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District Court Reform: Nationwide Injunctions

Chapter Four

RESPONSE:

Appendix for *District Court Reform: Nationwide Injunctions* by HLR

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ON NOVEMBER 18, 2022, MONTHS AFTER THE SUPREME COURT overturned *Roe v. Wade*, [1] a group of antiabortion doctors and organizations brought suit in the U.S. District Court for the Northern District of Texas. [2] The plaintiffs sought a preliminary and permanent injunction ordering the U.S. Food and Drug Administration (FDA) to withdraw its two-decade-old approval [3] of mifepristone, one drug used as part of a medication abortion regimen — the most common form of abortion in the United States. [4] The plaintiffs alleged that the FDA's approval process for mifepristone violated the Administrative Procedure Act [5] (APA). [6] On April 7, 2023,

Judge Kacsmaryk [7] issued a nationwide stay that suspended the FDA's drug approval. [8] Hours later, Judge Rice of the U.S. District Court for the Eastern District of Washington granted a "dueling" [9] injunction that enjoined the FDA from changing its guidance and approvals in seventeen states and the District of Columbia. [10]

Outrage and confusion ensued. President Biden called Judge Kacsmaryk's order "the next big step toward the national ban on abortion that Republican elected officials have vowed to make law." [11] Professor Nicholas Bagley asked: "[Judge Kacsmaryk is] just a single judge in a small courthouse in Amarillo, Texas. Does he really have the power to dictate national policy about drug safety? If so, *should* he have that power?" [12] Dean Erwin Chemerinsky explained how "the case reveals underlying problems in the judicial system" and argued that "[l]itigants should not be able to handpick a judge who then can issue a nationwide injunction throwing the entire country into chaos." [13]

A robust scholarly literature has grappled with these questions. Some scholars, jurists, and attorneys criticize the practice of district courts issuing nationwide injunctions as an inappropriate abuse of power. [14] Others defend nationwide injunctions as a powerful way to check federal agency overreach and ensure robust relief for plaintiffs. [15]

This Chapter explores these arguments, considering court reform at the district-court level. It also builds on a list of injunctions solicited from the Department of Justice (DOJ) [16] to provide the first empirical evidence documenting a trend that has not been, until now, fully quantified: nationwide injunctions have indeed grown much more common, dramatically spiking during the Trump Administration before decreasing during the Biden Administration. Section A of this Chapter quantitatively surveys this rise. Given this trend, section B identifies the troubling policy consequences of more frequent nationwide injunctions. Section C surveys proposals for reform, taking into consideration the ways in which judges have recently responded to this trend with apparent self-restraint and self-awareness.

Drawing from the list of injunctions, this Chapter notes the increasing risk of politicizing the nationwide injunction and delegitimizing the courts, as plaintiffs proceed to cherry-pick judges to increase the likelihood of political outcomes or policy goals. Ultimately, in light of this danger, this Chapter calls for reform to restructure the court system to disincentivize forum shopping. Though lower courts may be policing their use of the nationwide injunction, reforms centering on judicial restraint may miss the mark. If the goal is to disincentivize the political gamesmanship of nationwide injunctions, instead of their absolute use, reforms focused on curbing forum shopping may be most effective.

A. *Quantifying the Rise of Nationwide Injunctions*

1. Definitions. — The injunction is an equitable remedy that enables the court to "control a party's conduct" [17] — either by prohibiting or requiring action by a party. Either option is strong, coercive relief. Injunctions are thus a "drastic" [18] and "extraordinary" [19] remedy. Because of this concern, courts aim to issue injunctions that are "no more burdensome to the defendant than necessary to provide complete relief" to the parties before the court. [20] Courts generally retain broad discretion to craft the injunction's scope. Depending on the stage of litigation, it can take the form of a temporary restraining order (TRO), [21] a preliminary injunction, [22] or a permanent injunction. [23]

No statute or Supreme Court case has defined what a "nationwide injunction" is. Indeed, scholars debate the proper terminology. [24] In general, however, the nationwide injunction is a universal remedy whereby a court enjoins a party with respect to *all* persons and entities, not just parties to the litigation. [25] Though "no one denies that district courts have the power to enjoin a defendant's conduct anywhere in the nation . . . as it relates to *the plaintiff*," [26] sharp disagreement exists over courts' ability to issue relief as applied to nonparties. This Chapter focuses on nationwide injunctions directed against the federal government that completely enjoin the government from implementing and enforcing a federal statute or executive policy. [27]

