for redress of executive malfeasance.<sup>25</sup> Such an

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15. *Hawaii*, 878 F.3d at 702. The court did limit the injunction to those immigrants "with a credible bona fide relationship with the United States." *Id.*

16. *See* *Trump v. Hawaii*, 138 S. Ct. 2392, 2403 (2018).

17. *Id.*

18. *Id.* at 2407.

19. *Id.* at 2420–23. For the Establishment Clause, see U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

20. *Trump*, 138 S. Ct. at 2423 (concluding that "[o]ur disposition of the case makes it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court").

21. *Id.* at 2424 (Thomas, J., concurring).

22. *Id.* at 2425 (Thomas, J., concurring).

23. *Id.* (Thomas, J., concurring).

24. *Id.* (Thomas, J., concurring).

25. For example, compare universal injunctions with declaratory judgments, which state only the rights present for a given plaintiff, or compensatory judgments, which award only monetary damages for malfeasance. Both of these remedies restrict themselves to only the parties before the court. For a declaratory judgment example, see *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 108

imposition and this remedy's ever-increasing popularity among federal courts have heightened the tension that exists between the executive and judiciary.<sup>26</sup> It has relocated questions of abuse of constitutional power from the executive, as per Andrew Jackson, to the federal judiciary.

Justice Thomas's findings on the appropriateness of the universal injunction as a remedy are hardly conclusive, nor has the Supreme Court since adopted them.<sup>27</sup> Nevertheless, these injunctions suffer from a number of defects, both of law and policy. Universal injunctions suffer from legal defects, in that they not only fail to comport with equity limits on Article III courts, but also impute false universality to judicial decisions and reach beyond the case or controversy at hand.<sup>28</sup> Universal injunctions are also bad policy, as they encourage forum shopping and over-reliance on ideology, reverse the precedent model used for judicial decision-making, and halt the percolation of questions of law through the courts.<sup>29</sup> Ultimately, courts should stop imposing universal injunctions and replace them with injunctions that apply only within the jurisdiction of the court which issued them.

Part I of this Comment will discuss the historical background for suing and enjoining the executive, as well as the genesis and proliferation of universal injunctions through the lower courts. Part II will argue that there are severe legal defects that should inhibit federal courts from imposing universal injunctions. Next, in Part III, this Comment will discuss the challenges that universal injunctions, even if legal, pose for the judiciary from a policy standpoint, including issues of forum shopping, percolation, and the precedent model of judicial decision-making. Part IV will explore and critique the most compelling arguments for the appropriateness of the universal injunction. Finally, Part V will discuss two alternatives to the universal injunction: (1) the most ideal approach, which mandates that injunctions apply only to plaintiffs in the case at hand, and (2) the more practical middle-ground approach, whereby courts might issue injunctions that apply only to their jurisdiction. Ultimately, this Comment will conclude that, although less congruent with the origins and history of the

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(D.D.C. 2008). For an example of compensatory damages for executive malfeasance, see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

26. See *infra* Section I.C.

27. When the Court has been presented with these injunctions, they have declined to consider the scope of the remedy and ruled merely on the merits of the case itself. See, e.g., *Trump*, 138 S. Ct. at 2423.

28. For the origin of the "cases and controversies" language, see U.S. CONST. art. III, § 2.

29. See *generally Trump*, 138 S. Ct. at 2424–25 (Thomas, J., concurring).

federal judiciary, the best and immediate solution to this problem is a rule that would restrict courts to issuing only jurisdiction-specific injunctions, with these injunctions being binding only upon a finding and notification that the issuing court had correctly laid jurisdiction and venue.

## I. TAKING ON THE GIANT: SUING AND ENJOINING THE EXECUTIVE

The emergence of the universal injunction as an equitable remedy represents a continuing evolution of the judiciary's approach to cases and controversies where the executive is a party.<sup>30</sup> Before exploring the genesis and propagation of these injunctions, it is necessary to discuss the extent to which the judiciary has broadened the relief it has granted over the years regarding suits against the executive.

### A. *Suing the Executive: The Original Understanding*

The validity of universal injunctions comprises two basic requirements. First, their validity turns on whether the executive is subject to suit or, as at common law, the executive can claim sovereign immunity.<sup>31</sup> Second, if the executive is subject to suit, universal injunctions also require that it is within the power of federal courts to enjoin the executive.<sup>32</sup>

#### 1. *The Right to Sue the Executive*

For the majority of its history, the United States has permitted suits against the executive.<sup>33</sup> The U.S. Supreme Court addressed the contours of the right to sue the executive in the 1882 case of *United States v. Lee*.<sup>34</sup> In *Lee*, the estate of General Robert E. Lee asked the Court to void an

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30. See generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 428 (2017).

31. The Framers of the Constitution debated the extent to which sovereign immunity, the notion that the king or government was exempted from suit, applied to the new constitutional republic. See *Alden v. Maine*, 527 U.S. 706, 764 (1999) (discussing the extent to which the government and the original colonies enjoyed sovereign immunity).

32. The lesser power to enjoin is a necessary precursor to the greater power to enjoin universally. It would be illogical for Article III courts to be denied the power to enjoin the executive's conduct with regard to only the parties in a case or controversy but to still allow them to enjoin conduct with respect to all similarly situated parties.

33. See generally *United States v. Lee*, 106 U.S. 196, 206 (1882).

34. *Id.*



ejection order that a Virginia state court issued on the U.S. government.<sup>35</sup> The U.S. attorney general, making a special appearance, asserted that even if the ejection were without error, the courts had no jurisdiction to hear the case because the United States could not be sued without consent.<sup>36</sup>

Writing for the majority, Justice Miller parsed the history of bringing lawsuits against the sovereign, going back to pre-founding Great Britain.<sup>37</sup> English common law deemed it absurd that the king would be amenable to suit without prior consent because, in essence, he would be sending a writ to himself to command his presence in his own court.<sup>38</sup> As the Court noted, however, this absurdity is absent from the United States because federal law recognized that process can be served on the attorney general and because it cannot be said that appearing in its own courts degrades the government's dignity.<sup>39</sup> The *Lee* Court noted that though other courts have commented on the rationale of providing immunity from suits directed at a supreme executive, no such "supreme executive" exists in the United States, thus bringing into question total sovereign immunity of the U.S. government.<sup>40</sup> The Court ultimately concluded that it need not reach the broader question of whether the United States as a whole possesses sovereign immunity because this dispute was not a suit against the United States but against officers of the United States.<sup>41</sup> The Court recited several cases involving similar disputes and ultimately held that maligned parties can correctly bring such suits.<sup>42</sup> Relying on its precedent in this area, as well as the judiciary's understanding of individual rights,<sup>43</sup> the Court held

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35. *Id.* at 197.

36. *Id.* at 204.

37. *Id.* at 205.

38. *Id.* at 206.

39. *Id.* The Court cited the case of *Chisholm v. Georgia* for the former proposition; for the latter, the Court noted that the government "is constantly appearing as a party in such courts, and submitting its rights as against the citizens to their judgment." *Id.*

40. *Id.* Citing the Supreme Court of Massachusetts, the Court referenced the various dangers of subjecting a supreme executive to repeated suits, namely the endangering of his ability to serve the public as sovereign. *Id.*

41. *Id.* at 210.

42. *See, e.g., id.* at 212–14 (quoting *Osborn v. U.S. Bank*, 22 U.S. (9 Wheat.) 738, 842–43, 846–47, 850–51 (1824)). In particular, Chief Justice Marshall in *Osborn* noted that though courts in chancery cannot usually bring an injunction against any parties not before it, it would be an injustice to not allow the substituting of agents because, failing this, the state could be above the law. *Osborn v. U.S. Bank*, 22 U.S. (9 Wheat.) 738, 842–43.

43. *See Lee*, 106 U.S. at 219–20. Citing Chief Justice John Marshall, as well as the Due Process and Takings Clauses of the Fifth Amendment, the Court

that, even if the United States as sovereign might be immune to suit, the same cannot be said of individual members of the executive branch.<sup>44</sup> This proposition of law remains an understood rationale for suits against individual officers in the executive.<sup>45</sup>

## 2. *The Right to an Injunction*

Throughout the 19th century, it was not uncommon for courts to enjoin the federal government from the enforcement of a statute.<sup>46</sup> In all cases, the injunctions blocked the executive's enforcement only with respect to the plaintiff before the court, rather than all possible plaintiffs.<sup>47</sup>

For example, in the matter of *Georgia v. Atkins*, the State of Georgia filed a bill of equity to enjoin the collection of certain money that the local United States tax collector claimed was owed to the United States.<sup>48</sup> The court, in construing the act, held that the term "corporation" did not include states, and thus issued the injunction against the collector that Georgia requested.<sup>49</sup> The court strictly limited its injunction to the State of Georgia and did not extend the injunctive relief sought.<sup>50</sup> Though the holding here has a logical connection to the collection of taxes against any state in the union under the same act, the court did not issue an injunction concerning other such tax collection in this manner.<sup>51</sup>

The level of restraint from the *Atkins* court in its imposition of the injunction extended far beyond the lower federal courts, with even the

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argued that, for those whose rights were violated, there were but two choices: they could resort to tribunals or they could resist, amounting to a crime. Further, in submitting to a tribunal for investigation, that tribunal necessarily obtains jurisdiction over the matter at hand. *Id.*

44. *Id.* at 219–21. The Court opined that "no man in this country. . . is above the law" and that "all the officers of the government . . . are creatures of the law and are bound to obey it." *Id.*

45. *See, e.g.,* *Cunningham v. Macon & Brunswick R. Co.*, 109 U.S. 446, 452 (1883); *Tindal v. Wesley*, 167 U.S. 167, 213 (1897); *Land v. Dollar*, 330 U.S. 731, 736–37 (1947); *Malone v. Bowdoin*, 369 U.S. 643, 645–46 (1962) (citing *Lee's* reasoning with approval numerous times in holding that suits against executive officers are possible).

46. *See, e.g.,* *Georgia v. Atkins*, 10 F. Cas. 241, 241 (Cir. Ct. N.D. Ga. 1866); *Scott v. Donald*, 165 U.S. 107, 112 (1897).

47. *See, e.g.,* *Atkins*, 10 F. Cas. at 241; *Scott*, 165 U.S. at 112.

48. *Atkins*, 10 F. Cas. at 241.

49. *Id.* at 243.

50. *See generally id.*

51. *See id.* In fact, the injunctive relief did not even attach to all dealings against the state of Georgia, but only to the collection of this specific tax. *Id.*

Supreme Court justifying this approach to injunctions against the executive.<sup>52</sup> In the matter of *Scott v. Donald*, the Supreme Court determined the extent to which the defendant, in seizing liquor subject to an unconstitutional statute, should be enjoined against the statute's enforcement.<sup>53</sup> The plaintiff asserted that this injunction should extend to the executive's restriction on liquor importation against any party based on this statute, on the grounds that such an injunction is the only adequate remedy and that it would save a multiplicity of suits.<sup>54</sup> Although the Court acknowledged that injunctive relief for the plaintiff against the executive officers was appropriate, it refused to enjoin the executive with respect to all similarly situated parties.<sup>55</sup> The Court rejected the argument that the plaintiff may, on his own, speak for the entire class of similarly situated persons.<sup>56</sup> The Court concluded that it is reasonable to presume that once executive officers are made aware of the unconstitutionality of a statute, they will voluntarily refrain from enforcing it.<sup>57</sup> Further, the Court opined that it would be unreasonable to hold officers of the executive in contempt for violating an injunction in a case in which they were not represented.<sup>58</sup> However, it would be little more than six decades before this limited understanding of injunctive relief would cease to hold sway over the federal judiciary.

### *B. The Universal Injunction: Genesis and the Changing Judicial Landscape*

Although the original understanding of the power to sue and enjoin executive officers remained constant for many years, federal judges shifted their stances on the use of injunctions midway through the 20th century.<sup>59</sup> This change in understanding revolutionized federal courts' understanding of limits on remedies against the executive and ultimately

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52. *Scott*, 165 U.S. at 112.

53. *Id.*

54. *Id.*

55. *Id.* at 115.

56. *Id.* at 116. Accepting the holdings of lower courts on this issue, the Court noted that few cases in equity can ever be said to affect only the party before it, and no lawyer would be willing to argue that an injunction involving all similarly situated parties would always be appropriate. *Cutting v. Gilbert*, 6 F. Cas. 1079, 1080 (Cir. Ct. S.D.N.Y. 1865).

57. *Scott*, 165 U.S. at 117.

58. *Id.*

59. *See, e.g., Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 521 (D.C. Cir. 1963); *Harlem Val. Transp. Ass'n v. Stafford*, 360 F. Supp. 1057, 1066 (S.D.N.Y. 1973).

culminated in the universal injunction becoming an equitable remedy that was regularly used.<sup>60</sup>

*1. A New Mode of Judicial Power: Stiffening Remedies against Executive Violations*

Universal injunctions represent a form of equitable relief that federal courts have only recently accepted.<sup>61</sup> The first mention of the universal injunction was in *Wirtz v. Baldor Electric Co.*, a 1963 D.C. Circuit case.<sup>62</sup> An administrative law demanded due process before wage fixing, and several members of the electric motor industry challenged the defects in this process.<sup>63</sup> The D.C. Circuit did not have sufficient information in the record to issue a ruling and remanded the case to the district court for further findings.<sup>64</sup>

This remand was far from the D.C. Circuit's final word on the matter. In its opinion, the D.C. Circuit included a section entitled "Scope of the Remedy," in which the court considered the proper relief owed to the *Wirtz* plaintiffs and the industry as a whole.<sup>65</sup> The plaintiffs argued that they filed suit on behalf of themselves and similarly situated parties, thus making it a class action.<sup>66</sup> The executive, however, argued that the case could not be a class action, as per the Federal Rules of Civil Procedure.<sup>67</sup> The D.C. Circuit did not truly dispense with the dispute, concluding that it need not resolve it, as it would be appropriate to enjoin the executive against all similarly situated parties regardless.<sup>68</sup>

The D.C. Circuit first noted that whenever the Supreme Court speaks, the executive should follow the Court's principle in cases of essentially similar character.<sup>69</sup> Additionally, when presented with similarly situated parties, lower courts usually give the same relief to all similarly situated

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60. *See infra* Section I.C.

61. *See* *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (noting that universal injunctions did not emerge until a century and a half after the founding).

62. *Wirtz*, 337 F.2d at 521.

63. *Id.* at 521–22.

64. *Id.* at 535.

65. *Id.* at 533–35.

66. *Id.* at 533.

67. *Id.*

68. *Id.*

69. *Id.* at 534 (arguing that "the principles announced by the court—at least if it is the Supreme Court which speaks—should be followed by the administrator in all cases of essentially similar character").

parties.<sup>70</sup> Further, the Court noted that if it granted the relief sought for only those plaintiffs who had standing to sue, they would have an unconscionable bargaining advantage over other firms in the industry.<sup>71</sup> The D.C. Circuit analogized its power over the executive to its power over Congress, noting that had Congress promulgated an unconstitutional statute, this statute would be unconstitutional not only toward the plaintiffs, but against all other parties.<sup>72</sup> The court concluded that “if one or more of the plaintiffs-appellees is or are found to have standing to sue, the District Court should enjoin the effectiveness of the Secretary [of Labor’s] determination with respect to the entire industry.”<sup>73</sup>

*Wirtz* represented the first of three cases, all in the 1960s and 1970s, to conceptualize the universal injunction.<sup>74</sup> In 1968, the Supreme Court, in *Flast v. Cohen*, contemplated whether an injunction barring federal expenditures to purchase textbooks for parochial schools was appropriate.<sup>75</sup> Writing for the majority, Chief Justice Warren noted that though the dispute involved only New York programs, the district court’s ruling would “cast sufficient doubt on similar programs elsewhere as to cause confusion approaching paralysis to surround the challenged statute.”<sup>76</sup> In 1973, in *Harlem Valley Transportation Ass’n v. Stafford*, the Southern District of New York concluded that the plaintiffs were sufficient to constitute a class of similarly situated parties and issued a preliminary injunction against certain violations of the National Environmental Policy Act.<sup>77</sup>

Although these cases laid a foundation for a change in the landscape of equitable remedies against the executive, courts did not immediately

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70. *Id.*

71. *Id.*

72. *Id.* The D.C. Circuit noted that a statute “would necessarily be regarded as unconstitutional as to all persons similarly situated, and not merely as to those who brought the suit attacking it.” *Id.*

73. *Id.* at 535.

74. See *Flast v. Cohen*, 392 U.S. 83, 89–90 (1968); *Harlem Val. Transp. Ass’n v. Stafford*, 360 F. Supp. 1057, 1066 (S.D.N.Y. 1973)

75. *Flast*, 392 U.S. at 85.

76. *Id.* at 89–90. This is not to say that the Court directly sanctioned the imposition of a universal injunction, as the *Flast* Court was only tasked with resolving an issue of standing. Nevertheless, this logic is directly applicable to such an imposition. If the district judge is sufficiently convinced that the narrow scope of such an injunction could lead to “paralysis” of the regulation, it might decide to enjoin the government against all such programs. *Id.*

77. *Harlem Val. Transp. Ass’n*, 360 F. Supp. at 1066.

begin utilizing universal injunctions with regularity.<sup>78</sup> One case in which such an injunction might have been appropriate was the Second Circuit's decision in *Campbell v. Secretary of Department of Health & Human Services*.<sup>79</sup> In this case, the Second Circuit examined regulations concerning the denial of disability benefits, and held that the secretary of the Department of Health and Human Services was required to provide a list of alternative jobs that fit the definition of "light work" as found in the relevant regulations.<sup>80</sup> Even though the Second Circuit never expressly struck down these regulations, in its opinion reversing the Second Circuit's findings, the Supreme Court noted that the Second Circuit's decision requiring the secretary to present such a list of jobs effectively rendered the guidelines useless.<sup>81</sup> However, ultimately the Second Circuit's decision did nothing more than establish future precedent.<sup>82</sup> Rather than enjoin the secretary's conduct with regard to other similarly situated parties, the court only established the principle that, when similarly situated parties might emerge, the secretary must provide them with the same list.<sup>83</sup>

It is worth noting that the Second Circuit never provided any explanation as to why it did not impose a universal injunction. An evaluation of the arguments that the *Wirtz* court used suggests that the Second Circuit would have been justified had it chosen to do so.<sup>84</sup> There may be two explanations for not imposing such an injunction. First, the Second Circuit would not be obliged to follow D.C. Circuit precedent: if it disagreed with the *Wirtz* court's reasoning, it could have simply ignored

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78. See, e.g., *Campbell v. Sec'y of Dept. of Health & Hum. Servs.*, 665 F.2d 48, 54 (2d Cir. 1981), *rev'd*, *Heckler v. Campbell*, 461 U.S. 458, 470 (1981).

79. *Id.*

80. *Id.*

81. *Heckler v. Campbell*, 461 U.S. 458, 465 (1981).

82. The notion of this decision as future precedent stems not from its actual application in any future case, since the Supreme Court reversed the Second Circuit before any such decision was forthcoming, but rather in the fact that courts in that circuit would have been required to follow the principles the court articulated.

83. *Id.* at 465. As the Supreme Court noted, the Second Circuit's decision rendered the regulations unenforceable, at least within that circuit. Logically, then, future applicants would have to be provided with the same list as was the plaintiff in this case. *Id.*

84. *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 534 (D.C. Cir. 1963) (discussing the scope of the remedy afforded to the plaintiffs and its reasons for its remedy). For example, it would be unlikely that courts would afford a similarly situated party different relief and not mandate that the secretary provide them the same lists.

it with no consequences.<sup>85</sup> Second, at the time, universal injunctions were still a new remedy, which had not yet proliferated through the federal courts.

## 2. “Universal” vs. “Nationwide” Injunctive Relief

Federal judges often erroneously call universal injunctions “national” or “nationwide” injunctions.<sup>86</sup> The critical difference between a nationwide injunction and a universal injunction concerns the scope of the issued injunction, namely, the “who” and “where” involved.<sup>87</sup> On the one hand, injunctions might be restricted by the “where,” or the geographic location in which the injunction has the force of law.<sup>88</sup> On the other hand, the “who” outlines the group of people for whom the government is mandated to enforce the judicial decree, compared to those for whom it is not.<sup>89</sup> The issuing of truly “national” injunctions is appropriate to protect a plaintiff from the executive’s enforcement of a defective law or regulation wherever he or she might go.<sup>90</sup> Universal injunctions are “universal” because they speak to the who, rather than where, in their scope.<sup>91</sup> Whereas a nationwide injunction is defined by its geography—the United States—universal injunctions apply to the entire universe of similarly situated parties, whether or not they are part of the litigation in which the injunction was issued.<sup>92</sup>

### C. From Conception to Explosion: The Proliferation of Universal Injunctions Through Lower Courts

The newly minted power of federal courts to enjoin the executive over not only the plaintiffs in a particular case, but also to all similarly situated

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85. As courts of appeals have noted, though opinions of sister circuits may have some import in reasoning, they are never binding precedent. *See, e.g.*, *United States v. Auginash*, 266 F.3d 781, 784 (8th Cir. 2001) (citing *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1971)); *Terry v. Tyson Farms, Inc.*, 704 F.3d 272, 278 (6th Cir. 2010); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987).

86. Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335, 349 (2018).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 350.

91. *Id.*

92. *Id.*

parties remained relatively dormant through the end of the 20th century. In recent years, however, the popularity of the universal injunction has exploded, with district courts more likely than ever to issue such injunctions.<sup>93</sup> Federal courts have issued universal injunctions against multiple administrations, including the Bush, Obama, and Trump Administrations.<sup>94</sup> These injunctions cover various kinds of litigation, and federal courts now use them as remedies in many areas in which the lawfulness of executive action is at controversy.<sup>95</sup>

### *1. The Bush Administration: Environmental Regulations*

In 1992, the Forest Service, an administrative agency, sought to overhaul its administrative appeal procedures, replacing them with a “predecision notice comment period.”<sup>96</sup> Earth Island Institute, a non-governmental organization (NGO), brought suit in the matter of *Earth Island Institute v. Pengilly* to challenge the validity of the Forest Service’s practice.<sup>97</sup> The plaintiffs, who were regular visitors to national forests in California, asserted that the regulations impeded them from challenging Forest Service projects.<sup>98</sup>

The district court first refuted the government’s contentions that the plaintiffs lacked standing to sue for an injunction and that this case did not present an issue that was ripe for review.<sup>99</sup> Dispensing with these asserted obstacles to litigation, as well as the correct standard of review, the district court next turned to the various assertions of malfeasance.<sup>100</sup> The court reviewed the merits of the asserted regulatory defects and held that several of the regulations that the Forest Service promulgated in 2003 fell outside

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93. See, e.g., *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 999 (E.D. Cal. 2005); *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015); *Washington v. Trump*, C17-0141JLR, 2017 WL 462040, at \*3 (W.D. Wash. 2017); *Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1122 (D. Haw. 2017); *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md. 2017).

94. See *infra* Sections I.C.1–3.

95. See, e.g., *Earth Island Inst.*, 376 F. Supp. 2d at 999; *Texas*, 86 F. Supp. 3d at 604; *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 846–47 (N.D. Cal. 2018).

96. *Earth Island Inst.*, 376 F. Supp. 2d at 999. Instead of the appeals process the agency previously used, this “predecision” period would subject new regulations to a notice-and-comment period. *Id.*

97. *Id.*

98. *Id.* at 1000.

99. *Id.* at 1001–02.