2. Methodology. — To capture and provide as complete a list as possible of nationwide injunctions as defined above, [28] this Chapter relies on two datasets [29]: First, in response to a Freedom of Information Act (FOIA) request to DOJ, editors of the *Law Review* received a dataset of the nationwide injunctions identified by the Department from 1963 into the beginning of 2020. [30] Second, editors compiled a list of nationwide injunctions issued from the beginning of 2020 through the end of 2023. [31]

Though our search was thorough, this data does not purport to be comprehensive. Most obviously, the documents provided by DOJ did not include the methodology by which the Department compiled its list. While editors of the *Law Review* reviewed each case identified by DOJ, [32] we did not verify whether DOJ's list was comprehensive. For purposes of our analysis, we focus on injunctions issued beginning in 2001 with the Bush Administration. Finally, we cannot guarantee our own search for nationwide injunctions from 2020 to 2023 picked up every single nationwide injunction issued. Westlaw and LexisNexis do not publish every case. Further, because judges use varying terminology, and do not always identify an injunction as "nationwide," "national," or "universal" despite issuing an injunction to that effect, our figures likely underestimate the total

number of injunctions issued. [33] At the very least, we are confident this is the most comprehensive dataset of nationwide injunctions compiled and published to date.

3. The Numbers. — The dataset includes 127 injunctions. Just over half (64) of the injunctions issued since 1963 were issued against Trump Administration policies. [34]

Table 1: Nationwide Injunctions from 2001 to 2023

Presidential Administration that Promulgated the Enjoined Policy	Total Injunctions	Injunctions Issued by Judge Appointed by President of Opposing Party	Percentage
Bush	6	3	50.0%
Obama	12	7	58.3%
Trump	64	59	92.2%
Biden	14	14	100.0%
Total	96	83	86.5%

Of the 12 nationwide injunctions issued in response to Obama Administration policies, 7 were issued by judges appointed by a Republican President. The 12 injunctions were issued by 8 district courts. Just over half were issued by district courts in Texas: 3 by the Northern District of Texas, 3 by the Eastern District, and 1 by the Southern District.

Of the 64 nationwide injunctions issued against Trump policies, only 5 were issued by judges appointed by a Republican, leaving 92.2% of injunctions issued by a judge appointed by a Democrat. The 64 injunctions were issued by 18 district courts, with 15 (23.4%) issued by the Northern District of California, 10 (15.6%) by the District of the District of Columbia, and 8 (12.5%) by the District of Maryland.

Through the end of President Biden's third year in office, 14 nationwide injunctions were issued, halting vaccine mandates, [35] immigration policies, [36] climate-change cost estimates, [37] and stimulus programs for farmers of color, [38] among other presidential priorities. Every single injunction was issued by a judge appointed by a Republican President. As in the Obama Administration, these injunctions have clustered in Texas: 5 by the Southern District and 1 by the Northern District.

The number of nationwide injunctions issued during the first three years of the Biden Administration is lower than the number issued during President Trump's first three years. [39] But two points, which will be discussed in greater depth below, are worth noting. First, the extreme use of nationwide injunctions during the Trump Administration could reflect judicial responsiveness to the unprecedented degree to which President Trump tested the limits of presidential power. [40] Second, in the Biden years, judges appear to be ordering vacatur in cases where plaintiffs requested an injunction. Whether the falling rate of injunctions from the Trump to the Biden Administration reflects a decrease in abuses of executive power, judicial responsiveness to growing criticism of the nationwide injunction, [41] or the replacement of some injunctions with the "lesser remedy" [42] of vacatur, the decrease should not mislead: district court judges appear to be striking down executive policies of opposing administrations with unprecedented frequency.

B. The Consequences

Nationwide injunctions issued over the past twenty years collectively reveal three main takeaways: First, nationwide injunctions are becoming more common. Second, they are overwhelmingly issued by judges appointed by a President from the opposite political party as the President who promulgated the policy at issue. Third, some judges are increasingly turning to vacatur, rather than nationwide injunctions, to stop executive action.

1. The Increase in Nationwide Injunctions. — Nationwide injunctions are undeniably on the rise. As gridlock in Congress has forced Presidents to turn to executive action, so too have nationwide injunctions increased. [43] Scholars theorize that nationwide injunctions interrupt the ordinary development of law in three main ways: by interfering with percolation, creating conflicts in the law, and allowing an end-run around class actions. Two of these concerns have borne out in practice.