100. *Id.* at 1004.



of the agency's authority and severed the regulations.<sup>101</sup> On appeal, the Ninth Circuit bifurcated its analysis similarly to that of the lower court.<sup>102</sup> The court first asked whether the plaintiffs had standing to challenge the disputed regulations.<sup>103</sup> It then analyzed the correctness of the district court's conclusions concerning the ripeness of the litigation.<sup>104</sup>

Like the district court, the Ninth Circuit rejected the agency's argument that the plaintiffs suffered no cognizable injury in fact.<sup>105</sup> Noting the loss of the ability to appeal certain forest service projects, the court concluded that the plaintiffs can reasonably be said to lose certain recreational enjoyments they might otherwise have.<sup>106</sup> Because Congress contemplated public participation in the appeals process, and the agency denied said process, the court concluded that an injury was present.<sup>107</sup>

In addressing whether this issue was ripe for review, the Ninth Circuit outlined the Article III restriction on federal courts that created the ripeness doctrine.<sup>108</sup> Citing *Flast v. Cohen*, the court noted its restriction to hear only "cases and controversies," in particular those that stem only from facts present in the case.<sup>109</sup> Parsing the framework of jurisprudence concerning the ripeness doctrine, the court held that only those provisions that the agency used were severable and that all other provisions the district court severed were not ripe for dispute.<sup>110</sup> Finding both standing for the plaintiffs, as well as ripeness concerning certain regulations that the district court severed, the Ninth Circuit affirmed the supposed nationwide injunction as to those regulations.<sup>111</sup> Finally, it denied the government's request to limit the scope of the injunction to the Eastern District of California, instead continuing to apply it nationwide.<sup>112</sup> Though both courts referred to the injunction as "nationwide," the actual end result was a universal injunction that prohibited the Forest Service from enforcing the regulations that the Eastern District had severed.<sup>113</sup>

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101. *Id.* at 1011.

102. *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 690 (9th Cir. 2009).

103. *Id.* at 693–94.

104. *Id.* at 695.

105. *Id.* at 693.

106. *Id.*

107. *Id.*

108. *Id.* at 694.

109. *Id.*

110. *Id.* at 696.

111. *Id.* at 699.

112. *Id.*

113. *See generally* *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 1011 (E.D. Cal. 2005).

## 2. The Obama Administration: Immigration and Resettlement

During President Obama's second term in office, the Department of Homeland Security (DHS) sought to implement a program named the "Deferred Action for Parents of Americans and Lawful Permanent Residents" (DAPA).<sup>114</sup> DAPA's stated purpose was to legalize those members of the "shadow population" that the government simply had no resources to deport.<sup>115</sup> Twenty-six states brought suit in the matter of *Texas v. United States*, seeking an injunction to prohibit DAPA's implementation on the theory that DHS's regulation violated the Take Care Clause of the Constitution.<sup>116</sup>

The Southern District began its analysis by reviewing grounds for standing.<sup>117</sup> The Southern District relied on Article III standing,<sup>118</sup> "prudential" standing,<sup>119</sup> and standing under the Administrative Procedure Act (APA) when it found that the states involved had standing to sue.<sup>120</sup> After finding standing for the states, the court noted that the states met the four factors that are appropriate for the imposition of a preliminary injunction: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the states will suffer if no injunction is imposed; (3) that the threatened injury outweighs the harm the injunction might cause the defendants; and (4) that the injunction will not disserve the public interest.<sup>121</sup> The court then imposed the injunction on the grounds that the secretary passed DAPA without meeting the APA enumerated requirements.<sup>122</sup> On appeal, the Fifth Circuit agreed in full with the district court's analysis and affirmed its judgment.<sup>123</sup> Later, on petition of certiorari, an equally divided Supreme Court affirmed the Fifth Circuit's

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114. *Texas v. United States*, 86 F. Supp. 3d 591, 604 (S.D. Tex. 2015).

115. *Id.*

116. *Id.* at 607.

117. *Id.* at 614.

118. *Id.* at 607.

119. *Id.* at 614.

120. *Id.* at 615.

121. *Id.* at 646.

122. *Id.* at 677. For the requirements imposed for passing new rules under the APA, referred to as "notice and comment" rulemaking, see 5 U.S.C. § 553(b) ("General notice of proposed rule making shall be published in the Federal Register . . ."), and *id.* § 553(c) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.").

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

holding.<sup>124</sup> As with the *Earth Island* case, the end result of litigation was a universal injunction that blocked the Obama Administration from enforcement of an administrative program.<sup>125</sup>

### 3. *The Trump Administration: Asylum*

In November of 2018, the Trump Administration undertook two asylum-related actions that became the subject of national controversy.<sup>126</sup> In particular, the Department of Justice, in combination with the DHS, added a restriction that categorically barred the entry of aliens who violated certain presidential proclamations.<sup>127</sup> Coinciding with this regulation, President Trump issued an executive order suspending the entry of aliens through the border of Mexico, excepting those who entered through a port of entry.<sup>128</sup> These two executive orders became the subject of litigation in *East Bay Sanctuary Covenant v. Trump*.<sup>129</sup>

In *East Bay*, the Northern District of California found standing for East Bay Sanctuary Covenant—an NGO—through their assertion that the executive’s actions frustrated the goal of their mission, as established through Ninth Circuit precedent.<sup>130</sup> Further, the court evaluated the same four-factor test for the temporary restraining order (TRO).<sup>131</sup> Concluding that the four-factor test was amply satisfied, the court imposed the TRO, blocking the Trump Administration’s two regulations governing asylum-seekers.<sup>132</sup>

On appeal, the Ninth Circuit refused to lift the TRO against the Trump Administration.<sup>133</sup> The court concluded, as did the district court, that the regulations likely violated provisions in the United States Code that set

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

125. *See Texas*, 86 F. Supp. 3d at 677–78 (enjoining the implementation of DAPA).

126. *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 846–47 (N.D. Cal. 2018).

127. *Id.* (citing *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (Nov. 9, 2018)).

128. *Id.* at 847.

129. *Id.*

130. *Id.* at 868.

131. *Id.* at 854; *see also Texas v. United States*, 86 F. Supp. 3d 591, 646 (S.D. Tex. 2015) (laying out the factors for a temporary restraining order).

132. *E. Bay Sanctuary Covenant*, 349 F. Supp. 3d at 868.

133. *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742 (9th Cir. 2018).

guidelines for executive action concerning asylum-seekers.<sup>134</sup> As a result, the district court's injunction was appropriate.<sup>135</sup> Noting that equitable relief may "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," the Ninth Circuit nevertheless found that the scope of the injunction was appropriate because of a need for uniformity in immigration policy.<sup>136</sup> Furthermore, the court concluded that there was no tangible reason for a reduction of the scope of the injunction.<sup>137</sup> Additionally, the court noted that the government raised no grounds on which to distinguish circuit precedent and failed to explain how the district court could have crafted a narrower remedy that would have provided complete relief to the organizations.<sup>138</sup>

These three cases represent only a small sample of the injunctions that federal courts have issued.<sup>139</sup> However, they illustrate the basic shift among federal judges from plaintiff-specific to universal injunctions.<sup>140</sup> Moreover, they show a definitive trend within Article III courts. Regardless of the claimed executive violation, federal judges are now far more likely to grant a universal injunction than in years past.<sup>141</sup>

## II. LEGAL DEFECTS IN UNIVERSAL INJUNCTIONS

The various legal defects of universal injunctions can be divided into several categories. First, these injunctions conflict with the equitable principles established in the U.S. Constitution as being powers of Article III tribunals.<sup>142</sup> Second, these injunctions comport with the false doctrine of judicial universality, which is the notion that judicial decisions are

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134. *Id.* at 754; *see also* 8 U.S.C. § 1182 (providing for classes of inadmissible aliens).

135. *E. Bay Sanctuary Covenant*, 932 F.3d at 754.

136. *Id.* at 779 (quoting *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994)).

137. *Id.*

138. *Id.*

139. *See* Bray, *supra* note 30, at 457–59 (discussing numerous universal injunctions issued against the Bush, Obama, and Trump Administrations).

140. *See generally supra* Sections I.C.1–3.

141. Compare the extent of the remedies in these cases with the Second Circuit's *Campbell* decision, where the court stopped short of any injunctive relief beyond the case. *See supra* Section I.B.1.

142. *See* U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases . . . in Equity, arising under this Constitution, the laws of the United States, and Treaties made . . .").

somehow self-executing on non-parties to the litigation.<sup>143</sup> Finally, these injunctions contradict long-settled judicial principles of ripeness.<sup>144</sup>

### A. *The Inequity of Universal Injunctions*

As with all powers vested in the federal government, the root of the powers of federal courts lies in the U.S. Constitution.<sup>145</sup> In particular, the Constitution allows Article III courts to hear all cases “in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”<sup>146</sup> The universal injunction, as a form of injunctive relief, finds its place in the set of remedies administered under Article III courts’ equity jurisdiction.<sup>147</sup> As with any power vested in the courts—or in any governmental department—such relief must find its root in either statute or the Constitution, and there exists no such statute concerning universal injunctions.<sup>148</sup> The necessary inquiry, then, is whether such equitable relief falls within the bounds of federal courts’ ability to fashion remedies as contemplated in the Constitution. This inquiry requires a discussion of the history of equity in England and how the framers of the Constitution applied it to Article III tribunals.

#### 1. *The Contours of Equity*

Common law courts were divided into two categories: law courts and the Court of Chancery, with the chancellor presiding over the latter.<sup>149</sup> The Court of Chancery, as well as U.S. courts sitting in equity, exercised the rigidity of strict legal rules.<sup>150</sup> In essence, equity courts are capable of dispensing individualized justice when the relief necessarily requires the adaptation of circumstances to an individual case.<sup>151</sup> In medieval England, it was the chancellor who oversaw the dispensing of this “individual

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143. Though accepted by many courts as correct, some commentators have alleged that judicial universality is an invalid extension of judicial power. *See infra* Section II.B.1.

144. *See generally* National Orgs. for Marriage, Inc. v. Walsh, 714 F.3d 682, 687 (2d Cir. 2013).

145. U.S. CONST. art. III.

146. *Id.* art. III, § 2, cl. 1.

147. Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring).

148. *Id.*

149. Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 610 (1997).

150. *Id.* at 609.

151. *Id.*

justice.”<sup>152</sup> The King of England appointed the chancellors, who were often bishops or clergymen of the church.<sup>153</sup> As such, the chancellors were not versed in the rigors of common law but would, instead, create their own body of rules and remedies.<sup>154</sup> These remedies would, in effect, trump the rulings of the law courts.<sup>155</sup>

Given the evolving contours of medieval English common law, the creation of the Court of Chancery was a necessity.<sup>156</sup> The law courts of England derived power from the King; for parties wishing to avail themselves of the law courts, a writ could be purchased through the chancellor.<sup>157</sup> As new types of disputes arose, the chancellor created new writs to meet these new claims.<sup>158</sup> This practice was deeply unpopular with the lords because the issuing of new writs broadened the scope of national power at the expense of local power.<sup>159</sup> As a result of the English nobility’s dissatisfaction with the system, the King prohibited the chancellor from issuing new writs without the King’s express permission.<sup>160</sup>

Through the process of issuing writs and the subsequent ossification of the law, courts of equity arose.<sup>161</sup> Over time, the commercialization of England made it impossible for writs to keep up with new developments.<sup>162</sup> There arose a practice that, should no writ provide the relief sought, the plaintiffs could petition the chancellor, as an agent of the King, to dispense justice through the King’s own good will.<sup>163</sup> Though highly criticized in the beginning, since the chancellor would often do little more than consider appeals on matters of conscience,<sup>164</sup> the chancellor nevertheless eventually became a judicial officer, and the Court of Chancery became the formal organ for dispensing equity.<sup>165</sup>

Though divorced from the rigors of the common law in some respects, equity courts were always required to exercise certain discretion when

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152. *Id.* at 610.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 611.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *See id.* at 613. Perhaps the most colorful deriding of the chancellor’s dispensation of equity was that his conscience “varied with the length of his foot.” *See id.*

165. *Id.* at 612.

hearing cases.<sup>166</sup> Even in England, equity courts did not tolerate petitioners appealing only to conscience, and courts of equity required some legal citation or some reference that equitable remedies of this nature had been used in the past.<sup>167</sup> As such, the discretion of judges sitting in equity was not unbridled, but was required to rest on either a statute granting permission for the relief sought or clear precedent establishing the right to the requested relief.<sup>168</sup>

## 2. *Equity at the Time of the Founding*

By the time of America's founding, English courts of equity underwent significant evolutions, transforming from bodies that dispensed justice only through the conscience of the chancellor to rigorous and procedurally driven tribunals, not unlike the law courts.<sup>169</sup> Though critics contended otherwise in 18th-century England, courts of equity could not replace written positive law with their own judgments.<sup>170</sup> The discretion of courts of equity did extend beyond the letter of the law but only when strict adherence to the letter led to a law being too general, specific, or defective.<sup>171</sup> Indeed, the duty of both courts of law and of equity was to use similar methods of legal interpretation.<sup>172</sup>

In addition, the courts of equity in England were not free from precedent, though such was also claimed at the time.<sup>173</sup> Similar to English courts of law, courts of equity were bound with precedents from which they did not, in general, depart.<sup>174</sup> Such authority was important because, in its absence, courts of equity could become arbitrary legislatures, rather than courts.<sup>175</sup> This operation of courts of equity marked a substantial change from the days of their genesis, when chancellors dispensed remedies that were more correctly considered awards and, as such, did not conflate themselves with notions of precedent.<sup>176</sup> By the 18th century, the only true differences in the administration of justice in the two types of

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166. *Id.* at 613.

167. *Id.*

168. *Id.* at 614.

169. *See generally* 3 WILLIAM BLACKSTONE, COMMENTARIES Ch. 27.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

courts were the modes of proof, trial, and relief available in each.<sup>177</sup> In fact, the procedures and practices in courts of equity were so well established that they became a “regular science,” through which a petitioner might know the remedy to which he or she was entitled and the mode of suit he or she might use to gain it.<sup>178</sup> These principles served as the basis of the grant of equity powers to Article III courts.<sup>179</sup>

### 3. *Restrictions on Article III Courts*

The framers of the U.S. Constitution envisioned a specific and limited grant of powers to Article III tribunals.<sup>180</sup> Article III courts were to be the weakest of the three branches of government, possessing neither force nor will, but only judgment.<sup>181</sup> The limited scope of authority of Article III courts came to the fore in the debate between the Federalists and Anti-Federalists concerning the grant of Article III courts to hear cases arising in equity.<sup>182</sup> The Anti-Federalists alleged that the discretion so afforded to judges would allow them to explain the Constitution according to its reasoning spirit, as opposed to confining their interpretations to its letter.<sup>183</sup> The Federalists underscored the limited nature of equity.<sup>184</sup> They noted that the judiciary would be “bound down by strict rules and precedents, which serve to define and point out [judges’] duty in every particular case that comes before them.”<sup>185</sup> They further noted that the dispensations of equitable remedies were limited because the principles by which they were administered were reduced to a regular system.<sup>186</sup> These assertions

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177. *Id.*

178. *Id.*

179. *See* *Guaranty Trust Co. v. York*, 326 U.S. 99, 105 (1945). If Blackstone’s understanding of the powers and limits of equity was correct in 1789, then they would have been transplanted into Article III courts’ powers of equity. *See generally id.*

180. *See generally* THE FEDERALIST NOS. 78–83 (Alexander Hamilton); *see also* U.S. CONST. art. III.

181. THE FEDERALIST NO. 78 (Alexander Hamilton). Hamilton notes, in his justification for insulating Article III judges from the political process afforded to elected officials, that the judiciary “truly [may] be said to have neither force nor will.” *Id.*

182. *See* *Trump v. Hawaii*, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring).

183. *Id.*

184. THE FEDERALIST NO. 79 (Alexander Hamilton).

185. THE FEDERALIST NO. 78 (Alexander Hamilton).

186. *See* THE FEDERALIST NO. 83 (Alexander Hamilton); *see also supra* Section II.A.2.



regarding the limits of Article III courts served as the basis upon which the Framers constructed the original understanding of the judiciary.<sup>187</sup>

The Supreme Court has recognized the restriction on the use of equity since the founding of America.<sup>188</sup> The Court reads statutes that give general grants of equitable authority as constrained by the body of law transplanted from the English Court of Chancery in 1789.<sup>189</sup> Moreover, the Court recently noted that broad statutory grants of equitable authority do not give the judiciary broad leeway to fashion new remedies in equity, but rather only give federal courts “an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.”<sup>190</sup> Therefore, when evaluating the validity of the universal injunction, it is necessary to discern whether it conflicts with this understanding of the discretion required in the administration of equitable remedies.

#### *4. Universal Injunctions: Outside the Bounds of Equity*

No general statute authorizing the impositions of universal injunctions exists, meaning that the Constitution must vest Article III courts with this power.<sup>191</sup> As a result, the most apt analytical method to determine whether such relief exists within the limits of Article III is best undertaken by ascertaining whether the principles of equity would allow for the imposition of universal injunctions.<sup>192</sup>

##### *a. The Notion of Citation*

The imposition of universal injunctions violates the principle that remedies in equity, like remedies in law, must find their root in precedent.<sup>193</sup> Therefore, for a federal court to issue universal injunctions,

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187. See generally *Guaranty Trust Co. v. York*, 326 U.S. 99, 105 (1945); *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 309, 318 (1999).

188. See *Guaranty Trust Co.*, 326 U.S. at 105; *Grupo Mexicano de Desarrollo S.A.*, 527 U.S. at 318.

189. *Guaranty Trust Co.*, 326 U.S. at 105.

190. *Grupo Mexicano de Desarrollo S.A.*, 527 U.S. at 318 (quoting *Atlas Life Ins. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)).

191. See *supra* Section II.A.

192. See *supra* Sections II.A.1–3.

193. See *supra* Section II.A.1.

a sufficiently analogous grant of equitable power has to have existed in English courts before the founding, and no such precedent exists.<sup>194</sup>

There was no precedent in England to enjoining the crown—which represented the executive—with respect to the interpretation of statutes.<sup>195</sup> The closest analog in English law to modern-day universal injunctions was the “bill of peace,” in which a party might be subject to suit from a group of parties.<sup>196</sup> Even when the Court of Chancery issued bills of peace, the resulting injunction was considered valid only to the parties involved in the case and was never considered to extend to the entire world.<sup>197</sup> Given that this is the equitable remedy most analogous to the universal injunction as it exists today, any assertion that this represents a justification for universal injunctions is tenuous. Such a conclusion is further buttressed when considering the manner in which 19th-century courts approached this question.<sup>198</sup> Rather than seeing their role as extending injunctive relief to nonparties, the courts explicitly repudiated this practice, finding it at odds with equitable principles and precedents.<sup>199</sup> As a result, there is no basis in equity, as established in Article III, for the imposition of universal injunctions.

*b. Constitutional Restrictions on Remedies in Equity*

The Framers of the Constitution created a system of checks and balances that bind the judiciary to strict precedents governing its conduct.<sup>200</sup> Therefore, it would be peculiar to conclude that such a system of precedent would allow for a remedy that had no true root in equitable remedies as they were understood. Any conclusion that the most analogous remedy to universal injunctions that existed in English equity—the bill of peace—contemplates such an extension of power is dubious because it would fundamentally alter the “strict precedents” by which the courts were

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194. See generally Bray, *supra* note 30, at 425–27.

195. See *id.*

196. See *id.*

197. *Id.*

198. As discussed above, those courts that were confronted with dispensing injunctive relief either failed to extend it beyond the parties to the case or rejected requests to so extend it. See *supra* Section I.A.2.

199. See, e.g., *Scott v. Donald*, 165 U.S. 107, 117 (1897) (“[W]e do not think it comports with well-settled principles of equity procedure to include [executive officers] in an injunction in a suit in which they were not heard or represented . . .”).

200. See *supra* Section II.A.3.

to be “bound down.”<sup>201</sup> Given the Supreme Court’s conclusion that the extent of general grants of equity includes only those remedies contemplated by the English Court of Chancery,<sup>202</sup> universal injunctions are a dubious extension of the equitable power of federal courts.<sup>203</sup>

*c. “Neither Force Nor Will . . .”*<sup>204</sup>

Considering that the dispensation of universal injunctions cuts against any equitable precedents established in England,<sup>205</sup> and that the powers vested in Article III courts do not contemplate their imposition,<sup>206</sup> the only manner in which they might be valid is if the courts have the power to fashion new remedies. This notion is in conflict with the manifest restriction that courts have “neither force nor will” but only judgment.<sup>207</sup> Reaching beyond vested powers to create new ones—extending the remedies that Article III courts are entitled to dispense—must be either an act of will or force, or even both.<sup>208</sup> The power of judgment does not itself vest the ability to create wholly new powers.<sup>209</sup> This ability can only be found in the ability to legislate or to execute the laws.<sup>210</sup> Therefore, the creation and imposition of new remedies—in particular, the universal

201. *See supra* Section II.A.4.a.

202. *Guaranty Trust Co. v. York*, 326 U.S. 99, 105 (1945).

203. *See supra* Section II.A.3.

204. THE FEDERALIST NO. 78 (Alexander Hamilton).

205. *See supra* Section II.A.4.a.

206. *See supra* Section II.A.4.b.

207. THE FEDERALIST NO. 78 (Alexander Hamilton).

208. Article I of the Constitution provides for a Congress that shall make laws, while Article II provides for an executive who will take care that Congress’s laws will be faithfully executed. Creating an otherwise unauthorized remedy is analogous to first making a law—using the “will” of the legislature—and then enforcing this law—the force given to the executive to execute laws. *See generally* U.S. CONST. arts. I, II.

209. Though the Federalist Papers do not speak in terms of “new powers,” this conclusion is unavoidable if the terms “force,” “will,” and “judgment” are to retain their meanings. If creating a new power required only that the courts “judge” that they had a power they did not previously have, then it becomes difficult to distinguish force and will—the products of the executive and legislature—from the judgment of the courts.

210. It is the exclusive purview of Congress to legislate, U.S. CONST. art. I, §1, and the power of the executive, as vested in a president of the United States, to enforce the laws, *id.* art. II, § 1. The act of legislating—lawmaking—is to “will” into existence new laws that did not previously exist; the act of carrying out—or executing the laws—requires the “force” to do so.

injunction—represents a violation of the separation of powers that are written into the Constitution.<sup>211</sup>

### *B. Judicial Universality*

Inherently, universal injunctions impute a power to the courts that some commentators have named “judicial universality.”<sup>212</sup> Judicial universality is defined as the ability of a court to consider its judgments applicable not only to the parties present in a given case, but other similarly situated parties, both present and future.<sup>213</sup> Under this theory, the judgment of a court becomes self-executing for all similarly situated parties.<sup>214</sup> The concept of judicial universality is a recent innovation of the Supreme Court and is also antithetical to the constitutionally granted powers of Article III courts.<sup>215</sup>

#### *1. Origins of Judicial Universality*

The notion of judicial universality originates in the Supreme Court’s decision in *Cooper v. Aaron*.<sup>216</sup> The dispute in *Cooper* involved the Little Rock School System, which claimed it need not obey the Court’s decision in *Brown v. Board of Education*.<sup>217</sup> In rejecting the school’s argument, the Court in *Cooper* asserted that, per *Marbury v. Madison*, its interpretation of the Fourteenth Amendment in *Brown* was the supreme law of the land, and Article VI of the Constitution mandated that this interpretation of the Constitution was binding on all states.<sup>218</sup> The *Cooper* Court never acknowledged judicial universality with specificity.<sup>219</sup> As Justice Breyer noted, however, the implications of the Court’s decision in *Cooper* mandated that judicial universality existed.<sup>220</sup> Under judicial universality,

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211. See generally THE FEDERALIST NO. 78 (Alexander Hamilton).

212. See generally Josh Blackman, *The Irrepressible Myth of Cooper v. Aaron*, 137 GEO. L. J. 1135, 1137 (2019).

213. *Id.*

214. *Id.*

215. See *id.*

216. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

217. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (announcing that the doctrine of “separate but equal” as applied to public education is violative of the Equal Protection Clause of the Fourteenth Amendment).

218. *Cooper*, 358 U.S. at 18.

219. Blackman, *supra* note 212, at 1139.

220. *Id.* (“[T]he Court in *Cooper* . . . actually decided that the Constitution obligated other governmental institutions to follow the Court’s interpretations, not

nonparties to a case do not follow the case's precedent merely out of a fear of future litigation.<sup>221</sup> Instead, the judgments of the Supreme Court are self-executing against these individuals.<sup>222</sup> Judges and some scholars have justified this principle, arguing that it stems from the desire to avoid a "cacophonous Constitution," replacing it with one in which an authoritative voice describes the manner in which the Constitution should be interpreted.<sup>223</sup>

## 2. *The Judicial Fallacy of Judicial Universality*

The notion of judicial universality is in conflict with any historical understanding of the limits of Article III courts.<sup>224</sup> The understood role of courts before *Cooper* was that it was the courts' job to settle disputes between parties that came before them.<sup>225</sup> Furthermore, courts could not mandate that non-parties to a case had to follow mere principles articulated by the Court, particularly when the court can—and does—overturn itself.<sup>226</sup> The general premise was that, if a person wished similar treatment to persons granted relief by the Court, those persons must either be party to the suit or file their own suit requesting the same relief.<sup>227</sup>

Furthermore, the Supreme Court itself has shied away from assertions of judicial universality in the decades since its decision in *Cooper*.<sup>228</sup> *Cooper's* coinciding assertion of judicial supremacy—the notion that the Supreme Court, when it speaks, is uttering the supreme law of the land—remains a basic principle through which the Court has operated.<sup>229</sup> This stands in sharp contrast to the treatment the Court has given judicial universality in the years since.<sup>230</sup> Though *Cooper* represented the first of a number of important civil rights cases before the Court, the doctrine of judicial universality nevertheless has not found much favor with the

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just in the particular case announcing those interpretations, but in *similar cases as well.*")

221. *Id.* at 1156.