(a) Percolation. — Scholars contend that proper "percolation" — "the practice of awaiting multiple lower courts' answers to a legal question that the [Supreme] Court is bound to decide" [44] — is foundational to legal development. Where legal challenges involve complex questions of law, development across many factual contexts may facilitate a more considered resolution, and granting a nationwide injunction could cut that short. [45] The Southern District of Georgia's decision to enjoin the Biden Administration's vaccine requirement for federal contractors and subcontractors presents a discrete example. [46] Around the time when the Georgia court enjoined the requirement, three other district courts had also considered and preliminarily enjoined the

contractor mandate, but these courts limited the injunctions to the parties in each case. [47] After the nationwide injunction was issued, at least seven district courts considered cases where plaintiffs challenged the vaccine mandate, but dismissed or stayed the claims instead of offering independent evaluations of the mandate's legality. [48] The courts claimed they lacked jurisdiction to decide the cases because plaintiffs could not demonstrate an imminent or traceable injury as a result of the preexisting nationwide injunction. [49] The nationwide injunction also led to more cursory review in circuit courts. [50] And, in other cases, courts struggled to answer questions tangential to the executive order because the injunction had prevented other courts from exploring them. [51]

Furthermore, the lack of percolation fast-tracks to the Supreme Court issues that have not "ha[d] the benefit of varying court of appeals decisions based upon multiple records." [52] Instead, the Court may "review a single grant of preliminary relief and effectively decide a legal issue of nationwide importance without a well-developed sense of the consequences of its decision." [53] Justice Gorsuch has lamented the loss of factual development in this manner, which "permits the airing of competing views that aids [the] Court's own decisionmaking process." [54]

(b) Conflicting Law. — With an increase in nationwide injunctions, some scholars warn that conflicting injunctions "could result in a defendant being held in contempt of court no matter which injunction the defendant tried to obey." [55] But these fears of increased conflicts between jurisdictions may be overblown, [56] as Professor Amanda Frost has posited. [57] Judges tend to abide by the principle of comity — which "requires judges to avoid issuing [conflicting] injunctions when possible" [58] — and often narrow injunctions or otherwise issue injunctions so as not to overlap with preexisting ones. [59] Take the mifepristone case. Though the Eastern District of Washington limited the scope of its ruling to the Democratic plaintiff states, the Northern District of Texas ruling applied nationwide, leaving the judges' orders at war with one another in nearly half the states. But only for a moment. The Fifth Circuit stayed the injunction, alleviating the tension. [60]

(c) Relationship with Class Action. — The availability of nationwide injunctions makes obtaining class-wide relief under Rule 23(b)(2) seemingly unnecessary. When "plaintiffs can get the same relief in an individual suit that they can in a class action," [61] it raises the question: Why jump through the procedural hoops to obtain class certification when you can bypass them and still receive the same relief? [62]

2. Nationwide Injunctions as Political Weapons. — Notably, nationwide injunctions are not only increasing in frequency but also overwhelmingly issued by judges appointed by Presidents of the opposite party from the administration whose actions the judges are enjoining. Of the 78 nationwide injunctions issued during the Trump and Biden

Administrations, 93.6% of injunctions were issued by judges appointed by a President of the opposing political party. Often, it is the policies that relate to politically hot-button issues or a President's policy priorities that are enjoined: for President Obama, it was LGBTQ+ civil rights; [63] for President Trump, it was immigration; [64] and for President Biden, it was policies combatting the COVID-19 pandemic. [65]

Structural features of litigation exacerbate the politicization of the injunction. First, the ability of plaintiffs to target particular courts and forum shop for judges who are most likely to honor a request for injunctive relief results in a "race to the ('right') courthouse." [66] Since securing a favorable ruling can enjoin enforcement of the challenged policy nationwide, strategic plaintiffs and state attorneys general are incentivized to bring cases in forums "with a particular perceived political valence" that aligns with plaintiffs' own policy preferences. [67] Often, that means shopping litigation to states where the likelihood of drawing a judge appointed by a friendly political party is higher. Today, for example, two-thirds of all California federal district judges have been appointed by a Democrat. [68] The opposite is true in Texas. [69] It is also often the case in these states — where home-state senators tend to be solidly of one political party — that judges appointed by Presidents of the opposite party as the home-state senators are likely to be more moderate due to the Senate's tradition of granting home-state senators veto power over a President's judicial nominees. [70] It is no surprise that of the 6 injunctions issued against the Bush Administration, 4 (66.7%) were issued by judges in California. Of the 12 injunctions issued against the Obama Administration, Texas district courts issued 7 (58.3%). Like the trend observed during the Bush Administration, district courts in California issued more injunctions against the Trump Administration than any other state. Unsurprisingly, Texas federal courts have again become the hot zone for nationwide injunctions and vacatur after the election of President Biden. [71]