222. *Id.*

223. *Id.*

224. *Id.* at 1158.

225. *Id.* at 1157.

226. *Id.* at 1158.

227. *Id.*

228. *Id.* at 1192–93.

229. *Id.* at 1193.

230. *Id.* at 1194. Commentators have argued that the Court's refusal to reaffirm its validity even in the face of a logical extension of this doctrine speaks to the shaky ground on which it rests. *Id.*

Justices since *Cooper*.<sup>231</sup> This refusal to assert the universality of Supreme Court decisions, coupled with the lack of historical precedent for this doctrine, suggests that judicial universality is an inappropriate extension of judicial power.

### 3. *Extending Judicial Universality to Encompass Universal Injunctions*

Though the dispute concerning judicial universality is primarily restricted to the Supreme Court, judicial universality is easily analogized to include the actions of lower courts. Like the Court in *Cooper*, lower courts impose injunctions that they deem self-executing against parties similarly situated but who are not included in the litigation.<sup>232</sup> Just as with the Supreme Court, however, the role of the lower courts is to afford relief to the litigants before it.<sup>233</sup> Certainly, the reasons given for judgment will establish district or circuit precedent, but those persons who would avail themselves of this interpretation of law need to present their cases before the court.<sup>234</sup> A failure to file suit means that the court has not passed judgment on their case or controversy.<sup>235</sup> If court judgments cannot be self-executing, then a judgment for a plaintiff will never suffice to afford automatic injunctive relief to nonparties.<sup>236</sup> Given that universal injunctions—by their very nature—impute this power, they necessarily fall within the false universal power of the judiciary.

### C. *Ripeness*

Ripeness is also an obstacle to the imposition of universal injunctions. A given dispute is only ripe for judicial review when it is a constitutionally defined case or controversy.<sup>237</sup> Even if a given dispute may be “ripe” for judicial review, it is a violation of the ripeness principles to extend these

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231. *Id.*

232. *See, e.g.*, *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 1011 (E.D. Cal. 2005); *Texas v. United States*, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015); *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md. 2017). These and other district courts, though presented with a finite group of plaintiffs, nevertheless found it appropriate to extend injunctive relief to all similarly situated parties. *Id.*

233. *See generally* Blackman, *supra* note 212, at 1158.

234. *See generally id.*

235. *See generally id.*

236. *See supra* Section II.B.2.

237. *Flast v. Cohen*, 392 U.S. 83, 96 (1968).

holdings to encompass nonparties.<sup>238</sup> Thus, a federal court's imposition of a universal injunction creates a separate dispute that will never be a "case or controversy" and therefore can never be ripe.

### 1. *A Brief Overview of Ripeness*

Whether an issue is ripe for judicial review hinges on the Constitution's restriction on federal courts to hear only cases and controversies.<sup>239</sup> This restriction means that courts are forbidden from deciding abstract or hypothetical controversies and from giving merely advisory opinions.<sup>240</sup> The Supreme Court noted that Article III courts have "neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.'"<sup>241</sup> Rather than issuing advisory opinions, Article III courts must restrict their judgments to resolving a "real and substantial controversy" that results in a decree concerning a specific set of facts.<sup>242</sup> This restriction bars courts from deciding what relief might be afforded if given a hypothetical set of facts.<sup>243</sup>

### 2. *Universal Injunctions Are Never "Ripe"*

Based on the Supreme Court's guidelines concerning ripeness, it is difficult to square the universal injunction as an adequate remedy with this doctrine. The Court has asserted that the cases-and-controversies requirement inherently means that courts should refrain from deciding issues that do not affect the litigants before them.<sup>244</sup> The imposition of a universal injunction necessarily makes such a decision.<sup>245</sup>

For the vast majority of cases in which universal injunctions are the remedy, the ripeness analysis can be broken down into two questions. The first question the court must answer is whether the conduct of the

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238. See *infra* Section II.C.2.

239. See *Flast*, 398 U.S. at 94.

240. *Id.* at 96.

241. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)).

242. *Id.*

243. *Id.*

244. *Id.*

245. The substance of any universal injunction will certainly grant relief to the parties before the court. The unique feature of universally applicable injunctive relief is its ability to affect parties not before the court. As a result, it is correct to say that universal injunctions do not affect only the litigants in a given case or controversy. See *Wasserman*, *supra* note 86.

executive toward the plaintiff represents a violation of that plaintiff's rights under statute or the Constitution.<sup>246</sup> The second necessary inquiry is whether said conduct merits enjoining the executive to all other similarly situated parties.<sup>247</sup> The answer to the first question will depend solely on the facts of the case at hand: if the executive's conduct or a passed regulation created a harm, then the case is certainly ripe.<sup>248</sup>

The second question, however, seems to present a less nuanced line of discussion. None of the "similarly situated parties" are before the court, and none of them have seen fit to file suit. This seems to represent a wholly separate issue from the first question, itself possibly representing a "case or controversy."<sup>249</sup> In the case of the second inquiry, however, given that these similarly situated parties were not brought before the court, any holding concerning them is correctly considered merely advisory.<sup>250</sup> This characteristic of these opinions concerning relief puts them squarely outside of any accepted principle of ripeness.

Universal injunctions are vulnerable to criticism on a number of legal grounds. They involve the creation of a new equitable remedy, a power which the Constitution does not authorize; they create self-executing judgments, which also fall outside of the constitutional powers of Article

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246. *See, e.g.,* *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 999 (E.D. Cal. 2005). As the court notes, the original suit specifically concerned the Burnt Ridge Project Timber Sale instituted by the Forest Service.

247. *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (noting that the duty of the judiciary is "ascertaining and declaring the law applicable to the controversy" and "the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right"). The Supreme Court has implicitly recognized this part of the analysis as separate and has noted that injunctive relief can only apply where a justiciable issue exists, but not simply where there is an illegal law. *Id.*

248. Requiring that an issue be ripe is designed to keep the court from rendering merely advisory opinions and to restrict it to only cases and controversies. U.S. CONST. art. III, § 2. If a concrete set of facts is before a court, it is necessarily not rendering an advisory opinion if a harm is alleged. *Id.*

249. *See generally Mellon*, 262 U.S. at 488. As the *Mellon* Court noted, such a "case or controversy" would remain only a question of public policy rather than a justiciable issue.

250. The Supreme Court has defined advisory opinions as those that concern a hypothetical set of facts not before the court. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). However, the only set of facts the court can possibly know to be actual are the facts of the parties before it. Therefore, any alleged harm occurring to non-parties can only be considered as hypothetical, particularly for those who have yet to be injured by the defective rule or statute. *See generally id.*



III courts; and they necessarily cause courts to provide advisory opinions, thus violating the Constitution's cases-or-controversies limitation.

### III. UNIVERSAL INJUNCTIONS: A BAD POLICY

Universal injunctions, beyond their legal defects, suffer from several difficulties in light of traditional policy considerations surrounding the judiciary and the manner in which it fulfills its constitutional responsibilities. Though not binding on Article III tribunals, these considerations have functioned to channel the judiciary's operations throughout the history of the country and should not be offended lightly. In particular, universal injunctions encourage forum shopping that is deleterious to the functioning and legitimacy of federal courts, overturn the precedent model, and halt percolation of complex legal issues through the courts.<sup>251</sup>

#### *A. Incentivizing Forum Shopping*

The universal injunction affects many persons who are not parties to a given suit, and this aspect of universal injunctions creates an incentive for plaintiffs to forum shop.<sup>252</sup> Though doubtless an appealing proposition for advocates, the U.S. system of justice is still tasked with reaching its own conclusions surrounding the effects of forum shopping.

##### *1. "Shop 'Til the Statute Drops"*<sup>253</sup>

With the rise in popularity of universal injunctions, plaintiffs now routinely seek out courts which might enjoin certain presidential administrations from carrying out their selected policies.<sup>254</sup> During the Bush Administration, plaintiffs turned to Ninth Circuit courts—particularly those in California—to seek universal injunctions, which

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251. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring); *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (Gorsuch, J., concurring).

252. *EMC Corp. v. Parallel Iron, LLC*, 914 F. Supp. 2d 125, 128 (D. Mass. 2012). Forum shopping occurs when plaintiffs select a forum that has little factual relevance to their actions. In the context of universal injunctions, plaintiffs might forum shop if, for example, they are convinced a certain court is more probable to grant relief than another. *Id.*

253. *Bray*, *supra* note 30, at 460.

254. See, e.g., *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 1011 (E.D. Cal. 2005); *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015); *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 868 (N.D. Cal. 2018).

blocked issues such as proposed forest regulations.<sup>255</sup> During the Obama Administration, the focus switched to courts in Texas, which enjoined policies such as the following: the President's DAPA program,<sup>256</sup> a department regulation known as the "persuader rule,"<sup>257</sup> issues concerning the statutory use of the word "sex,"<sup>258</sup> and the enforcement of a Department of Labor regulation that would have given overtime pay to many workers.<sup>259</sup> Once President Trump took office in 2017, the focus switched back to less conservative circuits, such as the Fourth, Seventh, and Ninth, where courts enjoined the Administration from implementing its proposed "travel ban,"<sup>260</sup> policies governing so-called "sanctuary cities,"<sup>261</sup> and cease-and-desist immigration proceedings.<sup>262</sup> Plaintiffs brought these proceedings in courts with ideologies that favored the imposition of the injunction.<sup>263</sup> Moreover, in many of the proceedings, it is almost impossible to argue that jurisdiction could not have been found in other states.<sup>264</sup>

## 2. *Why Not Forum Shop?*

Forum shopping is a useful practice for any advocate seeking the most favorable relief for his client.<sup>265</sup> However, the considerations of individual advocates do not answer the question of whether the justice system as a whole should be concerned about the effects of the practice.

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255. See, e.g., *Earth Island Inst.*, 376 F. Supp. 2d at 999.

256. *Texas*, 86 F. Supp. 3d at 604.

257. *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-cv-00066-C, 2016 WL 3766121, at \*46 (N.D. Tex. 2016).

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

259. *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 533–34 (E.D. Tex. 2016).

260. *Washington v. Trump*, No. C17-014JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017); *Hawaii v. Trump*, F265 F. Supp. 3d 1140, 1160 (D. Haw. 2017); *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570 (D. Md. Oct. 17, 2017).

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

262. *Nw. Immigr. Rts. Project v. Sessions*, No. C17-716RAJ, 2017 WL 3189032, at \*6–7 (W.D. Wash. July 27, 2017).

263. *Bray*, *supra* note 30, at 460.

264. See, e.g., *Texas v. United States*, 86 F. Supp. 3d 591, 604 (S.D. Tex. 2015); see also *Bray*, *supra* note 30, at 460 (arguing that "[t]he forum selection happens not only for the district court, but also for the appellate court").