Second, for each policy challenged, the asymmetrical effects of preclusion ensure that nationwide injunctions are a powerful tool for political opponents who can challenge the policy in multiple venues. Practically speaking, a successful defense against a nationwide injunction in one court is barely a win for the government at all: because that decision has no preclusive effect on new plaintiffs, other plaintiffs are free to bring the exact same lawsuit elsewhere and "[s]hop 'til the statute drops." [72] All it takes is one judge siding with the plaintiffs to enjoin the challenged law. These asymmetric consequences force the federal government to engage in a game of whack-a-mole. If enough plaintiffs sue — and if they can each target the forum most likely to be hostile to the government's action — it seems almost inevitable that the action will be nationally enjoined. A prominent example is President Biden's COVID-19 vaccine mandates: At least four judges declined to issue nationwide injunctions against Executive Order 14,042, but ultimately one did. [73] One

judge declined to issue a nationwide injunction against Executive Order 14,043, but still the policy was enjoined nationally. [74] The same is true for the Centers for Medicare & Medicaid Services' vaccine mandate. [75] And at least four different judges declined to issue nationwide injunctions against President Biden's military vaccine mandate, but, ultimately, two enjoined the policy nationally. [76]

Though these structural factors contribute to the increase in nationwide injunctions, the exact causation is hard to pinpoint. As Judge Rovner notes, it is difficult to disentangle "whether any such increase signals an expanding judicial overreach or an increasing executive autocracy." [77] But, regardless of the exact causation, the numbers nonetheless demonstrate that nationwide injunctions — continually issued out of a select few districts, which change depending on the President's party — are playing an increasing role in political battles. As a consequence of increased forum shopping and political gamesmanship, the increase in nationwide injunctions on highly politicized issues fuels the public's perception that the courts themselves are politicized and that federal judges are political actors. [78] When "judges in the 'red state' of Texas halt Obama's policies, and judges in the 'blue state' of Hawaii enjoin Trump's," it tests the limits of the public's imagination to argue that the federal judiciary is impartial, nonpartisan, and legitimate. [79] The medication abortion cases are a prominent example, garnering public attention [80] and reigniting concerns that plaintiffs selectively "shopped" for judges they believed would likely rule in their favor. [81]

Perception of the judiciary as political is a natural conclusion in light of the fact that injunctions are disproportionately issued by more extreme judges: judges who were selected precisely because plaintiffs saw them as especially ideological and unafraid to reach beyond principles of judicial restraint. [82] In turn, these judges, who are least representative of the federal judiciary (not to mention unelected and unaccountable), determine policy for the rest of the country.

3. Relationship with Vacatur. — Finally, the Chapter's analysis does not capture many high-profile cases deemed "nationwide injunctions" because the analysis did not include APA stays or grants of vacatur, which Bagley calls nationwide injunctions' "evil twin." [83]

Vacaturs and injunctions are considered distinct. [84] First, a vacatur is authorized by the APA, which scholars argue is separate from remedies in equity. [85] In section 706 of the APA, Congress gave reviewing courts the power to "set aside agency action, findings, and conclusions" that the court found to be unlawful. [86] Section 705 authorizes stays, which effectively halt enforcement under the statute or regulation, pending judicial review. [87] Courts have interpreted this language to mean that they have the authority to vacate the entire rule, not simply the application of the rule as to the individual petitioners. [88] This tees up another distinction: their remedial nature (or lack thereof). While "[v]acatur

operates on the legal status of a rule, causing the rule to lose binding force," injunctions operate on the parties to the litigation. [89] Put differently, "an injunction . . . merely blocks enforcement" while "vacatur unwinds the challenged agency action." [90] Thus, whether vacatur is considered a remedy is an open question.

Despite their technical differences, vacaturs and injunctions function in the same manner when the challenged executive action is an agency rule. [91] Practically, both bar enforcement of the rule against all individuals across all jurisdictions [92] and "prevent[] some action before the legality of that action has been conclusively determined." [93] Indeed, vacaturs are often colloquially referred to as nationwide injunctions, [94] and sometimes, courts consider them interchangeable. [95]

Because many of the most high-profile cases where courts issue nationwide prohibitions arise in the context of executive action, courts are free to choose between issuing a nationwide injunction or ordering vacatur. In considering President Trump's decision to rescind the DACA program, two judges enjoined the recission, [96] while one judge decided that vacatur, instead, was the appropriate remedy. [97] In the mifepristone case discussed above, plaintiffs sought a nationwide injunction in the Texas federal court, but Judge Kacsmaryk ultimately opted to issue a stay, or preliminary vacatur, instead. [98] He stated: "Because the Court finds injunctive relief is generally appropriate, Section 705 plainly authorizes the lesser remedy of issuing 'all necessary and appropriate process' to postpone the effective date of the challenged actions." [99]

Given the perceived interchangeability between the two remedies, in recent rulings, what was once achieved through the nationwide injunction is increasingly being achieved through vacatur — especially because vacatur is considered a "less drastic remedy" that requires a lower standard. [100] Judge Mizelle's order blocking President Biden's mask mandate on federal transit was deemed "a national injunction" by the media [101] but was actually vacatur. [102] So too was Judge Pittman's order vacating President Biden's student loan forgiveness program [103] and Judge Tipton's decision invalidating immigration enforcement guidelines. [104] In practice, vacatur's lower standard, combined with the enhanced opportunity for pre-enforcement challenges under the APA, [105] suggests litigants can use vacatur to achieve the same universal remedy as they might seek when pursuing injunctive relief. [106]

Many of the policy concerns regarding nationwide injunctions apply with similar force to vacatur. [107] Most obviously, plaintiffs are similarly incentivized to shop their litigation to friendly forums. And, indeed, this trend has been documented. [108] Further, when judges stay or vacate executive action, the order is still likely to halt the proper development of law, including by making it more likely that the case must be fast-tracked to the Supreme Court without proper factual development.

C. *Proposals for Reform*

The rise in nationwide injunctions, coupled with the consequences identified in section B, suggest that reform is needed to curb the abuse of extreme nationwide injunctions that risk politicizing the judiciary. This section considers court reform proposals. [109] While many proposals may address one or a few particular symptoms of nationwide injunctions, when taking into account that judges are increasingly using vacatur to do what was once achieved through nationwide injunctions, structural reforms focused on limiting forum shopping are best suited to address the problem. These proposals preserve the ability of courts to use these remedies as a tool to curb executive abuses of power, while simultaneously limiting the most extreme uses.

Hanging over the debate on whether and how to reform nationwide injunctions is one large question: Are they constitutional? Scholars [110] and jurists [111] disagree — arguing about when the remedy first emerged and whether the remedy is consistent with traditional equitable principles. [112] Given the existing robust scholarly debate on the subject, the rest of this Chapter sets the question of constitutionality to the side. The increase in both executive policymaking and the issuance of nationwide injunctions supports the notion that nationwide injunctions are a critical tool in maintaining the constitutional separation of powers and protecting against executive abuse. For the purposes of this Chapter, we assume nationwide injunctions are not unconstitutional as a matter of law.

1. Prohibiting Nonparty Relief. — Some scholars and commentators argue for blanket prohibitions on nationwide relief. For example, Professor Michael Morley recommends adding to the Federal Rules of Civil Procedure a rule that would eliminate nationwide injunctions altogether and limit relief to the parties in the case. [113] Another commentator proposes a rule that would allow only circuit courts to issue nonparty relief. [114] Others suggest limiting injunctions by issue area, providing clear-cut cases where nationwide relief should be circumscribed. [115] And others look to limit by geographic scope, such as by a "circuit-border rule" [116] or a state-line boundary. [117] These reforms look to balance "the need for uniformity with the benefits of regional percolation." [118] They also even the asymmetrical effects of an injunction: to enjoin a policy nationwide, plaintiffs must win multiple times.

However, outlawing nonparty injunctions altogether would be overly broad. Based on our survey of nationwide injunctions, many courts weigh heavily the need for restraint — suggesting the excessive use of nationwide injunctions is limited to certain judges and certain courthouses. Moreover, in some instances, nationwide injunctions may be the only remedy that could meaningfully check the executive branch's power. [119]

Indeed, outlawing nationwide injunctions in response to their increase could confuse cause and effect: nationwide injunctions might be increasingly common in part because they are increasingly warranted. From the plaintiff's perspective, nationwide injunctions are also a powerful tool in stopping or pausing irreparable harm. [120] Finally, from the government's perspective, nonparty relief is a "practical necessity" that ensures the government does not have to track its enforcement on an individual-by-individual basis. [121] As a matter of policy, this Chapter recognizes the nationwide injunction as a critical tool in protecting plaintiffs and ensuring governmental efficiency and thus does not recommend a blanket prohibition.