265. See A. Benjamin Spencer, *The Territorial Reach of Federal Courts*, 71 FLA. L. REV. 979, 1013 (2019). At least one commentator has noted, "There is nothing inherently suspect about forum shopping." *Id.*

Those who forum shop for the benefit of obtaining specific remedies prevent other more appropriate courts from hearing their case on the theory that those courts might be less likely to grant them the relief requested.<sup>266</sup> For example, though 26 states were involved in the DAPA dispute, Texas was selected as a forum, likely because of the conservative tendencies of the Fifth Circuit.<sup>267</sup> Today, federal courts often find themselves under fire for ruling based on ideologies rather than on the law. Commentators have described the Supreme Court as everything from “liberal” during the Warren years,<sup>268</sup> to “conservative” during the Rehnquist and Roberts years.<sup>269</sup> If one court is unlikely to grant sweeping relief that another would, it becomes more likely that such rulings are made out of an ideological decision.<sup>270</sup> Encouraging judges to bring their ideologies to the forefront is inappropriate in the face of obtaining actual justice.<sup>271</sup> Forum shopping itself would not be eliminated with the ban of universal injunctions. In cases that involve universal injunctions, however, because of the limited relief that would be granted, the harm is not nearly so deleterious. The effects of percolation will, at least in theory, tend to defeat ideologically driven precedent.<sup>272</sup> Forum shopping will cut off this process before it can occur if the court into which the litigation was forum-shopped can enjoin the executive with regard to all similarly situated parties.

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266. Predominantly conservative circuits might be less willing to set aside—or give broad relief concerning—activities of conservative presidents. Likewise, more liberal circuits and courts may act similarly with respect to more liberal administrations.

267. See generally Bray, *supra* note 30, at 459–60.

268. See, e.g., Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 65–66 (1998).

269. See, e.g., Christopher E. Smith & Thomas R. Hensley, *Decision-Making Trends of the Rehnquist Court Era: Civil Rights and Liberties Cases*, 89 JUDICATURE 161, 162 (2005).

270. See Belknap, *supra* note 268. If, for example, it is true that Justices on the Warren Court sometimes wrote whole opinions without any eye to the Constitution, any ruling or relief they granted could easily have stemmed from ideological preferences rather than from a correct application of the law. See *id.*

271. See Kennedy, *supra* note 149, at 614. Even when courts of equity were permitted to go beyond the written law, it was these very appeals to conscience and personal ideologies that were harshly criticized and ultimately disallowed in equity courts. See *id.*

272. See *infra* Section III.B.

## *B. Universal Injunctions and the Absence of Percolation*

Universal injunctions vastly limit the ability of disputes challenging executive action from percolating through the federal courts.<sup>273</sup> Percolation is an important vessel through which constitutional interpretation is concluded at the Supreme Court; thus, federal courts should preserve this process whenever possible.

### *1. Percolation in the U.S. Judicial System*

The hierarchical design of the federal courts facilitates percolation.<sup>274</sup> As questions of statutory and constitutional interpretation are brought in differing district courts, courts give differing conclusions and reasons for those conclusions.<sup>275</sup> These interpretations are further refined or clarified through the appellate process.<sup>276</sup> Assuming the Supreme Court ultimately grants certiorari to resolve a dispute, the Court will have the ability to view several alternatives concerning the correct resolution for the dispute and can synthesize the best answer.<sup>277</sup>

Percolation allows the synthesis of diverse opinions on complex statutory and constitutional disputes.<sup>278</sup> Through the percolation process, federal courts can benefit from the wide diversity of backgrounds and skills among judges.<sup>279</sup> Moreover, percolation creates the ability for lower courts to respond to other decisions and thus further refine the analysis concerning difficult constitutional and statutory issues.<sup>280</sup> Whenever judges sitting on different courts converge on a single argument, much less doubt arises concerning the correctness of these judicial conclusions.<sup>281</sup>

Percolation serves a particularly crucial purpose in constitutional disputes because, unlike statutory disputes, Congress cannot simply step in to correct the Supreme Court's decision if they find it erroneous.<sup>282</sup>

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273. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring).

274. See generally Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U.L. REV. 457, 481 (2012).

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 482–83.

279. *Id.*

280. *Id.* at 483.

281. *Id.*

282. *Id.*

Whenever Congress may find a court's interpretation of a statute to be at odds with its legislative intent, it can draft around—and thus supersede—the interpretation in question.<sup>283</sup> Such a process does not exist regarding constitutional decisions.<sup>284</sup> Moreover, given that the process of amending the Constitution is extremely difficult and resource-intensive,<sup>285</sup> the Supreme Court is in the best position to rule on difficult questions of interpretation when it has been provided with the most thought on them.<sup>286</sup> These considerations make percolation an indispensable process for well-informed judicial decision-making.

## 2. *Universal Injunctions: A Stagnation of the Percolation Process*

The imposition of universal injunctions severely impacts this percolation process in two ways. First, the Supreme Court is presented with only one interpretation of the law when it takes up a question of constitutionality. If other courts give deference to the court issuing the injunction,<sup>287</sup> they will not themselves embark on any examination of the reasons for such an injunction; thus, the Court will be presented with no competing opinions for consideration. Second, because such injunctions invariably freeze further litigation on other fact patterns implicated by the decision, the Supreme Court's consideration of the disputed law's validity is necessarily restricted to a single fact pattern.<sup>288</sup> This stagnation prevents the Court from making well-reasoned and informed decisions about the most correct interpretation of the Constitution or statute.

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283. See U.S. CONST. art. V. If Congress disagrees with the interpretation of a particular statute, they can clarify the statute by redrafting it to incorporate their intent. The Constitution, however, is not subject to redrafting in this way. *Id.*

284. See *id.*

285. *Id.* To amend the Constitution, two-thirds of both houses of Congress must propose the amendment, or two-thirds of the state legislatures must call for a convention of states. For an amendment to be ratified, three-fourths of the legislatures of the states must agree on it or, if it is a convention of states, three-fourths of the states must agree. *Id.*

286. Gewirtzman, *supra* note 274, at 483; see also U.S. CONST. art. V.

287. Without a court of differing territorial jurisdiction deferring to universal injunctions, they would be of no real value as they, by definition, subject the executive to injunctive relief against all parties who are similarly situated.

288. In cases where universal injunctions were issued, the only set of facts that the Court can consider is the one which ultimately led to the universal injunction.

### C. Overturning the Precedent Model

For the majority of the history of Article III courts, the precedent model has also served a crucial role in well-reasoned rulings on the proper interpretations of statutes and the Constitution.<sup>289</sup> As with percolation, universal injunctions severely inhibit this process because the injunctions allow lower courts to supersede the Supreme Court as the tribunal through which nationally binding precedent is set.

#### 1. Background and Constitutional Basis

The precedent model and its importance in judicial decision-making originate from how common law courts generally reach conclusions of law. Through this model, lower courts identify relevant legal authority, and then apply it to the facts at hand to reach a decision.<sup>290</sup> In practice, this approach means that lower courts will use Supreme Court decisions as their primary authority and then apply methods of common law interpretation to fit them to the case at hand.<sup>291</sup> This model envisions lower judges as “infantry carrying out the marching orders of generals who sit on the court of last resort.”<sup>292</sup>

The rationale for this approach to judicial decision-making stems from the text of the Constitution.<sup>293</sup> The Constitution vests judicial power in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>294</sup> The Constitution further clarifies the nature of those courts that can exist outside of the Supreme Court.<sup>295</sup> Article I gives Congress explicit power to create tribunals “inferior to the [S]upreme Court.”<sup>296</sup> This approach creates what scholars have described as a “principal-agent” relationship among the courts, with the Supreme Court—the principal—at the top of the judicial hierarchy, as the only court that the Constitution created.<sup>297</sup> Within this framework, the Supreme

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289. See Gewirtzman, *supra* note 274, at 465.

290. *Id.*

291. *Id.*

292. Sanford Levinson, *On Positivism and Potted Plants: “Inferior” Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 848 (1993).

293. Gewirtzman, *supra* note 274, at 467.

294. U.S. CONST. art. III, § 1.

295. *Id.* art. I, § 8, cl. 9.

296. *Id.*

297. Gewirtzman, *supra* note 274, at 467.

Court—the principal—is the director of the manner in which the lower courts—its agents—perform certain tasks and reach certain outcomes.<sup>298</sup>

## *2. Universal Injunctions and the End of the Principal-Agent Relationship*

Whereas courts may have been beholden to the Supreme Court in years past for binding precedents nationwide, universal injunctions, if followed by other courts, replace this precedent model with a precedent model guided by lower courts that does not comport with the “inferior” nature of lower courts.<sup>299</sup> Whereas the Supreme Court in past cases would be the tribunal in which nationally binding decisions were made, the imposition of universal injunctions necessarily relocates this power to lower courts.<sup>300</sup> This does not suggest that the Supreme Court should be allowed to issue universal injunctions. Such a dispute is immaterial to this discussion because this Comment does not seek to overturn the well-established rule that Supreme Court precedents are binding on lower courts.<sup>301</sup> If the Court reaches a conclusion on a question of statutory interpretation, even if such a judgment cannot be self-executing on nonparties, as future cases arise, lower courts will be bound to follow these precedents.

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298. *Id.*

299. The Constitution references this inferiority in two provisions. *See* U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”); *id.* art. I., § 8, cl. 9 (“The Congress shall have the Power . . . [t]o constitute Tribunals inferior to the supreme Court.”).

300. It is important to note that this discussion does not suggest that other lower courts would not be found to enforce injunctive relief against specific parties. Rather, what is questioned is the validity of one district or circuit court imposing an injunction which must be followed when other courts hear new cases concerning the same disputed statute or regulation.

301. *See* C. Steven Bradford, *Following Dead Precedent: The Supreme Court’s Ill-Advised Rejection of Anticipatory Overruling*, 59 *FORDHAM L. REV.* 39, 83 (1990) (“A lower court clearly violates its duty of allegiance to the Supreme Court when . . . it rejects a precedent that the Supreme Court has not questioned.”).

#### IV. COULD UNIVERSAL INJUNCTIONS EVER BE APPROPRIATE?

In their imposition of these injunctions, lower courts have routinely provided justifications for their use.<sup>302</sup> Some of these justifications provide compelling insights into the rationale behind imposing universal injunctions. In particular, courts have found authority to issue universal injunctions through analogies with their powers of judicial review over acts of Congress, through their search for uniform policies, and through their conclusion that no narrower remedy exists to provide relief to the plaintiffs.

##### *A. Following Precedent in Cases “of Essentially Similar Character”*

In its 1963 *Wirtz* decision, the D.C. Circuit was a pioneer in advocating for the imposition of universal injunctions.<sup>303</sup> One argument the D.C. Circuit used in *Wirtz* to justify its universal injunction tracked the reasoning used in *Cooper v. Aaron*.<sup>304</sup> The D.C. Circuit noted that “the principles announced by the court—at least if it is the Supreme Court which speaks—should be followed by the administrator in all cases of essentially similar character.”<sup>305</sup> Further, the court noted that when lower courts are presented with similar causes of action, they will tend to provide the same relief to any individual who brings such a cause of action against the administrator.<sup>306</sup>

The logic of the first claim the D.C. Circuit made in *Wirtz*—that the administrator should always follow Supreme Court precedent—is likely based on *Cooper v. Aaron* and its assertion of judicial universality.<sup>307</sup> Moreover, even in the absence of judicial universality, it is undoubtedly prudent for the executive to follow Supreme Court precedent once it is set.<sup>308</sup> Should the executive fail to do so, any district court is likely to find

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302. See, e.g., *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 534–38 (D.C. Cir. 1963); *State v. Trump*, 265 F. Supp. 3d 1140, 1160 (D. Haw. 2017).

303. For a discussion of the *Wirtz* decision and its significance, see *supra* Section I.B.1.

304. *Wirtz*, 337 F.2d at 535.

305. *Id.*

306. *Id.*

307. This principle echoes the notion of judicial universality that the Court first announced in *Cooper*. *Cooper v. Aaron*, 358 U.S. 1 (1958)

308. This executive prudence has represented the backdrop against which courts have issued opinions on the constitutionality of laws and acts since America’s founding. See, e.g., *Scott v. Donald*, 165 U.S. 107, 117 (1897).



in favor of a plaintiff whom the court finds injured as a result of the same defective statute or regulation.

The *Wirtz* court's analysis is lacking, however, on how this applies to lower courts. Indeed, lower courts are likely to grant the same relief to all individuals with a similar cause of action.<sup>309</sup> However, this approach to decision-making rejects the imposition of a universal injunction. If lower courts are left to give similar relief to causes of action with essentially similar character, then no court has enjoined the executive from taking this action. Had a court imposed such an injunction, there would remain no reason for the court to act beyond ordering the executive to obey the previous judicial decree.<sup>310</sup> Moreover, a different court may, in viewing the same fact pattern, conclude differently as to the merits of a question of law.<sup>311</sup> If this is true, it is prudent to allow courts to reach their own conclusions on questions of law and to not handcuff courts with extraterritorial universal injunctions.<sup>312</sup>

### *B. Analogies to Judicial Review over Acts of Congress*

The most compelling case that the *Wirtz* court made regarding the appropriateness of universally enjoining the executive relates to the manner in which courts interpret congressional statutes.<sup>313</sup> The court analogized the regulation in controversy to a congressional statute, noting that had Congress passed such a statute, and had that congressional statute been held unconstitutional, then “there is no doubt that it would necessarily be regarded as unconstitutional as to all persons similarly situated, and not merely as to those who brought the suit attacking it.”<sup>314</sup> Any federal court—certainly the Supreme Court, if not inferior courts—can, if suit is correctly brought, declare an act of Congress

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309. *Wirtz*, 337 F.2d at 535.

310. *See* Wasserman, *supra* note 86, at 350. The nature of the federal judiciary is that injunctions that one court imposes can be brought by the party who is benefited to any other court to order that it be followed. *Id.*

311. *See supra* Section III.A.

312. *See supra* Section III.C.1. This distinction is important because, if a higher court speaks concerning the correct interpretation of a statute or regulation, then the precedent model dictates that the lower court follow this decision.

313. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 178 (1803) (“If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.”).

314. *Wirtz*, 337 F.2d at 534.

unconstitutional.<sup>315</sup> Whether this power is found in Article III tribunals depends upon the extent of the power of judicial review and how this power is applied to universal injunctions.

*1. The Power of Judicial Review: Writ of Erasure, or Constitutional Supremacy?*

The Court's landmark decision in *Marbury v. Madison* established the principle of judicial review.<sup>316</sup> However, the manner in which this "duty of the judicial department,"<sup>317</sup> is to be expounded may not be as obvious. Writing for the court, Chief Justice Marshall noted that when there existed a conflict between a statute and the Constitution, then Article III courts are bound to decide the case on the Constitution, rather than on the constitutionally-defective statute.<sup>318</sup> Understood in this light, the power of judicial review requires courts to decide all cases with an eye to the Constitution before any statute is considered.<sup>319</sup> This power does not vest Article III courts with the equivalent of a veto pen, whereby they can remove defective statutes or regulations from the books.<sup>320</sup> Thus, the Supreme Court, and lower courts alike, when presented with such a statute, should simply refuse to enforce it.<sup>321</sup> In this way, judicial review provides

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315. See, e.g., *Marbury*, 5 U.S. (1 Cranch.) at 180 (finding that "the particular phraseology of the constitution of the United States confirms and strengthens the principle . . . that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument").

316. See *id.*

317. *Id.* at 177.

318. *Id.* at 178.

319. *Id.*

320. See *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) ("[The power of the judiciary] amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right."); *Perez v. Ledesma*, 401 U.S. 82, 124 (1971) (Brennan, J., concurring in part and dissenting in part) ("Of course, a favorable declaratory judgment . . . cannot make even an unconstitutional statute disappear."); *Wisness v. Yocom*, 433 F.3d 727, 728 (10th Cir. 2006) ("There is no procedure in American law for courts or other agencies of government—other than the legislature itself—to purge from the statute books, laws that conflict with the Constitution as interpreted by the courts.").

321. The history of the judiciary's power over statutes as opposed to the Constitution shows that there were genuine disputes over how much power should be vested in Article III tribunals. Some delegates favored *Marbury*-style judicial review; others did favor an executive-style veto over such statutes. Ultimately, although several influential framers pushed for such a power, it was rejected. See

for constitutional supremacy, whereby the Constitution is the primary source of law in federal court and must always supersede when a statute or action of the government is constitutionally defective.

## 2. *Universal Injunctions and Constitutional Supremacy*

The D.C. Circuit's analogy to the powers that Article III tribunals have over legislation is a wholly inadequate justification for universal injunctions.<sup>322</sup> Should a court find any action of the executive defective when applied to a governing statute or, ultimately, to the Constitution, courts have the power to refuse to enforce it.<sup>323</sup> This approach does not suggest the validity of universal injunctions, which by their nature purport to apply as a kind of veto to the statute or regulation.<sup>324</sup> Rather, this process follows the more typical precedent model, wherein a decision that finds an act or regulation constitutionally void is simply applied to each individual case or controversy that the court may hear in the future.<sup>325</sup> This approach to judicial review comes with the advantage of allowing a court to overturn previous findings of unconstitutionality if it feels the need to do so without concerning itself with the scope of injunctive relief it needs to use beyond the case at hand.

### C. *Promoting Uniform Policy*

Universal injunctions can serve the important function of promoting uniform policy.<sup>326</sup> Many areas of the government, particularly in the administrative field, are best served by a single, uniform rule or policy, so

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Jonathon L. F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 954–59 (2018).

322. See *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 534 (D.C. Cir. 1963).

323. See *Marbury*, 5 U.S. (1 Cranch.) at 178 (1803).

324. Courts have admitted as much in their imposition of universal injunctions. See, e.g., *Wirtz*, 337 F.2d at 534. There the court argued that the language of the APA, 5 U.S.C. § 553, required the court to hold unlawful and set aside agency actions found to be invalid. The D.C. Circuit clearly viewed “setting aside” agency action as striking down the regulation itself, not just the controversy before the court. In that way, the universal injunction contemplated amounted to a kind of veto of the regulation.

325. See *supra* Section III.C.

326. This “uniform policy” consideration was a core justification for both the *Wirtz* and *East Bay Sanctuary Covenant* courts. For the D.C. Circuit, the consideration was against providing bargaining advantages to the plaintiffs; for the Ninth Circuit, it was a uniform immigration policy. *Wirtz*, 337 F.2d at 534; *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018).

that parties similarly situated do not find themselves treated differently in different circumstances.<sup>327</sup> For example, when the *Wirtz* court acknowledged that a universal injunction might be warranted, it noted that failing to enjoin the executive with respect to the entire electric motors industry could give an “unconscionable bargaining advantage” over its competitors.<sup>328</sup> Such considerations of uniform policy are hardly restricted to use in the electric motor industry. In imposing universal injunctions concerning immigration policy, courts have routinely argued that one important focus of the executive must be a uniform immigration policy.<sup>329</sup>

However, courts are prohibited from involving themselves in questions of policy when such questions are unnecessary to address.<sup>330</sup> Lower courts may find that certain parts of statutes or regulations are violative of controlling legal authority, such as the Constitution or a governing statute for an administrative agency.<sup>331</sup> However, this decision should extend only so far as to involve the case disputed. Questions of policy are questions reserved to either the legislature or the executive.<sup>332</sup> Should the Supreme Court deem the law too harmful to policy concerns, it can establish nationally binding precedent to this end.<sup>333</sup>

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327. See, e.g., *Wirtz*, 337 F.2d at 534. It is logical to believe that a company that is not burdened with regulations fixing its wages will have a bargaining advantage compared with those that do.

328. *Id.*

329. See, e.g., *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015) (noting the Constitution’s requirements for uniform naturalization and that Congress’s instruction that the immigration laws of the United States should be uniformly enforced); *Regents of the Univ. of Cal. v. U.S. Dept. of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018) (citing *Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017)) (noting the need for a uniform immigration policy).

330. See generally *Baker v. Carr*, 369 U.S. 186, 210 (1962). The “political questions” to which Justice Brennan refers are essentially questions of policy, in particular policy decisions in which the courts should refuse to intervene because of separation of powers.

331. This power is a logical extension of the power of the judicial department to “say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177–78 (1803).

332. The Supreme Court refers to this non-delegation of power to Article III as a “political question.” Political questions are by their nature nonjusticiable, meaning that federal courts have no ability to question or reverse them. See *Baker*, 369 U.S. at 209.

333. Such is readily contemplated by the precedent model of judicial decision making. Lower courts, as the “agents” of the Supreme Court, would be bound to follow the Court’s precedents. See Gewirtzman, *supra* note 274, at 467.

*D. No Other Remedy?*

In some cases, universal injunctive relief is the only viable remedy.<sup>334</sup> Consider, for instance, the case of *East Bay Sanctuary Covenant v. Trump*.<sup>335</sup> The reasoning the Ninth Circuit articulated is justifiable.<sup>336</sup> The plaintiffs were not the asylum seekers themselves, and thus there was truly no manner in which relief could be granted without enjoining the executive with respect to all asylum seekers.<sup>337</sup> The nature of an injunction tailored to only an NGO would certainly be complicated. One possibility might be that asylum seekers would fall under the purview of the injunction only if the NGO represented them, but this would be a strange approach to equitable relief. Under this approach, a party is subject to an injunction brought by another party when they become represented by that other party but not otherwise. In other words, the executive is compelled to follow a different law based not on the status of an asylum seeker but rather on who represents that asylum seeker. Under this hypothetical injunction, a party's relief would not truly be based on whether their rights were violated but on whether they were represented by East Bay Sanctuary Covenant. Given that the court's decision is based not on the representation of the person, but on the defective nature of the law, this injunction would be inconsistent with the court's reasons for judgment.<sup>338</sup>

The issue is not that courts need to invent new forms of equitable relief to satisfy different perceptions of their role; rather, courts should be cautious of extending their power when such an extension mandates such judicial inventions. For example, the Ninth Circuit only found standing for the NGO in *East Bay Sanctuary Covenant* by applying what is known as "organizational standing."<sup>339</sup> Organizational standing, courts have held, can be established if the defendant's practices have impaired the

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334. See, e.g., *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 868 (N.D. Cal. 2018).

335. *Id.*

336. *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018).

337. *East Bay Sanctuary Covenant*, as an NGO that represents and advocates for asylum-seekers, is not itself seeking asylum. See *E. Bay Sanctuary Covenant*, 349 F. Supp. 3d at 868.

338. See *E. Bay Sanctuary Covenant*, 932 F.3d at 769–79.

339. See *id.* at 765. Even before the Ninth Circuit established its own parameters, in *Sierra Club v. Morton* the Supreme Court tacitly suggested that organizations might be able to bring suit, though such a suit required "special interest" in the subject before the court. *Sierra Club v. Morton*, 406 U.S. 727, 739–40 (1972).

organization in providing the services they were formed to provide.<sup>340</sup> The Ninth Circuit used its own precedent to conclude that an organization can satisfy this test by a showing that the organization, because of a challenged policy, needed to expend resources in ways that they would otherwise not need to expend.<sup>341</sup>

The difficulty with broad standing requirements that grant organizations the right to sue on behalf of their members is that it hinges on a remedy that is dubious at best.<sup>342</sup> As in *East Bay Sanctuary Covenant*, where the NGO was itself demanding relief, the universal injunction would be the only remedy that could grant full redress of the alleged injury.<sup>343</sup> In its 1992 decision *Lujan v. Defenders of Wildlife*, the Supreme Court articulated the “irreducible constitutional minimum” of Article III standing: (1) the plaintiff must have suffered an injury in fact; (2) the injury must be fairly traceable to the defendant’s actions; and (3) it must be likely that the injury will be redressed by a favorable decision of the court.<sup>344</sup> Where a universal injunction is the only manner of relief, it becomes difficult to argue that it is likely that a court can redress the alleged injury because, as discussed previously, universal injunctions have several legal and policy defects that should disqualify them as a proper remedy.<sup>345</sup> In this way, the third element of *Lujan* standing could never be satisfied where the court must impose a universal injunction.<sup>346</sup>

This admonition against inventing new doctrines of standing does not mean that courts can—or should be—blind to the need to flesh out the requirements for standing or any other equally opaque doctrine of law. However, courts should exercise caution in this extension of judicial power. Where the Supreme Court has articulated constitutional minima that conflict with the new doctrine, that doctrine cannot be a valid extension of judicial power.<sup>347</sup> Where the remedy a court must impose—

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340. *E. Bay Sanctuary Covenant*, 932 F.3d at 765.

341. *Id.*

342. In this case, the Ninth Circuit demanded a universal injunction because, by its own admission, there was no narrower remedy which would be adequate. *Id.* at 779–80.

343. *See id.*

344. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

345. *See supra* Parts II, III.

346. *See Lujan*, 504 U.S. at 561 (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38, 43 (1987)) (“[I]t must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”).

347. *See supra* Section III.C. The lower courts act as “agents” of the “principal” that is the Supreme Court. Where the principal has mandated action

here, the universal injunction—is without sound legal basis,<sup>348</sup> and has even been repudiated in part by the Supreme Court,<sup>349</sup> it is incorrect to extend standing to encompass these cases.