2. Judicial Standards and Procedures. — Some scholars believe courts can be trusted to self-regulate their use of nationwide injunctions and note that courts are well suited to "impos[e] self-disciplining rules and standards to calibrate the effect that the nationwide injunction has." [122] But this Chapter's empirical analysis suggests reforms that rely on judicial restraint may not effectively address the problem — that plaintiffs strategically shop their cases to the forums and judges most likely to issue drastic remedies. So even if the vast majority of federal judges exercised self-restraint, those judges may not be the ones driving the rise in nationwide injunctions. Instead, the small pocket of judges who issue most nationwide orders — and who seem least likely to display restraint — would remain. And so would nationwide injunctions.

Scholars have detailed several proposals counseling self-restraint. Self-regulation could take the form of adopting a multifactor balancing test [123] or a strengthened presumption against issuing nationwide injunctions. [124] For example, Professor Alan Trammell draws on principles of preclusion and acquiescence to propose a "preclusion-based theory" where a presumption against issuing nationwide injunctions can be overcome only if a government official is acting in bad faith by ignoring settled law. [125] Zayn Siddique suggests amending Federal Rule of Civil Procedure 65 to codify a standard that nationwide injunctions can be issued only when necessary to provide complete relief to the parties. [126]

But appellate courts have already attempted to institute standards and presumptions against issuing nonparty injunctions. [127] The Ninth Circuit instituted a presumption against issuing nonparty injunctions that reach beyond the circuit, absent "a showing of nationwide impact or sufficient similarity." [128] The Fifth Circuit deemed nationwide injunctions appropriate if there is "(1) concern that a geographically limited injunction would fail to prevent a plaintiff's harm or (2) a constitutional command for a consistent national policy," such as immigration. [129] The Eleventh Circuit expressed skepticism of district courts' ability to issue nationwide relief, explaining that courts should be "weary and wary" of such a "drastic form of relief" that "push[es] against the boundaries of

judicial power" by allowing "a single district court an outsized role in the federal system." [130] To cabin discretion, the Eleventh Circuit noted "a range of factors that may counsel in favor of a nationwide injunction." [131] The Second and Sixth Circuits have also urged caution. [132]

District courts are catching on, taking steps to constrain or restrict broad nationwide injunctions. [133] In particular, courts have shown interest in respecting judicial comity [134] and avoiding "chaos and confusion" [135] when considering an order that may cause conflicts. [136] Lower courts weigh this factor against whether a policy demands uniformity, often declining to issue nationwide relief when it does not. [137]

Yet, despite these standards and warnings, nationwide injunctions are still on the rise, [138] illustrating how difficult standardizing complete relief is. The proliferation of nationwide injunctions also indicates that reforms of this nature will be less likely to be effective. Any reform to the injunction that relies on the exercise of judicial restraint, even if adopted by the majority of judges, might be ignored by the particular judges who are *most likely* to issue nationwide injunctions — those whom plaintiffs seek out precisely because they may be unrestrained.

Alternatively, some recommend procedural reforms to cabin judicial discretion. For example, Judge Milan Smith of the Ninth Circuit supports requiring special hearings to determine the appropriate scope of a potential injunction and requiring district courts to fully explain their reasoning in writing with regard to the costs and benefits of enjoining the federal government. [139] In the context of permanent injunctions, parties might also be required to "brief the appropriate scope of the injunction after the court has issued its substantive decision," which would allow the government to present arguments specifically related to the scope of the injunction in light of the judge's findings and conclusions. [140] Others propose allowing more outsiders to intervene in cases seeking nationwide injunctions, which would provide more information to courts looking to understand the impact of an injunction and prompt either a better analysis or record for appellate review. [141]

But here too, procedural reforms may be an inadequate solution. More transparency does not stop judges from overissuing nationwide injunctions or necessarily make them think twice. Many opinions issuing nationwide injunctions thoroughly explain the court's reasoning.

Regardless of their efficacy, such proposals may be missing the point: the consequences and problems purportedly resolved in the context of injunctions would still rear their head in the context of vacatur. As executive rulemaking under the APA increases, plaintiffs — and judges — could evade limits on nationwide injunctions by seeking — and granting — vacaturs instead. [142] The same concerns about politicization

and forum shopping would arise. Reforms aimed at addressing the increase in nationwide relief broadly — but that focus on injunctive relief narrowly — would prove ineffective in curbing partisan actors who see universal relief, in any form, as a tool for political ends.

Even if courts were able to resolve questions pertaining to nationwide relief more broadly, uniform and systematic judicial reforms seem practically unlikely in the short term. The Supreme Court has considered nationwide injunctions on a number of occasions [143] but has continually sidestepped the question. [144] In turn, lower courts have generally construed the Court's silence as an implicit endorsement. [145] The judiciary seems likely to continue to do so absent greater pressure.