## V. SOLUTIONS TO THE PROBLEM OF THE UNIVERSAL INJUNCTION

In weighing the evidence of the nature and history of the judicial function,<sup>350</sup> the implications for executive and judicial policy,<sup>351</sup> and court-made arguments that are put forward to validate the universal injunction,<sup>352</sup> the universal injunction proves a dubious equitable remedy. Two solutions present themselves for consideration. The most ideal remedy is the plaintiff-specific injunction, which effectively returns the limits of injunctive relief to those recognized before the *Wirtz* court.<sup>353</sup> Should such a severe limitation on injunctive relief be seen as nonbeneficial, a middle-ground approach is the court-specific injunction.

### A. Plaintiff-Specific Injunctions

The most ideal approach to remedying the issue of universal injunctions is the plaintiff-specific injunction, which would simply return courts to a traditional limitation concerning equitable remedies. This type of injunctive relief returns federal courts to the historical precedent that allowed courts to enjoin only the parties before them.<sup>354</sup> In other words, the injunctive relief is only applicable to the plaintiff or plaintiffs before the court.<sup>355</sup> Any future parties concerning the challenged rule cannot be subject to the injunction, but the court's judgment will operate as established precedent on the issue. In addition, the court will be able to fine-tune the relief it affords if this is necessary. Fact patterns are rarely identical from case to case; thus, some variation on the extent of the injunctive relief may be prudent.

These injunctions do not suffer from the defects of the universal injunction scheme. They comport with traditional understandings of

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that conflicts with the action the agents have taken, the agents cannot supersede that action.

348. See *supra* Part II.

349. See *Scott v. Donald*, 165 U.S. 107, 107 (1897).

350. See *supra* Part II.

351. See *supra* Part III.

352. See *supra* Part IV.

353. See *supra* Section I.A.2.

354. See *supra* Section I.A.2.

355. See *supra* Section I.A.2.

equity in that the Court of Chancery in England readily contemplated injunctive relief.<sup>356</sup> They do not implicate judicial universality in any way because, by their very nature, they apply only to the parties before the court.<sup>357</sup> They raise no questions of whether an advisory opinion is being sought, because injunctive relief to a particular plaintiff represents the redress of a particular injury.<sup>358</sup> They provide a minimal incentive for forum shopping, as the court's opinion, no matter how ideology-driven, can do no more than set precedent for future litigation.<sup>359</sup> They provide for the continued percolation of difficult questions of constitutional and statutory interpretation because injunctive relief that is party-specific does not implicate setting any nationally binding precedent.<sup>360</sup> Finally, they maintain the precedent model of judicial decision-making in that courts will first look to the Supreme Court before looking to other courts that provide individualized injunctive relief.<sup>361</sup>

The primary objection to the plaintiff-specific approach is the inequity it is likely to visit on other similarly situated parties. As the *Wirtz* court noted, the failure to enjoin the executive beyond the parties of a case may result in negative consequences that reach beyond the courtroom.<sup>362</sup> In particular, for the D.C. Circuit, unconscionable bargaining advantages might result if only one company in an industry is not subject to an unlawful fixing of wages.<sup>363</sup> The other companies could bring their cases before the D.C. District Court, at which time they would likely be vindicated by the court's precedent. In the meantime, however, they would be subject to the unfair practices just mentioned. Additionally, more poorly situated companies, for example those with poor finances, might find it more troublesome to go to court.

The only way to overcome this hurdle is for the executive to comport his behavior to comply with court precedents. Rather than take up the alleged Jacksonian mantle of belligerent noncompliance with the courts, the executive should be willing to accept Chief Justice Marshall's famous quote from *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is."<sup>364</sup> So long as the Supreme Court has not spoken on the issue, two choices exist when

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356. *See supra* Section II.A.

357. *See supra* Section II.B.

358. *See supra* Section II.C.

359. *See supra* Section III.A.

360. *See supra* Section III.B.

361. *See supra* Section III.C.

362. *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 534 (D.C. Cir. 1963).

363. *Id.*

364. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803).



established precedent is repugnant to the executive: it can request an appeal to the higher court, or it can attempt to persuade a different court of the merits of its arguments. If it is the Supreme Court that has spoken, then the executive remains capable of requesting a rehearing or, if another similar dispute arises, the executive can try to convince the Court of its error.

### *B. Court-Specific Injunctions*

A middle-ground approach to universal injunctions is to limit the scope of any injunctive relief to only the court that issues it. These injunctions would reach beyond the plaintiffs before the court, but the executive would be subject to the injunction only so far as that particular court has jurisdiction. This approach provides a more inviting approach for those who may not be comfortable with the comparatively harsh limits on plaintiff-specific injunctions. If one does not subscribe in full to the legal and policy considerations discussed in Parts II and III, or agrees with at least one of the possible cases made in Part IV, his or her acceptance of plaintiff-specific injunctions is likely qualified at best.

In either case, these injunctions at least somewhat coincide with the discussion points in this Comment. They are less violative of equity norms in that they limit the “who” to which the injunction will apply.<sup>365</sup> They do not import universality to the decisions of lower courts, as these injunctions will have no effect on parties outside of the issuing court’s jurisdiction.<sup>366</sup> They restrict advisory opinions in their scope, as these opinions will not apply to other courts.<sup>367</sup> They can never affect plaintiffs outside of the court into which the case was forum shopped.<sup>368</sup> They still allow for percolation because the issues will need to be relitigated in other courts before injunctive relief will apply.<sup>369</sup> Finally, they retain the precedent model insofar as the court that issued the injunction does not set the national precedent.<sup>370</sup>

Moreover, courts have already expressed a willingness to adapt this comparatively limited version of injunction.<sup>371</sup> In *East Bay Covenant v. Barr*, the Ninth Circuit considered the stay of a TRO that the Northern

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365. See *supra* Section II.A; see also *supra* Section I.B.2.

366. See generally *supra* Section II.B.

367. See generally *supra* Section II.C.

368. See generally *supra* Section III.A.

369. See generally *supra* Section II.B.

370. See generally Section III.C.

371. See, e.g., *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028 (9th Cir. 2019).

District of California granted concerning a new regulation on asylum.<sup>372</sup> The regulation mandated that asylum seekers first apply for asylum in a country through which they passed before crossing the southern border.<sup>373</sup> Concluding this regulation violated certain provisions of the APA, the Northern District imposed a TRO that put a universal stay on its use.<sup>374</sup> The Ninth Circuit took up appeal of this case and granted a stay of the Northern District's TRO in so far as it extended beyond the Ninth Circuit, concluding that the nationwide scope of the injunction "is not supported by the record as it stands."<sup>375</sup> As a result, the Ninth Circuit effectively issued the exact kind of injunction discussed here, in that the injunctive relief reached no further than the courts within that circuit. This apparent willingness by courts to already consider narrowing the scope of some injunctions makes the court-specific injunction an appealing alternative to the universal injunction.<sup>376</sup>

Even as the court-specific injunction might assuage those not comfortable with plaintiff-specific injunctions, it does create a different problem, in that it is not immediately apparent to whom court-specific injunctions will apply. Court-specific injunctions would certainly apply to parties within the traditional territorial limits of the circuit. For example, were the Southern District of Texas to issue a court-specific injunction, that injunction would only apply within the territorial limits of the district. Were the Fifth Circuit to issue such an injunction, those parties in Texas, Louisiana, and Mississippi would automatically fall under its purview. For those parties who have forum shopped their way into a particular court, however, it is not apparent whether the injunctive relief would apply to them. If it does, the question becomes what point in time the injunction applies. If it finds the executive disobeying an injunction, a court might contemplate contempt charges.<sup>377</sup> It is difficult to imagine how the executive could foresee the whole group of persons who might find their

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372. *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019).

373. *Id.* at 929.

374. *Id.* at 960.

375. *E. Bay Sanctuary Covenant*, 934 F.3d at 1028.

376. The necessity to discuss and circumscribe the imposition of the court-specific injunction remains important even though in some cases, courts are willing to use it now. This is because presently, their imposition is not anything more than judicial discretion; there are no standards for its imposition.

377. *See, e.g., Taggart v. Lorenzen*, 139 S. Ct. 1795, 1799 (2019) (discussing when a creditor might be held in civil contempt for violating an injunction for bankruptcy discharge).

way into a given court in the future. Given this, holding the executive in contempt might be considered an unfair use of the judiciary's power.

The answer to this hurdle is rooted directly in the existing rules of civil procedure and practices of the courts.<sup>378</sup> First, it is stated explicitly that federal courts have jurisdiction in cases where the federal government is a defendant.<sup>379</sup> Once the basic question of jurisdiction is established, the next inquiry is where proper venue can be laid to try a case.<sup>380</sup> Title 28 also provides the answer to this question, and it provides specific provisions for where officers of the government can be sued.<sup>381</sup> These rules together provide a framework whereby courts can always determine where jurisdiction and venue are proper and can provide in-depth reasons for their decisions. As such, the most logical manner to overcome the uncertainty of the scope of a court-specific injunction is to withhold injunctive relief from the plaintiff until such time as proper jurisdiction and venue are found. Once the court has found jurisdiction and venue, the executive will have no argument that it was not on notice of the applicability of the injunction to a prospective plaintiff. Once this notice has been given, the executive becomes subject to this injunction as well as any contempt proceedings that might arise from failing to follow it.<sup>382</sup>

### C. *The Case for Preferring the Court-Specific Injunction*

The plaintiff-specific injunction is by far the best solution: it avoids any possibility of judicial universality; it comports with equity; and it should never violate basic principles of ripeness. For some, however, the Supreme Court's assertion of its power in *Cooper* may be a logical extension of judicial power, and thus some level of judicial universality is appropriate. Moreover, the only manner in which the major hurdle to plaintiff-specific injunctions—the disparate treatment of parties not subject to the injunctive relief—involves a level of faith in the executive that judges may not have. In contrast, the primary hurdle to court-specific injunctions—the uncertainty of those parties to which the injunction might apply—admits a comparatively simple remedy, in that once it has been put

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378. See 28 U.S.C. §§ 1331, 1332, 1346, 1367, 1391.

379. *Id.* § 1346.

380. See generally *id.* § 1391.

381. *Id.* § 1391(e)(1). District courts can hear cases in which a defendant is an officer of the federal government if the defendant resides in that district; a substantial portion of the conduct was involved in that state; or, if no real property is involved, the district where the plaintiff resides.

382. For an example of contempt charges for violating an injunction, see *Taggart*, 139 S. Ct. at 1799.

on proper notice, the executive has no reason to assert that a given plaintiff is subject to injunctive relief. Given these considerations, the best remedy to this problem is to shrink the universe of injunctive relief to those plaintiffs over which a court can find proper jurisdiction and venue, after the executive has been put on notice of these findings.

#### CONCLUSION

Universal injunctions suffer from several defects, both of law and policy. These injunctions violate principles of equity,<sup>383</sup> create a false universal reach of federal courts beyond the parties to a case or controversy,<sup>384</sup> and violate the doctrine of ripeness.<sup>385</sup> They also promote deleterious forum shopping within the judiciary,<sup>386</sup> inhibit the percolation of issues through the courts,<sup>387</sup> and upend the principle-agent relationship of Article III tribunals.<sup>388</sup> These arguments hardly conclude that all injunctions that reach beyond the parties to a case are beyond the power of federal courts.<sup>389</sup> As a result, the best solution is a middle-ground approach whereby courts restrict injunctions to their own jurisdiction. These injunctions would become binding on the executive only after two criteria are met: (1) the district court has found proper jurisdiction and venue to hear a given case; and (2) the court puts the executive on notice of these findings.

It is unclear precisely how the scope of injunctions will change as judges are continuously seen, rightly or wrongly, as essentially political animals. Regardless, it remains urgent to maintain the integrity of Article III courts and to do whatever is necessary to attain this end. If this means that judges should restrict the scope of their injunctions, this may become a necessary step in preserving the legitimacy of our judiciary.

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383. *See supra* Section II.A.

384. *See supra* Section II.B.

385. *See supra* Section II.C.

386. *See supra* Section III.A.

387. *See supra* Section III.B.

388. *See supra* Section III.C.

389. *See supra* Part IV.