3. Reforms to Curb Judge Shopping. — Perhaps, then, reform may be better focused on curbing judge shopping, which would target the underlying concern raised by universal remedies: namely, that the polarization of the judiciary, combined with the ability of plaintiffs to stack the deck by picking certain forums, undermines the legitimacy of the decision. Such proposals would preserve the judiciary's check on the Executive, but would undercut the ability of plaintiffs to forum shop by eliminating the ability to seek out a single extreme judge.

Indeed, support for limiting forum shopping is mounting. Justice Kagan and Chief Justice Roberts have expressed concerns with forum shopping. Speaking on the Court's legitimacy, Justice Kagan observed: "It just can't be right that one district judge can stop a nationwide policy in its tracks and leave it stopped for the years that it takes to go through the normal process." [146] Chief Justice Roberts has endorsed the random assignment of judges for patent cases as a cornerstone of the court system's legitimacy. [147] Last summer, nineteen Democratic senators asked the Judicial Conference to recommend rules to district courts regarding the random assignment of judges. [148] Just prior to print, the Judicial Conference of the United States announced a policy for random case assignment in nationwide injunction cases. [149]

This Chapter identifies three buckets of forum-shopping reforms:

(a) Ensure the Random Assignment of Judges. — At its annual meeting last year, the American Bar Association adopted a resolution urging federal courts to eliminate case-assignment procedures that "predictably assign cases to a single United States District Judge without random assignment" when an injunction is contemplated in a case of nationwide impact and one of the parties raises concerns about case assignment. [150] Representative Sherrill's End Judge Shopping Act would require plaintiffs seeking nationwide injunctions to file in a forum where at least two judges are available to hear a case, eliminating the possibility that plaintiffs can select a single-judge forum. [151]

Professor Adam White recommends instituting a national lottery for nationwide injunctions, modeled off of the procedures for multi-court challenges to agency action

under 28 U.S.C. § 2112. [152] White's reform would involve establishing a timeframe in which plaintiffs seeking nationwide injunctions against government action must file, and then running a lottery among all federal district courts to determine which court would collectively decide the cases. [153] White also proposes this reform be accompanied by fast-tracking provisions directing reviewing courts to expedite any appeals of a district court's injunction. [154]

(b) Transfer to the District of the District of Columbia. — Some propose requiring all lawsuits requesting national injunctive relief to be filed in the District Court for the District of Columbia, or another specific district, to curtail forum shopping. [155] The D.C. District Court could then consolidate similar cases and randomly select a judge to hear the case. After the mifepristone case, Democrats introduced legislation to this effect. Senator Hirono, for example, proposed the Stop Judge Shopping Act, which would give exclusive jurisdiction over cases seeking national remedies to the D.C. District Court. [156] (Notably, this proposal echoes legislation that was introduced by Republican Representative Palmer at the start of the Trump Administration. [157])

Professors Bradford Mank and Michael Solimine argue that the D.C. District would be particularly well suited to hear these cases because Congress has granted it exclusive jurisdiction over other federal administrative agency actions and it has built up relevant expertise. [158] They also note that these federal judges are often regarded as less partisan, which might add to the legitimacy of the court's decisions. [159]

(c) Panel Systems. — The last set of proposals recommends multi-judge panels review cases where nationwide relief is requested — requiring multiple judges to agree on the remedy. This agreement could lend credibility that the complete relief principle is operating as it should. Representative Casten proposes deterring forum shopping by creating a randomized multi-circuit panel of thirteen judges to hear cases against the Executive concerning challenges to statutory or executive actions. [160] A supermajority of at least nine judges would be required to invalidate the action. [161] Senator Wyden and Representative Ross's Fair Courts Act of 2023 [162] would codify former Fifth Circuit Judge Gregg Costa's proposal to require plaintiffs seeking nationwide relief to be heard by a three-judge panel of randomly assigned judges. [163]

Panel-system proposals are reminiscent of reforms undertaken in response to the Supreme Court's hostility to Progressive Era policies [164] : Between 1937 and 1976, Congress required constitutional challenges to be heard by three-judge district courts. [165] This reform aimed to improve legitimacy and instill more confidence in judicial action: "[I]f three judges declare that a state statute is unconstitutional the people would rest easy under it." [166] It also decreased the risk of conflicting injunctions. [167] Eventually, motivated by concern over wasted judicial resources, [168] and the American

Law Institute's belief that that "[m]odern rules of procedure safeguarded against district judges granting precipitous ex parte injunctions," [169] Congress reverted to default procedures for appellate review. [170] Notably, Congress *has* retained the three-judge system for redistricting and some voting rights cases, [171] in recognition of the fact that "such cases were ones of 'great public concern' that require an unusual degree of 'public acceptance.'" [172]

Conclusion

As nationwide injunctions — and vacatur — against high-profile executive policy initiatives continue to increase, inaction risks politicizing the nationwide injunction further. Proposals to curb forum shopping directly address the main problems revealed by our empirical analysis. Even if the exact causes of the increase in nationwide injunctions cannot be neatly disentangled from the increasing role of executive policymaking, the fact remains that plaintiffs can strategically shop litigation to judges they perceive as the most political or otherwise most predisposed to issue the requested relief.

If the goal is to disincentivize the political gamesmanship of nationwide injunctions, instead of their absolute use, random judge selection, multi-judge panels, or funneling through designated forums can constrain the most extreme uses without eliminating the remedy entirely. And most importantly, these reforms could also help restore perceptions of the judiciary as nonpartisan, while preserving judges' ability to issue nationwide relief in cases where it is necessary to curb executive abuse.

Though these reforms may appear radical, they are not novel. Many of the proposals' mechanisms have historical analogues, providing a powerful reminder that Congress not only possesses the power to retool the scheme for judicial review, but has historically experimented with and enacted reforms in response to concerns of judicial overreach.

Importantly, and unlike judicial reforms that solely focus on injunctive relief as a remedy, these proposals can also address the ways in which judges are increasingly turning to vacatur to issue universal relief. Structural reforms, if limited to the injunctive context, leave plaintiffs able to plead in a manner that avoids triggering any proposed guardrails for injunctions specifically. Thus, structural reforms dealing solely with nationwide injunctive relief may ultimately fall short if they do not also take account of vacatur. A robust set of reforms that work in tandem with one another would be the most effective approach.

FOOTNOTES HIDE ×

1. ^ 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

2. ^ All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507, 520 (N.D. Tex. 2023), *aff'd in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023), *cert. granted sub nom.* Danco Lab'ys, L.L.C. v. All. for Hippocratic Med., No. 23-236, 2023 WL 8605744 (U.S. Dec. 13, 2023), *and cert. granted sub nom.* FDA v. All. for Hippocratic Med., No. 23-235, 2023 WL 8605746 (U.S. Dec. 13, 2023).

3. ^ Mifepristone was first approved by the FDA in September 2000. *Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, U.S. Food & Drug Admin. (Sept. 1, 2023), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation [https://perma.cc/7BCZ-ZH3V].

4. ^ Katherine Kortsmit et al., Ctrs. for Disease Control & Prevention, Abortion Surveillance — United States, 2020, at 8 (2022), https://www.cdc.gov/mmwr/volumes/71/ss/ss7110a1.htm [https://perma.cc/CV26-79EC].

5. ^ 5 U.S.C. §§ 551–559, 701–706.

6. ^ Complaint ¶ 357, *All. for Hippocratic Med.*, 668 F. Supp. 3d 507 (No. 22-CV-223).

7. ^ "A devout Christian, . . . [who] has been shaped by his deep antiabortion beliefs," Judge Kacsmaryk was appointed to the bench by President Trump. Caroline Kitchener & Ann E. Marimow, *The Texas Judge Who Could Take Down the Abortion Pill*, Wash. Post (Feb. 25, 2023, 6:00 AM), https://www.washingtonpost.com/politics/2023/02/25/texas-judge-abortion-pill-decision [https://perma.cc/CXM7-DTK2].

8. ^ *All. for Hippocratic Med.*, 668 F. Supp. 3d at 560.

9. ^ *READ: Dueling Rulings from Federal Judges in Texas and Washington on Medication Abortion Pill*, CNN (Apr. 7, 2023, 10:50 PM), https://www.cnn.com/2023/04/07/politics/read-texas-abortion-pill-mifepristone-ruling/index.html [https://perma.cc/NHM5-CT6W].

10. ^ *See* Washington v. FDA, 668 F. Supp. 3d 1125, 1144 (E.D. Wash. 2023).

11. ^ Press Release, The White House, Statement from President Joe Biden on Decision in *Alliance for Hippocratic Medicine v. FDA* (Apr. 7, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/07/statement-from-president-joe-biden-on-decision-in-alliance-for-hippocratic-medicine-v-fda [https://perma.cc/DX6Y-2TB8].

12. ^ Nicholas Bagley, *A Single Judge Shouldn't Have This Kind of National Power*, The Atlantic (Apr. 17, 2023, 2:30 PM), https://www.theatlantic.com/ideas/archive/2023/04/mifepristone-case-problem-federal-judiciary/673724 [https://perma.cc/A2BN-96UG].